

OPINION NO. 524

A legislator asked the Commission to determine whether the ethics code would prohibit him from representing clients before the Medical Claim Conciliation Panel on a contingent compensation basis.

The section of the ethics code relevant to the question the legislator raised was HRS §84-14(c), which states that

[n]o 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.

After examining this provision of the ethics code in light of the functions of the Medical Claim Conciliation Panel, the Commission concluded that HRS §84-14(c) would not prohibit the legislator from representing clients before the panel in cases where the legislator's compensation would be contingent upon the outcome of the case.

By statute, all medical malpractice claims must be presented to the Medical Claim Conciliation Panel prior to being filed in court. The panel, which encourages the parties to settle their dispute, renders an advisory decision on the issues of liability and damages after a hearing. After the advisory decision is rendered, the parties may choose to settle or either party may proceed to court. The advisory decision cannot be enforced by the panel and therefore has no effect on the parties other than to provide them with an expert opinion on the issues so that they may be encouraged to settle their dispute.

Since the panel has no authority over the parties and its advisory decision cannot be enforced, the Commission determined that representing a client before the panel in cases where an attorney's fee is contingent upon the ultimate disposition of the case would not be prohibited by HRS §84-14(c). The Commission concluded that the legislature, when enacting HRS §84-14(c), intended that the restrictions found in that provision of the code be predicated upon an agency's actual authority over the parties and their dispute. Since the Medical Claim Conciliation Panel has no power over parties appearing before it, the Commission concluded that an attorney's compensation is not contingent upon any action the agency might take. Furthermore, since appearing before the Medical Claim Conciliation Panel is a prerequisite for proceeding to court, the Commission concluded that the panel is, in essence, part of the court process. Finally, the Commission noted that when an attorney represents a client before the Medical Claim Conciliation Panel on a contingent compensation basis, the attorney's fee must be approved by the court, even if the parties reach a settlement while the case is before the panel.

Although the Commission concluded that HRS §84-14(c) would not prohibit the legislator from representing a client before the Medical Claim Conciliation Panel in cases where compensation is contingent upon the ultimate disposition of the case, the Commission informed the legislator that HRS §84-13, the fair treatment section of the ethics code, would prohibit him from using his official position to secure any special or favorable treatment for a

client. The Commission told the legislator that when he appeared before the Medical Claim Conciliation Panel in his capacity as a private attorney he should not refer to his official position. Likewise, the Commission informed the legislator that if he dealt with the Medical Claim Conciliation Panel in his role as a public official, he should not refer to any legal cases he might be involved in before the panel. Finally, the Commission informed the legislator that he could not use state telephones, his state office, or his state address when dealing with the Medical Claim Conciliation Panel in his role as a private attorney. HRS §84-13(3) prohibits the use of state equipment or facilities for private business purposes.

The Commission told the legislator that it appreciated his requesting an advisory opinion on this matter. The Commission has found that this kind of attention to ethical matters furthers public confidence in state employees and contributes to an improved ethical climate in state government.

Dated: Honolulu, Hawaii, January 19, 1984.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Allen K. Hoe, Vice Chairperson
Mildred D. Kosaki, Commissioner
Gary B.K.T. Lee, Commissioner
Rabbi Arnold J. Magid, Commissioner