



California Fair Political Practices Commission

October 28, 1987

Edward J. Hoefling
Executive Director
Board of Chiropractic Examiners
921 11th Street, Suite 601
Sacramento, CA 95814-2867

Re: Your Request for Informal
Assistance
Our File No. I-87-246

Dear Mr. Hoefling:

You have written in your capacity as Executive Director of the Board of Chiropractic Examiners to request our assistance regarding whether a private attorney which the Board wishes to retain would have a conflict of interest if he is retained. You have subsequently furnished us with a copy of his agreement with the board.

QUESTION

Will Michael Schroeder, attorney for the California Chiropractic Association have a conflict of interest if he is retained by the Board of Chiropractic Examiners to represent the board in pending litigation challenging one of its regulations?

CONCLUSION

A private attorney who is hired by a public agency to represent that agency on one case only does not become a public official as a result of that activity and, therefore, is not subject to the conflict of interest provisions of the Political Reform Act.^{1/}

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

FACTS

Suit has been filed against the board challenging a modification to one of its regulations (Section 302). The Office of the Attorney General has advised the board that it will not represent the board in defending the lawsuit. Instead, the Office of the Attorney General will authorize the board to employ its own private legal counsel to handle the case. This representation will apply only to this particular case.

The board has selected Mr. Michael Schroeder of the law firm of Case, Schroeder, Knowlson, and Burnett to represent it in the lawsuit. However, prior to proceeding, the board has asked that you seek our advice on whether Mr. Schroeder would have a conflict of interest. The concern arises because Mr. Schroeder and his firm represent the California Chiropractic Association. In that capacity, Mr. Schroeder appeared before the board on behalf of the association during the hearings to adopt the modification of your regulation Section 302.

ANALYSIS

Initially, I would like to point out that the Commission does not provide advice except to the person whose duties are in question or to his or her authorized representative. (See our Regulation 18329, copy enclosed.) However, we have elected to treat your request as one for informal assistance in the general interpretation of the Act.^{2/}

The conflict-of-interest provisions of the Act apply only to public officials. (Section 87100.) The term public official is defined in Section 82048 as follows:

"Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government....

(Section 82048.)

The definition of public official is further refined by our Regulation 18700(a) which provides as follows:

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Edward J. Hoefling
October 28, 1987
Page 3

(a) "Public official at any level of state or local government" means every natural person who is a member, officer, employee or consultant of a state or local government agency.

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decision-making authority....

(2) "Consultant" shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

(Emphasis added.)

On several occasions we have advised that when private counsel is retained by a public entity to represent that entity on one case (or from time to time on a case-by-case basis), the private attorney does not become a "consultant" within the meaning of the Act. Therefore, an attorney in that situation is not a public official for purposes of conflict-of-interest disclosure or disqualification. In contrast, an attorney retained for on-going representation would be a public official, either because he or she is a "consultant" or an employee or officer. (See our Advice Letters to Albuquerque, No. A-85-244; and Gifford, Nos. A-85-133 and A-85-134, copies enclosed.)

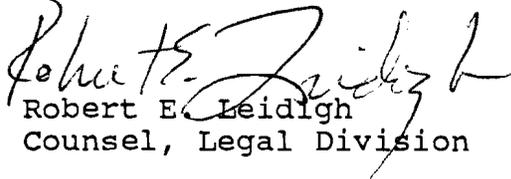
You may wish to direct your inquiry to the State Bar for consideration of questions regarding attorney's conflicts of interests.

Edward J. Hoefling
October 28, 1987
Page 4

I trust that this letter adequately responds to your request for our assistance. Should you have questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Robert E. Leidigh
Counsel, Legal Division

DMG:REL:plh

BOARD OF CHIROPRACTIC EXAMINERS

921 11TH STREET, SUITE 601, SACRAMENTO, CALIFORNIA 95814-2867
TELEPHONE: (916) 445-3244



F F P P
SEP 23 3 44 PM '87

September 25, 1987

Mr. John McLean:
Fair Political Practices Commission
528 J Street Suite 800
P.O. Box 807
Sacramento, CA 95814

Mr. McLean:

The California State Board of Chiropractic Examiners has adopted a modification of Section 302 of its regulations. This section defines the practice of chiropractic in California. The modification became effective on September 6, 1987.

Subsequently, lawsuits have been initiated by the California chapter of the American Physical Therapy Association and the California Medical Association. They are attempting to obtain a temporary restraining order to prevent the Board from enforcing the modified version of the regulation.

Preliminary indications are that the Office of the Attorney General will not represent the Board in these matters. The Attorney General's Office will likely provide the Board with the authorization to employ its own private legal counsel to represent the Board in Sacramento Superior Court on October 1, 1987, and later, on these issues.

The Board, on September 17, 1987 committed itself to employ Mr. Michael Schroeder of the law firm of Case, Schroeder, Knowlson, Mobley and Burnett to represent the Board in these actions. However, continued representation by Mr. Schroeder is contingent upon determining whether his participating as Board counsel constitutes a conflict of interest. Significant facts relating to this issue are as follows:

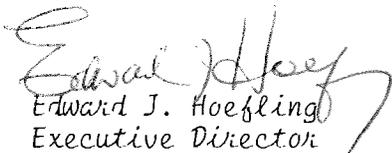
1. Mr. Schroeder and his law firm have represented many of the legal matters of the California Chiropractic Association (CCA) for the past four years. He has been their attorney in numerous legal actions.
2. Currently, and in the past, the CCA and Mr. Schroeder specifically have raised issues before the Board. (It is likely that the CCA will have issues before the Board in the future. It is also likely that Mr. Schroeder has already provided the CCA with legal counsel on these issues).
3. The CCA presently has issues in common with the Board against other state agencies. An example of this is the referral of chiropractic patients to clinical laboratories licensed by the Department of Health Services. An example of contrary views is that a CCA proposal to the Board to have it (the Board) operate a peer review system for the chiropractic profession throughout California. The Board rejected this request.

Mr. John Mclean
Fair Political Practices Commission
September 25, 1987
Page 2

4. Mr. Schroeder served as an advocate for the CCA in the preparation of preliminary drafts of Section 302 that the Board considered before publically noticing the proposed modification of Section 302.
5. On more than one occasion, Mr. Schroeder personally testified before the Board on behalf of CCA in support of the adoption of Section 302 by the Board.
6. Mr. Schroeder's law firm has provided personal legal representation to one Board member. That legal representation continues at present.
7. Mr. Schroeder has sworn that neither he nor member of his law firm will discuss the issues involved in these cases with representative of the CCA as long as he represents the Board's interests.

The Board is concerned about hiring the attorney for the Association as its counsel in the pending regulatory matters, Can an attorney have a divided loyalty both to the Board and to the CCA? The two entities have common, but sometimes diverse views. Could this affect the legal representation received by the Board? The Board requests an opinion as to whether the employment of Mr. Schroeder in the capacity of Board counsel in the law suits in question represents a conflict of interest and whether his continued use in that capacity would be appropriate.

BOARD OF CHIROPRACTIC EXAMINERS


Edward J. Hoefling
Executive Director

EJH:bp
cc: John Hemauei, D.C.

BOARD OF CHIROPRACTIC EXAMINERS

921 11TH STREET, SUITE 601, SACRAMENTO, CALIFORNIA 95814-2867
TELEPHONE: (916) 445-3244



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October 2, 1987

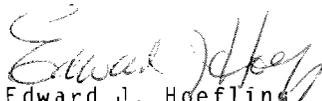
Mr. John McLean
Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95814

Mr. McLean:

On September 25, 1987 the Board of Chiropractic Examiners solicited an opinion from your agency questioning whether a conflict of interest existed if the Board were to employ an attorney who previously represented the California Chiropractic Association (CCA).

Germane to this issue is the disclaimer letter from Mr. Schroeder (who previously represented the CCA). I am enclosing a copy of that letter for your consideration.

BOARD OF CHIROPRACTIC EXAMINERS


Edward J. Hoefling
Executive Director

EJH/mksy

cc: John D. Hemauer, D.C.

LAW OFFICES
CASE, SCHROEDER, KNOWLSON, MOBLEY & BURNETT

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

ONE NEWPORT PLACE, SUITE 260

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LOS ANGELES

1900 AVENUE OF THE STARS, SUITE 1900

LOS ANGELES, CALIFORNIA 90067

TELEPHONE (213) 201-7585

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DANIEL A. CASE*
ARTHUR R. KNOWLSON, JR.*
MICHAEL J. SCHROEDER*†
MICHAEL W. BURNETT*
GARY S. MOBLEY*
ROBERTO G. BRUTOCAO*
BARRY A. YOCH
RICK A. CIGEL
MICHAEL F. WRIGHT
GERALD A. KLEIN
STEPHEN F. DIAL
AVARELLE SILVER-WESTRICK
ELIZABETH A. PETERSON

September 24, 1987

*A PROFESSIONAL CORPORATION
†ALSO MEMBER OF HAWAII BAR

Board of Chiropractic Examiners
921 11th Street, Suite 601
Sacramento, California 95814

Attention: Mr. Edward J. Hoefling, Executive Director

California Chiropractic Association
1700 Alhambra Boulevard, Suite 110
Sacramento, California 95816

Attention: Mr. Garrett F. Cuneo, Executive Director

Re: Representation of the State Board of
Chiropractic Examiners in Litigation Initiated
by the California Medical Association and the
California Chapter of the American Physical
Therapy Association

Dear Sirs:

As each of you are aware, the Board of Chiropractic Examiners has asked us to represent it in connection with litigation instituted by the California Medical Association and the California Chapter of the American Physical Therapy Association regarding Section 302 of Title 16 of the California Administrative Code. We have discussed with each of you the fact that we represent, and will continue to represent the California Chiropractic Association from time to time in connection with a number of matters as its retained general counsel. We will not, however, represent the California Chiropractic Association in connection with the above-referenced litigation or in other matters before the Board of Chiropractic Examiners. We also discussed with each of you the ramifications of our proposed representation of the Board of Chiropractic Examiners in this litigation, including the fact that should any litigation or dispute arise in connection with the litigation regarding the regulation that affects the interests of the California Chiropractic Association and which is adverse, we might be unable to represent either of you in such litigation or dispute, and in such event it might be

September 24, 1987

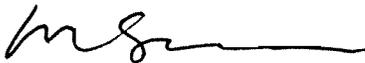
Page 2

necessary to withdraw from any and all representation of the State Board of Chiropractic Examiners in this litigation (including any representation in the litigation with respect to matters other than those in dispute).

Each of you, after consideration of the above matters and consultation with counsel and others as you have deemed necessary, has consented to our representation of the Board of Chiropractic Examiners in this litigation and to our continued representation of the California Chiropractic Association in connection with matters other than the litigation regarding Section 302 and other matters before the Board of Chiropractic Examiners.

Please confirm your agreement to the foregoing by signing the three enclosed copies of this letter in the space provided and returning them to me at your earliest convenience. I will then distribute to each of you one set of fully executed counterparts.

Very truly yours,

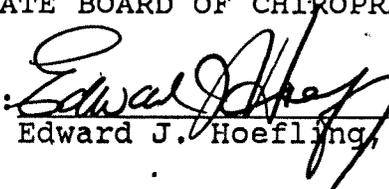


Michael J. Schroeder
of CASE, SCHROEDER, KNOWLSON, MOBLEY & BURNETT

MJS:ps\543
Enclosures

THIS WILL CONFIRM OUR AGREEMENT TO THE MATTER SET FORTH ABOVE.

STATE BOARD OF CHIROPRACTIC EXAMINERS

By:  SEP 26 1987
Edward J. Hoefling, Executive Director

CALIFORNIA CHIROPRACTIC ASSOCIATION

By: _____
Garrett F. Cuneo, Executive Director

cc: Jerilyn S. Kaibel, D.C.
John David Hemauer, D.C.



California Fair Political Practices Commission

September 29, 1987

Edward J. Hoefling
Board of Chiropractic Examiners
921 - 11th Street, Suite 601
Sacramento, CA 95814-2867

Re: 87-246

Dear Mr. Hoefling:

Your letter requesting advice under the Political Reform Act was received on September 28, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Robert Leidigh, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh