

## ADVISORY OPINION NO. 88-4

An attorney in solo private practice had accepted the position of staff attorney with a committee of the Legislature for the 1988 legislative session. The attorney had been representing a client for almost three years before a state board in an effort to obtain benefits for her client. The employee had a contingency fee agreement with her client in which she would receive one-third of any money that the client may have received in a lump sum (the client would pay for all expenses and costs of the legal matter). Because of this contingency fee agreement, the attorney requested advice as to whether the attorney may have continued to represent her client while she was employed at the Legislature in light of Hawaii Revised Statutes ("HRS"), section 84-14(c), a conflict of interest provision of the State Code of Ethics.

HRS, section 84-14(c) states as follows:

(c) No legislator or employee shall assist any person or business or act in a representative capacity before any State or county agency for a contingent compensation in any transaction involving the State.

While the language of HRS, section 84-14(c) may appear to have brought the attorney's situation within the purview of the provision, the Legislature, in Standing Committee Report No. 367 of the House Committee on Judiciary, 1967 General Session, made it clear that the primary intent of the Legislature in enacting the ethics code was to prevent venality. It follows, therefore, that the intent of the Legislature in prohibiting employees from assisting or representing persons or businesses before a state or county agency in a transaction involving the State on the basis of contingent compensation was to prohibit those situations falling under this description which contain elements of venality.

Upon reviewing the particular facts of the attorney's situation, the Commission found that her continued representation of her client before the state board was not intended by the Legislature to be proscribed by HRS, section 84-14(c) inasmuch as these facts did not lead the Commission to believe that the situation presented elements of venality. These particular facts were noted as follows:

1. At the time the attorney was retained by her client on a contingency fee basis almost three years ago, the attorney did not anticipate nor could the attorney have anticipated her employment with the Legislature for the 1988 Session. (A contingency fee arrangement for compensation between attorneys and clients is generally acceptable in the legal profession.)

2. The attorney's employment with the Legislature would run for approximately four months and, at the outset of her employment, she did not have expectations of returning to work at the Legislature after the 1988 Session.

3. The attorney's client's legal matter was nearing conclusion inasmuch as her client was awaiting a decision by the state board, although if the decision was not favorable in whole or in part the attorney anticipated having to engage in more proceedings.

4. Because of the complexity and duration of the legal matter, the physical and mental deterioration of the attorney's client, the volume of the client's records, and the lack of private attorneys experienced in matters before the state board in question, it would have worked a hardship on the client if the attorney had to arrange for substitute counsel.

Additionally, it was noted that the concern of the Legislature that conflicts of interests statutes not be applied overzealously was expressed in Standing Committee Report No. 670-72 of the Senate Committee on Public Employment, 1972 Regular Session, as follows:

*At the outset, certain observations, which your Committee considered, should be noted for an understanding of the spirit and intent which underlie the amendments. In drafting a conflict-of-interest statute it is easy to become overzealous and to forget the impact which a broad restriction may have. A statute clearly should prohibit conflicts of interests which are most damaging to the standards of good government and yet not prohibit so much that competent people will be discouraged from serving or that legislators and employees are deterred or restricted from freely carrying out their intended functions and duties. For example, the state would be hurt more than helped by a statute which barred experts from serving on regulatory boards and commissions. Similarly, a statute which barred (or is construed to bar) a union member-legislator from serving on the labor committee or a lawyer-legislator from being a member of the judiciary committee would be a disservice. Notwithstanding the apparent conflict in such instances, it would be foolish for the legislature to place all union members on the judiciary committee and all attorneys on the labor committee simply to avoid the possibility that an unethical conflict of interest might arise. Thus, it would be unwise to proscribe all instances in which a conflict of interest might arise. It is not necessarily the conflict of competing interests which should be prohibited but any unethical actions arising out of them. (Emphasis added.)*

In the enactment of the conflicts of interests provisions of the ethics code, it is apparent that the Legislature wished to make it clear that the spirit and intent behind the provisions was to not be overzealous and prohibit all conflicts of interests but to prohibit unethical conduct resulting from conflicts of interests.

Lastly, we informed the attorney of HRS, section 84-13 of the ethics code, to keep in mind while representing her client before the state board. HRS, section 84-13 prohibits state employees from misusing their official positions to obtain unwarranted advantages for themselves or others. This prohibition includes the misuse of an employee's official title. HRS, section 84-13 states in pertinent part as follows:

**§84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others ....

We thanked the attorney for her concerns regarding the ethics code and for requesting an advisory opinion. The attorney's cooperation and sensitivity in this matter were appreciated.

Dated: Honolulu, Hawaii, April 8, 1988.

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