COMPLAINT 2006 – NO. 4
In Re Schmidt

REASONABLE CAUSE DETERMINATION, STIPULATION AND ORDER
December, 2006

I. Nature of the Complaint

The complaint alleges that Senator David Schmidt (Respondent) communicated with petitioner by telephone as "Senator Dave Schmidt" in a persistent and intimidating manner which "…threatened my livelihood and ability to financially provide for my family." Petitioner alleges these communications violated the Legislative Ethics Manual (Manual), page 14 of the 2005-2006 edition, which prohibits "a legislator's persistent communications on behalf of a constituent or other party."

In addition, Complainant alleges that Respondent "…is using his position to intimidate a private citizen for the benefit of a third party."

The two statutes at issue are RCW 42.52.070 and RCW 42.52.160.

RCW 42.52.070 – Special privileges.
Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.

RCW 42.52.160 – Use of persons, money, or property for private gain.

> (1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit of gain of the officer, employee, or another.
> (2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.
> (3) ….

II. Jurisdiction

The Board has both personal and subject-matter jurisdiction.

III. Conclusions

The Board concludes there is reasonable cause to believe that Respondent has violated RCW 42.52.070 and RCW 42.52.160. Even though the parties disagree on the exact

wording of their conversation, reasonable cause exists to believe that Respondent used improper means and/or improperly advocated for his friend in an effort to confer a special privilege through the use of his office or position.

IV. Determinations of Fact

Many of the facts are not in dispute but the parties do disagree on the exact wording of their conversation. These differences are noted. After conducting two interviews with each party and reviewing the exhibits provided with the complaint and information gathered from the Office of Senate Accounting it appears the following is a fair representation of the facts of the case.

1. The Respondent was contacted by a friend who complained she was facing approximately $18,000 in additional costs after purchasing a remodeled home. Complainant was one of the principals involved in buying, remodeling and selling the home. The purchaser does not reside in the Respondent's legislative district. The Complainant's business address is in the district. The friend expressed her feelings that the sellers were at fault and Senator Schmidt agreed to look into the matter for her.

2. The parties agree that on May 16, 2006 the Respondent left a phone message for Complainant, identifying himself as Dave Schmidt, and requested a return call regarding a house the Complainant had built. The phone number left by Respondent was the number for his private residence and is not a legislative phone number.

3. Complainant alleges he returned the call to the private residence the evening of May 16 but did not leave a message and tried to return the call again on the 17th and left a message on the Respondent's home number. Senator Schmidt returned the call, left a message and this time left his cell phone number. Both the cell phone number and the cell phone are the property of the Respondent. Complainant returned this call and the parties were able to connect.

4. Complainant alleges that Respondent identified himself as Senator Dave Schmidt from Mill Creek and that he was calling about a house in Kirkland that had been sold to a friend of his who was now faced with $18,000 in plumbing expenses. Complainant alleges that Respondent said we could "settle this by getting together and finding an equitable solution or go to court." Complainant further alleges that Respondent said "I know where you live, I know who you are, and I know what you do." Further, it is alleged, Respondent said he knew people in television media and would have TV crews down there and would have them do a story to "ruin" Complainant unless he paid for the damages. Complainant further alleges that Respondent never mentioned the need for any legislation but rather just wanted the buyer's expenses paid and that he was "completely taken aback by the threats."

5. Respondent denies he used the word "ruin" but admits he was "firm." He states that Complainant evaded questions and "I got upset." However, he states it was his understanding that the builder might be more cooperative if the builder had more information about the issue so the Respondent said he would get back to Complainant with more information. Respondent did say that he may have said something like "don't make me make you an example in legislation and it could mean we would go to the papers." Respondent believes he told Complainant that he was willing to be an intermediary.

6. The parties agree that later that day, May 17, Respondent left a message for Complainant as "Dave Schmidt" to the effect that he had gathered further information and was requesting a return call. The number left on this occasion was Respondent's private residence.

7. Complainant chose to break off the phone messages and contacted Senator Schmidt the afternoon of May 17 at his legislative e-mail address informing him that any further communication between the two would have to be in writing.

8. This e-mail message to Respondent was received by his Legislative Assistant. The Assistant does, from time to time, forward e mails to the Respondent at his home where he maintains a computer and e-mail account at no expense to the Senate. Respondent states that he didn't receive this e mail until after he sent what turned out to be the final communication between the parties (discussed below).

9. On May 18 Complainant received a hand written note on a note card provided to senators at state expense. The note contained an apology from Respondent "for my abruptness in our conversation" and offered to get in touch to find an equitable solution. The Respondent stated that he "realized he had been abrupt and came on too strong." The parties agree there has been no further communication between them on this issue.

10. Respondent states that his research indicated there were problems in the building industry with sewer hookups and an apparent "loophole" in the law with regard to responsibility for these hookups to city systems if they malfunction. In addition, Respondent says he and his friend talked to attorneys who felt she had a good chance to recover her damages in a suit against this seller but not her attorney fees. Respondent referred to an article written by another legislator approximately two months after the conversation between the parties in which that legislator addressed problems with disclosure requirements in the building industry. That article is, Respondent says, an indication that others are concerned about these issues and that disclosure may well be a topic for future legislation. Respondent stated that as a result of his research he may introduce legislation to address the perceived shortcomings of the law. There is no indication that during the communication between the parties they discussed the law on attorney fees or the

perceived "loophole" in the law on disclosure of responsibility for sewer hookups.

11. The Senate has a written cellular telephone policy which provides that senators may receive up to $150 reimbursement for legislative activities (2006 Senate Policy and Personnel Reference Manual). Senate Accounting confirms that Respondent does not submit vouchers for reimbursement for any of his cell charges.

12. The timeline is not disputed. The first message left by Respondent for the Complainant was on May 16 at approximately 1:40 PM. The hand-written apology was received by Complainant on May 18.

13. The number of calls or other forms of communication between the parties is not in dispute. There were six phone calls and five of those were messages left by one party or the other. One of the calls resulted in a conversation between the two and that occurred the morning of May 17. One e mail was sent by Complainant to the Senator's legislative e mail address requesting no more phone calls and insisting that further communication be in writing and directed to his business address. There was one mailing and that is the apology written by the Respondent. Complainant infers the apology was the result of the e mail he had sent but the timeline, coupled with the Respondent's explanation of how his legislative e mail is forwarded to him and the fact the apology note ignored the mailing instructions contained in the e mail lead to the conclusion that the apology was not written as a result of the Complainant's e mail.

V. Analysis and Determinations of Law

Prior Board opinions have concluded that RCW 42.52.160 can be violated by the use of a single legislative envelope, a one-time letter prepared and mailed at public expense or a one-time letter prepared by legislative staff and mailed at personal expense.

.160 prohibits the use of persons, property or money (often referred to in the opinions as "public resources") under a legislator's official control or direction, or in his or her official custody, for the private benefit of self or another unless that use is part of the legislator's official duties. There are two instances in this case where it might be argued there is reasonable cause to believe this statute was violated. The first in time is the apology mailed on May 17 on a senate note card. If the Respondent was not performing an official duty when he intervened for his friend that intervention should not have involved the use of public resources. The second instance was the Legislative Assistant's forwarding of the e mail of May 17 to Respondent's private e mail address at his home. There is no reasonable cause to believe this activity constituted a violation of the statute. The forwarding of e mails from a legislative site to a legislator appears to be a widespread practice in the legislature so that assistants can stay in contact with legislators and keep them informed. There doesn't appear to be any thing about this e mail, even if

read by the Legislative Assistant, which would indicate it was inappropriate to forward. However, since we conclude that Respondent was not performing an official legislative duty when he intervened on behalf of his friend, the use of the note card was a violation of RCW 42.52.160.

The application of RCW 42.52.070 is not limited to those instances where a legislator intervenes with a state agency, board or commission on behalf of a third party.

.070 prohibits the use of "position" to secure special privileges for another except in cases where that position is used to perform duties within the scope of legislative employment. In AO95 – No. 1, the Board adopted as precedent several opinions issued by the "old" ethics boards which dealt with a Joint Rule prohibiting the use of "improper means" when a legislator dealt with state agencies. The Board concluded that these "improper means" cases still had value and that "improper means" analysis was contained within the constraints imposed by .070. The Board did not conclude that the application of .070 was restricted to cases involving legislators and state agencies. The Complainant quotes from that portion of the Manual which gives examples of possible threatening communications between a legislator and a state agency when he refers to "persistent communications." We may consider whether "persistent communications" is an issue but it is only one factor in determining "improper means."

In AO95 – No. 7 the issue was a letter written by a legislator/lawyer to his law firm. The opinion does not allege, or rely, on the possibility that public resources were used to write or send the letter. The "memo" was sent to several attorneys in the firm inviting them to contact the legislator if they or their clients had interests in legislation and the legislator might be able to provide a status report or provide an introduction with the appropriate legislative chair or committee person.

On page 2 of the opinion, the board said:

"The board finds that the offer to provide legislative assistance to the firm's attorneys and their clients would constitute a grant of special privileges. As a result of this offer, the firm is able to portray that a special advantage or privilege is available to its clients. It is this connection which creates the violation. It would not be a violation for the legislator to offer to assist people in finding out about the legislative process. Nor would it be a violation for the firm, or any firm, to claim that it has special expertise in dealing with the state legislature or the legislative process. The violation occurs because the legislator by making the offer enhanced the firm's ability to make the claim for special access. This ability amounts to securing special privileges in violation of RCW 42.52.070."

And on page 4 of the same opinion:

"The facts of the opinion request would create a situation in which the legislator is offering to let the law firm use the legislator's position for private advantage. This is clearly contrary to the policy set forth in the legislation."

The Board was asked, in AO95 – No. 17, for its view on whether five different letters could be prepared and mailed at public expense and signed by a legislator. The Board concluded that four of the letters were appropriate: one was to a state agency recommending a person for a grant; another was to a person who achieved a notable civic distinction; one letter would be to a member of Congress recommending a candidate for a service academy and one would be sent to a non-profit with the legislator's endorsement. The Board concluded that the public would expect these functions to be exercised; that these functions bring citizens in touch with their government and can serve to increase trust in government and finally that these functions have been firmly established by historical custom and practice within the legislative branch. The Board held that these four letters would not violate .070, the special privileges statute which prohibits certain uses of official position or .160 which prohibits certain uses of public resources for benefit or gain. It is this opinion which enunciated the tests for avoiding "improper means" when communicating with state agencies and which are contained in the Manual and quoted by Complainant. Though agency involvement was not a factor in all the letters the Board employed a .070 analysis for each.

In AO96 – No. 1, one question was whether a legislator could, absent the use of public resources, solicit non-lobbyists for certain expenses associated with an approved legislative conference. On page 4 of that opinion the Board stated:

"…to avoid violating the "special privileges" rule we advise that any solicitation of such contributions be accomplished in a fashion that does not expressly or impliedly threaten adverse legislative consequences should the person or entity solicited not make a contribution."

C2005 – No. 7, In Re Green, involved the use of public resources by a legislator to send a letter to one party in a dispute characterized as "private" by the Board. The opinion was based on an analysis of RCW 42.52.160 because of the use of public resource to benefit a third party in circumstances where the Board failed to see any legislative connection or duty involved. Later, the Board entered into a fuller discussion of when it would or would not be appropriate under .070 (use of position or office) or .160 (use of public resources) to assist a third party. AO6 – No. 1, was published on August 17, 2006, after this complaint was filed, in an effort to clarify Green. The advisory opinion contains a thorough discussion of .160, use of public resources, and also touches on the use of legislative position, .070. The Board uses the term "advocacy" to help distinguish factual patterns when analyzing these two statutes. This opinion affords more flexibility to legislators, after Green, to assist constituents.

The Board concluded, on page 5 of the opinion:

"When a legislator becomes an advocate for a constituent, public resources and the office of the legislator may be used on behalf of that constituent if a government official or government office is involved or if the constituent is seeking assistance on legislative issues. If either of these two conditions is met, there is a sufficient and tangible

legislative nexus to conclude that the advocacy is within the scope of a legislator's employment and/or within his or her official duties."

The opinion states that that "The Act does not permit the use of legislative position or public resources by legislators to assist constituents solely because a legislator has an interest in the subject matter or in the constituent's cause" and, if a legislator purports to use his or her office or public resources to act as an ombudsperson in a dispute between private parties, the legislator's role will be carefully examined if he or she "…has a sufficiently strong personal interest and benefit…" (citing CO97 – No. 1).

In addition to performing as an ombudsperson the advisory opinion notes other instances when legislators are properly involved in assisting constituents in a ***non-advocacy role***; to act as a mediator, or to perform an investigative function, including fact finding (emphasis added).

VI. Summary and Order

Respondent used his legislative position and a public resource when he advocated for a friend who was involved in a dispute with another private party. Respondent attempted to apply pressure on the Complainant to resolve the dispute in favor of his friend. It is not accurate to describe those attempts as excessively persistent but they may be viewed by a reasonable person as threatening. The request for assistance was directed to the legislator in an effort to recoup damages for a wrong allegedly perpetrated by the Complainant. Respondent, acting in his legislative capacity, attempted to assist her in that endeavor.

Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Respondent violated RCW 42.52.070 and RCW 42.52.160 and shall be penalized by a Letter of Instruction and this order shall serve as the Letter of Instruction.

Wayne Ehlers, Chair
Date:

I, Dave Schmidt, certify that I have read this Reasonable Cause Determination, Stipulation and Order in its entirety; that I stipulate to facts, conclusions of law and penalty; that I have had the option of reviewing this agreement with legal counsel, or have actually reviewed it with legal counsel and fully understand its legal significance and consequence. I agree to voluntarily sign as a resolution of this matter.

Dave Schmidt
Date: