

OPINION NO. 459

The Commission received a request for an advisory opinion from a state practitioner who worked at a clinic that was associated with a certain state facility. As a practitioner at the clinic, the employee provided therapy and counseling for the facility's students, employees, and teachers. The duties of the state practitioner also included career counseling and the administration of career-related tests for those who attended the facility for instruction. The clinic also provided vocational testing services for community members, who were counseled by a state practitioner before and after the tests were administered. Community members, however, were not eligible for therapy or counseling services that were unrelated to job testing.

The state practitioner stated that he was planning to start a part-time private practice. In regard to his private practice, he posed a number of questions to the Commission. First, he wished to know whether he could privately treat for compensation former students, employees, or teachers of the facility. Such persons, of course, were no longer eligible for the clinic's services. Second, the state practitioner wished to know whether he could privately treat for compensation individuals who were presently eligible for his clinic's services. He explained that many of those who taught at the facility, and possibly some of those who either received instruction or worked at the facility, did not wish to be seen at the clinic and thus preferred to pay for treatment at a private office. Third, he wished to know whether he could treat for compensation at his private office spouses of those who were being treated by him at the clinic. Finally, he wished to know whether he could treat community members for compensation at his private office. As stated above, community members were eligible only for the clinic's vocational testing services.

In accordance with HRS §84-2, the state practitioner was subject to the restrictions of the State Ethics Code because of his status as a state employee. In regard to counseling former students, employees, or teachers, HRS §84-14(b), a part of the conflicts-of-interests section of the ethics code, was relevant. HRS §84-14(b) prohibits state employees from acquiring financial interests in businesses that they have reason to believe may be directly involved in official action to be taken by them. HRS §84-3(7) defines official action as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority. However, since former students, employees, and teachers were no longer eligible for the clinic's services, the state practitioner would not be taking any official action in his state position in regard to them. Hence, the ethics code allowed him to counsel individuals formerly connected with the facility at his private office.

An ethics code problem did arise, however, in regard to referrals of these individuals from the clinic to his private office. The Commission understood, according to the clinic's associate director, that a practitioner at the clinic was allowed to give his or her name to a person who called the clinic and asked for a referral, as long as at least two other names were given to the caller. Likewise, practitioners at the clinic could receive referrals to their private practices from staff members at the clinic, as long as two other names were given to the caller.

Since a referral, under the ethics code, is deemed to be official action, and since the state practitioner was able to make referrals to his own office, HRS §84-14(b) would normally have barred him from acquiring a private practice. However, since it is important for the State to keep skilled practitioners in state practice, the Commission has held, in Advisory Opinion No. 406, that state practitioners would be allowed to practice privately as long as they were prohibited from referring clients to their private offices. Thus, in accordance with the above holding, the Commission informed the state practitioner that he could practice privately as long as he did not make referrals to his own office or to offices in which he had an income or ownership interest.

HRS §84-13, the fair treatment section of the ethics code, bars state employees from using their official positions in an unwarranted manner to advantage themselves or others. Since HRS §84-13 prohibits state employees from using their official positions in an unwarranted manner, and since even an appearance of inappropriate use of position is prohibited under the ethics code, Advisory Opinion No. 406 also prohibited state practitioners from accepting referrals from fellow employees. Such referrals may constitute, or appear to constitute, an unwarranted use of position. Thus, the Commission informed the state practitioner that the ethics code also prohibited him from accepting referrals from fellow staff members.

The Commission understood, on the other hand, that there were cases in which former students, employees, or teachers of the facility might contact the clinic specifically to request the state practitioner's services, because of his reputation or because of his past dealings with such individuals. In regard to these cases, the Commission was of the opinion that it might be in the best interest of such clients to be treated by the state practitioner. However, the Commission believed that an appearance of impropriety might arise if such individuals attended his private office. Others could reasonably take the view that either the state practitioner or a fellow employee had referred the client to the state practitioner's private office, even though the client had contacted the clinic expressly for the state practitioner's services. Since in Advisory Opinion No. 406 the Commission had granted an exception to state practitioners in regard to the strictures of HRS §84-14(b), which would normally prohibit the acquisition of private practices under these circumstances, the Commission believed that it was thus necessary for certain safeguards to be adopted in order to avoid any appearance of impropriety. Hence, the Commission determined that the state practitioner had to make a written record of a client's specific request for his services. The Commission also required that the record be signed by the clinic's director. The Commission informed the state practitioner that these procedures could be modified to comport with the clinic's current practices; however, the Commission told the state practitioner that the procedures finally adopted had to be submitted to the Commission for its approval and be available for review by the Commission. The Commission also told the state practitioner that the Commission would, if necessary, require additional procedures to be adopted if the procedures it had specified proved ineffective in safeguarding the public's interest.

In regard to his second question, the state practitioner stated in a letter to the Commission that some individuals who were eligible for the clinic's services might, nevertheless, wish to attend his private office because of the stigma attached to being seen

at the clinic. He stated that this was especially true for those who provided instruction at the facility. The Commission believed that the state practitioner should be allowed to treat such individuals privately if they so desired. The Commission was of the opinion that the only ethics problem that might arise concerned referrals of these individuals from the clinic to the state practitioner's private office. Thus, the Commission required that he follow the procedures outlined above when making counseling arrangements with those who contacted the clinic but wished to be treated at his private office.

The Commission understood that some individuals eligible for the clinic's services might contact the state practitioner's private office directly. Although no ethics problem involving referrals would arise, the Commission required the state practitioner to inform such clients of their eligibility for the clinic's services, in order to avoid an appearance of impropriety. If such individuals still wished to be treated privately by the state practitioner, the Commission informed the state practitioner that it was necessary for him to follow the procedures specified above.

In regard to his third question, the state practitioner stated that spouses of clients whom he treated at the clinic might wish to be treated by him at his private office. Since such individuals were ineligible for the clinic's services, the Commission believed that these individuals would not be involved in official action to be taken by the state practitioner. Since there was thus no violation of HRS §84-14(b), the Commission informed the state practitioner that he could treat such individuals at his private office. However, the Commission also informed the state practitioner that if spouses contacted the clinic to request referrals, the procedures mentioned above would have to be followed.

In regard to his last question, the state practitioner stated that community members might also wish to be treated by him at his private office. Since these individuals appeared at the clinic only for vocational testing, his private practice would not have been directly involved in official action to be taken by him if he were to counsel such individuals at his private clinic. Thus, again, since there was no violation of HRS §84-14(b), the Commission informed the state practitioner that he could see such individuals at his private office. However, the Commission also informed him that if community members contacted the clinic for referrals, the procedures specified above would have to be adhered to.

The Commission also drew the state practitioner's attention to two other relevant sections of the ethics code, HRS §84-13(3) and HRS §84-3(6). HRS 83-13(3) prohibits state employees from using state time, equipment, or other facilities for private business purposes. The Commission thus informed the state practitioner that this section of the ethics code prohibits consultations with private clients on state telephones, except in emergency circumstances. The Commission informed the state practitioner that it requires that records of such emergencies be kept. The other relevant section, HRS §84-3(6), defines "financial interest" as an interest held by a state employee, his or her spouse, or dependent child. The Commission informed the state practitioner that, under this provision, financial interests acquired by a spouse or dependent child are imputed to the state employee. The Commission advised the state practitioner to contact the Commission again if he had any questions concerning the applicability of either of these provisions.

Finally, the Commission informed the state practitioner that, in discussing the above ethical considerations, it did not intend to imply that it had any misgivings about his integrity. Rather, the Commission told the state practitioner that it was its responsibility to safeguard against situations that might contravene the provisions of the ethics code, even where the individual in question was beyond reproach.

Because this advisory opinion applied to other practitioners at the clinic who had private practices and also required that the clinic adopt certain procedures, a copy of this opinion, along with a copy of Advisory Opinion No. 406, was sent to the clinic's director.

The Commission commended the state practitioner for his sensitivity to the ethical considerations discussed above and for bringing these matters before the Commission at an early time. The Commission has found in the past that this kind of attention to ethical matters fosters public confidence in state employees and thus contributes to an improved ethical climate in state government.

Dated: Honolulu, Hawaii, March 17, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Paul C.T. Loo, Vice Chairperson
Gary B.K.T. Lee, Commissioner

Note: Commissioner Robert N. Mitcham was excused from the meeting at which this opinion was considered. Commissioner Dorothy K. Ching was not present during the discussion and consideration of this opinion.