

ADVISORY OPINION NO. 93-1

The program manager of a division of a state department requested an opinion from the State Ethics Commission ("Commission") regarding the state practitioners under her supervision. In the past, questions have arisen regarding the part time private practices of these state practitioners. The program manager asked for advice as to whom a state practitioner in a branch within the division could accept as a client of her private practice.

In order to determine whether a state practitioner with a private practice had any conflicts of interests, or any other problems with the ethics code, it was first necessary to ascertain the duties of the state practitioner. The Commission's staff spoke to the program manager and also to a state practitioner under the program manager's supervision about these duties. The program manager and the state practitioner both explained that a state practitioner has duties in three basic areas: the regulation of personal property for a short period of time after its importation into the State, the regulation of the importation of personal property, and surveillance of certain types of personal property within the State.

The first area in which a state practitioner has regulatory duties is the regulation of personal property for a short time after its importation into the State. The length of time that the property is regulated varies according to the type of property. A state practitioner may periodically spot check recent importers to see if they are abiding by the regulatory requirements. The division has the power to issue citations for violations of the requirements.

A state practitioner's second duty area is the regulation of the importation of personal property. Upon the property's arrival into the islands, a state practitioner makes sure that the property meets certain requirements. If the property does not meet these requirements, then it may be refused entry into the State. The State may also place certain restrictions on the property owner's facility.

The final duty of a state practitioner in the branch is surveillance. The State has several active surveillance programs for different types of personal property. The programs survey and test personal property for particular defects. The program manager had mentioned that there were roughly thirty reportable defects. If any personal property possesses one of these defects, then the state practitioner will take regulatory action over that property and the premises upon which the property is located. Surveillance programs are in effect for only a few types of personal property. In the future, however, the department may establish surveillance programs over other types of personal property as it deems necessary.

The State Ethics Commission has previously considered situations in which state practitioners perform private work. In Advisory Opinion 32, issued in 1969, the Commission expressed its concern for allowing state practitioners to privately care for personal property that they are regulating. The Commission held that it would be a violation of the state ethics law for a state practitioner to have as a private client an individual whose property the practitioner regulated in his state capacity. The Commission recognized two exceptions to this holding. The first was the situation in which, due to lack of work, the community could not support a private practitioner. The second was the emergency situation. In an emergency, a state practitioner could tend personal property belonging to an individual whose property he regulated if no private practitioner was available to care for the personal property.

In Opinion 151, the Commission affirmed Opinion 32 and applied the ethics code to forbid a state practitioner from acquiring a private client. The state practitioner took regulatory action affecting the property that the client owned. Similarly, in Opinion 171, the Commission held that a state practitioner would be in a conflict of interests situation if he were to accept as private clients those whom he must regulate or over whom he had official authority. In Opinion 199, the Commission reconsidered and affirmed Opinion 171.

In response to Opinion 199, in 1975, the department adopted a policy to phase out dual practice. The policy stated that at the end of five years, state practitioners would be forbidden from acquiring as private clients those over whom they had regulatory responsibilities. In Opinion 243, the Commission advised that the phase out period be three years rather than five. In Opinion 296, the Commission affirmed the decision in Opinion 243. Finally, in Opinion 324, the Commission denied a state practitioner's request for an exemption to the ruling in Opinion 296.

In 1986, the State Ethics Commission, in conjunction with the department, issued the following guidelines for the private practice of state-employed practitioners:

1. State practitioners may not conduct private practice during regular state working hours unless they are on approved leave (excluding sick leave); provided that a state practitioner may respond if, during regular state office hours, an emergency occurs in which time is a vital factor and the emergency cannot be handled by any other private practitioner.
2. State practitioners may not use state equipment, state facilities, or state personnel for private business purposes (for example, state phones or offices may not be used to conduct private business.)
3. State practitioners may tend personal property over which they have no regulatory jurisdiction or official responsibilities.
4. At no time (during or after state hours) may state practitioners tend personal property (A) over which they have regulatory jurisdiction, or (B) belonging to any operation, business, household, etc., which falls under their regulatory control unless:
 - (I) The state practitioner is responding to an emergency in which time is a vital factor, and
 - (II) No other private practitioner can handle the emergency.
5. If a state practitioner's responsibilities are normally confined to one county, the state practitioner's regulatory jurisdiction will be considered not to extend beyond that county, unless there is a statewide surveillance or control program in effect.

These guidelines comply with the requirements of the ethics code and with the rulings in the previous advisory opinions. These are general guidelines and more inquiry into a specific situation may be required in order to determine whether a state practitioner has regulatory jurisdiction over a particular article of property.

In a specific situation, issues are likely to be raised under several sections of the State Ethics Code. The first of these sections, section 84-14(b), refers to the acquisition of financial interests. This section reads:

§84-14 Conflicts of interests. (b) No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

In the past, the Commission has applied section 84-14(b) to a state practitioner's acquisition of a private client. Thus, under this section, a state practitioner may not acquire a private client if he has reason to believe that the client may be directly involved in official action to be taken by him. The term "official action" is elsewhere defined in the code as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." The Commission has interpreted section 84-14(b) as meaning that an employee may not acquire a client if there is reason to believe that he will take discretionary action directly involving that client.

A state practitioner in the branch may take discretionary action in three main areas: the regulation of personal property for a short time after its importation into the State, the regulation of the importation of personal property, and surveillance of personal property. Only certain types of personal property are regulated for a short time after their importation into the State. A state practitioner may inspect the facilities of owners who import these types of personal property in order to ensure that, during this short time period after importation, the restrictions are being followed. Once the time period has ended, the practitioner's duties in this area end. Thus, with respect to this duty, if the practitioner is required to enforce restrictions over these personal properties, then section 84-14(b) will prohibit the practitioner from acquiring as clients people who have personal property that is subject to these restrictions for a short period after its importation, and people who will likely be importing personal property that will be subject to these restrictions.

A state practitioner in the branch may also have duties concerning the regulation of the importation of personal property. She is required to inspect certain kinds of personal property upon its arrival. Again, if the state practitioner is required to regulate the importation of these personal properties, then section 84-14(b) will prohibit the practitioner from acquiring as clients people who are currently importing these kinds of personal property, or who will likely be importing these kinds of personal property.

Finally, a practitioner in the branch has regulatory duties in the area of surveillance and control. State practitioners are periodically required to survey different types of personal property in order to determine whether the property has a particular defect. Active surveillance programs are in place for certain kinds of personal property. It is likely that there will be surveillance programs for other kinds of personal property in the future. This means that a state practitioner could be called upon to perform surveillance on these kinds of personal property. It therefore appears that it is extremely likely that a state practitioner will take official action affecting owners of these types of personal property. Thus, section 84-14(b) will forbid a state practitioner in the branch from acquiring as clients people who own these types of personal property. If, in the future, other surveillance programs are enacted, then state practitioners will be forbidden from acquiring clients who own personal property that is the subject of one of these surveillance programs.

Section 84-14(b) will, therefore, prohibit a state practitioner in the branch from acquiring several classes of people as clients. If the state practitioner is required to regulate personal property for a short time after its importation into the State, then she may not acquire as clients persons who own personal property that will be subject to this short term regulation or persons who will likely own personal property that will be subject to this short term regulation. If the practitioner is required to regulate the importation of personal property then she may not acquire as clients persons who are currently importing personal property or persons who will likely be importing personal property in the future. Finally, the practitioner may not acquire as clients persons who own personal property that is the subject of a regulatory surveillance program. It was noted that there is considerable overlap in these areas.

The second section of the code that would apply to a state practitioner's acquisition of clients is section 84-13(4). This section reads:

§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; including but not limited to the following:

...

- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislators's or employee's official capacity.

This section will forbid a state practitioner from acquiring as a client a person or business that she supervises or inspects. A practitioner in the branch may be called upon to inspect a business to see that it is abiding by the restrictions that apply for a short period after the personal property has been imported. She may also be called upon to inspect a business to see if any personal property located at that business contains a particular defect. A state practitioner would generally only check certain kinds of personal properties for defects. Thus, the practitioner would generally only inspect those businesses which own these kinds of personal property. This, of course, may change if more surveillance programs are added in the future.

The restrictions resulting from section 84-13(4) coupled with the restrictions resulting from section 84-14(b) result in the following list of entities that a state practitioner may not accept as clients of her private practice:

1. Persons or businesses that have personal property that has recently been imported and is subject to the short term restrictions if the state practitioner enforces these restrictions.
2. Persons or businesses that, in the future, will likely own personal property that will be subject to these short term restrictions if the state practitioner enforces these restrictions.
3. Persons or businesses that are currently importing personal property if the state practitioner regulates the importation of personal property.
4. Persons or businesses that will likely be importing personal property in the future if the state practitioner regulates the importation of personal property.
5. Persons or businesses that own personal property that is the subject of a surveillance program.

The exception for emergency situations is still applicable. In an emergency, if no private practitioner is available, a state practitioner may tend any personal property regardless of whether, under normal circumstances, she could acquire the owner of the personal property as a client.

There are two other sections of the State Ethics Code that are generally applicable to this situation. The first of these sections is section 84-14(a), which, in relevant part, reads:

§84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest....

If a state practitioner legitimately acquires a client, and if she is later, unexpectedly, called upon to take official action directly affecting that client, then this section requires her to disqualify herself from taking that action. For example, if one of her clients owns a piece of personal property that is not subject to the practitioner's regulation, and then later, unexpectedly, imports a piece of personal property that is subject to her regulation, then the practitioner may not take any action affecting the newly imported property. Because of the existing financial interest in the client, she must disqualify herself from taking official action affecting the imported property.

The second section of the ethics code that is relevant is section 84-13(3). This section reads:

§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 other; including but not limited to the following:

...

- (3) Using state time, equipment, or other facilities for private business purposes.

This section will prohibit a state practitioner from using state time, equipment, or facilities for her private practice.

The Commission expressed its appreciation for both the patience and the cooperation that the program manager had shown throughout this matter. The Commission tried to make the advice in this opinion as specific as possible. The application of the ethics code, however, depends upon the facts of the particular situation. For this reason, the program manager was advised to consult the Commission for further advice should a specific situation arise.

Dated: Honolulu, Hawaii, April 28, 1993.

STATE ETHICS COMMISSION

Barbara J. Tanabe, Chairperson
K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Commissioner Laurie A. Loomis participated in the Commission's decision but was unable to be present at the signing of this opinion.