

OPINION NO. 406

A state director requested an advisory opinion concerning the private practices of state practitioners. While we had given advice to individual practitioners in the past (see, for example, Opinion Nos. 154, 232, and 238) and had discussed this problem with department officials, a number of circumstances indicated the need for a fresh look at this question.

Accordingly, our staff conducted an extensive review of the matter. Together with concerned individuals, the Commission staff prepared guidelines for the private practice of these practitioners. The guidelines are attached as an appendix to this opinion. We adopted these guidelines as a reasonable approach to the situation that had been presented to us.

We commented briefly upon the reasons for our adoption of these standards.

Our last review of the private practices of the practitioners in the department had been conducted in 1975. Very few of the practitioners were actually engaged in private practice at that time. However, since that time, the income of practitioners in the private sector had, for the most part, increased at a far greater rate than the salaries of state practitioners. In order to attract competent people, the department felt a need to be able to offer them the opportunity to engage in limited private practices.

These attitudes coincided with a shift in the approach toward treating the problems these practitioners dealt with in their state positions. It was our understanding that the department preferred to see itself as a hub that would find the best private resources to assist the people who sought assistance. While the department would continue to provide direct services in certain areas, many people would be referred to the private sector. It was felt that this was a much more efficient means with which to provide the needed services.

Because there would be more referrals to the private sector at the same time that state practitioners were themselves seeking private clients, potential conflicts were created.

The guidelines were a flexible approach to dealing with this conflict. We noted that there was no ban that would preclude state practitioners from receiving state referrals. Nor did we require a strict rotation policy.

As we had recognized in Opinion No. 360, the services were provided by these practitioners were not directly comparable to most of the other business areas we dealt with. Finding the help a particular client required, given a natural resistance that often existed in this process, required flexibility. Thus, while we did strongly recommend that as wide a group of practitioners as possible receive referrals, and we noted widespread interest in such referrals, we also recognized that there would be certain practitioners, some of them state employees, who would be particularly well-equipped to deal with certain kinds of client needs.

We emphasized that these guidelines would be successful only if the process they supported was administered openly. In addition, the practitioners themselves had to recognize

that department staff members and citizens had been concerned about outside practices. Such practices might earn substantial incomes for practitioners, incomes that might far exceed those earned by the staff members who worked in support of the practitioners. We cautioned the director that this circumstance would be likely to cause some resentment. Such resentment might have a significantly negative impact upon the functioning of the state facilities. While it might be true that the practitioners were underpaid as compared to practitioners in other states, their primary loyalty had to still be to their state work. We stated that they must exercise discretion and must understand the potential for resentment and conflict their private interests created if their outside practices were not to undermine the position of the department.

Finally, we saw this attempt to enunciate guidelines to be an evolutionary process. We were quite certain that we had not anticipated all the problems that would arise. Accordingly, the department was advised to work with our staff and raise the questions that would inevitably arise.

We expressed our appreciation to the many people in the department who had contributed to the preparation of the guidelines. We recognized the director's efforts, and those of his employees, to operate the department's programs within the guidelines of the ethics law.

Dated: Honolulu, Hawaii, February 20, 1980.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Dorothy K. Ching, Commissioner
Edith K. Kleinjans, Commissioner

Note: Vice Chairman Paul C.T. Loo and Commissioner Robert N. Mitcham were excused from the meeting at which this opinion was considered.

APPENDIX

The Ethics Commission is aware that the approach of the department toward the treatment of persons requiring service is changing. It is our understanding that the department will increase its efforts to refer clients to private and other public resources for appropriate services. The Commission understands the rationale for this policy decision and notes that it appears reasonable and in keeping with a modern approach to the promotion of department goals.

However, it appears inevitable that, as people are referred to private practitioners, state professionals who maintain private practices will also benefit from such referrals. Clearly such referrals will come from state practitioners.

These referrals come within the province of the ethics code and Commission because they will raise an appearance of impropriety and because they will also create the possibility that employees of the State may gain unwarranted advantages by the use of their state positions. Further, because state employees may be required to take action that will affect their private activities, conflict-of-interest questions may also be raised.

The Commission has considered the effect of the ethics code upon the private practices of state practitioners in the past. While those rulings were sufficient to deal with the problems they confronted, the Commission has, in light of the shift in emphasis, taken a new look at the entire area of outside practice.

As a result of this review, the following guidelines are adopted to govern the conduct of state practitioners who engage in the private practice of their professions.

GUIDELINES FOR THE CONDUCT OF PRIVATE PRACTICES

- (1) Referrals within state facilities: A staff member may not refer a client to the private practice of another staff member within the same center or to a private clinic or office in which a staff member holds an ownership or income interest.
- (2) A state practitioner may not refer a state client to his or her own practice or to a practice in which he or she holds an ownership or income interest.
- (3) In accordance with Rules 1 and 2, referrals shall be made to practitioners, both solely private and state-employed, in accordance with principles established by the department, provided that the Commission shall have an opportunity to review such principles. The policy may include a flexible program of referral that would not require referral in strictly numerical order. However, where possible, referrals on a rotation basis and referrals that offer a choice of practitioner shall be encouraged. The policy adopted shall also establish criteria for the referral of clients to private practitioners where such referral, for good cause, will not be in conformance with the general policy. It is recognized that a client may require specialized assistance from a particular

state practitioner acting in her or his private capacity or from a solely private practitioner and that it may not be advisable, at times, to offer a choice of practitioners to the client.

- (4)
 - (a) State practitioners may not engage in the private practice of their professions through the use of state time, equipment, or facilities. Client consultation shall not be carried on over state telephones except in emergency circumstances. A record shall be kept of such emergencies.
 - (b) The hours of a private practice must be accommodated to the needs of the department and its facilities. Scheduling of state hours should also consider the needs and morale of support staff.
- (5) State practitioners desiring to carry on private practices shall advise the department in accordance with rules established by the department.
- (6) State practitioners shall not take state action which in any way affects their private clients or practices except as may be provided for in these rules or by exception granted by the Commission.
- (7) The department shall establish, in a written form, the criteria that are used to determine when a client is to be referred out of its facilities. Such criteria shall be discussed with the executive director of the Commission as soon after adoption by the division as is practicable.
- (8) Supportive staff at the department's facilities shall be made aware of the guidelines adopted by the Commission and the department.

Note: The mere sharing of office space with other practitioners does not constitute an ownership or income interest in the practice of such practitioners. However, referrals to such practitioners are discouraged because of the appearance of conflict that would be thereby created. While the making of referrals to persons with whom one shares office space will not, by itself, constitute a violation of these guidelines, a pattern of such referrals would be cause for investigation by the Commission. The reasons for such referrals should be stated in writing.