



STATE OF NEVADA  
COMMISSION ON ETHICS

**BEFORE THE NEVADA COMMISSION ON ETHICS**

**IN THE MATTER OF THE  
REQUEST FOR ADVISORY OPINION OF  
BRIAN KROLICKI,  
Former Public Officer**

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**Advisory Opinion No. 06-49**

This matter came before the Nevada Commission on Ethics (“Commission”) for hearing on August 9, 2006 on the request for an advisory opinion filed with the Commission pursuant to NRS 281.511(1) by State Treasurer Brian Krolicki.

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511(5). Mr. Krolicki appeared in person with his legal counsel, Scott Scherer, Esq. Mr. Krolicki was sworn and presented testimony. Subsequent to the hearing, Mr. Krolicki waived confidentiality of this matter.

Mr. Krolicki sought guidance from the Commission regarding the propriety of his appearance in the marketing materials for Nevada’s Prepaid Tuition Trust Fund and Nevada’s College Savings Program.

After fully considering the request for an advisory opinion and considering all of the facts, circumstances and testimony presented, the Commission deliberated and orally advised

Mr. Krolicki of its decision in the matter. The Commission incorporates its oral decision into the following findings and issues this opinion.

### **FINDINGS OF FACT**

1. Brian Krolicki served as Nevada State Treasurer for two consecutive terms with his current term ending in 2006.
2. Pursuant to NRS Chapter 353B, the Nevada State Treasurer is charged with administering Nevada's Prepaid Tuition Trust Fund and Nevada's College Savings Program (collectively "Plans"). NRS 353B.155 makes it mandatory for the Board of Trustees of the Plans ("Board") to promote and market the Plans. The Board delegates this duty to the Treasurer.
3. The marketing plan and materials for the Plans are approved by the Board.
4. Nevada's College Savings Program is administered by Upromise through a contract approved by the Board. The contract provides for Upromise to conduct marketing activities to generate interest in the College Savings Program. The costs of the marketing activities are borne by Upromise and not by Nevada taxpayers out of the State General Fund.
5. Throughout the country, state treasurers regularly appear in advertisements promoting college savings programs in their states.
6. Mr. Krolicki was asked by Upromise to appear in television advertisements or brochures promoting the College Savings Program. He did not receive any remuneration for appearing in the advertisements. During the period in which the advertisements were made, Mr. Krolicki received a salary for his service as State Treasurer.
7. The first television commercial for the Plans was a public service announcement featuring State Treasurer Krolicki and former U.S. Senator Richard Bryan. This advertisement first aired in late 2000 and continued into 2001. Another public service announcement featuring Mr. Krolicki ran in 2002 and 2003.

8. Paid advertising for the Plans began in late 2001. Marketing of the Plans is funded both by fees that are paid to the State Treasurer's office to cover costs of administering the Plans and by direct expenditures by the fund managers. No general fund money is used to administer or market the Plans.

9. Mr. Krolicki was featured in television advertisements for the Plans in 2003, 2004, 2005 and 2006.

10. At Mr. Krolicki's request, television advertising for the Plans ceased in March of 2006 because he was concerned about the perception the ads might create during his 2006 campaign. At the time of the hearing, Mr. Krolicki was running for the office of Nevada Lieutenant Governor.

11. Direct mailing advertising for the Plans is targeted only at parents of children for whom a college savings plan might be beneficial. Direct mail pieces to target households were mailed in April of both 2005 and 2006 and in June of 2005 and 2006 to coincide with filing of federal income taxes and with graduation. Direct mail pieces were also mailed in September and December of 2005 to coincide with the beginning of the school year and the winter holidays.

12. No further marketing was planned after the June 2006 mailing.

### **CONCLUSIONS OF LAW**

1. At the time of the hearing, Mr. Krolicki was a public officer as defined by NRS 281.4365.

2. The Commission has jurisdiction to render an advisory opinion in this matter pursuant to NRS 281.511(1) and NRS 281.521.

**WHEREFORE**, on motion duly made, seconded, and approved by a six to one<sup>1</sup> vote, the Commission renders the following Opinion:

### **OPINION**

The issue before the Commission is whether Mr. Krolicki's appearance in the marketing materials for the Plans violates any provision of the Ethics in Government Law (NRS 281.411-NRS 281.581).

NRS 281.481, subsection 2 states:

A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.<sup>2</sup>

(b) "Unwarranted" means without justification or adequate reason.

Nothing in the materials provided by Mr. Krolicki to the Commission or in the testimony at the hearing showed that Mr. Krolicki used his position in government to secure or grant an unwarranted privilege or advantage for himself by appearing in the marketing materials for the Plans. Any advantage gained by his appearance was warranted. The Treasurer's office has a responsibility to see that the Board's approved marketing plan for the Plans comes to fruition. Publicizing the Plans was a proper discharge of Mr. Krolicki's official duties. In fact, any failure

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<sup>1</sup> Chairman Jenkins, Vice Chairman Hutchison, Commissioners Capurro, Cashman, Flangas, and Keele voted to approve the motion, while Commissioner Kosinski voted nay.

<sup>2</sup> NRS 281.501(8) provides: "commitment in a private capacity to the interests of others" means a commitment to a person: (a) Who is a member of his household; (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) Who employs him or a member of his household; (d) With whom he has a substantial and continuing business relationship; or (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

to comply could have been regarded as a dereliction of his duties. Accordingly, Mr. Krolicki's appearance in the marketing materials did not violate NRS 281.481(2).

Similarly, Mr. Krolicki's appearance in the marketing materials did not violate NRS 281.554. The provision provides in relevant part:

1. Except as otherwise provided in subsections 4 and 5, a public officer or employee shall not request or otherwise cause a governmental entity to incur an expense or make an expenditure to support or oppose:

...

(b) A candidate.

2. For the purposes of paragraph (b) of subsection 1, an expense incurred or an expenditure made by a governmental entity shall be considered an expense incurred or an expenditure made in support of a candidate if:

(a) The expense is incurred or the expenditure is made for the creation or dissemination of a pamphlet, brochure, publication, advertisement or television programming that prominently features the activities of a current public officer of the governmental entity who is a candidate for a state, local or federal elective office; and

(b) The pamphlet, brochure, publication, advertisement or television programming described in paragraph (a) is created or disseminated during the period specified in subsection 3.

3. The period during which the provisions of subsection 2 apply to a particular governmental entity begins when a current public officer of that governmental entity files a declaration of candidacy or acceptance of candidacy and ends on the date of the general election, general city election or special election for the office for which the current public officer of the governmental entity is a candidate.

4. The provisions of this section do not prohibit the creation or dissemination of, or the appearance of a candidate in or on, as applicable, a pamphlet, brochure, publication, advertisement or television programming that:

(a) Is made available to the public on a regular basis and merely describes the functions of:

(1) The public office held by the public officer who is the candidate; or

(2) The governmental entity by which the public officer who is the candidate is employed; or

(b) Is created or disseminated in the course of carrying out a duty of:

(1) The public officer who is the candidate; or

(2) The governmental entity by which the public officer who is the candidate is employed.

...

NRS 281.554.

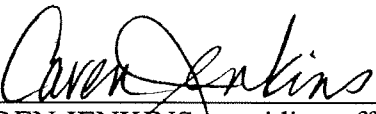
Under NRS 281.554(4)(b)(1) and (2), Mr. Krolicki is not prohibited from causing a governmental expenditure for or for his appearance in, any publication that is created or

disseminated in the course of carrying out a personal duty or a duty of the Treasurer's office. In his capacity as Treasurer, Mr. Krolicki had a duty to promote the Plans through marketing approved by the Board. Under these facts, Mr. Krolicki's activities did not violate NRS 281.554.

The Commission concluded that nothing in the Ethics in Government Law would have prohibited Mr. Krolicki from appearing in the marketing materials for the Plans. The Commission shared Mr. Krolicki's concern over the image the Plans' television media created during the election period cited in NRS 281.554(3) and commended Mr. Krolicki for suspending the media during this period.

DATED: March 15, 2007.

NEVADA COMMISSION ON ETHICS

By:   
CAREN JENKINS, presiding officer at hearing

**DISSENT**

The Commission correctly points out that Mr. Krolicki "had a duty to promote the Plans through marketing approved by the Board." The evidence presented to the Commission by Mr. Krolicki, the Nevada State Treasurer, clearly supported this finding. However, there was no evidence presented to the Commission supporting Mr. Krolicki's use of his own image in the brochures, pamphlets and television advertising promoting the Plans.

NRS 281.481(2) provides:

A public officer or employee shall not use his position in government to secure or grant *unwarranted privileges*, preferences, exemptions or *advantages* for *himself*, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

...

(b) "Unwarranted" means without justification or adequate reason.

...  
[Emphasis added.]

The Commission was presented with no evidence that Mr. Krolicki engaged in any conduct to "secure" the use of his image in the advertising material. However, the contractors who chose to use Mr. Krolicki's image in the ads would certainly have been aware that it is good business to suggest/offer an elected official the use of his image in advertising material that would be seen, we would assume, by a significant number of the treasurer's constituents. The fact, testified to by Mr. Krolicki, that other state treasurers use their images in similar advertising material would have been known by the contractors and would certainly have been suggested/offered by them even without any encouragement by Mr. Krolicki. The use of Mr. Krolicki's image in the advertising material disseminated by the Plans "secured" the use of Mr. Krolicki's image in the advertising materials. This use clearly provided Mr. Krolicki a "privilege" and an "advantage" in furthering his political career.<sup>3</sup>

The Commission concluded that the use of Mr. Krolicki's image in the ads was "warranted" (NRS 281.481(2)(b)). "Unwarranted" is defined to mean "without justification or adequate reason." I agree that Mr. Krolicki had an obligation to advertise the Plans; however, he had no obligation to use his own image in those ads. Also, there was no evidence that the advertising material for the Plans was more effective because Mr. Krolicki's image was used in those ads. The only reasonable purpose for the use of Mr. Krolicki's image in the ads was to familiarize Mr. Krolicki's image with the voters of the State of Nevada (and to possibly form a "relationship" with parents who become participants in one of the Plans). I do not believe that an

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<sup>3</sup> The testimony that other state treasurers use their images in similar advertising should have no relevance to determinations concerning Mr. Krolicki's conduct under the Nevada Ethics in Government Law.

elected public official is permitted, under the provisions of NRS 281.481(2), to use his image in advertising material for programs sanctioned by government authority.

The Commission concluded that Mr. Krolicki's use of his image in the advertising materials did not violate NRS 281.554. I agree. The exceptions "swallow" the prohibitions contained in this statute, rendering it relatively meaningless to all except those who may be unaware of its existence.

Under the provisions of NRS 281.481(2) a public official should not be permitted to enhance his political career by using his image in advertising materials produced at the expense of, or under the authority of, government.

**NOTE: THIS MATTER IS A FIRST-PARTY ADVISORY OPINION REQUEST. FOR PURPOSES OF A FIRST-PARTY ADVISORY OPINION REQUESTED PURSUANT TO NRS 281.511(1) AND NRS 281.521, ALL FACTS IN THE MATTER ARE PROVIDED BY THE PUBLIC OFFICER REQUESTING THE ADVISORY OPINION, AND THE COMMISSION MAKES NO INDEPENDENT INVESTIGATION AS TO THE TRUTH OF THOSE FACTS. THE RECORD HEREIN, THEREFORE, CONSISTS SOLELY OF FACTS PROVIDED ON THE RECORD BY THE PUBLIC OFFICER, AND THIS OPINION IS BASED SOLELY UPON THOSE FACTS. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE PROVIDED BY THE PUBLIC OFFICER AND USED BY THE COMMISSION IN THIS ADVISORY OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.**

DATED: March 15, 2007.

NEVADA COMMISSION ON ETHICS

By:

  
JIM KOSINSKI