

## ADVISORY OPINION NO. 91-1

A former state legislator, now an attorney in private practice, requested an advisory opinion from the State Ethics Commission (the "Commission") concerning the propriety of representing a client who wished to challenge the constitutionality of a state law that resulted from a bill the former legislator voted in favor of when the former legislator served in the Legislature.

Because the former legislator no longer served in the Legislature, section 84-18(b) of the post-employment provisions of the State Ethics Code (chapter 84, Hawaii Revised Statutes) was the section most directly applicable to the question raised. Section 84-18(b) reads as follows:

### **§84-18 Restrictions on post employment.**

....

(b) No former legislator or employee shall, within twelve months after termination of the former legislator's or employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which the former legislator or employee participated as an employee.

Broadly, the question before the Commission was whether section 84-18(b) prohibits a former legislator who is within the twelve-month period following termination of employment by the State from representing clients on matters taken up by the Legislature during the individual's term of office. Put more narrowly, did the former legislator's vote on a bill constitute sufficient "participation," as envisioned by section 84-18(b), to preclude the former legislator from representing a client who wished to challenge the law resulting from that bill?

The Commission has in past advisory opinions considered the "participation" issue on a number of occasions in a variety of contexts. It has concluded that not all contact or involvement with a matter rises to the level of "participation," as envisioned by section 84-18(b). For participation to occur, the contact or involvement must be significant. Significance, of course, defies a quantitative definition, and in the absence of a bright-line test, the Commission stated that it must necessarily proceed on a case-by-case basis. The Commission explained that it weighs several factors in determining whether "participation" has occurred. Among these factors, in terms of former legislators, are the following:

1. Whether the former legislator has taken part in committee hearings or other discussions regarding the bill, and, if so, the nature of the hearings or discussions;
2. Whether the former legislator has lobbied others with regard to the bill;

3. Whether the former legislator has participated in other bills or other matters relating to the bill in question;
4. Whether the former legislator has communicated, in an official capacity, with the agency that would ultimately administer the law resulting from the bill;
5. Whether the former legislator has received information that might provide an unfair advantage to the legislator or others;
6. Whether the former legislator has voted on the bill; and
7. Whether the former legislator has otherwise played a significant role in promoting passage or defeat of the bill.

The former legislator informed the Commission that her involvement with the bill in question was limited to voting on the bill as it made its way through the Legislature. The former legislator added that with regard to other bills, she had much greater involvement and that during her tenure in office, the former legislator voted on many bills.

The Commission did not believe that the *mere* act of voting on a bill, either pro or con, amounts to sufficient involvement with a bill to constitute participation, as envisioned by section 84-18(b). The Commission believed that more is required, in terms of the factors listed above. Because the former legislator's involvement with respect to the bill in question was limited to voting on the bill, and because the former legislator had no other involvement with that bill, the Commission concluded that section 84-18(b) did not prohibit the former legislator from representing clients who wished to challenge the constitutionality of the law resulting from that bill.

The Commission thanked the former legislator for seeking its advice in this matter and expressed appreciation for the candor and cooperation provided.

Dated: Honolulu, Hawaii, April 3, 1991.

STATE ETHICS COMMISSION  
Rev. David K. Kaupu, Chairperson  
K. Koki Akamine, Vice Chairperson  
Cynthia T. Alm, Commissioner  
Elisa Yadao, Commissioner

Note: Commissioner Laurie A. Loomis disqualified herself from consideration on this matter.