ADVISORY OPINION 2015-17

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether public educators may appear in a software vendor's promotional video and articles demonstrating how West Virginia teachers and students use the vendor's products.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that it entered into a licensing agreement with the multinational software vendor in 2014. The vendor provides a bundle of web-based applications[1] which have been made available to all students and educators in West Virginia. The Requester states that the applications help the Agency meet its statutory goals, including allowing students to access its applications at home and on mobile devices and providing teachers with technological tools to help personalize student learning and corroboration among peers. The technology will also provide a safe education-based forum for teacher/student communication.

The vendor has a website where it posts customer "case studies." These case studies are customer interviews which include favorable reviews of the software which explain how the products have enhanced the customer's goals. The Requester submitted a sample case study which is posted on the vendor's website as an example of the vendor's proposed case study in this case. The proposed video would include interviews with West Virginia teachers and staff using the products in "innovative ways." The video would be placed on the vendor's and the Agency's websites and biogs. In addition to the video, the vendor would use the interviews in written materials such as articles to be placed on its website and biogs.

The Agency would allow the vendor to use the Agency's logo in connection with its website, articles, video and biogs.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) provides:

[1] Web-based applications are delivered over the internet instead of being installed on desktop computers or servers.

> 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 Ethics Commission has steadfastly followed this general rule: "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." Advisory Opinion 2015-13, *citing* Advisory Opinions 95-05 and 2015-04. *See also* Advisory Opinions 2005-10, 2012-21 and 2014-15 *[emphasis added].*

In enacting the Ethics Act, one of the Legislature's findings was that public officials who "seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government." W.Va. Code § 6B-1-2(a).

The Requester acknowledges that the case studies are endorsements of the vendor's products. The Requester asserts, however, that such endorsements should not be prohibited because there are overriding public benefits which make them permissible under the Ethics Act. The Requester states that there are two overriding public benefits. First, the vendor's case study, particularly the video, would encourage teachers and students to use the products to their full potential to meet the State's educational goals relating to technology.

Second, the case study would garner national recognition of West Virginia's technological advances and innovation, which in turn would provide greater opportunities for West Virginia to collaborate with other states on educational projects. The Requester also contends that the case study would give West Virginia's education system positive publicity on a national scale.

The Commission initially will consider the Requester's first asserted "overriding public benefit," which is that the vendor's case study will encourage teachers and students to use the products to their fullest potential. The Requester states that the case study is a "way to spark the interest of the [West Virginia] educators and students in an attention-getting way" to use the technology to the fullest. The Requester states that it offers tutorials on these web-based applications and could produce its own video, but it would not have the prestige that the vendor's production carries.

Since the Requester has the ability to produce a substantially similar video, the Commission is not persuaded by the Requester's first asserted "overriding public benefit." **Therefore, the Commission holds that the vendor's case study's purported role in encouraging teachers and students to use the products to their fullest potential is not an "overriding public benefit" sufficient to overcome the Ethics Act's prohibition against a commercial endorsement of a product or business.**

The Commission will now consider the Requester's second asserted "overriding public benefit": that the case study would give West Virginia's education system positive publicity on a national scale. The Requester points to Advisory Opinion 2012-06, in which the Ethics Commission permitted the Requester to be reimbursed by a State vendor for the Requester's expenses from his attendance at and participation in an international forum to discuss fraud control and financial management and procurement. The Commission concluded therein that the Requester's appearance at the forum provided a benefit to West Virginia by allowing it to be recognized for its achievements in fraud control and by providing an opportunity for the Requester to network with other government officials who also implement and manage electronic payments. The Commission also explicitly held, however, that:

> The Requester must ... formally notify the State contractor that ... [the Requester] is prohibited from endorsing the product. Moreover, at or before the forum, the Requester must notify the forum participants that the West Virginia Ethics Act prohibits him from endorsing a particular product and that his presentation relating to fraud control should not be construed as an endorsement of the ... product.

While the Requester in Advisory Opinion 2012-06 was permitted to accept reimbursement from a State vendor for his expenses associated with his attendance at the forum, the Commission prohibited the Requester from endorsing the vendor's product. In the instant situation, it would be impossible to appear in the vendor's case study without endorsing its products.

Accordingly, the Commission holds that the vendor's case study's purported role in giving West Virginia's education system positive publicity on a national scale is not an "overriding public benefit" sufficient to overcome the Ethics Act's prohibition against a commercial endorsement of a product or business.

In conclusion, the Ethics Commission holds that public teachers and staff may not voluntarily appear in the software vendor's case study video and articles without violating the prohibition against public officials' commercial endorsements of a product or 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 § 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 68-2-2, 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/ Jack Buckalew
Jack Buckalew, Acting Chairperson