



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

April 24, 2009

Re: Distribution of a Video Featuring a Public Servant
Interpretation of G.S. 138A-31(b) and 138A-31(c)
AO-E-09-004

Dear Requester:

This formal advisory opinion addresses the question of whether it would be permissible, under the State Government Ethics Act (“the Ethics Act”), to permit the distribution of two videos that feature the picture, title, and voice of a public servant. This opinion was adopted by the State Ethics Commission (“Commission”) at its April 24, 2009, meeting.¹

I. Brief Conclusion.

The Commission has concluded that the Ethics Act would not restrict the public servant from allowing the distribution of the videos. Specifically, the videos are not subject to G.S. 138A-31(b), since their primary purpose is to advance a public, not a private, interest. In addition, G.S. 138A-31(c) is inapplicable, since State funds were not used specifically to produce or distribute the video.

II. The Facts.

The public servant’s employing entity is a member of an association of state entities performing similar regulatory functions throughout the United States (“Association”). The employing entity pays annual membership dues to the Association. Dues assessed by the Association are based upon the scope of each member’s regulatory operations relative to the other members of the Association.

Members of the Association receive a variety of services in return for membership dues, including information with respect to regulated individuals and entities; educational, training, and information systems support; assistance with certain regulatory functions; and the tracking and reporting of legal and regulatory developments. The Association also provides public relations and consumer outreach services to its members.

¹ Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

In addition to other membership services, the Association periodically produces videos for use by its members concerning issues of public concern. These videos are distributed by the Association to television stations. Airtime is not purchased by the Association or its members. Instead, the decision to broadcast the videos is left to the individual stations. Recently, the Association offered to produce two videos for its members, each featuring a general topic of interest to consumers. Each video was customized to include the name and image of a representative of the member.

The public servant is featured in two videos produced by the Association. Both videos reference the employing entity and provide the entity's contact information. They also contain a brief reference to the Association. The Association has offered to distribute these videos to North Carolina television stations. The Association will not pay for the airtime, but the stations will have the option of broadcasting the videos.

III. Applicable Statutory Provisions.

A. Use of Title in Nongovernmental Advertising.

G.S. 138A-31(b) provides that a covered person (a term that includes public servants):

shall not mention or permit another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others.

"Nongovernmental" is not defined. However, since the provision also includes the requirement that the "advertising" advance a private interest, the reference to "nongovernmental" apparently does not refer to the nature of the interest served by the advertising. This reference therefore appears to refer to the source of the funding or resources for the advertisement, e.g., does the funding come from a private (nongovernmental) source? This interpretation is supported by the companion provision to G.S. 138A-31(b), G.S. 138A-31(c), which deals exclusively with the use of State, as compared with private, funds for an "advertisement or public service announcement."

"Advertising" is also undefined in the Ethics Act. G.S. 163-278.38Z, concerning campaign disclosure requirements, defines "advertisement" as "any message appearing in the print media, on television, or on radio that constitutes a contribution or expenditure under this Article." G.S. 136-128, defines "outdoor advertising" as "outdoor signs ... or any other thing which is designed, intended or used to advertise or inform ..." and that is visible from certain highways. "Advertising" is generally defined as "the action of attracting public attention to a product or business." *The American Heritage Dictionary* (2nd College Ed., 1991).

A number of exceptions to the prohibition against the use of a covered person's title are listed in G.S. 138A-31(b), including a "charitable solicitation for a nonprofit business entity qualifying under 26 U.S.C. § 501(c)(3)." The term "solicitation" is defined in G.S. Chapter 131F ("Solicitation of Contributions") as:

a request, directly or indirectly, for money, property, financial

assistance, or any other thing of value on the plea or representation that it will be used for a charitable or sponsor purpose or will benefit a charitable organization or sponsor.

G.S. 131F-2(18).

B. Use of State Funds for Advertising and PSAs Featuring Covered Persons.

G.S. 138A-31(c) generally prohibits a covered person from using or permitting:

- State funds for any advertisement or public service announcement;
- in a newspaper, on radio, television, magazines, or billboards;
- that contains that covered person's name, picture, or voice;
- except in case of State or national emergency; and
- where the announcement is reasonably related to the person's official function.

Fund-raising on behalf of and aired on public radio or television is exempt from this prohibition. "Public service announcement" is not defined, but this term is commonly understood to refer to advertisements that reference an issue or concern in the public's interest, as compared with those which relate to commercial or private interests.

IV. Discussion.

The public servant's official title is referenced in both videos. The videos also briefly reference the Association. They therefore could be seen to promote the interests of the Association, a private entity, to a limited extent. However, the primary purpose of the videos is to guide the consumers on issues related to the employing entity's regulatory function. Therefore, because the video primarily advances that public interest, G.S. 138A-31(b) is inapplicable.

Next, it needs to be considered whether G.S. 138A-31(c), which specifically pertains to the use of State funds, would restrict the distribution of the videos. To the extent the videos are broadcast on television, they would qualify as a public service announcement. Moreover, the public servant's name, picture, and voice are used and the videos do not relate to a State or national emergency. Thus, the sole remaining question arising under G.S. 138A-31(c) is whether "State funds" were used for the videos.

As noted above, the videos were produced by the Association in connection with one of many services provided to members of the Association. The videos represent a relatively minor component of those services. The amount of dues paid by the public servant's employing entity is unrelated to the provision of those services. Thus, although the Association's dues were paid by State funds in return for Association membership, the production of the videos had no direct relationship to the use of State funds. Moreover, no State funds will be utilized to purchase airtime for the videos. In light of this conclusion, the Commission has determined that G.S. 138A-31(c) is inapplicable, and therefore the Ethics Act would not restrict the distribution of the two videos.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).