

## OPINION NO. 505

In Advisory Opinion No. 485, the Commission prohibited a legislator from representing a client on non-ministerial matters before a certain department because the legislator served as a member of a legislative committee that had subject matter jurisdiction over the department. After receiving Advisory Opinion No. 485, the legislator asked the Commission to determine whether its holding in that opinion would likewise bar a legislator who serves on one of the legislature's finance committees from representing private clients before any state agency, since the finance committees pass on the budgets of all state agencies.

Because the resolution of the legislator's question involved a possible encroachment on the activities of other legislators, the Commission decided to ask all legislators for their views on the question the legislator posed. Of the legislators who commented on the matter, most, like the legislator himself, found Advisory Opinion No. 485 objectionable for one reason or another. One legislator, however, felt that the logic behind Advisory Opinion No. 485 was "compelling," although the restrictions in the opinion would be a "difficult burden to bear." Another legislator stated that he saw "no problem" with the opinion. The Commission was pleased with the response from the legislators, and the information received was helpful to the Commission.

The Commission itself, realizing the serious impact its decision could have on legislators, began a comprehensive examination of the question of legislator representation of private clients before state agencies. The Commission carefully reviewed the history of the relevant code provisions, past Commission opinions, and the practices of other states.

The Commission concluded after its examination that two provisions of the ethics code, HRS §84-14(c) and HRS §84-13, were applicable to the question of legislator representation of private clients before state agencies. The Commission initially realized that HRS §84-14(c), a part of the conflicts-of-interest section of the code, is the only provision of the code that deals specifically with legislator representation of private clients before state agencies. HRS §84-14(c) prohibits such representation only when compensation is contingent upon the result of the case:

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.

The Commission has in the past, however, also applied HRS §84-13, the fair treatment section of the code, in representation cases. HRS §84-13 bars the misuse of one's official position. The statute, in pertinent part, reads as follows:

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

When the ethics code was adopted in 1967, the prohibition against the receipt of contingent compensation applied only to state employees--not to legislators. Thus, when legislators asked the Commission for advisory opinions on the propriety of their representing clients before state agencies, the Commission could only consider such representation in light of HRS §84-13. Although HRS §84-13 might have been construed to prohibit only actual misuses of position, the Commission in its early opinions believed that the power of legislators in certain situations was significant enough to undermine objective treatment of their clients' cases. Specifically, in Advisory Opinion No. 59, the Commission stated that a member of a legislative committee that had jurisdiction over a state agency should not represent a client before that agency.

In 1972 the ethics code was amended, and for the first time legislators were included in the provision prohibiting the receipt of contingent compensation in representation cases. However, the Commission had already embarked--out of necessity--on a policy of applying HRS §84-13 in legislator representation cases and, even after the 1972 amendments, still made reference to the applicability of HRS §84-13 as it had been applied in representation cases in earlier opinions.

Admittedly, before the adoption of the 1972 amendments to the code, HRS §84-13 had been applied in situations where there had been no showing of an actual misuse of position. Rather, the Commission prohibited legislators from representing clients before certain state agencies because of the Commission's belief that such representation was tantamount to a misuse of position: the Commission believed there was a reasonable likelihood that the state agency in question would be influenced by the legislator's official position. Because legislators had not been specifically restricted, as other state employees had been, from receiving contingent compensation when representing clients before state agencies, the Commission's interpretation of HRS §84-13 to prohibit legislators from representing clients in certain apparently egregious situations seemed reasonable at the time.

However, the Commission now believes that in light of the 1972 amendments to the ethics law, the legislature has expressed its intention that the only restriction meant to be applied in representation cases for both legislators and employees is the prohibition in HRS §84-14(c) against the receipt of contingent compensation. It is a well-established rule of statutory construction that specific provisions of law take precedence over general provisions. It is also well recognized that restrictions explicitly set forth in a statute on a specific matter imply that other restrictions not set forth have been purposely avoided by the legislature. For these reasons, the Commission holds that HRS §84-14(c) allows legislators to represent clients before state agencies for compensation other than contingent compensation, and that in this context HRS §84-13 applies only in situations where there has been an actual misuse of position. The Commission believes that this interpretation of the ethics code conforms to the language of the code's provisions and the legislative intent behind those provisions.

Although our holding in this case overturns our decision in Advisory Opinion No. 485, the Commission believes that this does not diminish our concerns, expressed in Advisory Opinion No. 485, as to the propriety of legislators representing clients before state

agencies. The Commission continues to believe that legislator representation of private clients before state agencies raises very serious ethical questions. Because such representation raises serious ethical problems, both California and Florida have totally barred legislators from representing clients before state agencies. According to the 1981 California Fair Political Practices Commission report entitled Legislators as Advocates Before State Agencies: Avoiding Conflicts of Interest (a copy of which may be obtained from the Legislative Reference Bureau library), the State of Massachusetts bars its legislators from appearing before state agencies unless the matter is ministerial in nature or the proceeding is quasi-judicial. The report also lists a number of other states whose ethics provisions are more restrictive in scope than the singular prohibition found in our law. Whether our ethics laws should be changed to incorporate more restrictions affecting legislator representation cases is, of course, a matter for further research. But an examination of the California Fair Political Practices Commission report and other states' laws seems to suggest that more can be done in this area without seriously affecting the quality of the legislature.

It is worth noting that states that either prohibit or restrict legislator representation of clients before state agencies do so across the board: all legislators are restricted equally without regard to their individual power or committee membership. The approach adopted by this Commission in the past aimed at avoiding across-the-board prohibitions by singling out and prohibiting certain apparently egregious situations. However, the legislators have themselves pointed out that committee membership, positions of importance in the legislature, seniority, party affiliation, and so forth are not always true indicators of personal power. The Commission therefore believes that whatever restrictions apply or may apply in the future should apply to legislators as a group.

When discussing with various legislators the question of legislator representation of private clients before state agencies, the Commission noted that many legislators stated that they did not understand why such representation raised ethical problems in the first place. When legislators in California were asked to comment on the propriety of legislators representing clients before state agencies, the California Fair Political Practices Commission was able to write in its report that

[m]ost of the legislators contacted felt that it was generally inappropriate for a legislator to represent a paying client before a state agency on anything other than the most routine, ministerial matters. Id. at 24.

The California report goes on to cite some representative comments from California legislators on the subject of why legislator representation of private clients before state agencies raises ethical problems:

An agency might feel "intimidated" if a legislator on its budget committee appeared as an advocate.

The appearance of an attorney-legislator on behalf of a client before a state agency inevitably creates "an aura of a threat of political repercussions if the result is unfavorable."

A legislator who takes a fee to represent a client before a state agency is in a "dual role," and is "serving two masters."

Legislators should contact state agencies to get "attention" for their constituents, not to get "special favors" for their clients.

An agency would "feel under pressure" if a legislator appeared on a non-routine matter for a client.

An attorney "must not allow even the 'appearance of impropriety.'"

A part of a legislator's job is to represent constituents before state agencies--as vigorously as possible. He should not receive extra pay for doing his job, nor should non-constituents have the advantage of the extra "clout" of a legislator representing them before state agencies. Id. at 25, 26.

The Commission is in accord with these comments and therefore generally disfavors--at least on a theoretical plane--legislator representation of private clients before state agencies. Of course, the Commission recognizes that some situations--for example, quasi-judicial proceedings and requests for ministerial action--are less problematic than others.

Since the Commission has determined that legislators may represent private clients before state agencies so long as they do not do so for contingent compensation, the Commission advises that legislators abide by the following caveats. The purpose of the ethics code, as stated in the preamble to chapter 84, HRS, is to preserve "public confidence in public servants." Obviously, legislator representation of private clients before state agencies creates an appearance of impropriety that serves to weaken the public's trust in its officials. The Commission therefore urges that legislators voluntarily refrain from representing clients before state agencies whenever possible. When representing clients before state agencies, legislators should take steps to minimize or neutralize the importance of their state position. Since HRS §84-13 prohibits the misuse of position, legislators should avoid clients who solicit their services if it appears that the solicitation is done with an intent to obtain improper influence over a state agency. Of course, no legislator may use or attempt to use improper means to influence a state agency--or a court for that matter--in any representation case in which the legislator or any person with whom he maintains close economic association is participating. Legislators should also be aware that HRS §84-14(d) prohibits them from representing clients on matters in which they have participated or will participate as legislators and that HRS §84-17(f)(6) requires legislators to list on their yearly disclosure of financial interests the names of clients they represent before state agencies on non-ministerial matters. Finally, since the ethical standards found in the attorneys' code of professional responsibility differ from the standards set forth in chapter 84, HRS, attorney-legislators are advised to contact the Office of Disciplinary Counsel before representing a client before a state agency.

Because of the conclusions reached in this opinion, the Commissioners expressed concern that Advisory Opinion No. 485 may have unfairly restricted the legislator in the

representation of his client before the department his legislative committee had jurisdiction over. However, the Commission learned that the legislator had informed its staff that he had not been required to assist his client in anything other than ministerial matters.

The Commission commended the legislator again for his sensitivity to the ethical issues discussed above and told the legislator that it appreciated his bringing this question to the attention of the Commission at an early time.

Dated: Honolulu, Hawaii, August 15, 1983.

STATE ETHICS COMMISSION  
Edith K. Kleinjans, Chairperson  
Allen K. Hoe, Vice Chairperson  
Gary B.K.T. Lee, Commissioner

Note: Commissioner Mildred D. Kosaki was excused from the meeting at which this opinion was considered.

#### DISSENT

I respectfully dissent. Because of the inherent power of a legislator's official position and the fact that legislators have budgetary responsibilities affecting all state agencies, I interpret HRS §84-13 to bar all legislators from representing private clients before state agencies. I believe that legislator representation of private clients before state agencies is tantamount, under HRS §84-13, to an unwarranted use of official position. That the mere representation of a private client before a state agency constitutes an unwarranted use of official position is borne out, I believe, by the actions California and Florida have taken in totally prohibiting their legislators from representing private clients before state agencies. Furthermore, my interpretation of HRS §84-13 is supported by HRS §84-1, which provides that chapter 84, HRS, "shall be *liberally construed* to promote high standards of ethical conduct in state government." (Emphasis added.) Finally, I note that the preamble to our ethics code declares that the purpose of the code is to preserve "public confidence in public servants." I believe that allowing legislators to appear before state agencies to represent clients for pay greatly undermines the public's confidence in its state legislators. Although the majority base their opinion on what they believe to be a proper interpretation of HRS §84-14(c), I believe that that provision, as it applies to legislators, is inconsistent with HRS §84-13, HRS §84-1, the preamble to chapter 84, and, most importantly, the spirit of the ethics code.

Dated: Honolulu, Hawaii, August 15, 1983.

Rabbi Arnold J. Magid, Commissioner