



FORMAL ADVISORY OPINION #01-11

MARCH 4, 2011

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QUESTION PRESENTED

Does Article VI, Section 3 of the Hawaii State Constitution prohibit a per diem judge from being employed with another public office or position for which the per diem judge is paid?

RESPONSE

Whether the Hawaii State Constitution prohibits a per diem judge from holding another public position depends on the nature of the responsibilities required of the public position being considered as discussed below.

BACKGROUND

Article VI, Section 3 of the Hawaii State Constitution states in relevant part:
. . . No justice or judge shall, during the term of office, engage in the practice of law, or run for or hold any other office or position of profit under the United States, the State or its political subdivisions.

The Commission on Judicial Conduct has previously advised that Article VI, Section 3 of the Hawaii Constitution applies to per diem judges, and thus, per diem judges could not hold another public office or position of profit.

The Commission had based its advice on an informal public opinion issued by the Attorney General's Office on October 17, 1988 which concluded that Article VI, Section 3 prohibited per diem judges from holding another state position of profit. The Attorney General's opinion was based on general prevailing authorities and judicial decisions from out of state because there were no Hawaii court decisions providing precedence or guidance.

Subsequent to the issuance of that Attorney General Opinion, the Hawaii Supreme Court decided *In re Ferguson*, 74 Haw. 394, 846 P.2d 894 (1993). The issue in *Ferguson* is a per diem judge's private practice of law. The Court concluded Article VI, Section 3's prohibition against the practice of law only applies to full-time judges and not to per diem judges.

Ferguson does not address the issue of whether per diem judges can hold public offices or positions of profit. However, it is evident from *Ferguson* that the Court, citing with approval the constitutional history of Article VI, Section 3, views the purpose of Article VI, Section 3 as serving to reduce, if not to eliminate, any possibility of conflict of interest that might arise either from the private or the public sector. *Id.*, at 402, 846 P.2d at 898. Therefore, there is an absolute prohibition that full-time judges cannot practice law and cannot hold another public office or position of profit.

The Court relied on the constitutional history of Article VI, Section 3, and concluded that "missing from the record are any indications that the [Constitutional] Convention delegates intended to apply article VI, section 3's private law practice restrictions to per diem judges." *Ferguson*, at 402-03, 846 P.2d at 898.¹ The Court also stated its concern that if per diem judges were prohibited from practicing law, there would be a dramatic reduction in the number of attorneys available and willing to serve as per diem judges.

In *Ferguson* the Court recognized an exception to Article VI, Section 3 allowing per diem judges to practice law, but did not address their holding other public offices or positions of profit. It is arguable the two restrictive provisions of Article VI, Section 3, the practice of law and the holding of public office or position of profit, are intended to be in tandem. That is, the two provisions are to be read as being complementary to each other, one addressing potential conflicts from the private sector, and the other, conflicts from the public sector.

The *Ferguson* Court interpreted Article VI, Section 3 as a means to prevent conflicts in the private and the public sectors, 74 Haw. at 402, but only addressed an exception for per diems to practice law. Because *Ferguson* did not address whether per diems can hold public offices or positions of profit, it would be prudent to proceed discreetly with the per diems' ability to hold public offices or positions.

¹ The Attorney General's Office had interpreted the same absence of reference to per diem judges in the constitutional history and concluded that had the Convention delegates intended to exclude per diem judges they would have so specified.

ANALYSIS

In view of the *Ferguson* Court's discussion of Article VI, Section 3, its concern about conflicts of interest arising from both the private and public sectors, and its conclusion to allow per diem judges to practice law, the Commission is inclined to conclude that if per diem judges are allowed to practice law, there could also be occasion when they could hold public offices or positions of profit.

This Commission has been advised that the view of the Attorney General's Office (hereinafter "AG's Office") is that the Court in *Ferguson* did not rule on the issue of whether a per diem judge can hold any other public office or position of profit, and so the AG's Office will not unconditionally conclude that per diem judges may hold such offices or positions of profit.

However, in recent discussions with the AG's Office, the Commission learned that the AG's Office has relaxed the conclusion reached in its 1988 informal opinion that per diem judges are prohibited from holding public office or positions of profit. The AG's Office recognizes that there is a difference between holding a public office of profit and holding a public position of profit, and that there may be instances where a per diem judge could hold a public position without violating Article VI, Section 3 of the State Constitution.

In reviewing whether an individual may hold both a per diem judgeship and a public office or position of profit, the AG's Office would look first to the nature of the public office or public position.

The term "public office" has been relatively well litigated and the AG's Office advises that it would apply the general interpretation of "public office" as contained in Article III, Section 8 of the State Constitution (which prohibits members of the legislature from holding any other public office under the State), to its determination of whether per diem judges can hold a particular public office or position of profit. In considering the question of what constitutes such a "public office" the AG's Office has consistently relied upon a number of factors:

1. whether the person is elected or appointed to the position, rather than hired;
2. whether the position is established, and salary, duties and responsibilities are set out in state law; and
3. whether the person has discretion and uses it to exercise any sovereign powers.

For example, if the person is hired, as opposed to elected or appointed, and lacks authority to exercise a certain amount of discretion or some portion of sovereign power and instead performs more ministerial duties, then the person is more likely to occupy a public position as opposed to a public office.

The AG's office says one who occupies a public position for profit may be able to serve as a per diem judge as long as such service is not prohibited by the common law of incompatibility and cites State v. Villeza, 85 Hawai`i 258, 270, 942 P.2d 522, 534 (1997), where the Court addressed incompatibility between two offices stating:

Whether one office is incompatible with another depends on the rights, duties, or obligations connected with or flowing from the offices. If one office is subordinate to the other or the functions of the offices are inherently inconsistent and repugnant to each other, the offices are incompatible.

Also, in Woods v. Treadway, 31 Haw. 792, 794 (1931), the Court stated:

The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest.

Based on the above considerations, the AG's Office is inclined to conclude, for example, that a professor at the University of Hawaii does not occupy a public office. And while the professor occupies a public position of profit, because the professor is not elected or appointed, the professor's position, salary, duties and responsibilities are not specified by law, and the professor does not have the discretion to exercise and does not exercise any sovereign power of the State, the AG's Office opines that no violation of Article VI, Section 3 occurs if a per diem judge were also a professor teaching part-time at a public university.

It is noted that Article VI, Section 3 is not the only limitation on a per diem judge's ability to hold a public position of profit. If a per diem judge were to hold a public position of profit that creates an apparent or actual conflict of interest, the Code of Judicial Conduct could prohibit the per diem judge from holding that position.

Accordingly, the Commission believes there may be occasion when a per diem judge's public position of profit conflicts with the judge's judicial responsibilities. Given that the Hawaii Supreme Court has yet to address the issue of whether a per diem judge

may hold a public office or position of profit, the Commission believes that evaluation and analysis on a case by case basis of the public position that is involved is appropriate.²

CONCLUSION

Article VI, Section 3 of the State Constitution does not necessarily preclude a per diem judge from holding another public position of profit and accepting payment for services performed in that office or position. Whether a per diem judge is permitted under the State Constitution and/or the Revised Code of Judicial Conduct to hold a particular public position should be determined on a case by case basis. The criteria discussed above would be applied to determine whether the services to be performed in the public position are in the nature of policy-making responsibilities which could conflict with the responsibilities required of a member of the judicial branch of government and thus be prohibited by the Hawaii Constitution.

FOR THE COMMISSION
ON JUDICIAL CONDUCT


GERALD Y. SEKIYA, CHAIR

² A per diem judge was recently advised by this Commission that he was not prohibited by the State Constitution from accepting part-time contract employment providing legal services to the City and County of Honolulu Ethics Commission.