

ADVISORY OPINION NO. 2007-02

Issued On March 1, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A State Agency seeks guidance on whether it would violate the Ethics Act for the Agency to enter into a contract with a private entity to make Public Service Announcements where the Agency would be obligated to: provide visibility to the entity and its corporate underwriters, make its executives and spokespersons available to the entity during its promotional media tours, or publicize its relationship with the entity.

FACTS RELIED UPON BY THE COMMISSION

The Agency, although charged with enforcing state law, must also implement and comply with federal laws affecting its jurisdiction. Recently, Congress enacted a measure that applies to all fifty states. Consumers will now have to undergo a more rigorous process, and supply more and different paperwork to the Agency than was required in the past.

The Agency belongs to a membership organization comprised of similar agencies from other states. That Association has begun to promote a campaign for Public Service Announcements (PSAs) to get the word out about this new law. According to the Association's website, "[p]articipating agencies will receive, at no cost, the production and broadcasting in primetime television of a 30-second animated commercial".

The Association has contracted with, and seeks to have all its member agencies contract with, a private entity, CATV, that presently has a long running radio show on public radio that is in the process of expanding to television. The contract would have CATV characters appear in the PSAs for the Agency. These PSAs would relate to public service and safety information, including, without limitation, the new law. In exchange, the Agency would have to include the air date and time of the television show. Originally, agencies were obligated to include acknowledgement of the corporate underwriters of the television show; after several states objected, this requirement was removed, and the new language includes it, "if appropriate".

Although the Association amended the proposed contract in one place, other requirements for

participating agencies remain unchanged. For example, the contract obligates the Agency to use one other element from a list of choices¹ in its public information program. Among the choices:

1. Where appropriate and creative [sic] is supplied by CATV and state statutes allow, the [Agency] will provide visibility (including links on [its] Web site) to the [television] show, the Public Broadcasting System and the corporate underwriters of [the television] show.
2. The [Agency] executives and spokespersons will be available to CATV during CATV promotional media tours.
3. The [Agency] will publicly announce, via news releases, [its] relationship with CATV.

Included in the materials the requester provided is what appears to be a Power Point presentation for marketing the new television show. Apparently directed at corporate underwriters, it offers "Off-Air Benefits" that sponsors' logos/links will be on all pages of CATV's website and sponsors will be included in national "PBS public relations and advertising efforts". Also, it proposes an idea to partner with agencies such as the requester's Agency on "Edutainment" to reach new "customers"² online and through State Agencies.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) reads: A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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The basic concept of the Ethics Act is that public servants may not use their public positions for their own private gain or the private gain of others. The Act's Legislative findings explain that the Act is intended to prevent public servants from using their public positions "... to benefit narrow economic ... interests at the expense of the public at large"

In Advisory Opinions 95-05, 95-28, and 2005-04, the Commission authorized a public servant or agency to enter into arrangements that provided certain benefits to private businesses. In each case, the Commission concluded that the agreements involved an overriding public benefit sufficient to

¹ Only elements that are presently available in West Virginia are listed in this opinion.

² These "customers" were earlier referenced as a "captive audience".

legitimize any resulting private gain. Thus, even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain. In each of these Advisory Opinions, the overriding public benefit arose in the context of an economic development initiative.

By contrast, in Advisory Opinions 2003-03 and 2003-09, the Commission ruled that public entities could not accept free use of vehicles, covered with commercial advertising, to conduct official business.³ The Commission found that in the absence of any overriding public benefit, endorsement of commercial products through advertising on police and emergency county vehicles could constitute a use of office for private gain.

The Commission notes that the new federal law does not require the Agency to air PSAs; indeed, there are grants available to states to assist them in conforming to the standards of the new law. According to the Agency, however, it does not have a specific budget for PSAs; it is extremely difficult to get PSAs, and never during prime time as the cost is too great.

Here, although the PSA is offered free to the Agency, there is the potential for a *quid pro quo*, as with the “rolling billboards”. Although the requirement to include corporate underwriters has been amended in one part of the contract, it remains in the first of the three choices above; including corporate underwriters on the Agency’s website could easily be characterized as constituting a prohibited endorsement. In Advisory Opinion 2000-19, the Commission refused to allow an Agency to act as a reference account to recommend or endorse a vendor’s software. There, as here, the “promotion of the product will bring no corresponding public benefit to the State’s businesses or its citizens”.⁴ Even though the Agency arguably receives a “thing of value”, that fails to balance the endorsement. In Advisory Opinion 2002-18, the Commission ruled that it would violate the Ethics Act for an Agency to allow its dog to be used in a dog food commercial even though the business had provided dog food to the Agency at no cost for almost five years. The Commission found that it was not “part of a program which results in an overriding public benefit”.

The two remaining elements would require Agency personnel to promote the new television show or to publicly announce its relationship with CATV. Although the television show will be broadcast on public rather than commercial stations, these actions constitute endorsement. The question is whether such endorsement is prohibited by the Ethics Act, or whether overall the arrangement provides an overriding public benefit. Here, the Agency has not identified any way that its

³ The Commission did allow a volunteer fire department to do just that, in AO 2004-05, finding that the VFD “operates a voluntary, community-based organization without significant governmental authority.” Thus, the VFD’s use of such “rolling billboards” was less likely to be construed by the public as government endorsement of the advertised products.

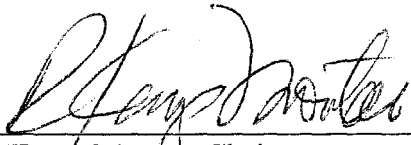
⁴ By contrast, in Advisory Opinion 2001-02, the Commission allowed a County Board of Education to enter into a mutual promotion campaign with some of its vendors and a local television station so long as the Board personnel were not involved in soliciting financial support from Board vendors. Although not explicit in the opinion, it appears there was an overriding public benefit: promoting public education.

operations will be constrained if it does not enter into a contract with CATV for the PSAs. Although PSAs provide a valuable service to the public, in balance, the value of that service does not outweigh the detriment of an arm of the State endorsing a private endeavor.

Under the information provided, the Commission has carefully examined the proposed contract's potential for violating the Ethics Act. Inasmuch as there does not appear to be a clear overriding public benefit, the Commission finds that it **would** violate the Ethics Act for the Agency to enter into the proposed contract.

This advisory opinion is limited to questions arising under the Ethics Act, W.Va. Code § 6B-1-1 *et seq.*, and does not purport to interpret other laws or rules. Although other public servants facing similar factual situations should review the guidelines contained in this opinion, the prohibitions contained in this opinion are limited to the precise facts presented in this request.

The Commission further finds that decisions on whether an overriding public benefit exists in situations such as these must be decided on a case-by-case basis. Therefore, this opinion is limited to the particular facts and circumstances presented by the requester, and others may not rely upon it as a precedent.



R. Kemp Morton, Chairman