

OPINION NO. 485

A member of the legislature asked the Commission to determine whether he might, as an attorney, represent one of his clients in dealings with a state agency--either before the agency or through its deputy attorney general. The legislator also asked the Commission to determine whether he might bring a suit, if necessary, against the agency on behalf of his client. The question of a conflict arose because the legislator was a member of a committee that had subject matter jurisdiction over the agency.

The Commission first informed the legislator that the conflicts-of-interests section of the ethics code, HRS §84-14, does not prohibit legislators from representing clients before state agencies, although HRS §84-14(c) and HRS §84-14(d) provide certain restrictions. HRS §84-14(c) prohibits legislators from assisting or representing a person or business before a state agency for a contingent compensation in any transaction involving the State, and HRS §84-14(d) prohibits legislators from assisting or representing a person or business for compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which they have participated or will participate as legislators. HRS §84-14(d) also prohibits legislators from assisting or representing a person or business for compensation on such a bill, contract, claim, or other transaction or proposal before the legislature.

Although the Commission noted that the conflicts-of-interests section of the ethics code permits legislators to represent clients before state agencies under certain conditions, the Commission stated that it had held in the past that such representation is also subject to the fair treatment section of the code, HRS §84-13, which in pertinent part reads as follows:

No legislator ... shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others

Because of the appearance of impropriety that accompanies a lawyer-legislator's representation of a client before a state agency he has jurisdiction over, the Commission held, in Advisory Opinion No. 59, that such representation violates HRS §84-13:

[H]is membership on the committee is sufficient in itself to place pressure on the "Board" which a non-legislator or legislator not on a committee affecting said "Board" could not place on it. We find that this would present a violation of HRS §84-13.

In Advisory Opinion Nos. 41, 66, and 79, the Commission found that the lawyer-legislators in those opinions could represent clients before state agencies, because, in fact, they did not serve on committees that had jurisdiction over the state agencies they were to appear before.

The Commission stated that it understood that while its duty was to serve the interest of the public in maintaining and improving public confidence in the integrity of government officials, it should not discourage capable men and women from entering public life. The Commission therefore was reluctant to place restrictions on the outside activities of

legislators, who, after all, served part-time. However, the Commission believed that there was a general consensus that lawyer-legislators should be prohibited from representing clients before state agencies in certain situations. For example, the Commission noted that the Conflict of Interest Laws Commission of Illinois had stated:

We ... do not recommend that lawyer-legislators be forbidden to practice before State agencies, unless there are *special circumstances* requiring such a ban as to particular agencies. (Emphasis added.) Conflict of Interest Laws Commission, Ethical Standards in Illinois State Government 26 (1967), quoted in Comment, "State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendations," 23 Alabama Law Review 369, 390 (1970).

And, with regard to a lawyer-legislator appearing before a state agency he oversees as a legislative committee member, the Commission noted that the following statement had appeared in an article on Pennsylvania's ethics code:

[T]he danger of a legislator's public duties being subterfuged by private interests when he is allowed to represent clients before agencies which he supervises as a member of the overseeing legislative committee appears great enough to justify the proscription of such acts Comment, "Legislative Conflicts of Interest: An Analysis of the Pennsylvania Legislative Code of Ethics," 19 Villanova Law Review 82, 109 (1973).

The Commission believed that these comments supported the Commission's interpretation of HRS §84-13 as it applied to lawyer-legislators who represented clients before state agencies they had jurisdiction over. Furthermore, the Commission pointed out that HRS §84-1 provides that chapter 84, HRS, be "liberally construed to promote high standards of ethical conduct in state government." For these reasons, the Commission saw no basis for deviating from the policies set forth in Advisory Opinion Nos. 41, 59, 66, and 79.

With regard to the legislator's case, the Commission understood that as a committee member he took action on the agency's budget and legislation, as well as on other matters. The Commission therefore concluded that his representation of a client before the agency would create an appearance of impropriety, or an appearance of misuse of position, in violation of HRS §84-13. Since the deputy attorney general the legislator negotiated with was assigned to the agency, the Commission held that the legislator's contacts with the deputy attorney general would also violate HRS §84-13. As stated above, the Commission was extremely reluctant to place restrictions on the outside activities of legislators; however, the Commission believed that in this case the restrictions were warranted.

With regard to the legislator's second question, the Commission held that the legislator could not represent his client in a suit against the agency if there was a possibility of settlement, in which case the same appearance of impropriety as discussed above would exist. However, the Commission stated that the legislator could represent his client if it was clear that the matter was to be litigated. Although the possibility of abuse of position still

existed, the Commission was of the opinion that courts were not nearly as susceptible to legislative influence as were state agencies.

Finally, the Commission pointed out that legislators, of course, were not prohibited by the ethics code from representing their constituents before any state agency on a non-compensated basis.

The Commission told the legislator that it appreciated his contacting the Commission with regard to this matter and appreciated his openness in discussing the matter with the Commission's staff.

Dated: Honolulu, Hawaii, February 17, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Paul C.T. Loo, Vice Chairperson
Allen K. Hoe, Commissioner
Robert N. Mitcham, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.