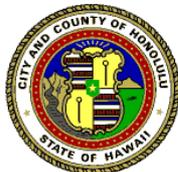


ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2012-1[1]  
4-2 Decision**

**Chair Gall, and Members Lilly, Burroughs, and Chen for the Majority Opinion**

**I. SUMMARY**

A board member represents a client in a private legal matter unrelated to any board cases. The attorney opposing the board member in the private legal matter is also the attorney for the petitioner in a case before the board. Under these circumstances, the board member's financial interest or business activity resulting from his representation of the private client is too remote to create a conflict of interest. In addition, in order for there to be a conflict of interest, one would have to assume that opposing counsel would breach their fiduciary duties to their clients and breach the attorneys' rules of professional responsibility. A reasonable person would not conclude that the board member's representation in the private legal matter may affect the impartiality of his judgment in carrying out his official city duties as a board member. As a result, the Honolulu Ethics Commission ("Commission") finds that the board member does not have a conflict of interest which requires disclosure or abstention from participating in the board's case.

**II. FACTUAL BACKGROUND**

Lyle Ishida is a partner at the law firm of Tom Petrus & Miller. Mr. Ishida also became a member of the Zoning Board of Appeals ("ZBA") on August 17, 2011. The ZBA hears and determines appeals from the actions of the administration of the zoning code and subdivision ordinances and any rules and regulations adopted pursuant thereto.

**A. CASE PENDING BEFORE MR. ISHIDA AS A MEMBER OF THE ZBA**

In January 2012, the ZBA will be hearing Case No. 2011/ZBA-1 In re Hawaii's Thousand Friends et al. Kyo-Ya Hotels & Resorts, LP ("Owner") owns several properties in the Waikiki area including the properties known as the Moana Surfrider Hotel located at 2365 Kalakaua Ave., Honolulu, Hawaii ("Moana") and the Sheraton Princess Ka'iulani

Hotel located at 120 Ka`iulani Ave., Honolulu Hawaii since 1963. On September 23, 2010, the Owner submitted an application for a zoning variance (“Application”) to allow a new 26-story hotel and residential tower to encroach into the 100-foot coastal setback and coastal height setback on the Moana to the Department of Planning and Permitting (“DPP”). Findings of Fact, Conclusions of Law, and Decision and Order in the Matter of the Application of Kyo-Ya Hotels & Resorts, LP for a Variance (Dec. 1, 2010) at 1. On December 1, 2010, DPP Director, David Tanoue, granted a partial approval of the Application (“Order”). *Id.* at 11.

On January 3, 2011, Hawaii’s Thousand Friends, Ka Iwi Coalition, Surfrider Foundation, KAHEA, and Michelle Matson (collectively referred to herein as “Petitioners”) filed a petition to appeal the Order to the ZBA (“Appeal”).

### **B. ENCHANTED LAKES RESIDENT ASSOCIATION V. DELTA CONSTRUCTION**

The Petitioners are represented by Linda Paul. Ms. Paul also represents the Enchanted Lakes Residents Association (“ELRA”), who has a dispute (“Dispute”) with Delta Construction Company (“Delta”). Mr. Ishida represents Delta. The dispute between ELRA and Delta is unrelated to Case No. 2011/ZBA-1.

As early as May 2011, ELRA, which represents residents of 140 houses and 110 townhouse units, sent several letters to Delta Construction alleging that they have an actionable claim against Delta for work performed in Kailua and have demanded money for compensatory damages. “ELRA wrote letters to Delta Construction which is nearing completion of ten residential lots on the hillside near the pond complaining of sediment filled run off, which adds nutrients to the water and causes algae to bloom and proliferate.” Leila Fujimori, Algae Bloom Blamed on Construction, Star Advertiser, June 2, 2011. The ELRA has also filed complaints with the State Department of Health. The Department has a pending investigation and enforcement case regarding polluted soil runoff. *Id.* ELRA has not filed a lawsuit yet, but Mr. Ishida and Ms. Paul have discussed the possibility of mediation to resolve the dispute. This case has been publicized in the Star Advertiser and has been the subject of concern at Kailua Neighborhood Board Meetings. Kailua Neighborhood Board Meeting Minutes (April 7, May 5, 2011).

Mr. Ishida stated that he has a professional relationship with Ms. Paul.

### **III. ANALYSIS**

Revised Charter of Honolulu (RCH) Sec. 11-102.1(c) prohibits city officers and employees from engaging in any direct or indirect business activity or financial interests that

a reasonable person would believe may tend to impair the independence of judgment in the performance of such person's official duties.

In analyzing whether a particular situation presents a prohibited conflict under RCH Sec. 11-102.1(c), proof that one's judgment in discharging his/her official duties is actually impaired is not required. The reasonable appearance of impairment through conflicting loyalties is sufficient to establish a violation. See, e.g., Advisory Opinion No. 2001-06 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)); Advisory Opinion No. 158 (possibility of real conflict of interest arising is sufficient to establish violation of RCH Sec. 11-102(c)).

The financial interest that an attorney has in his client's business is too remote and not the type of financial interest, direct or indirect, that the laws contemplate giving rise to a conflict of interest. For example, if a partner's lawfirm represented Business X, it cannot be said that the partner would have an indirect financial interest in all of the activities of Business X.

Further, this is not the type of situation that qualifies as a prohibited conflict of interest caused by certain "business activities." Take the example where Attorney A is on a board and attorney B is representing a client before that board and that client is also in litigation with a client represented by Attorney A. In this example, there would be a clear conflict of interest because Attorney A is representing a client in an adverse action against Attorney B's client who is before Attorney A in his or her role as a city board member. But, the facts of the case before us are different than this example. Neither Mr. Ishida's client, Delta, nor Ms. Paul's client, ELRA, are before the ZBA, on which Mr. Ishida sits. So, the business relationship between Mr. Ishida's representation of Delta and his duties as a ZBA member is too remote to create even an indirect conflict of interest in the mind of a reasonable person.

Further, as an attorney, Mr. Ishida must follow the Hawaii Rules of Professional Conduct ("HRPC"). The rules prohibit an attorney from "using means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." HRPC 4.4. Violation of these rules, could subject Mr. Ishida and Ms. Paul to discipline including suspension or disbarment. Haw. Sup. Ct. R. 2.2, 2.3. Besides being factually remote, the potential conflict of interest in this case is precluded by both attorneys' fiduciary duties to their clients and the HRCP. Additionally, there is no history of animosity between Mr. Ishida and Ms. Paul. A reasonable person knowing all the facts, including the remote interests described above and Mr. Ishida's requirements to abide by the HRPC and fiduciary duty to of both counsel to their clients, would not believe that Mr. Ishida, as an attorney, would use his power as a ZBA member to provide Delta with an advantage over Ms. Paul's other client, ELRA.



KATY Y. CHEN, Esq., Member  
Honolulu Ethics Commission

APPROVED AS TO FORM  
AND LEGALITY:

\_\_\_\_\_/S/\_\_\_\_\_  
CHARLES W. TOTTO, Executive Director and Legal Counsel  
Honolulu Ethics Commission

**Advisory Opinion No. 2012-1**  
**4-2 Decision**  
**Vice Chair Wong and Member Silva for the Dissenting Opinion**

Ethics laws prevent city officials from exploiting or appearing to exploit their public office for the advantage of a private client. In this case there is an appearance that power or discretion in public authority might be used for the special benefit of a private client. A city officer should not be in a position where benefit to a private client might affect performance of the city officer's functions on behalf of public authority.

The Commission determines whether under the totality of the circumstances a reasonable member of the public would perceive that the business or financial interest of the officer is "incompatible with the proper discharge of such person's official duties or . . . may tend to impair the independence of judgment in the performance of [his/her] official duties." RCH Sec. 11-102.1(c).

We consider several factors to aid in the determination of this case: the status of the board member/attorney's private case (i.e., whether the case is active or dormant); importance of the private case (i.e., whether this is a high profile case or is mundane); dollar value of the private case (i.e., whether this is a multi-million dollar case or is it a small claims case); the level of interaction between the two attorneys (is the attorney an active participant on behalf of the client or merely a representative of the firm on the caption page of a filing); and any history of animosity between the board member/attorney and opposing counsel.

Here, the dispute between ELRA and Delta is active and occurring at the same time as the petition being heard before the ZBA. The ELRA matter has garnered media attention, generated discussion with the Kailua Neighborhood Board and has also initiated an investigation by the Department of Health. While the actual dollar value of the case is

unknown, it is most likely more than the threshold for the \$5,000 small claims court limit. Mr. Ishida and Ms. Paul are both active participants in this case and have communicated to each other about the case status. Finally, there is no history of animosity between Mr. Ishida and Ms. Paul. Based on an analysis of all these factors combined, we conclude that a reasonable person would question Mr. Ishida's impartiality as a ZBA member hearing the petition.

A reasonable person might be concerned that Mr. Ishida could use his city position as a ZBA member to find in favor of Petitioners, thereby currying favor with Ms. Paul for the benefit of Delta; or, one could conclude that Mr. Ishida might be tempted to provide an advantage to his client by coercing Ms. Paul to settle the ELRA v. Delta matter if she wants a favorable ruling for the Petitioners.<sup>[2]</sup> HRPC, for the most part, are self-policing laws. Even though attorneys are supposed to abide by HRPC, there is no way to ensure that they will. We do not believe that the remote threat of disciplinary action for failure to follow the HRPC would remove an appearance of impropriety in this matter.

Our position in finding a conflict of interest here is further supported by the bright line rule established by the Supreme Court in State v. McCabe, 987 A.2d 567 (N.J. 2010). In McCabe, the court held that "part-time municipal court judges must recuse themselves whenever the judge and a lawyer for a party are adversaries in some other open, unresolved matter." Id. at 574. In McCabe, a per diem judge presided over a case in which the attorney representing the defendant had an unresolved adversarial case where the judge represented another party in an unrelated probate matter that had been inactive for two years. The court used the same standards to evaluate requests for recusal as the Commission does: "would a reasonable, fully informed person have doubts about the judge's impartiality?" Id. at 572. The court indisputably concluded yes.

Under the circumstances here, allowing a judge to oversee a case in which the defendant's attorney is also the judge's adversary in another pending matter is to invite reasonable doubts about the judge's partiality. That, in turn raises reasonable questions in the minds of litigants and the public about the fairness of proceedings and the overall integrity of the process. For those reasons, disqualification is required in this case.

Id. at 573-574. We would like to emphasize that the court stated that there was "no evidence of bias or unfairness in the record. Nor is there proof of any animosity between the municipal judge and the defense counsel." Id. at 573. The court further stated that:

[T]here is no claim or evidence of bad faith or unethical conduct on the part of Judge Nish...also nothing in the record suggests that Mr. Albin was attempting to 'shop' for another judge at a late hour. It is the appearance of impropriety – and that alone –

which requires recusal here, consistent with the bright-line rule we announce today.

Id. at 574 (emphasis added). It is the Commission's responsibility to err on the side of preventing the appearance of impropriety. "Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government...They, as agents of public purpose...shall recognize that the public interest is their primary concern." RCH Sec. 11-101 (emphasis added).

We believe the majority's concern over "board member or commissioner shopping" should be given the relatively little weight that "judge shopping" was given in McCabe. Such conduct could occur but does not outweigh the need for recusal to protect government integrity. To the extent that attorneys who are board or commission members are inconvenienced, this minimal burden must be met because the cost to the integrity of city officials, including board and commission members, is greater. See McCabe, 987 A.2d at 574.

We clarify that our opinion does not mean that a board member/attorney is necessarily disqualified if a lawyer appears before the board who is an adversary of someone else in the board member/attorney's firm. As noted above, an attorney who is not actively involved in his or her lawfirm's case with the counsel appearing before the board may be considered to have too remote an interest to have a conflict of interest. Furthermore, RCH Sec. 11-103 requires "[a]ny 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...and to the ethics commission, at any time such conflict becomes apparent." (Emphasis added.) "Apparent" is defined as "visible; manifest; obvious." Black's Law Dictionary 105 (8<sup>th</sup> ed. 2004). This determination does not impose an affirmative duty for commissioners to verify what relationships their employers have with petitioners or petitioner's counsel. The conflict must be disclosed when the conflict becomes obvious.

In Advisory Opinion No. 2011-1, the Commission cautioned former Council Chair Apo that he was legally bound to file a disclosure of conflict of interest when the conflict first becomes apparent, and not later than the first vote on the measure (since the Commission would expect that at the time of the first vote, any conflict would be apparent). Just as the Commission does not impose an affirmative duty on councilmembers to seek out legislation in order to timely disclose a conflict of interest likewise, the Commission would not impose an affirmative duty on Mr. Ishida or other commissioners/board members. RCH Sec. 11-103 limits the requirement of disclosure to when the conflict is apparent.



standard that applies in conflict of interest cases, however, the Commission is required to determine whether a reasonable member of the public might harbor these concerns.