ADVISORY OPINION 2015-11

Issued on August 6, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **elected state official** requests an opinion regarding a new provision of the Ethics Act which places limitations on a public official from using his or her name or likeness on "trinkets." The Requester seeks guidance concerning the use of his/her picture or likeness on his/her agency's website and on educational materials distributed to the public, and asks whether his/her agency may continue to use materials containing his/her picture or name which were purchased before the May 28, 2015, effective date of W.Va. Code§ 6B-2-5c. The Requester also asks whether participation in videotaped interviews, presentations, and panels is permissible.

FACTS RELIED UPON BY THE COMMISSION

The Requester seeks an opinion regarding the use of his/her picture or likeness on his/her website and on educational materials developed by him/her to inform the public concerning areas of the law over which he/she has regulatory or statutory authority. The materials were paid for by a national non-profit institution which promotes educational endeavors and provides similar materials to other public entities. No public funds were utilized to create or print the educational materials.

The Requester also requests an opinion concerning the propriety of using materials such as banners and table skirts which contain his/her picture or name and which were purchased prior to the May 28, 2015, effective date of W.Va. Code§ 6B-2-5c.

Finally, the Requestor asks whether participation in videotaped interviews, presentations, panels and interviews is permissible. Internet links to examples of these types of presentations were submitted as part of the request.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b) provides:

> 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 ... 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.

W.Va. Code§ 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:
(1) Use the public official's name or likeness on any publicly-owned vehicles;
(2) Place the public official's name or likeness on trinkets paid for by public funds;
(3) Use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public.
(4) Use public funds or public employees, other than employees for security services, for entertainment activities within forty-five days of a primary, general, or special election in which the public official or agent is a candidate.

(b) For purposes of this section:
(1) "Agent" means any volunteer or employee, contractual or permanent, serving at the discretion of a public official; and
(2) "Trinkets" means items of tangible personal property that are not vital or necessary to the duties of the public official's or public employee's office, including, but not limited to, the following: magnets, mugs, cups key chains, pill holders, band aid dispensers, fans, nail files, matches, and bags.

(c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.

(d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

(e) The commission may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

2.1 The provisions of this section apply to all elected and appointed public officials and public employees, their agents, and any other person on the public payroll, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.

3.1 Incidental use of public resources for personal or business purposes resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.

3.2 Nothing in W.Va. Code 6B-2-5c shall require the removal of names or likenesses of public officials which appear on publicly-owned vehicles as of May 28, 2015.

4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official. Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising under W.Va. Code§ 6B-2-5c(a)(3).

6.1 Nothing in W.Va. Code § 6B-2-5c(b)(2) shall be construed to permit persons subject to this section to purchase with public funds pens, pencils, or other markers featuring a public official's name or likeness. However, public officials are not prohibited from expending public funds to purchase pens, pencils, or other markers used during ceremonial signings.

ADVISORY OPINION
Website

The Requester's agency's website was viewed in preparation for this Advisory Opinion. A photograph and biographical information regarding the Requester appear on a separate page which is accessible from the website's home page.

In evaluating the propriety of the use of the photograph under W.Va. Code § 6B-2-5c and the emergency Legislative Rules, it is found that the website is not "advertising" but is instead an acceptable method for the agency to communicate with and educate the public. The website likewise contains no reference to voting in favor of the Requester as prohibited by W.Va. Code§ 68-2-5c(d).

In deciding whether a public official may include his/her photograph on the website, one must weigh the value of the official identifying himself or herself to the public versus his or her potential use of the photograph for self-promotion. **The Ethics Commission concludes that public officials' websites may include the official's photograph on their home pages or on sections or pages devoted to biographical information regarding the official. However, multiple photographs of the official throughout the website should not be used.**

Educational materials

The Requester also seeks guidance concerning written educational materials, examples of which were reviewed in conjunction with the request for this Advisory Opinion. Some of these documents were printed using private funds, so at first blush one could conclude that the "trinkets" statute is not applicable because "public funds" were not used. However, to the extent that the Requester participates in the selection or editing of the content and approval of these materials, their use is subject to the Ethics Act. Public servants may not thwart the intent or purpose of W. Va. Code § 6B-2-5c by allowing or requesting third parties to finance the materials which are disseminated on their behalf.

Some of these educational materials include photographs of the Requester and, in one instance, a full page is devoted to the Requestor's name and photograph.

The Ethics Commission concludes that the Requester's inclusion of his/her own photograph in educational materials in which he/she has played a role in the selection, editing or approval of the content and which are disseminated to the public by his/her office may include the official's photograph. However, multiple photographs of the official throughout the materials should not be used.

The covers of other written educational materials provided by the Requester include his/her name and title in prominent sized type. In some instances, the Requester's name is larger than the title of the document. **Public officials should use caution in**

overemphasizing their names in any type of report, educational material or other publicly-disseminated document.

Items purchased before May 28, 2015

The Requester also asks whether materials which include his/her name or photograph and were purchased before the effective date of the "trinkets" statute may continue to be used. The Requester indicates that these materials include banners, table skirts and similar items.

W.Va. Code § 6B-2-5c(a) provides that public officials may not use their name or likeness on "trinkets" paid for by public funds, and that public funds may not be used to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising.

The items described by the Requester are not "trinkets" under W.Va. Code § 68-2-5c(b)(2). However, they have been paid for with public funds, and are therefore subject to the statute.

The Ethics Commission concludes that the Requester may not use any items classified as "trinkets" under W.Va. Code § 6B-2-5c which were purchased prior to the effective date of the statute (May 28, 2015.)

Banners and table skirts which contain the Requester's name and photograph whether purchased before or after May 28, 2015 -- may not be used.

TVNouTube videos

The Requester's appearance in television shows, YouTube videos and other such presentations arguably assists the Requester in communicating with the public regarding the services which the Requester's office provides. The purpose of this type of communication does not appear to be for advertising or to earn votes, but rather to promote services provided by the Requester's agency. The Requester may choose to appear in person in these presentations or designate other representatives to do so.

As public employees and officials such as the Requester perform their duties, they should be mindful of the public, rather than personal, nature of their work. Public employees' and officials' efforts and expenditures should focus upon their public mission and should not include any pursuits which draw the public's attention away from that mission. **If the public mission or services which the public employee or official provides do not require, and are not assisted or improved by, the inclusion of his/her photograph, his/her photographs should be omitted from public materials. Public employees and officials may use their name and title where necessary to identify themselves and/or their public office. However, the appearance of a public employee's or official's name and/or title should not be a**

unique, prominent detail which receives more emphasis than the surrounding information or text.

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-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

/s/ Michael Greer, Acting Chairperson
Michael Greer, Acting Chairperson