

OPINIONS NOS. 173 AND 174

In Opinion No. 173, a state employee inquired whether a legislator-attorney who was representing a client in civil and criminal cases involving the State, was in the same position as the legislator-attorneys in Commission Opinions Nos. 26-28.

In Opinion No. 174, the attorney-legislator also inquired whether he was in probable violation of the ethics law. The facts placed before the Commission by the persons interviewed by the Commission are as follows:

1. The legislator is chairman of a standing committee of the house of which he is a member and is considered a powerful legislator.

2. He is also a partner in a law firm which has represented this particular client for many years. Heretofore, he has not done work personally for the client. However, he is presently involved as counsel in several suits pending in various courts in the State in which the State is a party.

During our interview with the legislator, he disclosed that the compensation for this representation is based upon an hourly rate rather than a contingency basis. He also informed us that as a committee chairman, he has not been involved with any legislation directly involving his client nor has he, in a private capacity, been involved in the legislative concerns of this client. He stressed that his client has been with his law firm for many years on a case-by-case basis rather than a retainer basis. He has further informed us that his committee does a preliminary review of the budget of the Department of the Attorney General and of the Judiciary Branch. Final review is done by the Finance Committee with ultimate approval by both houses. It was his opinion that the legal issues involved in the three court cases involving the State will be resolved strictly through litigation rather than negotiation. He has further indicated that the client has possible counter claims and offsets against the State which might result in reducing any possible judgment against his client.

We, of course, were cognizant of the fact that he was a member of the House of Representatives, which is not involved in the confirmation of appointed officials in the executive and judicial branches.

Two deputy attorneys general involved in the case have confirmed that the legal issues involved in the cases will be resolved through litigation rather than negotiation.

We first discussed whether the legislator was in probable violation of HRS §84-13, relating to the use of official position to obtain unwarranted treatment or advantage. In Opinions Nos. 26-28, we had ruled that the appearance by three lawyer-legislators before certain state agencies on behalf of their clients was a violation of §84-13 because the nature of their official position under the circumstances of the cases was so overwhelming as to effectively preclude objective treatment of their clients' causes. We indicated that while there was no litmus paper test as to whether the appearance of a particular member of the legislature before a governmental body would be in violation of the section, some of the considerations would be the position occupied by the legislator, whether or not the appearance is to effect discretionary or ministerial actions, the level within government of the person being dealt with, the nature and magnitude of the interests the legislator

represents, the public importance of the issue, the public significance of the requested action, disclosures made by the legislator and the person with whom the legislator is associated.

Although the state courts are excluded from the definition of a state agency under HRS §84-3(9), appearances before a court are not excluded from consideration under HRS §84-13 since this provision makes no reference to "state agency." Hence, the considerations discussed in Opinions Nos. 26-28 were relevant here.

We ruled, based upon the facts before us, that the legislator was not in probable violation of HRS §84-13 in making appearances before the Attorney General's office or the various courts of this State. Unlike the individuals who were the subject of Opinions Nos. 26-28, he was not a member of the legislative body which exercises confirmation over the appointed officials with whom he would be dealing on this case, and his review of the budgets of the Judiciary Branch and the Department of the Attorney General was a relatively minor part of the budgetary review of those agencies. Moreover, we were swayed by the consideration that the law firm of which he is a partner has represented the client for almost 40 years. This fact alone strongly indicated that the client did not seek the legislator out because of his official position with the State. We were further influenced by his statement that these cases will have to be resolved through litigation rather than negotiation, which statement is also the opinion of the Department of the Attorney General. We were further influenced by the consideration that the Judiciary Branch has a relatively high degree of independence from the legislature and, further, the conduct of the attorneys in this case is subject to ethical review under the Code of Professional Responsibility adopted by the Hawaii Supreme Court on October 13, 1970, which has the force and effect of law.

Our conclusion, therefore, was that under the circumstances a reasonable man could not infer that the legislator was using or has attempted to use his official position to obtain unwarranted treatment or advantage for his client. We did not believe that objective treatment of his client's cause by either the courts or the Department of the Attorney General was precluded in this case due to his public position. We advised, however, that we would have continued jurisdiction in any subsequent allegation of violation of §84-13.

We were well aware of the point of view that a public officer is a public trustee. With this concept, we agreed. However, we believed that this principle must be carefully balanced with the desire expressed by our legislature that the State must be able to attract competent and qualified individuals to public service.[†] We have compared the State ethics law with the restrictions in the federal conflict of interest statutes as well as that of the counties of this State with considerable interest. We noted, for example, that the City and County of Honolulu, R.O. 1961, §7-15.2.c., states in part as follows:

No officer or employee of the city, except as hereinafter provided, shall ... appear in behalf of private interests before any agency other than a court of law, nor shall he represent private interests in any action or proceeding against the interest of the city in any litigation to which the city is a party;"

[†]"The public interest is best served by attracting and retaining in our State government and the legislature men and women of high caliber and attainment. A code of ethics, which is unnecessarily rigid and restrictive, will defeat its purpose. It would discourage qualified persons from entering government and may have a demoralizing effect upon incumbents." Haw. H. R. Stand. Com. Rep. No. 367 at 2, 4th Leg., Gen. Sess., 1967 (March 31, 1967).

This prohibition would impose upon a council member-attorney absolute prohibition against representing any private client in any action or proceeding in any litigation in which the city is a party. The state ethics law, however, contained no absolute prohibition against representation of a private client in litigation against the State. We noted, in particular, HRS §84-14(d) which states that:

No legislator ... shall assist any ... business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act 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 he is an employee or legislator.

The intent of this provision appears to prohibit undertaking, assisting or representing a private client when there is a reasonable probability that the legislator will be involved in the matter in his legislative capacity. It was our opinion that the provision was not intended to prohibit all representation of private clients in matters involving the State and this reading would be consistent with the stated legislative philosophy that restrictions in the ethics law should not be so prohibitive as to discourage persons from public service. It was our opinion that if after undertaking representation of a private client the matter does ultimately come before the legislator in his legislative capacity, §84-14(d) would require his disqualification since he is prohibited from representing clients on a matter before the legislature. In this case, we had no evidence of a reasonable probability that the legislator will be involved in a legislative capacity on the issues or claims being litigated in the pending court cases in which he was involved in a private capacity.

We expressed our concern of the apparent lack of disclosure on the part of the legislator of his attorney-client relationship. Legislation affecting this client was enacted during the past session. We were cognizant that the client's operations were "grandfathered in" by a previous legislature, and, further, that the act was generally more restrictive on his client. Nevertheless, it was our opinion that his firm's long-standing relationship with the client was a matter which should have been disclosed under HRS §84-17 last April 30, 1973 inasmuch as it was a financial interest and relationship which may be affected by a state agency.[†]

[†]At this time it would be appropriate to note that Disclosure Guideline Number 2 for legislators defines a client as any individual, corporation, partnership, proprietorship or organization for whom professional services are rendered by a legislator, his partners or associates and where the relationship and likelihood of further compensation is on a continuing basis or where the professional services rendered exceed \$1,000 per annum in value. Disclosure of clients is required where the legislator knows, or should have known, of:

1. A client who is a party to regulatory action, transaction or litigation in which the State is a party and for whom professional services on that particular matter are rendered.
2. A client who has drafted or submitted directly or indirectly, bills, resolutions or other matters to the legislature, or a client who, directly or indirectly, communicates with officials in the legislature or executive branch with the purpose of influencing legislative or executive actions.
3. A client who may be directly or indirectly financially affected by pending state regulatory action or transaction if professional services on the particular matter are rendered to the client.

Dated: Honolulu, Hawaii, December 7, 1973.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
Gwendolyn B. Bailey, Vice Chairman
Audrey P. Bliss, Commissioner

Note: Commissioner Walters K. Eli was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.