

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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MAYOR



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Advisory Opinion 2005-3

I. Summary

Investigators with the Honolulu Department of the Prosecuting Attorney (the Prosecutor's Office) may work as private civil process servers during their off-duty time, as long as they submit to their appointing authority a signed statement attesting that they have read, understood and will abide by the mandates of the Revised Charter of Honolulu Sections 11-102, 11-103, and 11-104.

II. Questions Presented

Under the city's ethics laws, may an investigator with the Prosecutor's Office engage in outside (*i.e.*, non-city) employment as a civil process server?

III. Discussion and Analysis

A. Relevant Ethics Laws

Allowing investigators with the Prosecutor's Office to moonlight as private civil process servers creates a risk of two potential ethics violations. First, it creates a risk that the investigators might use their access to confidential information or other city resources to assist them in serving process (*e.g.*, by using confidential city information to locate individuals to be served). An investigator who used his or her official access to confidential information to serve legal papers would be in violation of Revised Charter of Honolulu (RCH) § 11-102, which provides in pertinent part:

No elected or appointed officer or employee shall:

...

(b) Disclose confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.

Second, there is a risk that a Prosecutor's Office investigator might use the authority or color of his or her official position in the course of serving legal process. An investigator who

misused his or her official position in the course of serving legal process would be in violation of the city's fair and equal treatment policy, which provides:

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

RCH § 11-104. *See* Advisory Opinion No. 2003-4 (an employee of the Honolulu Prosecutor's Office violated the fair and equal treatment provision of the city ethics laws when, during an argument with a neighbor, the employee made it appear that she was calling in an official request to run license plate checks on a neighbor's vehicles).¹

B. Preemptive Ban or a Case-by-Case Approach

As a general rule, the Commission follows a case-by-case approach in enforcing the ethics laws. That is, we generally presume that city employees will comply with the mandates of the city's ethics laws, and we address alleged violations in response to complaints that the ethics laws have been violated in specific instances.

The question before the Commission is whether the above-mentioned risks of potential violations of RCH §§ 11-102(b) and 11-104 are significant enough to justify a departure from our typical case-by-case approach and to require our adoption of a preemptive ban, which would prohibit Prosecutor's Office investigators from acting as process servers on their off-duty time.

We conclude that a complete ban is not necessary. While we do not minimize the risks of potential violations of RCH §§ 11-102(b) and 11-104, we do not believe that they are compelling enough to justify singling out investigators for a preemptive prohibition.

First, the Prosecutor's Office does not have an internal policy specifically prohibiting its investigators from working as private civil process servers. In connection with this inquiry, the Honolulu Prosecuting Attorney, Peter Carlisle, was asked if his office had a position on the question of whether its investigators were permitted to work as private civil process servers and whether his office had any policies or standards on the question. Mr. Carlisle's response stated: "This office does not have any policies or standards that either permit or prohibit investigators from acting as private civil process servers. Our past practice involved allowing investigators to engage in such activities provided they filled out the appropriate disclosure form."² The fact that

¹ The Ethics Commission understands that the Honolulu Police Department's (HPD) collective bargaining agreement with SHOPO prohibits HPD officers from engaging in outside employment involving service of civil process due to similar concerns over the potential that HPD officers might misuse their access to confidential information or their official positions.

² We are aware of the fact that the Prosecutor's Office has a provision in its Standards of Conduct that prohibits its investigators from "engag[ing] in outside employment which is inconsistent or incompatible with properly discharging their duties" or "which reflects unfavorably on themselves and [the Prosecutor's Office]." Standards of Conduct of the Department of the Prosecuting Attorney for Investigators, City and County of Honolulu, Art. VII, para. 48. The Prosecutor's Office has not, however, used this provision to prevent its investigators from working as private civil process servers.

the Prosecutor's Office does not prohibit its investigators from working as private civil process servers suggests it does not consider the risk that its investigators might misuse their official positions as particularly great. Because the Prosecutor's Office is in a better position than the Commission to assess that risk, we think it appropriate to defer to its assessment.

In addition, the number of investigators is not great. Thus, in individual cases, it is possible to monitor their compliance with the ethics laws and whether they are misusing city resources in the course of their outside process serving work. Stated otherwise, a case-by-case approach is not impractical.

Accordingly we believe that it is appropriate to generally permit Prosecutor's Office investigators to work as private civil process servers and to address violations of the city's ethics laws on a case-by-case basis. The case-by-case approach does not exempt the investigators from compliance with the city's ethics laws. Rather, it simply treats them as most other city employees are treated: they are expected to comply with the letter and spirit of the city's ethics laws and are subject to discipline by their appointing authority in the event that the Commission determines they have violated the city's ethics laws.

V. Conclusion

While there is some risk that Prosecutor's Office investigators might misuse their official positions if permitted to work as private civil process servers, the risks in our view are not great enough to depart from the Commission's normal practice of addressing alleged violations of the ethics laws on a case-by-case basis. Thus, we decline to adopt a blanket prohibition against Prosecutor's Office investigators working as private civil process servers during their off-duty time, but instead we will follow our normal case-by-case approach – with one modification.

The modification is that Prosecutor's Office investigators are generally permitted to work as private civil process servers as long as they submit to the Prosecuting Attorney a signed statement attesting that they have read, understood and will abide by the mandates of RCH §§ 11-102, 11-103, and 11-104. If they do not submit such a signed statement, they are prohibited from acting as private civil process servers. A sample of an acceptable statement is appended hereto.³

Dated: April 19, 2005

/S/

ROBIN DAVID LIU, CHAIRPERSON
Ethics Commission

³ Notwithstanding the Commission's position generally permitting investigators to work as private civil process servers, the Prosecutor's Office could still adopt its own standards or policies prohibiting such moonlighting. *See* Advisory Opinion No. 187 (recognizing that city departments may establish higher, or more restrictive, standards of conduct than the minimum standards imposed under the RCH).

APPENDIX

1. **Name** _____

2. **City Department/Agency:**

3. **City Position:**

4. **Non-City Employment:**
Name of Employer:

Nature of Duties:

6. Statement of Compliance with Standards of Conduct:

I understand that under the Standards of Conduct embodied in Article XI of the Revised Charter of the City and County of Honolulu:

A. No elected or appointed officer or employee shall:

(a) Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the officer or employee in the performance of such person's official duties. Nothing herein shall preclude the solicitation or acceptance of lawful contributions for election campaigns.

(b) Disclose confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.

(c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

(d) Receive any compensation for such person's services as an officer or employee of the city from any source other than the city, except as otherwise provided by the charter or by ordinance.

(e) Represent private interests in any action or proceeding against the interests of the city or appear in behalf of private interests before any agency, except as otherwise provided by law.

B. Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he or she has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

C. Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

I attest that I have read and understood and that I am in compliance with the foregoing standards of conduct. I further attest that I will continue to abide by these standards and that my compliance with these standards is a condition to my being permitted to hold an active real estate license during my employment/appointment as a city officer or employee.

Date: _____

Signature