

ADVISORY OPINION NO. 89-3

A state employee requested an advisory opinion from the State Ethics Commission ("Commission") in regard to whether faculty members, both full and part time, of a state educational institution, may use their state titles in the advertisements of private professional groups to which the faculty members were affiliated. The employee explained that full-time faculty members were permitted to carry on a private practice of eight hours per week and that part-time faculty members maintained their private practices. The employee did not specify the forms that the advertising may have taken.

In previous advisory opinions, the Commission interpreted and applied Hawaii Revised Statutes("HRS"), section 84-13, the fair treatment provision of the ethics code, to situations involving the use of state title (or reference to state employment) in commercial contexts in a manner which amounted to a complete ban on the use of state titles in conjunction with private business activities. The purpose of the ban was to prevent a state employee from misusing his or her state position to give the employee or anyone else an unwarranted advantage. HRS, section 84-13 states 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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

However, in light of the freedom of speech protections found in the First Amendment to the United States Constitution and Article I, section 4 of the State of Hawaii Constitution, which came to the Commission's attention as being pertinent to the Commission's position on this issue, the Commission re-evaluated its position in reviewing the employee's request for an advisory

opinion. In re-evaluating its position, the Commission determined that a complete ban on the use of state titles in conjunction with the private business activities of employees would not withstand a constitutional challenge and, consequently, the prohibition had to be modified to allow such use of state titles in commercial contexts so long as the state title is not used improperly to give the employee or anyone else an unwarranted advantage, as evidenced by the facts of the particular situation.

Both the United States Supreme Court and the Supreme Court of Hawaii have acknowledged the value of commercial speech and have clearly held that commercial speech is afforded freedom of speech protections. The Courts have also held, however, that commercial speech receives lesser protection than other forms of speech and have set forth an analysis by which to determine whether a particular regulation of commercial speech is constitutionally permissible. Under this analysis, misleading speech or speech which promotes illegal activities is not entitled to freedom of speech protection. However, where commercial speech is not misleading and does not promote illegal activities, such speech may be regulated but only if the interest asserted by the government in support of the regulation is substantial, the regulation directly advances the governmental interest (as opposed to indirect, remote, or ineffective support for such interest), and the regulation is not more extensive than necessary to achieve the government's goals.

Under this analysis, the Commission believed that the complete ban on the use of state titles in commercial contexts would not be upheld under a constitutional challenge. While the State's interest in preventing employees from misusing their state positions to give themselves or anyone else an unwarranted advantage appears to be a substantial interest, because speech which is not misleading, which does not promote illegal activities, and which is not used in other improper ways to obtain an unwarranted advantage would also be included under the ban, the ban appears to only remotely support the State's interest and appears to be more extensive than is necessary to achieve the State's goal.

However, prohibiting an employee from using his or her state title in a commercial context to obtain an unwarranted advantage for the employee or anyone else, as evidenced by the facts of a particular situation, does appear to meet the constitutional requirements. This interpretation and application of the fair treatment section of the ethics code would directly advance the State's interest and would not be excessive. Thus, if the facts of the particular situation evidence a misuse of state title or an attempt to misuse state title to obtain an unwarranted advantage, the employee would be subject to proceedings by the Commission for violating HRS, section 84-13.

Consequently, the employee was advised that advertising in which a faculty member's state title may appear, which, for example, may be published in the yellow pages or in a newspaper, would not be prohibited under the ethics code provided that the state title is not misused to give the faculty member or the faculty member's private group an unwarranted advantage. Generally, merely mentioning one's state title for informational purposes, such as to show credentials or for biographical purposes, would probably not violate HRS, section 84-13. If, however, there were any questions with regard to a particular advertisement, the Commission urged the employee or any of the faculty members to contact the Commission for specific advice.

To the extent that Advisory Opinions Nos. 51, 315, 472, 476, and 517 went too far by imposing a complete ban on the use of state titles in commercial contexts, these opinions were modified to conform with the holding of this advisory opinion.

The Commission thanked the employee for consulting with the Ethics Commission. The Commission appreciated her concern for the requirements of the ethics code and for her patience and cooperation in this matter.

Dated: Honolulu, Hawaii, January 27, 1989.

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

Note: There was a vacancy on the Commission when this opinion was considered.