ADVISORY OPINION NO. 2013-12

Issued On April 4, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the Board of Public Works** asks whether he may appear in a video on the website of a business to promote his office's electronic payment program when the business has a financial relationship with the State.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Member of the Board of Public Works. His office has a contract with a financial institution to provide various financial services to the State of West Virginia. The financial institution contracts with another business to provide some or all of the services. The business is a financial service provider and is hereinafter referred to as the State subcontractor.

The Requester appeared, in his official capacity, in three videos promoting his office's electronic payment program on the State subcontractor's website during the latter part of 2012 and until late February 2013. Other State officials or employees appear in the videos. The videos highlight the benefits, efficiencies and convenience of using the office's program.

The Requester describes his office's electronic payment program as a "revenue generating program". He states that the contract is with another financial entity, and that the business-- the State subcontractor--on whose website the video appears is not a direct vendor of the State. Instead, the vendor selects the business. The State subcontractor, according to the Requester, "does not advertise or solicit business from" any similar program.

The Requester notes that he has also participated in recognition of the overwhelming public benefit garnered by highlighting the State of West Virginia's tremendous success in this program area. He concludes by stating:

> Highlighting our achievements and successes, rather than belaboring our perceived shortcomings, promotes our State. The public benefit is obvious. It would be unfortunate if public officials were unable to promote, or even provide factual comments concerning those successes.

In one video, the Requester states that the State subcontractor has "been an outstanding business partner ... working with us to better meet the needs of our vendors." The video shows the State subcontractor's product being used at least once.

One State official mentions the State subcontractor's product by name. The video also shows the State Capitol, State flag, and the Requester's office. This same video shows an election campaign button with the Requester's name. The Requester states in the video that he is an elected official and further states, "If we tried to take [the State subcontractor's product] away, I'd be run out of office."

According to the Requester, the videos were created to highlight the State's success and to provide educational information to other governmental entities using or considering using a similar program. The Requester's "purpose was to bring attention to the State's achievements in a significant business process affecting government." The videos appeared on the State subcontractor's website, not the Requester's. The State subcontractor's logo appears prominently at the conclusion of each video.

The Requester received no compensation for appearing in the videos on the State subcontractor's website. In his advisory opinion request, the Requester states: "Promoting the State's successes is important to the [Requester] and provides an overwhelming benefit to the State as a whole."

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

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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.

As a matter of first impression, the Ethics Commission looks to federal law and the ethics laws of other states for guidance. For example, federal employees are also subject to a code of ethical conduct, and are prohibited from endorsements as follows:

> **(c) Endorsements.** An employee shall not use or permit the use of his [or her] Government position or title or any authority associated with his

> [or her] public office to endorse any product, service or enterprise except:
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> **(1)** In furtherance of statutory authority to promote products, services or enterprises; or
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> **(2)** As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

5 CFR § 2635.702(c)

Delaware and Kentucky have addressed similar issues to that presented here. First, in Opinion 95-36, the Delaware Public Integrity Commission considered the request from the head of a State agency who was asked to appear in a video prepared by a private enterprise. In the past it had contracted with the agency and was expected to seek future contracts. The contracts were in highly competitive area. In reviewing the video script, the Delaware Public Integrity Commission found that it was a promotional or marketing tool for the firm, and the statements to be made by the agency head served little, if any, public purpose. The Commission found that appearance in the video might be s seen by competitors and/or the, public as an endorsement for that firm. While the agency said it was willing to appear in videos for all competitors, the Commission found that is was not a viable solution because some firms might not have the capacity to engage in such marketing efforts. Further, because the public official participated in reviewing the contract applications, there could be a perception that the public official's judgment was impaired or that preferential treatment could result. Thus, the Delaware Public Integrity Commission held that the head of a State agency could not appear in the video.

Next, Kentucky's Lieutenant Governor was authorized to promote a public health project, but **not** to endorse any companies or organizations sponsoring the event. This endorsement of a project does not appear to promote a specific product or service, but rather he will be endorsing a public service product not associated with any one particular business or organization. Kentucky Ethics Advisory Opinion 01-3.

One year later, after receiving "a plethora of questions regarding public/private partnerships and the propriety of endorsements of products/companies by state agencies and state employees" Kentucky's Governmental Ethics Commission issued an advisory opinion in an attempt to answer those questions and other questions that might arise, and stated:

> Active endorsement or promotion of private companies by state officials would constitute an attempt to use one's position to give an advantage to a person or business in derogation of the state at large. KRS 11A.020(1)(d).

Kentucky Ethics Advisory Opinion 02-21.

While little consensus exists amongst the other states, research reveals that the more recent opinions tend to fall in line with the more restrictive view.

Next, the Ethics Commission will examine its prior relevant advisory opinions. In Advisory Opinions 95-05, 95-28, and 2005-04, the Commission authorized a public servant or agency to enter into arrangements that provided certain benefits to private businesses. In each case, the Commission concluded that the agreements involved an overriding public benefit sufficient to legitimize any resulting private gain. Thus, even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain. In each of these Advisory Opinions, the overriding public benefit arose in the context of an economic development initiative. "Public benefit was the paramount goal. The benefit to private business interests was incidental and secondary." Advisory Opinion 2000-19

In other situations, however, the Commission has consistently prohibited public officials or agencies from endorsing private entities. For example, in Advisory Opinion 2002-18, the Commission held that a government agency should not permit the use of its dog in the production of a dog food commercial since there is no overriding public benefit.

In Advisory Opinion 2000-19, a public employee asked if she could endorse a training program that she attended in the course of her employment. According to the facts set forth in the opinion:

> The employee coordinates a specialized law enforcement program for a State Agency. The employee received specialized training which provided a model for the specific program she subsequently adapted and implemented in West Virginia. The Trainer has asked the employee to provide a "letter of recommendation" for the training she received. Neither the employee nor the State Agency will receive any compensation for the recommendation provided. The Trainer plans to incorporate the employee's comments into a brochure promoting future training sessions. The employee proposes to identify the training she received from the Trainer as a "blueprint for success" and give explicit credit to the Trainer in such terms as, "by following [the Trainer's] instructions, we feel that this ... program works!!!!!!!"

The Commission concluded that, notwithstanding the lack of compensation for the employee or the state agency, the proposed endorsement constituted the prohibited use of public office for private gain. The Commission found that such an endorsement would provide an indirect pecuniary benefit to the training program.

In Advisory Opinion 2005-10, the Ethics Commission ruled that a Division Director of a state agency that regulates motor vehicles was prohibited from appearing in an

advertisement promoting an automobile dealer. Even though the public official would not have received any compensation, nor would the dealer have used the public official's title, the Commission found that the proposed promotion constituted a prohibited endorsement by the state agency, given the prestige of the official's position.

In Advisory Opinion 2012-06, the Commission concluded that the Requester's appearance at an international forum provides a benefit to West Virginia by: allowing our State to be recognized for its achievements in fraud control; allowing the Requester to observe first-hand how Australian state governments approach financial management and procurement; and providing the Requester an opportunity to network with other government officials who also implement and manage electronic payments. the Commission authorized the Requester to attend the forum at the State subcontractor's expense, with limitations. He was required to provide a copy of the advisory opinion to the State subcontractor and to formally notify the State subcontractor that he is prohibited from endorsing its product. Moreover, at or before the forum, he was required to 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 State subcontractor's product.

Finally, in Advisory Opinion 2012-31, the Commission ruled that a public servant could not appear, or be referenced, in an advertisement for a product, service or business unless there is an overriding public benefit.[1] The Commission agrees with the Requester that it does not violate the Ethics Act for him to promote his office's electronic payment program. Indeed, he has every right to be proud of its success and national recognition, and the public benefits by this successful program.

Here, however, in the course of promoting his office's electronic payment program, he lends the prestige of his public position to a private business for which there is no overriding public benefit. References to the State subcontractor by name (verbally and visually) promote the State subcontractor, not the Requester's office's electronic payment program. As a result of the foregoing, because the State subcontractor would derive benefit from his action, the Requester may **not** appear in a video on the State subcontractor's website to promote his office's electronic payment program. Instead, the Requester may appear in a video on his own website promoting his office's electronic payment program without any reference, verbally or visually, to the State subcontractor.

Additionally, even though the Requester did not get paid for appearing in the videos, he may have violated the Ethics Act's prohibition against use of office for his own private

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[1] The Requester distinguishes between a vendor with the State and the business which produced the videos, i.e. the State subcontractor. The Commission has consistently applied the Ethics Act's prohibitions to relationships with subcontractors as well as contractors. *See* Advisory Opinions 94-22, 95-44, and 2012-40. Regardless, the prohibition against endorsing a private entity is not limited to a vendor. It applies to any private, commercial concern. A public official may not lend the prestige of public office to a for-profit enterprise whether or not the business has a relationship with the State.

gain by appearing in his official capacity in an online video produced by the State subcontractor during a contested election campaign. Although it may not be possible to quantify the benefit that may have inured to him as a result of this publicity, it is an intrinsic benefit that his opponent did not have access to during the campaign. Nonetheless, since advisory opinions are prospective only, the Commission is unable to opine as to whether the Requester used his public office for his own private gain.

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 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