

INFORMAL ADVISORY OPINION NO. 88-1

A member of the public (hereinafter "complainant") filed a charge with the State Ethics Commission (hereinafter "Commission") alleging that a state attorney had violated the State Ethics Code, chapter 84, Hawaii Revised Statutes, by using his state position to attempt to intimidate the complainant into hiring a lawyer for one of the state attorney's friends who was involved in a lawsuit. The complainant also alleged that the state attorney, in assisting his friend, had misused state time, equipment, and facilities by making telephone calls during state business hours to the complainant, to the complainant's former lawyer, and to the complainant's current lawyer.

Pursuant to section 84-31(b) of the State Ethics Code, the Commission notified the state attorney of the complainant's charge and afforded the state attorney an opportunity to respond. In response to the charge, the state attorney filed a reply denying the allegations.

In order to establish the facts of the case, the Commission's staff requested that the complainant and the state attorney respond to written questions. After these responses were obtained, the Commission scheduled, pursuant to section 21-5-3 of the Commission's Administrative Rules, an informal hearing at which the complainant, the complainant's former lawyer, and the state attorney appeared to discuss the facts of the case.

Based on the information presented to the Commission, the Commission determined the facts of the case to be as follows. The complainant's company had employed the state attorney's friend as a real estate agent. The complainant's company and the state attorney's friend had been sued by a client with respect to the sale of property to the client. The state attorney's friend, as an employee of the complainant's company, had been the real estate agent for the client, but was no longer affiliated with the company at the time of the suit.

The state attorney's friend was not able to obtain a lawyer to represent her with respect to the suit, and explained her predicament to the state attorney. He believed that there was reason for the complainant's company to provide a lawyer to her for both her protection and that of the complainant's company. The state attorney telephoned the complainant in order to obtain the telephone number of the complainant's lawyer so that the state attorney could suggest to the lawyer that the complainant pay the expenses of a lawyer for the state attorney's friend. The state attorney called the complainant from his state office at approximately ten o'clock in the morning.

After the complainant answered the telephone, the state attorney informed him that he was a state attorney, was calling on behalf of his friend, and wished to have the telephone number of the complainant's lawyer. When questioned by the complainant as to why the state attorney wished to speak to the complainant's lawyer, the state attorney stated that he wanted to find out if the complainant would provide a lawyer for his friend, since doing so might be advantageous to the complainant as well.

The complainant was apparently infuriated by the state attorney's call, and felt that he had misused his official authority by announcing his position with the State. The state attorney told the Commission that he explained to the complainant a number of times that he was not calling officially, but to help a friend. During the telephone conversation, the state attorney mentioned to the complainant that he thought they had met before. The state attorney explained to the Commission that he only mentioned his official position to the complainant because he had been previously introduced to the complainant as a state attorney and thought that the complainant might

recall him better if he mentioned his job title. During the telephone conversation, the complainant apparently felt that the state attorney was trying to intimidate and coerce him into providing a lawyer for the state attorney's friend.

Prior to contacting the complainant, the state attorney had telephoned the complainant's former lawyer about the problem. The complainant's former lawyer is in private practice and had been the principal broker for the complainant's company. Since the complainant's former lawyer was not in at the time of the call, the state attorney left his state telephone number and asked that his call be returned.

The complainant's former lawyer did return the call, and at the time was aware that the number he was calling was a number at a state office where state attorneys worked. The state attorney took the call and asked the complainant's former lawyer who was representing him in the lawsuit against the complainant's company. The state attorney told the Commission that he contacted the complainant's former lawyer to find out the name of the lawyer representing the complainant's company so that he could suggest to the lawyer that it might be in the interest of the company to represent the state attorney's friend as well. The complainant's former lawyer stated, however, that in addition the state attorney asked a number of other questions related to the lawsuit.

The complainant's former lawyer informed the state attorney that he was neither a party to the lawsuit nor any longer an employee of the complainant's company. The complainant's former lawyer told the Commission that during most of the telephone conversation he was extremely apprehensive because he thought he might be being investigated by the state attorney's office.

Halfway through the telephone call, the complainant's former lawyer asked the state attorney what his state position was. The state attorney replied that he was a state attorney, but did not at that time or previously during the telephone conversation indicate that the call was personal--not official--business. According to the complainant's former lawyer, the state attorney indicated only at the end of the telephone conversation that the call was personal and that he was trying to help his friend obtain a lawyer. Since the complainant's former lawyer was not involved in the case, he suggested that the state attorney contact the complainant to learn the name of the lawyer who might be representing the complainant's company.

The sections of the State Ethics Code relevant to the charge were sections 84-13 and 84-13(3), which read 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.

Section 84-13 prohibits state employees from using their state titles or official positions to give anyone an unwarranted advantage. Section 84-13(3) prohibits state employees from using state time, equipment, or facilities for private business purposes. A private business purpose

generally means for the purpose of making money, but also includes work that might be done for a nonprofit corporation.

In his charge, the complainant first alleged that the state attorney had misused his official title and state position by referring to his status as a state attorney when calling the complainant. However, the state attorney indicated to the Commission that he had told the complainant several times that the call was not official business. The complainant also acknowledged that the state attorney had commented to him during the telephone call that they had met before. Thus, the Commission was inclined to accept the state attorney's explanation that he mentioned his state position only to help the complainant recall that they had previously met. Under these circumstances, the Commission believed that there had been no misuse of position by the state attorney, nor a misuse of his state title.

The Commission also concluded that the state attorney had not used state time, equipment, or facilities for "a private business purpose" when calling the complainant. The Commission believed that the state attorney was only attempting to assist a friend and thus the assistance was more personal than "business" in nature. Although the friend had been sued in conjunction with her business as a real estate agent, the Commission believed that the state attorney's assistance was directed more at helping a friend than helping a friend with the friend's business. The Commission believed that using one's state telephone for a personal matter would not constitute a violation of section 84-13(3) unless there was more of an indication of engaging in business activities.

The Commission also considered whether the state attorney had misused his position in violation of section 84-13 by not immediately indicating, when talking to the complainant's former lawyer, that the matter at hand was not official business. The complainant's former lawyer told the Commission that through most of the telephone conversation he believed the call was official, and also told the Commission that he might have responded differently to the state attorney had he known the call related only to a personal matter.

The Commission noted that the complainant had not raised this aspect of the call to his former lawyer in his charge, and thus to proceed on this point the Commission believed it would have to file a charge against the state attorney with respect to this issue. Although the Commission believed that a legitimate question was raised as to whether the state attorney had misused his position by not immediately clarifying that his call to the complainant's former lawyer was personal, the Commission determined that evidence of a misuse of position on the state attorney's part was not sufficiently clear to warrant further proceedings. The Commission believed, however, that the state attorney had shown clear insensitivity to the distinction between official and personal business.

With respect to the state attorney's call to the complainant, despite the fact that the Commission believed that the evidence did not indicate that the state attorney had violated the State Ethics Code when telephoning the complainant, the Commission believed that the reaction that the complainant had to the call was understandable. Although the state attorney may have informed the complainant that his call was personal, the state attorney had still referred to his position and had called from his office during the day. Because the state attorney's friend and the complainant were at odds with each other over the lawsuit, it was certainly conceivable that the complainant would feel the way he did about the call. The Commission therefore believed that the complainant's filing of a charge against the state attorney was reasonable under the circumstances.

The Commission was more troubled with the state attorney's call to the complainant's former lawyer, since during the call the state attorney had not clarified that the call was personal until the end of the conversation. The Commission believed that the complainant's former lawyer had every right to assume that the call was official, since he had received a call during the day from a state office, and, upon returning the call, was not informed immediately that the call was unofficial. This created understandable anxiety on his part, and led him to respond to the state attorney in a way he might not have responded had he known the true nature of the call.

Although the Commission concluded this case without finding violations of the State Ethics Code, the Commission nevertheless believed that the state attorney had shown very poor judgment in his calls to the complainant and to the complainant's former lawyer. When a state attorney calls a member of the public from his or her state office during the day regarding litigation, there are very likely to be misunderstandings, even if the attorney explains the call is personal. Even though the state attorney's calls were personal, at the outset both the complainant and his former lawyer were made aware of the state attorney's official position. The Commission noted that state employees who make their official positions known to others and discuss personal matters from their state offices run a high risk of misusing their official positions in violation of section 84-13 when those they contact may reasonably believe that they are being questioned about official matters.

The Commission has in its advisory opinions stated over and over again that official business and private matters must be kept as separate as possible. Only in this way will the public feel confident that one's status as a state official is not being misused to obtain an unwarranted advantage. The Commission believed that state officials must, at the outset, take pains to state clearly that a matter is personal and not official when the circumstances of the situation might reasonably lead a member of the public to think otherwise. The Commission further noted that generally state employees should take whatever measures are available to minimize misunderstandings about whether they are acting as government officials or not.

Dated: Honolulu, Hawaii, August 3, 1988.

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

Note: Commissioner David K. Kaupu disqualified himself from consideration of this matter. Vice Chairperson Arnold J. Magid was not present during the discussion and consideration of this matter.