

## **ADVISORY OPINION NO. 2017-1**

February 16, 2017

On February 6, 2017, the Hawaii State Ethics Commission (“Commission”) received a request for an advisory opinion from a doctor employed by the State (“State Doctor”) regarding whether the State Ethics Code, Hawaii Revised Statutes (“HRS”) Chapter 84, prohibits her from accepting patient referrals from a state-run healthcare facility (“State Healthcare Facility”) as a private practitioner. The Commission concludes that, based on the facts of this case, the State Ethics Code does not prohibit the State Doctor from accepting referrals from the State Healthcare Facility.

### **I. Facts**

From the information provided by the State Doctor, her supervisor, and officials at the State Healthcare Facility, the Commission understands the facts to be as follows.

This case involves an Agency with multiple departments. One of those departments (“Department”) administers the State Healthcare Facility. The State Healthcare Facility provides medical treatment to patients. It has an immediate need for a doctor to provide very specialized treatment to a small number of patients.

The State Doctor is currently employed by the Department, where she and her colleagues (a handful of other doctors) perform more than 1,000 medical evaluations per year.

In her private capacity, the State Doctor operates a solo practice during her off-time, on nights and weekends. She is qualified to perform the specialized treatment sought by the State Healthcare Facility, and would like to become credentialed by that facility. After becoming credentialed, she would be qualified to accept referrals from the State Healthcare Facility. She would have the option of accepting or declining any referral, and has agreed to decline referrals that are related to her Department employment. If the State Doctor accepts a referral, she would provide progress reports and recommendations to the State Healthcare Facility treatment team. She may also attend treatment team meetings or other patient meetings. In the event that the State Doctor needs to attend a meeting for her private healthcare business during her Department work hours, she would request leave time from the Department to avoid any overlap in her state and private duties.

Prior to discussing the potential acceptance of referrals from the State Healthcare Facility in her private capacity, the State Doctor had a discussion with her Department supervisor regarding how to deal with potential conflicts of interest. The State Doctor and her supervisor agreed that, should a conflict arise, the State Doctor would: (1) notify her supervisor and seek guidance; (2) follow the medical ethics rules,

State laws, and Department policies and procedures; and (3) decline any referral from the State Healthcare Facility if a conflict existed. The State Doctor and her supervisor believe this would ensure that her primary role would continue to be as a Department doctor. Additionally, the State Doctor and her supervisor agreed that if she needed to evaluate a patient in her state capacity that she had previously treated in her private capacity, the State Doctor would notify her supervisor and recuse herself from the case. In that situation, one of the other Department doctors would take the case.

The Department supervisor supports the idea of the State Doctor accepting patients in her private capacity, even if this means that the State Doctor may have to recuse herself in her state capacity from certain Department cases. The supervisor believes that the public benefit in having another private practitioner to accept those patients that require specialized treatment more than outweighs the slight burden on the State caused by the State Doctor's recusal from certain Department cases.

The State Healthcare Facility has represented that, to become credentialed, the State Doctor would need to submit a letter, references from colleagues, and other materials to the State Healthcare Facility, which it would then review to determine whether credentialing is appropriate.

To be paid by the Agency for her private services, the State Doctor would submit invoices to the State Healthcare Facility, which the facility would review to ensure that her work is completed. She would also need to comply with the Department of Accounting and General Services' and the Agency's regulations regarding payment.

## **II. Application of the State Ethics Code**

The State Ethics Code applies to all state employees and therefore applies to the State Doctor.<sup>1</sup> As discussed below, the Commission determines that the State Ethics Code does not prohibit the State Doctor from accepting referrals from the State Healthcare Facility, subject to certain restrictions.

### Conflicts of Interests

The conflicts of interests law, HRS § 84-14, prohibits conflicts of interests between an employee's state duties and private business activities.

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<sup>1</sup> See HRS §§ 84-2 & 84-3.

HRS § 84-14(b)

The State Doctor is not currently accepting patient referrals from the State Healthcare Facility in her private capacity, but would like to do so in the future. HRS § 84-14(b) prohibits a state employee from acquiring a private financial interest in any business or undertaking which the employee reasonably believes may be involved in official action to be taken by the employee.<sup>2</sup> “Official action” means any decision which involves the use of discretionary authority.<sup>3</sup> The State Ethics Code defines a “financial interest” to include employment. Thus, the issue in this case is whether HRS § 84-14(b) prohibits the State Doctor from acquiring employment as a private practitioner in the treatment of particular patients.

The Commission has interpreted HRS § 84-14(b) to require more than a mere possibility that an employee may be called upon to take official action affecting the employee’s own financial interests. The Commission has stated that this section prohibits an employee from acquiring a new financial interest in a business or undertaking where there is a strong possibility or likelihood that the employee will take official action affecting the business or undertaking.<sup>4</sup>

Based on the Commission’s understanding of her state duties as a Department medical examiner, the work the State Doctor performs in her state capacity involves different responsibilities from, and does not overlap with, the work she would perform as a private doctor. The State Doctor would not be in a position to refer State Healthcare Facility patients to herself or take other official action in her state capacity directly affecting her private employment or business.

Moreover, the State Doctor is one of several doctors in her Department. She only recently started there (and therefore has not seen a large percentage of Department patients), and she would only accept private referrals for treatment in a very specialized field. Based on these facts, the State Doctor and State Healthcare Facility representatives agree that it is unlikely that she would be called upon to evaluate or treat a patient in her state capacity that she had previously treated in her private

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<sup>2</sup> HRS § 84-14(b) states that: “No employee shall acquire financial interests in any business or other undertaking which the employee has reason to believe may be directly involved in official action to be taken by the employee.” (Emphases added.)

<sup>3</sup> HRS § 84-3.

<sup>4</sup> See Informal Advisory Opinion No. 2010-1, at 7 (2010) (stating that the Commission had interpreted HRS § 84-14(b) as requiring more than a “mere possibility” and that it had “applied HRS section 84-14(b) to situations in which there was a strong possibility or likelihood that the subject state employee would be called upon to take official action.”) (emphasis added); Advisory Op. No. 361 (1978), at 1 (“In the past we had stated that the restriction of HRS § 84-14(b), which was quite broad, should not be applied unless there was a strong probability that the employee would be required to take action affecting the business in which he intended to acquire an interest.”) (emphasis added).

capacity. Therefore, HRS § 84-14(b) does not prohibit the State Doctor from accepting private employment in the treatment of patients under these specific circumstances.

HRS § 84-14(a)

If the State Doctor is called upon to take official action affecting her private business or employment as a private practitioner, the State Ethics Code requires her to disqualify herself from taking such action in order to avoid a conflict of interest under HRS § 84 14(a).<sup>5</sup> This section prohibits the State Doctor from taking any official action directly affecting her private business or private employment.

HRS § 84-14(d)

HRS § 84-14(d), another section of the conflicts of interests law, prohibits state employees from being paid to assist or represent another person or business before their own state agency.<sup>6</sup> Because the Department directly oversees the State Healthcare Facility, there is an issue as to whether HRS § 84-14(d) prohibits the State Doctor from assisting or representing her private business before her own agency by receiving patient referrals, attending treatment team meetings, and obtaining payment for her personal services from the Department or Agency.

The Commission has previously concluded that HRS § 84-14(d) does not prohibit personal service contracts between the State and an employee. For instance, the Commission has determined that HRS § 84-14(d) did not apply where an employee was offering her personal services to the agency employing her, she was “the sole owner and operator of her consulting business,” and she did not have any employees.<sup>7</sup> As in that case, the State Doctor does not have any private employees and would be providing her own personal services to the State Healthcare Facility to treat patients. Therefore, HRS § 84-14(d) does not prohibit the State Doctor from interacting with the State Healthcare Facility to receive referrals, treat patients, or obtain payment for her personal services from the Department or Agency.

HRS § 84-14(d) also does not prohibit the State Doctor from assisting or representing patients before the State Healthcare Facility. HRS § 84-14(d) is intended to prohibit the representation of other persons before an employee’s own agency because it creates an appearance of impropriety and an advantage to the people the

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<sup>5</sup> HRS § 84-14(a)(1) states that: “No employee shall take any official action directly affecting . . . [a] business or other undertaking in which the employee as a substantial financial interest[.]”

<sup>6</sup> HRS § 84-14(d) prohibits an employee from “assist[ing] any person or business or act[ing] in a representative capacity for a fee or other compensation on such bill, contract, claim or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.”

<sup>7</sup> Adv. Op. 87-4 (1987), at 2.

employee assists or represents.<sup>8</sup> In this case, the Commission does not believe the State Doctor's interaction with the State Healthcare Facility to treat patients would give her patients an improper advantage. Instead, it allows the patients access to specialized services they may not otherwise be able to access.

### Confidential Information and Fair Treatment

Additional provisions of the State Ethics Code regarding confidential information and fair treatment (misuse of one's state position) apply in this case. HRS § 84-12 prohibits a state employee from using or disclosing confidential information acquired in the employee's state capacity to personally benefit anyone. HRS § 84-13 prohibits an employee from using or attempting to use the employee's state position to secure unwarranted advantages, privileges or benefits for himself/herself or anyone else. The State Doctor must comply with both of these provisions.

### **III. Conclusion**

For the reasons discussed above, the Commission believes that the State Ethics Code does not prohibit the State Doctor from accepting patient referrals from the State Healthcare Facility in her private capacity, subject to the restrictions discussed above.

The Commission thanks the State Doctor for seeking guidance on this issue and demonstrating a commitment to high ethical standards.

Dated: Honolulu, Hawaii, February 16, 2017.

#### HAWAII STATE ETHICS COMMISSION

Reynaldo D. Gaulty, Chair  
David O'Neal, Vice Chair  
Susan N. DeGuzman, Commissioner  
Ruth D. Tschumy, Commissioner  
Melinda S. Wood, Commissioner

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<sup>8</sup> Adv. Op. No. 86-10 (1986); see also Adv. Op. No. 562 (1985), at 1.