

OPINIONS NOS. 26, 27, and 28

(Note: These opinions were requested together, but the originals were issued separately because of the slightly different facts presented by each legislator and because Commissioner July Simeona disqualified himself in Opinions Nos. 26 and 28. The opinions are deleted as one, however, because, to achieve anonymity through deletion, the distinguishing characteristics of these legislators were generalized to a point of similarity making possible one deleted opinion.)

Three members of the Legislature, two Senators and a Representative, who are also attorneys engaged in the private practice of law, ask whether the representation of certain of their clients presents a violation of the Ethics Act (Act 263, SLH 1967).

These clients, substantial corporations, are each engaged in large real estate developments in Hawaii. The legislators represent them on a retainer basis in various matters, including land use and zoning changes as well as highway alignments and rights of way before state and county agencies. In this connection, it is worthy of note that the members of the Land Use Commission and many other boards and commissions, as well as the Directors of the Departments of Planning and Economic Development and Transportation, are subject to confirmation by the Senate, and their budgets and legislative requests come before both the Senate and the House of Representatives.

Legislator-attorneys take two types of action with which we are concerned: (1) official action as legislators in the Legislature, and (2) action as attorneys in a representative capacity before various state and county agencies.

Legislative Action

A legislator's actions as a member of the Legislature, such as actions on appropriations and appointments, may well be actions directly affecting his clients. For instance, in the case before us, should one of these legislators take action on budgetary provisions for roads, harbors, or airports in the vicinity of his client's holdings, such action would clearly directly affect the corporate interests. While legislators are not covered by section 8, the conflict of interests section, nonetheless, their acts may be subject to review under other sections of the Act. [See Opinion No. 1.]

Section 7, the fair treatment section, governs the use by legislators of official position to obtain unwarranted treatment for themselves or others. We interpret this section to govern the use of official position within the Legislature to obtain unwarranted treatment, as well as its use to obtain the unwarranted action of other public bodies or offices.

Thus, using one's position as a Senator or Representative to effect legislation for the benefit of one's client, which legislation is unwarranted, would constitute a violation of section 7. "Unwarranted," in this instance, has reference to a result for a client which would not have been achieved without the use of his position by the legislator involved. This coincides with the intent of section 7 that the criteria for legislative action should be the merits of the issue and not the power of the man backing the legislation for private reasons.

One of these Senators holds a position of considerable power and influence in the Senate and is a member of an important committee. He is also co-counsel in this matter with the Representative, who is chairman of one important House committee and a member of other committees. Because of the nature of his client's business, many bills of importance to his client may come before the committee the Representative chairs and the committees of which he is a member.

The other Senator is also chairman of a very important committee and a member of another, which committees may also well have occasion to report on bills of great significance to his client.

Because of the power of the chairmen of these committees on matters before their committees, any action these legislators should take, express or implied, on bills of importance to their clients, such as voting or processing within these committees, may constitute a use of position in violation of section 7. So, also, the action of the Senator holding a position of great influence in the Senate on bills important to his client, including such actions as voting or processing within the Senate, may constitute a violation of section 7. We would be failing in our duty as guardians of the public trust, were we to nicely ignore the realities of the legislative process and its vulnerability to use by those in positions of power to their own ends.

Appearance before Other State Agencies

This situation also presents the problem of the appearance before an agency by individuals who are members of the legislative house which confirms the agency's members, or passes upon the budget of the agencies and the department to which the agencies are attached. We do not here refer to the courts of the State which are specifically exempted from inclusion by the Act's definition of "state agency."

The Ethics Act, as passed by the members of the Legislature, is not violated until such time as a legislator uses or attempts to use his official position to obtain for his client unwarranted treatment. However, the "aura of power" surrounding some members of the Legislature under certain circumstances is so overwhelming as to effectively preclude objective treatment of their clients' causes. The appearance before a public body of a legislator who is certain that the public body will accord his client unwarranted treatment because of the power of his position is such use of official position.

Unfortunately, there is here no litmus-paper test of whether the appearance of a particular member of the Legislature before some state agency in itself constitutes a violation of section 7. As indicia of whether the appearance will constitute a violation, this Commission will consider, amongst other things: (1) the position occupied by the person within the Legislature (i.e., party and position within the party, the committees he occupies or chairs, his seniority); (2) whether the appearance is to effect discretionary or ministerial action; (3) the level within state government of the person with whom he deals (how far removed the person or agency is from the direct power to exert legislative control); (4) the magnitude of the interest he represents; (5) the importance to his client of the state action he is requesting; (6) the public significance of the requested action; (7) disclosures made and rulings by the respective houses of the legislative body of which he is a member; and (8) with whom the

legislator is associated. These criteria must be applied on a case-by-case basis to arrive at reasonable regulation under section 7.

The Senator and the Representative who are chairmen of important committees in their respective houses and members of others thereby gain effective power over bills coming before these committees. The other Senator, a very influential member of the Senate, has great influence over legislation. He is co-counsel and is associated with the Representative. The appearances of these powerful legislators would be to effect discretionary action. The two Senators (but not the Representative) are members of the body confirming board and commission members and department heads. All three of these legislators at some point take action on the state budget. The interests represented here are all substantial, the ventures important to the clients, and the significance to the public of the use of these lands is very great.

Because of the enormous power of the official position of the Senator of great influence and because of the considerable power of the Senate committee chairman and member, appearances by them before the Land Use Commission, or the Departments of Transportation or Planning and Economic Development on behalf of their clients would constitute a violation of section 7 of the Act. By associating as co-counsel with this Senator, the Representative's appearance assumes the same force of position. We also note that the Representative is chairman of an influential committee and member of other committees, all of which may take action directly related to this client. While we make no decision here on the ethical propriety of the Representative's appearance without or with different co-counsel before these state agencies, his appearance in this case with this Senator as co-counsel subjects him to the same ethical limitations the Senator is under.

While our decision may seem unduly restrictive of legislator-attorneys' private practice, we reiterate that the public service is a public trust, in the case of legislators, sought from and granted by the people. Legislators, while they are "part-time officials," now receive substantial compensation for their public service. As guardians of the public trust, these members of the Legislature have accepted a unique opportunity to set the very highest example of ethical conduct. To this group, the temptation to take advantage of their power must be amongst the strongest. And high ethical conduct is most praiseworthy where the temptation to "bend just a little" is strongest.

Dated: Honolulu, Hawaii, April 23, 1969.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
James F. Morgan, Jr., Vice Chairman
S. Don Shimazu, Commissioner
July Simeona, Commissioner

Note: All members of the Commission participating in these opinions concur. The vacancy left by Commissioner George's resignation in favor of public office has not been filled. Commissioner July Simeona disqualified himself from consideration and preparation of Opinions Nos. 26 and 28, although he participated in and signed Opinion No. 27.