ADVISORY OPINION NO. 2015-04

Issued On February 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A member of the West Virginia Legislature asks whether his appearances in advertisements for his personal business violate the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester, the owner and principal clinician of a business, has appeared in and provided voice-overs for print, radio and television advertising for his business for more than a decade. He states that the advertising does not reference his legislative service or position and he receives no compensation over the regular salary from his business for appearing in the advertisements.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) states, in relevant part:

> 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.

ANALYSIS

The Ethics Act, at W. Va. Code § 6B-2-5(b), prohibits public officials from using their office or the prestige of their office for their private gain. In considering the request herein, "[t]he general rule is that a public official may not endorse a particular product or business. A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit." See Advisory Opinion 2005-10.

As delineated in prior Advisory Opinions, "the Commission must first determine whether an endorsement by a [state official] in his personal capacity amounts to the endorsement of a product by a State Agency." If the endorsement is found to essentially be the endorsement of a product by a State agency, then the Commission

must weigh the public benefit of the endorsement against the potential private gain of the endorsee.

The Ethics Commission generally has found that a state officer or employee may not endorse a private entity because it lends the prestige of that officer's or employee's position, as well as the prestige of the agency, to a private party for that party's direct or indirect private gain. *See* Advisory Opinions 2000-19, 2000-21, 2002-18 and 2012-31.

However, the Requester's situation is more similar to that evaluated by the Ethics Commission in Advisory Opinion 2005-10, where the director of the division of an agency which regulated motor vehicles asked whether he was permitted to appear in an advertisement for a local automobile dealership. The director was not to be compensated for the endorsement and would not use his title in it.

The Commission there found that "although his title would not be used, due to the prestige of his position, providing the testimonial would be construed as an endorsement of a product by a State Agency." The Commission ruled that the director should not allow the use of his name or image for the proposed advertisements due to the prestige and responsibilities of his public position and that the testimonial offered no overriding public benefit.

The Commission must determine, then, whether the prestige of the Requester's position as a member of the Legislature would amount to an endorsement of his business by the Legislature. Unlike the facts presented in Advisory Opinion 2005-10, the Requester here is a part-time public official. The Commission has recognized the need for part-time public servants to make a living. In ruling that a Legislator may also serve as a town recorder, the Commission reasoned in Advisory Opinion 2012-23 that:

> While the Ethics Act places employment limitations on 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.

Advisory Opinion 2015-01 is also instructive in evaluating the request at issue. In that Opinion, the Commission reasoned as follows in ruling that a legislator could continue his employment as an attorney for a company which employs registered lobbyists:

> [T]he Requester is not considering prospective employment, but has held his private job for more than 13 years. Therefore, the public should not perceive that the company would have hired the Requester because of his unique ability to influence legislation.

The Requester here is not seeking additional employment, nor is he seeking to promote another person's business. He is merely seeking to continue to operate his business in the same manner as he has done before taking office. It is highly unlikely that the public would construe his advertisements, which originally ran well before he took office,

as any sort of endorsement by the Legislature. To bar legislators and other part-time public servants from appearing in advertisements for their own businesses would unduly interfere with their abilities to properly run those businesses and would unnecessarily discourage them from running for and holding public office.

Accordingly, the Commission holds that the Ethics Act permits the Requester to continue to appear and provide voice-overs for print, radio and television advertising for his own personal business. The Requester may not use his title or any public resources to promote his business.

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 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, W Va. Code § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W Va. Code § 6B-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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman