ADVISORY OPINION NO. 2012-31

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Circuit Clerk** asks three questions:

1. Under what, if any, circumstances may a public servant recommend or allow a letter of support for a product, service or business?

2. May a public servant or public entity be listed by a vendor as a reference?

3. May a public servant appear, or a public servant or public entity be referenced in any way, in an advertisement for a product, service or business?

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Circuit Clerk. Her office has a longstanding contract with a software development company (vendor) to provide various services related to information technology for the benefit of the office and the public. The vendor prepared a letter and company brochure describing the process he developed for the Circuit Clerk's office; he sent the letter and brochure to all West Virginia Circuit Clerks under the Requester's name and title and the Clerk's Office seal and address.

The letter's opening sentence reads: "Fellow Clerks; with regards to the current process underway to modernize the scanning and storing of court orders within the offices of the Circuit Clerks throughout the state of West Virginia, the enclose brochures and documentation demonstrates our position and commitment to this endeavor." The letter concludes: "I hope this information is helpful when considering changes within the Circuit Clerks offices and I would invite any suggestions, comments or concerns after reviewing this information."

Although the Requester approved the concept of the letter before it was mailed, she did not know that the vendor would use the seal and/or letterhead of her office.

CODE PROVISIONS RELIED UPON BY THE 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 Commission stated in Advisory Opinion 2007-02:

> The basic concept of the Ethics Act is that public servants may not use their public positions for their own private gain or the private gain of others. The Act's Legislative findings explain that the Act is intended to prevent public servants from using their public positions"..... to benefit narrow economic ... interests at the expense of the public at large ....."

The Ethics Act prohibits public officials from endorsing products. *See e.g.* Advisory Opinions 2000-19, 2000-21, 2002-18, 2005-02, 2005-10, 2007-02, and 2009-12. The Ethics Commission has consistently ruled that a public official may only endorse a product or service when there is an overriding public benefit. In Advisory Opinions 95-05, 95-28, and 05-04, the Commission authorized a public servant or agency to enter into arrangements that provided certain benefits to private businesses; in each case, the Commission found 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 those Advisory Opinions, the overriding public benefit arose in the context of an economic development initiative.

Question #1: Under what, if any circumstances may a public servant recommend or allow a letter of support for a product, service or business?

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.

Here, the Requester wanted to share information with her fellow clerks about a company that she felt could provide a good service to them. Instead of generally describing a process, however, the mailing explicitly described the vendor's company and program. Under the particular facts presented, the Commission has carefully examined the potential for violating the Ethics Act. Inasmuch as there does not appear to be an overriding public benefit in the promotional material the vendor sent out under the Requester's name, title, seal and address, the Commission finds that it would violate the Ethics Act for the Requester to recommend or allow a letter of support for a product, service or business of an "interested person" as defined in the Ethics Act, since it would lend the prestige of the office to advance the vendor's private interest.

Question #2: May a public servant or public entity be listed by a vendor as a reference?

In Advisory Opinion 98-22, the 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." And, 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.

Thus, the Ethics Commission concludes 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.

Question #3: May a public servant appear, or a public servant or public entity be referenced in any way, in an advertisement for a product, service or business?

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 2002-18, the Ethics Commission ruled that a state agency was prohibited from allowing one of its dogs to be featured in a dog food commercial. There the agency used two bloodhounds to assist it in wildland fire investigations for almost five years, during which time a business which sells dog food supplied dog food to the agency at no cost. When the business asked to use one of the dogs in a dog food commercial, the agency was willing to cooperate as a way of thanking it for its past financial support and because it felt that the promotion would promote public awareness of the bloodhound program and reduce the likelihood of arson related wildfires. Notwithstanding the fact that the advertisement may have raised public awareness on an issue of importance, the Commission held that there was no overriding public benefit.

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.

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

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson