

ADVISORY OPINION NO. 88-3

The State Ethics Commission ("Commission") received a request for an advisory opinion from a legislator on the question of whether he had violated the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), by using his official title or by using the state seal on a business flier that advertised a new service developed by a particular company ("Company A"). In conjunction with the request for an advisory opinion, the legislator appeared at a Commission meeting to make a statement and to provide further information.

The Company A business flier in question carried a reduced copy of a letter from the legislator to his constituents. In the letter, the legislator stated that Company A was pleased to introduce the new service and that Company A believed that the new service would significantly aid the community in alleviating one of its more serious problems. The legislator in the letter then commented that he thought that Company A's charge for its service was very reasonable. The legislator then asked in his letter that people use Company A's service.

The legislator's letter carried the state seal and the official title of the legislator. The letter also carried the official heading the Legislature generally uses on its stationery. Apart from the legislator's letter, the flier advertised the new service by providing other information about the service.

The legislator had had an employment relationship for quite some time with Company A. The legislator's disclosure of financial interests statement filed with the Commission indicated that he served as an administrator in Company A and was compensated for his services. The legislator's previous candidate's disclosure form filed with the Commission also carried the same information.

The legislator explained, however, that he was not an employee of Company A per se, but was an employee of another company ("Company B"). The legislator explained that as an employee of Company B, he had been working for Company A as an administrator. The legislator further explained that he was the owner of Company B and also served as the company's president. The legislator also stated that his work for Company A involved developing the new service, and that for the past twelve months he had been compensated by Company A for the consultant services he rendered.

The Company A flier announcing the new service did not indicate that the legislator had an employment relationship with Company A. Aside from having his letter describing Company A's new service printed on the flier, the legislator also distributed the flier with an unrelated, official letter from him to constituents, informing them of an upcoming meeting the legislator would attend. The official letter was sent along with the flier to a considerable number of constituents and new residents in the legislator's district. The legislator stated that the mailing of the flier did not involve the use of any state funds.

The State Ethics Code is found in chapter 84, HRS. A number of the substantive provisions of the ethics code are applicable to legislators, and section 84-31(a)(2) provides that legislators may request advisory opinions from the State Ethics Commission as to whether "the facts and circumstances of a particular case constitute or will constitute a violation" of the State Ethics Code.

In considering the legislator's request for an advisory opinion, the Commission was principally concerned with section 84-13, the fair treatment section of the ethics code, which reads in pertinent part as follows:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

....

(3) Using state time, equipment or other facilities for private business purposes.

The initial paragraph of this section of the ethics law prohibits legislators and state employees from using their positions to give anyone, including themselves, an unwarranted advantage. The Commission has long maintained that under this section of the ethics law a legislator generally cannot use his or her official position, official title, or the state seal on behalf of a private business.

The Commission believed that the legislator's letter on the Company A flier violated section 84-13 in a number of ways. First of all, the legislator used his official title in his letter. Second, the state seal was used. Third, the heading of the letter gave the impression that the legislator was writing in his capacity as a legislator. Fourth, the flier was mixed with an unrelated, official letter from the legislator to constituents, again giving the impression that the flier was part of state business.

Although the legislator had indicated that his letter on the flier was meant to be only an endorsement of a concept (i.e., an alternative solution for alleviating a serious community problem), the Commission believed that the wording of the letter in actuality constituted an impermissible endorsement of Company A's new service, as well as an impermissible sales solicitation. The Commission believed that the legislator's comment in the letter that Company A's fee for its service was quite reasonable went far beyond endorsing a concept. The Commission believed that language of the letter was indistinguishable from a normal sales pitch that might have been penned by a Company A employee. The Commission stated that the legislator's use of his official title, the state seal, and his official position with respect to his letter on the flier gave, to the Commission's mind, an unwarranted advantage to Company A, since an appearance of state approval and endorsement was created.

As stated above, the Commission has long prohibited the use of one's official title or the state seal in commercial transactions. In Informal Advisory Opinion No. 22, the Commission stated:

While we recognized that public officials could not completely hide their identities when they carried on their private activities, the use of the state seal and the specific identification of the individual's official public position carried with them a weight that did have influence. In addition, officials and employees were elected and appointed solely to carry out the business of the public. The use of the state seal, state stationery, and the designation of the official's actual position in government in private matters was not consistent with that purpose.

The Commission also noted that section 5-6, HRS, also appears to prohibit the use of the state seal in commercial transactions "in any manner likely to give the impression of official State approval":

§5-6 Seal; commercial use. Whoever uses any representation of the great seal or the coat of arms of the State in any advertisement or for any commercial purpose or in any manner likely to give the impression of official State approval shall be guilty of a misdemeanor. The preceding sentence shall not be construed to apply to the use of the seal or the coat of arms in any newspaper, periodical book or pamphlet wherein the seal or coat of arms is printed for informational purposes only.

Because this section of the law is not part of the State Ethics Code, the Commission advised the legislator to contact the Office of the Attorney General with respect to the application and interpretation of section 5-6. The Commission mentioned this section of the law to the legislator in this opinion for his future reference.

While the Commission believed that the legislator misused his position and the state seal in conjunction with his letter on the Company A flier, the Commission pointed out that the State Ethics Code does not prohibit legislators in their official capacities from writing letters of support, congratulation, recognition, or letters endorsing a concept. However, the Commission noted that such letters must be drafted so that they cannot be construed to be unwarranted endorsements of a company or its products. The Commission reviews letters when asked, so that state officials may feel secure in issuing letters. The Commission also noted that the legislator's letter on the flier would not have violated the State Ethics Code had there been no use of the state seal or reference to the Legislature or the legislator's state position. The Commission commented, however, that it had long maintained that official matters and private business matters must be kept as separate as possible to avoid any misuse of official position. Thus, the Commission stated that official correspondence and private business correspondence should not be mailed in the same envelope.

The legislator told the Commission that he had researched the application of the State Ethics Code prior to mailing the flier and had concluded that he would not be violating any of the provisions of chapter 84. Because the State Ethics Code can be difficult to interpret, however, the Commission stated that it believes that state officials should not run the risk of interpreting chapter 84 themselves. The State Ethics Commission has been given the sole authority to issue advice and advisory opinions regarding the State Ethics Code so that state officials and employees would not have to "guess" at the application of the State Ethics Code or make risky decisions. The Commission noted that certainly a quick call to the Commission would have avoided a serious problem in this case, and any unwarranted advantage going to Company A.

The legislator stated that after doing research into the application of the State Ethics Code, he believed that Company A did not receive an unwarranted advantage over other businesses because the company had no competitors. The Commission noted that while this may be true to the extent that Company A had no competitors, the lack of a competitor did not entitle a company to an unwarranted endorsement or aid in doing business.

The Commission also considered whether it should initiate charge proceedings in this case. In conducting such proceedings, the Commission would hold a formal, contested hearing to determine as a matter of fact that the State Ethics Code had been violated. If the Commission found a violation of the State Ethics Code after a formal hearing, the Commission would forward a complaint containing findings of fact and conclusions of law to the Legislature for further action.

The Commission determined, however, that for a number of reasons charge proceedings were not warranted. First, the legislator had already been subject to a great deal of unfavorable

media coverage regarding this matter. The restrictions contained in the State Ethics Code with respect to the unwarranted endorsement of a business were also commented upon in the media. Second, the legislator had indicated that he intended only to endorse a concept, not to give Company A an unwarranted advantage. Third, the legislator had expressed a sincere desire to learn if he had made an error in judgment, and fourth, the legislator had indicated a sincere desire to comply in the future with the State Ethics Commission's interpretation of the State Ethics Code in this case. Although the State Ethics Commission believed that the violation of the State Ethics Code in this case was not minor, given the above factors, the Commission believed that further action by the Commission was not warranted. Nevertheless, the Commission informed the legislator that he should consider this advisory opinion tantamount to a written reprimand with regard to the propriety of his involvement in the circulation of the Company A flier.

Finally, the Commission also brought to the legislator's attention the fact that his disclosure statement on file in the Commission's office should have indicated his ownership interest in Company B in item three of the disclosure form. The Commission asked that the legislator amend his form by addressing a letter to the Commission making the amendment so that the letter could be placed with his disclosure form.

The Commission told the legislator that it appreciated his candor and cooperation in discussing the facts of his case, and commended him for requesting an advisory opinion on this matter when it became evident to him that his letter printed on the flier might have been in violation of the State Ethics Code.

Dated: Honolulu, Hawaii, April 8, 1988

STATE ETHICS COMMISSION
Laurie A. Loomis, Chairperson
K. Koki Akamine, Commissioner
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Vice Chairperson Arnold J. Magid was not present during the discussion and consideration of this opinion.