



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

ADVISORY OPINION NO. 2012-1

CONFIDENTIAL

Lyle M. Ishida, Esq.



Dear Mr. Ishida:

Thank you for your letter dated November 22, 2011, requesting an advisory opinion as to whether you have a conflict of interests with respect to your role as a trustee of the Lawyers' Fund for Client Protection of the Hawaii Supreme Court ("Lawyers' Fund"). This letter is the Hawaii State Ethics Commission's advisory opinion responding to your request.

You explained that you are a partner in the law firm of Tom, Petrus, and Miller. You are also an attorney trustee of the Lawyers' Fund.¹ Trustees of the Lawyers' Fund investigate, consider, deliberate, and rule upon awards to claimants who have filed claims to the Lawyers' Fund. Your question concerns the situation in which a claimant is represented by an attorney in a claim before the Lawyers' Fund. Specifically, you described a situation in which an attorney who is representing a claimant has another client in an unrelated matter and that unrelated matter involves a dispute with one of your private clients.² You asked whether the Hawaii State Ethics Code would require you to recuse yourself from taking action on the claim before the Lawyers' Fund.

¹ The Lawyers' Fund is established by Rule 10 of the Hawaii Supreme Court. The Lawyers' Fund exists to reimburse losses caused by the dishonest conduct of members of the Hawaii Bar Association. It is administered by five trustees, three of whom must be lawyers. The trustees meet to consider payment for all claims made to the Lawyers' Fund.

² In your letter, you explained that you are also a member of the City and County of Honolulu Zoning Board of Appeals (ZBA). One of the parties in an action before the ZBA is being represented by an attorney who has a client in an unrelated matter who is involved in a dispute with one of your private clients. The Honolulu Ethics Commission determined that, under the Revised Charter of Honolulu, a conflict of interests existed and you were required to recuse yourself from taking action as a member of the ZBA.

Hawaii Revised Statutes Section 84-14(a)

Your question raises issues under the conflicts of interests section and the fair treatment section of Hawaii Revised Statutes chapter 84, the Hawaii State Ethics Code. Hawaii Revised Statutes section 84-14(a), part of the conflicts of interests section, reads, in relevant part:

§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; or
- (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

The term "employee" is defined as including members of state boards, commissions, and committees.³ As a trustee of a board created by the Hawaii Supreme Court, you are a state employee for purposes of the State Ethics Code. The term "official action" is essentially defined as any state action or inaction involving the use of discretionary authority.⁴ Thus, Hawaii Revised Statutes section 84-14(a) prohibits you from taking any discretionary action, as a trustee of the Lawyers' Fund, directly affecting your law firm.⁵ It also prohibits you from taking official action directly affecting an undertaking in which you are engaged as a private attorney.

Hawaii Revised Statutes Section 84-14(a)(1)

Hawaii Revised Statutes section 84-14(a)(1) prohibits a state employee, including a member of state board, commission, or committee, from taking any official state action directly affecting a business in which the employee has a financial interest. In the situation that you described, as a trustee of the Lawyers' Fund, you would be called upon to take official action directly affecting a claimant who is represented by an

³ Haw. Rev. Stat. §84-3.

⁴ Haw. Rev. Stat. §84-3.

⁵ Haw. Rev. Stat. §84-3 defines the term "financial interest" as:

An interest held by an individual, the individual's spouse, or dependent children which is:

- (1) An ownership interest in a business.
- (2) A creditor interest in an insolvent business.
- (3) An employment or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property.
- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

As a partner in Tom, Petrus, and Miller, you have a financial interest in that law firm.

attorney who has another client who is involved in a separate dispute also involving one of your private clients. At issue is whether or not your actions on the claim before the Lawyers' Fund would directly affect your law firm.

The term "directly affecting" has been construed by the Hawaii Supreme Court. In Tangen v. State Ethics Commission,⁶ the court noted that the usual definition of "directly" is, "without any intervening agency or instrumentality or determining influence."⁷ In the situation that you described, neither your law firm nor any of the clients involved in the separate dispute are before the Lawyers' Fund. It is therefore our opinion that your actions as a trustee of the Lawyers' Fund would not directly affect your law firm. For this reason, Hawaii Revised Statutes section 84-14(a)(1) would not require you to recuse yourself in the situation that you described.

⁶ 57 Haw. 87 (1976). The court considered an appeal and cross-appeal of a lower court's reversal of a decision by the State Ethics Commission. The Commission had determined that the failure of Eddie Tangen, a member of the Land Use Commission, to recuse himself from petitions before the Land Use Commission was a violation of HRS section 84-14(a)(1). Mr. Tangen was the international representative of the International Longshoremen Workers Union ("ILWU"), and as such, for the purposes of HRS section 84-14(a)(1), he had a financial interest in the ILWU. Four petitions for rezoning land were before the Land Use Commission. The four owners of the land asked the Land Use Commission to reclassify to urban districts various parcels of land located within agricultural or conservation districts. In three of the cases, the subject land was leased to businesses in the sugar industry who employed members of the ILWU and who had collective bargaining agreements with the ILWU. In the remaining case the owner of the land directly employed members of the ILWU.

Based on these facts, the Ethics Commission determined that Mr. Tangen's participation on the petitions violated HRS 84-14(a)(1). The lower court reversed the Ethics Commission. The Hawaii Supreme Court affirmed the lower court. The Hawaii Supreme Court initially noted that the ILWU was not a petitioner and did not own an interest in any of the lands before the Land Use Commission. The court stated:

Moreover, HRS § 84-14(1)(A) mandated that the proscribed act be one directly affecting the business or matter in which the appellee has a substantial financial interest. The usual and ordinary definition of "directly" is "without any intervening agency or instrumentality or determining influence." Webster's Third New International Dictionary (1967).

.....

Action by the State Land Use Commission concerning changes in the classification of land directly affects the petitioner who seeks authorized changes of the land. In our view the effect such an action would have on persons or organizations other than the petitioner and those with financial interests in the land affected by such a petition would be indirect, at the most. Id., 92-3.

The court held that, because action on the petitions would only indirectly affect the ILWU, Mr. Tangen was not prohibited by HRS section 84-14(a)(1) from acting on the petitions.

⁷ Id., at 92, citing Webster's Third New International Dictionary (1967).

Hawaii Revised Statutes Section 84-14(a)(2)

Hawaii Revised Statutes section 84-14(a)(2) prohibits a state employee, including a member of a state board, commission, or committee, from taking any official action directly affecting an undertaking in which he is engaged as legal counsel, or other agency capacity. This section would prohibit you, as a trustee of the Lawyers' Fund, from taking official action on a claim if, by doing so, you would directly affect a private matter in which you are engaged as legal counsel. In the situation you described, you would be serving as legal counsel on a dispute in a matter unrelated to the claim before the Lawyers' Fund. Again it is our opinion that the official action that you would take as a trustee of the Lawyers' Fund would not directly affect a separate dispute that is not before the Lawyers' Fund. For this reason, Hawaii Revised Statutes section 84-14(a)(2) would also not require you to recuse yourself in the situation that you described.

Hawaii Revised Statutes Section 84-13

Aside from the conflicts of interests section, you should also be aware of the "fair treatment" section of the State Ethics Code. In relevant part, this section reads:

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

The fair treatment section prohibits a state employee, including a member of a state board, commission, or committee, from misusing his state position to grant himself or anyone else any unwarranted benefit. This section would not require you to recuse yourself in the situation that you described. It would, however, prohibit you from using your position as a trustee on the Lawyers' Fund to unfairly benefit yourself, your law firm, a client, or anyone else.

Based on the information that you provided, it is the Hawaii State Ethics Commission's opinion that the Hawaii State Ethics Code does not require you to recuse yourself from taking official action as a trustee of the Lawyers' Fund when a claimant is represented by an attorney and that attorney has another client who is involved in an unrelated dispute with a private client of yours. It is the Commission's opinion that the conflicts of interests section would not require your recusal in this situation. The fair treatment section similarly would not require recusal. The fair treatment section would, however, prohibit you from misusing your position to grant anyone an unfair benefit or advantage.

The Commission's opinion is based on its interpretation of the Hawaii State Ethics Code. Other laws or rules may also be applicable. For this reason, the

Commission suggests that you also consult with the Department of the Attorney General and the Hawaii Supreme Court.

If you have any questions about the advice in this opinion, please contact our office at 587-0460.

Dated: Honolulu, Hawaii, January 11, 2012.

HAWAII STATE ETHICS COMMISSION

RECUSED

Maria J. Sullivan, Esq., Chairperson

Signature Block

Cassandra J. Leolani Abdul, Vice Chairperson

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Edward L. Broglio, Commissioner

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Jacqueline B. Kido, Esq., Commissioner

Chairperson Maria Sullivan recused herself from this matter.