ADVISORY OPINION NO. 2013-20
Issued on June 6, 2013
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

Two **Members of the Legislature** ask whether it is permissible under the Ethics Act for them to continue to appear in a television program for a non-profit foundation, if the non-profit solicits and obtains financial underwriting for future broadcasts.

FACTS RELIED ON BY THE COMMISSION

At some point before the 81st session of the Legislature, Requesters were asked to appear in public broadcasts produced by a non-profit foundation. Requesters appeared, without compensation, in ten public television broadcasts which focused on various issues in West Virginia. The broadcasts included: discussion about the upcoming 81st legislative session and hot-button issues in front of the Legislature, child poverty, prison overcrowding, the "Home Rule" Pilot Project bill, the role of the legislative services office in the bill writing process, and other subjects involving State government. The broadcasts were made available to the public without commercials and without underwriting.

The non-profit foundation would like to continue these broadcasts for public viewing. In order to continue, the foundation would like to solicit underwriters for the program subject to the following restrictions: the Requesters will not be directly or indirectly involved in the solicitation of financial underwriters, Requesters will not be paid or otherwise receive any financial payments or remuneration for their participation in the broadcasts, and the underwriting will be undertaken in compliance with the PBS National Program Funding Standards and Practices and Guidelines for On-Air Announcements Promoting Program Related Goods and Services.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits a public official from knowingly and intentionally using his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W. Va. Code§ 6B-2-5(c) reads, in relevant part:
(c) *Gifts.* -- (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: *Provided,* That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position is subordinate to the soliciting official or employee: *Provided, however,* That nothing

herein shall prohibit a candidate for public office from soliciting a lawful political contribution. No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

Title 158, Series 7, Section 7. Manner of Solicitation and Use of Funds reads:

7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:

a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

b. A vendor which has a contract with the agency, is bidding on a contract or is in the process of soliciting business from the agency.

7.2. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated persons or vendors, is permissible; Provided, That the written solicitation may not be directed solely to persons under the regulatory authority of, or vendors, of the public official, employee or agency. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.

7.3. Solicitations should be conducted, and acknowledgments made, in a fair and even-handed manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.

7.4. Under no circumstances should anyone soliciting a contribution for a charitable purpose state that contributors will receive some special treatment from a government agency or its employees, or any other sort of quid pro quo as a consequence of making

a donation.

ADVISORY OPINION

In Advisory Opinions 2003-03 and 2003-09, the Commission ruled that public entities could not accept free use of vehicles, covered with commercial advertising, to conduct official business. The Commission found that in the absence of any overriding public benefit, endorsement of commercial products through advertising on police and emergency county vehicles could constitute a use of office for private gain.

In Advisory Opinion 2012-08, the Commission reaffirmed the Ethics Act's prohibition of solicitation except for a charitable purpose.

The Commission also ruled in Advisory Opinion 2007-02, that it would violate the Ethics Act for a State Agency to enter into a contract with a private entity to make Public Service Announcements where the Agency would be obligated to: provide visibility to the entity and its corporate underwriters, make its executives and spokespersons available to the entity during its promotional media tours, or publicize its relationship with the entity. The Commission reasoned the provisions of this contract would, in effect, be an endorsement by a State Agency of a private business. The Commission further reasoned that the public benefit was not outweighed by the private benefit to that entity.

Here, however, a private non-profit will engage in the solicitation of underwriters for the broadcast without Requesters participation or assistance. Further, there are no contractual obligations between the Requesters and the underwriters. Thus, the Commission hereby finds that the Requesters may continue to appear in the broadcasts described above even if the non-profit solicits and accepts financial underwriting from private entities. Their participation in the broadcast does not violate the Ethics Act because the program is a tool to educate the general public about the inner workings of state government, issues facing the State, and the history and culture of the State. Therefore, any benefit to any underwriters or to the Requesters is outweighed by the public benefit of the broadcast.

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 public agencies unless and until it is amended or revoked, or the law is changed.

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