ADVISORY OPINION NO. 2013-10

Issued On April 4, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State University** asks whether its private partner in a University Program may use the State University name and logo for external marketing purposes solely related to the private partner's Program-related products and services, in exchange for free access to the private partner's information management system.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Director of a laboratory and applied research component of a University Program (Program). The Program partners with a private company (Partner) with which it has an ongoing relationship. The Program is only one part of that relationship. The Partner has also donated money to the Program lab, and provides internship opportunities and career mentoring for students.

The Partner has designed an information management system that allows for the rapid collection and analysis of "open source" information drawn from newspapers, other media, the Internet, and other data sources available to the public. According to the Requester, "use of the system would greatly enhance [our] ability to produce quality reports" on important issues.

The Partner has proposed a user agreement that provides, in relevant part:

> Subject to and contingent upon [Partner's] compliance with the terms and conditions of the Agreement, University hereby grants [Partner] a non-exclusive, royalty-free, paid-up license to use the University name and the Program name for external marketing purposes solely in conjunction with Partner Program products and services.

The Requester states that the University name and logo will only be used to identify the University as a user or customer of the Partner Program.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code§ 6B-2-5(b) provides:

> (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

The Ethics Act prohibits public officials from endorsing products. *See generally* Advisory Opinions 2000-21, 2005-10 and 2007-02. In Advisory Opinion 2012-31, the Ethics Commission articulated clear standards about prohibited endorsements, and ruled:

> In the abstract, the Ethics Commission is unable to envision a circumstance where a public servant could appear, or be referenced, in an advertisement for a product, service or business without violating the Ethics Act. Nonetheless, public servants and entities are encouraged to contact the Ethics Commission for advice if such a situation arises and there is an argument that there is an overriding public benefit.

Oftentimes institutions of higher education enter into agreements with private entities that are commonly referred to as Public Private Partnerships. These arrangements regularly result in significant scientific, technological and other advances. With dwindling access to public resources, universities are likely to increasingly participate in such partnerships. The issue for the Ethics Commission is to determine whether the term of the proposed user agreement between the University and its Partner, set forth above, is permissible, or instead constitutes a prohibited endorsement, in violation of the Ethics Act's prohibition against use of public office for the private gain of another. W. Va. Code§ 6B-2-5(b)

Notwithstanding any benefit that inures to the University via the partnership, the University's first and only loyalty must be to the public's interest. As a result, even if the University's ability to obtain free access to the information management system results in a great benefit, allowing the Partner to use the University name and logo may still constitute the prohibited endorsement of a business, company goods or services. Instead, the University must demonstrate that there is an overriding public benefit.

The Commission has had multiple occasions to analyze whether an overriding benefit permits the use of public office for what might otherwise be construed a prohibited endorsement. For example, Advisory Opinion 2005-04 involved a State Agency responsible for promoting growth, attraction and retention of private businesses on a statewide basis. One division within the agency is dedicated to facilitating small business development, and offers specialized training courses to business people. The Commission found that the proposed agreement to link the State Agency's website with a software company was permissible because of the overriding public benefit of promoting small business growth and the State's economy.

In Advisory Opinion 98-22, a State Employee asked whether it would violate the Ethics Act for her State Agency to be referenced in a private industry brochure. The State Agency had worked in conjunction with a private company to establish a computer

program prototype that allowed the public employees of the Agency to access data and create specific reports. This "job specific" program could be used by similar agencies in other states. The private company asked the Director of the State Agency to allow it to reference its work with the Agency in a brochure distributed to potential customers. This brochure did not contain a product endorsement from the State Agency. The Ethics Commission determined that no provision in the Ethics Act prohibits a public official from permitting a public company to reference its work with a state agency in a brochure "which does not contain a product endorsement from the agency or the public official".

In Advisory Opinion 2000-21 the Commission authorized a public employee to give permission to list the employee and her agency as a previous customer of the vendor that provided training to the agency.

In Advisory Opinion 2000-19, however, the Commission ruled that a state agency may not serve as a "reference account" for a vendor's software if the endorsement tends to promote the vendor's private business, and no overriding public benefit for the state or its citizens has been demonstrated. Specifically, such a reference may not include a subjective evaluation of the product, service or company in laudatory, terms.

More recently, in Advisory Opinion 2012-06, the Commission authorized an elected Member of the Board of Public Works to participate in an international forum sponsored, in part, by a business that has a financial relationship with the State. The Commission concluded that the Member's appearance at the forum provides a benefit to West Virginia by allowing our State to be recognized for its achievements in fraud control, and allowing the Member to observe first-hand how Australian state governments approach financial management and procurement. Further, the event will provide an opportunity for the Member to network with other government officials who also implement and manage electronic payments.

Finally, in Advisory Opinion 2012-31, the Ethics Commission concluded that the Ethics Act permits a public servant or entity to be listed on a vendor's promotional materials solely as a previous customer. Any language that tends to refer to the public servant or entity as a "satisfied customer" or otherwise serve to promote or endorse the vendor is expressly prohibited.

Notably, although the Ethics Act does contain what is commonly referred to as the "Higher Education Exemption", it does not apply here since the contract is between the University and the private partner, not a University employee. Specifically, W. Va. Code§ 6B-2-5(n) provides:

> Any person who is employed as a member of the faculty or staff of a public institution of higher education and who is engaged in teaching,

> research, consulting or publication activities in his or her field of expertise with public or private entities and thereby derives private benefits from such activities shall be exempt from the prohibitions contained in subsections (b), (c) and (d) of this section when the activity is approved as a part of an employment contract with the governing board of the institution or has been approved by the employee's department supervisor or the president of the institution by which the faculty or staff member is employed.

Finally, it is helpful to review related policies of other universities. Another State University has a policy regarding the use of that institution's name by a sponsor. It reads:

> Under no circumstances shall a sponsor be permitted to use its name in any publication or other published announcement to state or imply that ... University or the [University-related research unit] approves or endorses any product or service of the sponsor. Both the University and the [University-related research unit] also require that their names not be used in connection with any advertisement, press release, or other form of business promotion or publicity, or refer to a research agreement, without their prior written approval.

Harvard University permits promotional material that identifies "some unit of the University" as a customer or client but does not permit giving an opinion concerning the quality of a product. The Endorsement Guideline reads:

> Promotional material that identifies some unit of the University as a customer or client but does not give an opinion concerning the quality of a product is permissible. In these cases, the name of a particular school or department may be used, but not "Harvard" or "Harvard University" more broadly. Promotional material that gives an opinion about the quality of a product or service is only permissible when done by an individual in his/her personal capacity, not when done by a school, department or other unit of the University. In the case of an individual, reference to that person's University title or position may be made only if there is explicit recognition

that the statements made do not officially represent views of the University or any of its units or officers.

The University of Texas has adopted "Guidelines for Web Site Solicitations". While not directly on point, it provides, in relevant part, as follows:

> **Sponsorship acknowledgments:** A logo or identifier with a hypertext link to a person or entity's Web site, placed on a UT Web Page to acknowledge the person or entity's ... research support to UT System....
> ***
> **Sponsorship Acknowledgments** ...
> ***
> The text of Sponsorship Acknowledgments may not promote any service, facility or product offered by the donor or sponsor....

Here, the proposed user agreement allows the Partner the use of the University name and logo in its external marketing materials in exchange for the University's use of the Partner's information management system. Based on the totality of the foregoing facts, the Commission hereby finds that the University has demonstrated an overriding benefit of obtaining critical free access to a system that greatly enhances the University Program's ability to produce quality reports. As a result, the University may enter into a user agreement whereby its Partner uses the State University name and logo in external marketing materials solely related to Program-related products and services, in exchange for the University Program's free access to the Partner's information management system.

The Partner may only list the University's name and logo in its external marketing materials; any language that tends to refer to the University as a "satisfied customer" or otherwise serve to promote or endorse the Partner is expressly prohibited. Moreover, if another potential user contacts the University about the Partner's product and asks its opinion about this product, then the University may give its opinion, be it favorable or unfavorable. Nevertheless, the Commission reminds the Requester that even if it has a favorable view of the vendor's product, it may not provide a testimonial or letter of support unless there is an overriding public benefit, pursuant to Advisory Opinion 2012-31. Decisions on whether an overriding public benefit exists must be decided on a case-by-case basis. Advisory Opinion 2005-04.

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§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman