

OPINION NO. 324

In Opinion No. 32, issued in 1969, the Commission had found that certain state practitioners who had as private clients persons or organizations they regulated in their state capacities would be in violation of the ethics code. We had reiterated that holding in subsequent Opinion Nos. 151, 171, and 199. Finally, as part of Opinion No. 243, the Commission had reviewed the department's plan to phase out this dual practice by 1980. The Commission had found January, 1978 to be a more reasonable date and notified the department of this decision. The department had asked for a reconsideration of this date, but because no new evidence had been presented to justify this extension, the Commission in Opinion No. 296, had refused to extend the date until 1980. The department had ultimately adopted a policy that all such dual practice by state practitioners should be terminated by January, 1978.

One of these practitioners requested that he be granted an exception from our holding so that he might retain as private clients until 1980 those clients over which he had official regulatory responsibilities. The basis of his request was that when he had been hired by the Territory over 20 years ago, he was hired not only with the understanding that he would provide state regulatory work, but that he would also provide private services to the area which he served. He felt that a type of "grandfather" clause should apply to him because of the understanding under which he had been originally hired. He was not asking that we find an exception for him until he retired but only until 1980.

While we were appreciative of the services he had given to first the Territory and then the State, we did not find any legal justification for giving him a special exception from the ethics code that would permit him to maintain as private clients those businesses for which he had official regulatory responsibilities.

In Opinion No. 32, the Commission had recognized the valuable services provided by those state practitioners who had offered private services in those areas which had no available private practitioners. In that opinion, the Commission had gone so far as to state that in those areas where private services were still unavailable, it would not proceed to find a violation if the practitioner continued to offer private services to persons regulated in their state capacities. However, in 1972 it had found that this situation no longer existed in this practitioner's district and he was specifically directed to divest himself of his retainer clients. We noted from the information which he had given to us that he had not done so and had therefore been in continuous violation of the ethics statute since that time.

We were not insensitive to the personal sacrifices he had made in the early years of disease control work in Hawaii. We advised him, however, that the situation in his area had changed and that where once a private practice was complementary to a state practice simply because no other services existed, this was no longer the case. His primary function as a state employee was disease control. As we had stated in Opinion No. 32,

The state practitioner who renders treatment for a private client in his state capacity has the private interest of keeping his client satisfied to assure that his client will continue to retain him. However, in this disease control work, the public interest is best served by impartial and stringent enforcement of disease control measures. In deciding upon the measures to be taken, some of which may be extreme, the state practitioner should be entirely free of concern for his private interests in the matter.

Certainly he had no argument with this. As private practitioners were available in his area, there was no longer a justification for his providing private services to the persons he regulated.

We pointed out that while his original job descriptions may have included his engaging in private practice, subsequent ones had not. By agreeing to stay on as a state practitioner under the new job descriptions he had agreed to the absence of the private practice provision. In addition, under basic contract law, when two parties agree to certain terms, one of which later becomes prohibited by law, that term can no longer be enforced as a part of that contract. Therefore, when the ethics statute was enacted, he could no longer continue in a practice that violated this statute simply because of the terms of his original employment agreement.

Finally, neither the ethics law nor any "contract" with the department contained what is commonly known as a "grandfather" clause. Traditionally these clauses apply to persons who gained professional licenses before more stringent licensing requirements were enacted. Under a "grandfather" clause, these people are allowed to continue the practice of their professions without meeting the more stringent licensing requirements. Our holding in this case, however, had no effect on his license. We were only stating that if he remained a public employee he might not maintain or acquire as private clients those persons he regulated in a state capacity regardless of the actual type of private work that he did for them.

We appreciated his full cooperation in our investigation of his request both in this most recent situation and in 1972. His willingness to be open and honest about the extent of his practice was to be commended.

Dated: Honolulu, Hawaii, December 21, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

Note: Vice Chairman I.B. Peterson and Commissioner Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.