Advisory Opinion 2017-13

Issued on May 4, 2017, by

The West Virginia Ethics Commission

Opinion Sought

An **Elected Mayor** asks whether his private technology company may be an exhibitor at a municipal association conference and whether he may, in his private capacity, be a speaker at the conference on data backup and related technology issues. He further seeks guidance on whether his public job title may be referenced in biographical material provided to attendees.

Facts Relied Upon by the Commission

The Requester is an elected mayor of a municipality. The position is part-time.

The Requester owns a technology company which provides technology solutions to businesses and government entities in West Virginia and the tristate area. The company's services include installation and maintenance of computer and telephone systems, back up disaster recovery for electronic data, security cameras, internet security and other related services.[1]

In his private capacity as a business owner, the Requester attends conferences to market his company's products and services. He also makes presentations to various groups, *e.g.,* rotary clubs and chambers of commerce, on technology matters.

The City where he serves as mayor is a member of an association comprised of municipalities. The association is having a conference. Most attendees will be municipal officials and employees. For the conference, the association sells exhibitor space. The Requester would like for his company to participate as a vendor at the conference under the same terms as other vendors.

The association has asked the Requester to be a speaker at the conference. The topics of his speech are data backup, disaster recovery and business continuity. He would not be paid by the association for his speech. He states that he would be speaking at the conference in his private capacity as a business owner. He states that he would ask to be listed as a speaker and introduced by his given name, and not by his mayor title.

If he is a speaker at the conference, he anticipates that a short biography will be provided to the attendees, either through his introduction or in written material. He further anticipates that attendees will be informed that he is a mayor. Also, he may get questions about technology challenges faced by the city where he serves as mayor.

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[1] His company does not provide these services to the City where he serves as Mayor.

Provisions Relied Upon by the Commission

W. Va. Code§ 68-2-5 provides in relevant part:

> (b) *Use of public office for private gain.* - (1) 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.

Advisory Opinion

First, the Commission must determine whether the Requester's company may be a vendor at the conference.

In Advisory Opinion 2012-07, the Commission noted that most mayors are part-time and work in some fashion in the private sector. In that Opinion, the Commission provided guidance to a mayor on limitations relating to his private business. For example, he could not distribute business cards and promotional flyers from his office at the town hall.

In Advisory Opinion 2012-23, the Commission ruled that a Legislator may also serve as a town recorder. It reasoned: "While the Ethics Act places employment limitations on a full-time public servant, a different standard applies to part-time public servants, most of whom must balance their public responsibilities with the need to make a living and support their families."

In Advisory Opinion 2013-34, the Commission ruled that a sheriffs tax deputy may provide security services to law enforcement agencies throughout the state of West Virginia. The Requester provided free security services to the sheriffs department which employed him.[2] The Commission held he may not use more than a *de minimis* amount of public resources for private purposes. For example, the Commission stated: "[H]e may not use office equipment, office supplies or office space for the benefit of his private company."

[2] The Commission ruled, without providing its reasoning, that he may not contract for providing these goods or services to any government agency within his county.

The Ethics Commission reaffirms that nothing in the Ethics Act prohibits part-time public servants from operating private businesses.[3] Similarly, the Commission finds there are no restrictions in the Act which bar a public servant's private business from participating as a vendor at a conference hosted by associations comprised of public officials.

The Commission holds that the Requester's private company may participate as a vendor at the conference. He may not use his public position to receive special treatment as a vendor. For example, he may not ask to pay a lower vendor fee.

Second, the Commission must determine if the Requester may be a speaker at the conference in his private capacity as a business owner. The Ethics Commission recognizes that the association may have asked him to be a speaker at the conference as the person planning the conference may know him from his city's membership in the association. Nevertheless, the Commission finds that this fact, standing alone, does not constitute the knowing and intentional use of office for private gain by the Requester. *See* W. Va. Code§ 6B-2-5(b).

The Commission finds that the Requester may be a speaker at the conference in his private capacity as a business owner. The Requester must instruct the association that it may not endorse his business or encourage participants to conduct business with his private technology business. Similarly, during his presentation, the Requester may not encourage participants to conduct business with his private technology business.

Last, the Commission must consider whether the association may reference the Requester's public job title in biographical information provided to attendees. The Requester states that he will request to be introduced by his given name and not by his public job title. He is aware that some attendees at the conference will know he is a mayor and that they may also ask him about technology challenges faced by his city.

In Advisory Opinion 2015-04, the Commission ruled that a member of the West Virginia Legislature may appear in advertisements for his personal business. The advertising did not reference his legislative service or position. The Opinion states: "The Commission has recognized the need for part-time public servants to make a living." The Opinion concluded that the member of the legislature could continue to appear in advertising for his personal business but "may not use his title or any public resources to promote his business." The Opinion concludes that the Requester's appearance in an advertisement for his private business does not constitute a prohibited endorsement by a public servant of his own business.

In Advisory Opinion 1997-05, the Ethics Commission held that a county commissioner may have a business website which referenced his public position. The reference was in

[3] Public servants are subject to other restrictions in the Ethics Act. They may not use their public position for private gain. Further, there are restrictions on conducting business with a government agency by which they are employed or serve. *See* W. *Va.* Code 6B-2-5 (e), (f) and (g). Further, there is nothing in the Ethics Act which expressly prohibits full-time public servants from having private businesses.

the form of a link to the county commission's website on his private law practice's website.[4]

In contrast, the Commission ruled in Advisory Opinion 1997-18, that a State Trooper may not use the word "Trooper" in any advertising for the trooper's private driving school. Similarly, in Advisory Opinion 1998-30, the Ethics Commission ruled that a State Legislator's "reference to his position as a member of the WV Legislature in a television commercial would be an improper use of the prestige of his public position for private gain and a violation of the Ethics Act."

The Commission did not specifically address in Advisory Opinions 1997-18 and 1998-30, or in any other Advisory Opinions, if a public servant may reference his or her public service or employment in biographical material for private businesses.

The Commission finds that it is normal and customary for hosts of conferences to provide biographical information about speakers. It is commonplace for biographical material to contain information about a person's outside activities, including service in public positions. The Commission finds that there are no restrictions in the Ethics Act which prohibit the association or the Requester from referencing the Requester's public position in biographical information distributed to attendees or when he is introduced as a speaker.

This holding allows reference to a public job title or position in biographical material. This Opinion does not authorize public servants to directly use their public job titles to promote their private businesses in television, radio, print, internet, direct mail or other forms of advertising. For example, in television advertisements for their private businesses, public officials may not be introduced or referenced by their public job titles. Further, they may not state in television advertisements that they hold an appointed or elective office. Reference to a public servant's government position may be made in areas devoted to biographical information "if that reference is given no more prominence than other significant biographical details."[5] Permissible use of public job titles include reference to their government position in biographical information included on websites and in written materials for their companies.

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[4] The Requester wanted the separate link on his business website to encourage constituents to use the county commission website, and not his private law practice website, to contact him on county commission matters or concerns.

[5] The Ethics Commission finds that the quoted language, codified in a federal regulation, summarizes, in part, what constitutes for purposes of the West Virginia Ethics Act a permissible reference to a public job title. The federal regulation reads: "(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details " 5 C.F.R. § 2635.807

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, at W Va. Code §§ 68-1-1 through 68-3-11, and does not purport to interpret other laws or rules.

*In accordance with **W.** Va. Code § 68-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe, Chairperson
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