

ADVISORY OPINION NO. 90-1

The State Ethics Commission (the "Commission") received a request for an advisory opinion from a deputy attorney general who was assigned to provide legal services to a state department. Most of the attorney's work involved representing the interests of a particular state client in certain types of cases. The attorney requested an advisory opinion from the Commission regarding an offer of employment that the attorney received from a private law firm concentrating on the same general types of cases in which the attorney was involved on behalf of the State. The attorney asked the Commission whether the post-employment provisions of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), would prohibit her, following the termination of her state employment, from appearing on behalf of private clients before a particular branch of a division within the same department to which she was assigned as a deputy attorney general.

The attorney and her supervisor from the Department of the Attorney General appeared before the Commission to discuss this matter and to provide additional information to the Commission regarding the attorney's situation.

Shortly thereafter, the attorney requested additional advice from the Commission concerning the application of the post-employment laws to her. The attorney again appeared before the Commission to provide further information in connection with her request for additional advice.

The Commission consolidated both of the attorney's advisory opinion requests and responded to both requests in this opinion.

1. Post-employment representation of private clients before hearings branch within department to which attorney provided legal services.

The first question raised by the attorney was whether, following the termination of her state employment, she could represent private clients in cases before a particular branch of a division within the department to which she provided legal services as a deputy attorney general. The section of the ethics code that was relevant to this question was section 84-18(c), HRS, which provides as follows:

No former legislator or employee shall, within twelve months after termination of the former legislator's or employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which the former legislator or employee had actually served.

The Commission advised the attorney that if she terminated her state employment to enter private law practice, section 84-18(c) would prohibit her, for a period of twelve months, from assisting or representing any person or business for compensation or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which she had served. "Official action" is defined by the ethics code as a decision,

recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

The Commission explained that it has generally interpreted section 84-18(c) to mean that a former employee who served a particular division within a state agency or department is prohibited, during the prescribed post-employment period, from assisting or representing others before the division that the former employee served, but is not prohibited from assisting or representing others before other divisions (within the same department or agency) that the former employee has not served. The Commission stated that in certain situations where a former employee has served only a particular branch or office within a division, and that branch or office can be considered separate from other parts of the division, the Commission has held that section 84-18(c) applies only to the particular branch or office that the employee served.

The Commission stated that based upon the information that had been provided in this case, the Commission believed that section 84-18(c), HRS, would prohibit the attorney, for twelve months following the termination of her state employment, from representing private clients in cases before a certain division within the department to which the attorney provided legal services. This division included the branch before which the attorney wished to represent private clients.

The Commission reviewed the information that had been provided concerning the attorney's state duties. Most of the attorney's work (her supervisor had estimated approximately ninety to ninety-five percent) involved handling cases brought against the attorney's state client. This client was a state entity which had been established by statute. Cases against this client had to be filed with a certain division within the department to which the attorney was assigned. A supervisor within this division served as the department's representative for this client. The supervisor determined whether or not cases against the client should be settled or contested by the State. If contested, cases were resolved through administrative hearings conducted by a particular branch within the same division. The attorney wished to represent private client's before this branch following the termination of her state employment.

State employees within the branch who resolved these types of cases rendered written decisions. All decisions were forwarded to the division head, or to the division head's delegate, for review and signature. The Commission was informed that these decisions were reviewed to ensure their conformance with policies set by the division head.

As a deputy attorney general, the attorney in this case provided legal advice to the supervisor who served as the department's representative for the attorney's state client. The attorney also acted as the client's attorney in contested hearings before the division branch that resolved cases against the client.

The Commission concluded that by providing legal services to her state client and to the division supervisor who represented the client, the attorney had served both the client and the supervisor within the meaning of section 84-18(c), HRS. The Commission further

concluded that by serving her state client and the supervisor, the attorney also served the department division to which the client was attached and under which the supervisor worked.

The Commission believed that the attorney's state client had to be considered part of the department division for purposes of the ethics code's post-employment laws. Among other things, the Commission noted that the client was represented by a supervisor for the division and that the division determined how the client would respond in cases that were brought against the client. Cases against the client had to be filed with the division and hearings for such cases were conducted by a branch within the division. Decisions in such cases had to comply with policies set by the division head and were subject to review and approval by the division head. The Commission believed that these factors indicated that the attorney's state client was very much a part of the division for purposes of section 84-18(c). Therefore, the Commission concluded that by serving the client as a deputy attorney general, the attorney had also served the division.

The Commission held that because the attorney had served the division as a state employee, section 84-18(c) would prohibit her from representing private clients in cases before that division, including cases before the particular branch within that division which resolved contested hearings. The Commission noted that this branch did not appear to function independently from the division and the Commission believed that the branch could not be considered separate from the division for purposes of section 84-18(c). The Commission referred to the fact that decisions rendered by employees in the branch were subject to review and approval by the division head. The Commission was informed that in addition to the division head, other supervisors within the division also reviewed and approved decisions rendered by branch employees. This included the same supervisor who acted as the department's representative for the attorney's state client and to whom the attorney provided legal advice as a deputy attorney general. The Commission was also informed by the supervisor of the branch that, in his opinion, the branch was not an independent office but was very much a part of the division to the extent that the branch's decisions had to carry out policies set by the division head.

The attorney had indicated to the Commission that if she were prohibited by the post-employment laws from representing clients before this particular branch, she would decline the offer of private employment that she had received. The Commission expressed its regret that its opinion in this case would cause the attorney to forgo this employment opportunity. However, the Commission did not believe that there was any way to avoid the application of section 84-18(c) in this situation. The Commission explained that the purpose of this post-employment section of the ethics code is to provide a "cooling off" period after an employee leaves state employment to prevent the employee from using any influence derived from contacts and associations made while in government service for the employee's personal benefit or for the benefit of others. The Commission observed that if the attorney were to represent private clients in cases before this division's branch, it was more than possible that decisions rendered in those cases would be subject to review and approval by the same division supervisor to whom the attorney currently provided most of her legal services as a deputy attorney general. In fact, the attorney had stated to the Commission that this supervisor seemed to be responsible for reviewing most of the types of cases in which the attorney would be involved in representing private clients. The Commission believed that

the attorney's representation of private clients in such cases before the division that she served as a deputy attorney general would be impermissible under both the language and the intent of section 84-18(c).

The attorney in this case had specifically requested that the Commission not contact either the division head or the division supervisor in connection with her advisory opinion request. The attorney expressed concern about jeopardizing her working relationship with these individuals if it was known that she was contemplating leaving state employment. The Commission consequently was unable to obtain all of the information that it would have liked to obtain in this case. However, the Commission felt that the information that had been provided in this case supported the Commission's conclusion that the attorney's state client and the division branch which resolved cases against the client should both be considered part of the same division for purposes of section 84-18(c), HRS. The Commission informed the attorney that if she believed that additional information was available to support a contrary conclusion, the Commission would be willing, with the attorney's consent, to contact other persons to obtain such information. In the absence of such information, the Commission concluded that section 84-18(c), HRS, would prohibit the attorney, for twelve months following the termination of her state employment, from representing private clients before the department division to which she rendered legal services, and that this prohibition would apply to her representation of clients before the branch within that division that rendered decisions in contested hearings.

2. Post-employment services to private clients in cases before the department division to which the attorney provided legal services.

In her request for additional advice from the Commission, the attorney inquired whether, following the termination of her state employment, she could provide professional services to private clients in cases before the division to which she provided legal services as a deputy attorney general if she did not physically appear before the division. The Commission believed that even if she avoided physically appearing on behalf of clients before the division, section 84-18(c), HRS, would still prohibit her from assisting clients with cases that were subject to official action by the division.

Section 84-18(c) states that a former employee cannot "assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action" by the state agency or subdivision thereof which the former employee has served. The Commission stated that it was quite clear from the language of the statute that section 84-18(c) prohibits more than a former employee's physical appearance on behalf of others. The Commission pointed out that section 84-18(c) prohibits a former employee from either *assisting* or *representing* any person or business on matters involving official action by the state agency or subdivision thereof that the former employee has served.

The Commission believed that by rendering professional services to private clients in cases that were before the department division that she had serviced as a deputy attorney general, the attorney would be assisting as well as representing those clients on matters involving official action by the division. The Commission was informed that even if a case settled without proceeding to a contested hearing, all settlement agreements were subject to

review and approval by the division branch that resolved contested cases as well as by the division head. Furthermore, the attorney had informed the Commission that the division supervisor to whom she provided legal advice was also involved in reviewing and approving settlement agreements for the division head. In addition, the Commission was informed that attorneys' fees were subject to review and approval by employees in the division branch and by the division head.

Because such cases were subject to official action by the division that the attorney had served as a state employee, the Commission concluded that section 84-18(c) would prohibit her from assisting or representing clients for a fee or other consideration on such cases.

The Commission explained that it has previously held that section 84-18(c), HRS, prohibits a former employee from engaging in those activities that are intended to influence, or that one can reasonably believe will influence, the official action to be taken by the agency or subdivision thereof with which the former employee has served. In Advisory Opinion No. 88-1, the Commission advised a former state employee who was engaged in the private practice of law that section 84-18(c) prohibited him from advising others about strategical or tactical matters in order to influence official action to be taken by his former state division. The Commission noted in that opinion that this prohibition did not apply to matters involving only ministerial action by the former employee's division. The Commission also held in that opinion that section 84-18(c) did not prohibit the former employee from providing general advice to others about administrative procedure.

In accordance with Advisory Opinion No. 88-1, the Commission advised the attorney that she would be prohibited from advising others for compensation about strategical or tactical matters in order to influence official action to be taken by the department division that she had served. However, the Commission stated that the attorney would not be prohibited from advising others with respect to matters involving only ministerial action (as opposed to discretionary action) by the division, nor would she be prohibited from providing general advice to others about administrative procedure.

3. Post-employment representation of private clients before state board on matters that did not involve the attorney's state client.

The attorney also asked the Commission whether the post-employment laws would prohibit her, following the termination of her state employment, from representing private clients before a state board on matters that did not involve the attorney's state client.

The board decided appeals from decisions and orders issued by the department to which the attorney was assigned, including decisions and orders involving the attorney's state client. The board was attached to the department for budgetary and administrative purposes only.

The attorney informed the Commission that she had not provided any legal services to the board as a deputy attorney general. She stated that her contact with the board had been limited to appearing before the board as an advocate for her state client in approximately five or six cases within the past year. The Commission had considered a very similar situation in

Advisory Opinion No. 273, and had concluded in that opinion that a former employee whose association with an appeals board was limited to appearing as an advocate before the board did not actually serve the board within the meaning of section 84-18(c). Therefore, the Commission had held that the former employee was not prohibited from representing clients before the board. The Commission similarly concluded in this case that section 84-18(c) would not prohibit the attorney, following the termination of her state employment, from assisting or representing private clients before the board on matters not involving the attorney's state client.

4. Post-employment representation of private clients before state board on matters involving the attorney's state client but not involving cases participated in as a state employee.

The attorney also asked the Commission whether the ethics code would prohibit her, following the termination of her state employment, from representing private clients before the same state board on matters involving the attorney's state client but not involving cases in which the attorney participated as a state employee.

The Commission initially explained that section 84-18(b), HRS, would prohibit the attorney, for a period of twelve months following the termination of her state employment, from assisting or representing private clients on matters in which she participated as a state employee. Section 84-18(b) provides as follows:

No former legislator or employee shall, within twelve months after termination of the former legislator's or employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which the former legislator or employee participated as an employee.

The Commission advised the attorney that pursuant to section 84-18(b), she would be prohibited from representing private clients before the board on matters in which she participated as a deputy attorney general. The Commission stated that section 84-18(b) would not prohibit her from representing clients before the board on matters in which she had *not* participated as a deputy attorney general. However, the Commission stated that with respect to cases before the board that involved the attorney's state client, the Commission also had to consider the possible application of section 84-18(c), HRS.

The attorney informed the Commission that in cases which were before the board and which involved the attorney's state client, the division supervisor who served as the department's representative for the state client acted on behalf of the client and a deputy attorney general served as legal counsel for the client. The deputy attorney general assigned to such cases would be from the same division in the Department of the Attorney General to which the attorney in this case was assigned. The attorney acknowledged to the Commission that as a private attorney representing the interests of a private client, she would be in an adversarial position with respect to the division supervisor and the deputy attorney general representing the state client.

The attorney also stated that the board strongly encouraged parties to attempt to settle their claims and, in fact, that the majority of cases before the board were settled. Therefore, it was very likely that if the attorney were to represent private clients before the board in cases involving the state client, the attorney would, at some point, participate in settlement negotiations with a deputy attorney general from the attorney's own division within the Department of the Attorney General. The attorney had informed the Commission that a deputy attorney general would actually negotiate settlements for the state client, but that authorization for those settlements would derive from the division supervisor.

The Commission explained that in previous advisory opinions, it had held that section 84-18(c), HRS, prohibits a former employee from participating in matters involving negotiations with the agency or agency subdivision that the former employee served. In Advisory Opinion No. 342, for example, the Commission concluded that a former state employee who was subsequently associated with a private law firm was prohibited by section 84-18(c) from representing private clients before an appeals board in cases involving the state office that the former employee had served. The Commission had noted in that opinion that although the former employee had not actually served the appeals board, the former employee would, in cases before the appeals board, be involved in negotiating settlements with the office that the former employee had served in his state capacity. At the time that Advisory Opinion No. 342 was issued, the Commission believed that this would be prohibited by section 84-18(c). The Commission noted that it reached similar conclusions in Advisory Opinions Nos. 365 and 426.

The Commission stated that it did not believe a similar holding should be reached in this case. The Commission was informed that the state board involved in this case operated as an independent body although it was attached to the department for administrative and budgetary purposes. The board had to approve all settlements that were negotiated by the parties in cases before the board. Therefore, although the attorney in this case might be involved in settlement negotiations with deputy attorneys general from the same state division in which she currently served, those settlements would be subject to approval by the board.

Under these circumstances, the Commission did not believe that the purpose of the post-employment laws would be served by applying section 84-18(c) to prohibit the attorney from representing private clients in cases involving the state client before the board. The Commission believed that the independence of the board and the board's role in reviewing and approving the disposition of cases before the board would safeguard against any influence that the attorney might wield, as a result of her state employment, in connection with her state client or the division of the Attorney General's office which the attorney had served. Accordingly, the Commission concluded that section 84-18(c) would **not** prohibit the attorney, following the termination of her state employment, from representing clients in matters before the board involving the state client but not involving cases in which the attorney participated as a deputy attorney general. The Commission stated that to the extent that previous advisory opinions issued by the Commission, including the opinions that had been previously discussed, were inconsistent with the Commission's decision in this case, those opinions were overruled.

5. General advice regarding the post-employment laws.

The Commission noted that the advice rendered in this opinion was based upon the information that the Commission had obtained regarding the attorney's *current* employment situation. In her discussions with the Commission and its staff, the attorney had also requested advice regarding the post-employment laws for purposes of future private employment offers that she might receive. The Commission stated that its advice was always predicated upon the facts of a specific situation. Because the Commission had no way of knowing whether the facts relating to the attorney's state employment would change in the future, the Commission stated that at this time, it could only provide the attorney with general advice regarding the post-employment laws.

Section 84-18(a), HRS, prohibits a former employee from disclosing any information which by law or practice is not available to the public and which the former employee acquired in the course of the employee's official duties. This section also prohibits a former employee from using such information for personal gain or for the benefit of anyone. The Commission stated that in accordance with section 84-18(a), the attorney would, upon termination of her state employment, be prohibited from disclosing any confidential information that she had acquired in the course of her state employment. The attorney was advised that she would also be prohibited from using such information for her personal gain or for anyone else's benefit.

The Commission noted that it had already discussed section 84-18(b), HRS, which would prohibit the attorney, for twelve months following the termination of her state employment, from assisting or representing any person or business for compensation or other consideration on matters in which she participated as an employee. The Commission had previously held that this restriction does not apply to general areas of work that occupied an employee during state employment, but instead applies to specific projects that continue after the employee leaves state service. Accordingly, the Commission stated, section 84-18(b) would prohibit the attorney in this case from assisting or representing others for compensation on specific projects or cases in which she participated as a state employee.

The Commission stated that it had also already discussed section 84-18(c), HRS, which would prohibit the attorney, for twelve months following the termination of her state employment, from assisting or representing any person or business for compensation or other consideration on matters involving official action by the particular state agency or subdivision thereof with which she had actually served. The Commission stated that it was aware that deputy attorneys general are often assigned to provide legal services to several state agencies. The Commission had previously held that section 84-18(c) did not apply to state agencies to which a former employee was assigned but which the employee did not actually serve. However, the Commission noted that it had also held that section 84-18(c) was applicable with respect to any state agency that a former employee served, even if the employee was involved in only one case on behalf of the agency. Finally, the Commission explained that it has held that the restrictions in section 84-18(c) only apply to state agencies or subdivisions of state agencies that a former employee served within the one-year period immediately preceding the date of termination of state service.

The attorney had informed the Commission that in addition to providing legal services to the department division that had been discussed earlier, she had also on occasion performed legal work for other divisions and offices within the department. The Commission advised her that section 84-18(c) would also apply to her assistance or representation of others before other state agencies and subdivisions (including other divisions within the same department) that she served as an employee within the one-year period preceding the termination of her state employment.

Finally, the Commission stated, section 84-18(d), HRS, provides that notwithstanding the other provisions of section 84-18, a state agency is not prohibited from contracting with a former employee to act on a matter on behalf of the State within the post-employment period of limitations. Section 84-18(d) further provides that a former employee may appear before any agency in relation to such employment.

Another post-employment law which the Commission called to the attorney's attention was section 84-15(b), HRS, which is part of the contracts section of the State Ethics Code. This section provides that a state agency shall not enter into a contract with any person or business which is represented or assisted in the matter by a person who has been an employee of the agency within the preceding two years and who participated while in state employment in the matter with which the contract is directly concerned.

The Commission emphasized that these were general guidelines only. The Commission informed the attorney that if, in the future, she received another offer of private employment or otherwise planned to terminate her state employment, she should contact the Commission's staff with respect to any specific questions that she might have concerning the application of the post-employment laws.

The Commission thanked the attorney for seeking the Commission's advice. The Commission expressed its appreciation for the attorney's cooperation in connection with this matter, as well as the cooperation of her supervisor in the Department of the Attorney General.

Dated: Honolulu, Hawaii, February 5, 1990.

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

Note: Chairperson David K. Kaupu participated in the Commission's decision but was unable to be present at the signing of this opinion. There was a vacancy on the Commission when this opinion was considered.