ADVISORY OPINION 2015-11

Issued on August 6, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **elected state official** requests an opinion regarding a new provision of the Ethics Act which places limitations on a public official from using his or her name or likeness on "trinkets." The Requester seeks guidance concerning the use of his/her picture or likeness on his/her agency's website and on educational materials distributed to the public, and asks whether his/her agency may continue to use materials containing his/her picture or name which were purchased before the May 28, 2015, effective date of W.Va. Code § 6B-2-5c. The Requester also asks whether participation in videotaped interviews, presentations, and panels is permissible.

FACTS RELIED UPON BY THE COMMISSION

The Requester seeks an opinion regarding the use of his/her picture or likeness on his/her website and on educational materials developed by him/her to inform the public concerning areas of the law over which he/she has regulatory or statutory authority. The materials were paid for by a national non-profit institution which promotes educational endeavors and provides similar materials to other public entities. No public funds were utilized to create or print the educational materials.

The Requester also requests an opinion concerning the propriety of using materials such as banners and table skirts which contain his/her picture or name and which were purchased prior to the May 28, 2015, effective date of W.Va. Code § 6B-2-5c.

Finally, the Requestor asks whether participation in videotaped interviews, presentations, panels and interviews is permissible. Internet links to examples of these types of presentations were submitted as part of the request.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b) provides:

> 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 ... 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.

W.Va. Code § 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:
  (1) Use the public official's name or likeness on any publicly-owned vehicles;
  (2) Place the public official's name or likeness on trinkets paid for by public funds;
  (3) Use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public.
  (4) Use public funds or public employees, other than employees for security services, for entertainment activities within forty-five days of a primary, general, or special election in which the public official or agent is a candidate.

(b) For purposes of this section:
  (1) "Agent" means any volunteer or employee, contractual or permanent, serving at the discretion of a public official; and
  (2) "Trinkets" means items of tangible personal property that are not vital or necessary to the duties of the public official's or public employee's office, including, but not limited to, the following: magnets, mugs, cups key chains, pill holders, band aid dispensers, fans, nail files, matches, and bags.

(c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.

(d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

(e) The commission may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

> 2.1 The provisions of this section apply to all elected and appointed public officials and public employees, their agents, and any other person on the public payroll, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.
>
> 3.1 Incidental use of public resources for personal or business purposes resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.
>
> 3.2 Nothing in W.Va. Code 6B-2-5c shall require the removal of names or likenesses of public officials which appear on publicly-owned vehicles as of May 28, 2015.
>
> 4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official. Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising under W.Va. Code § 6B-2-5c(a)(3).
>
> 6.1 Nothing in W.Va. Code § 6B-2-5c(b)(2) shall be construed to permit persons subject to this section to purchase with public funds pens, pencils, or other markers featuring a public official's name or likeness. However, public officials are not prohibited from expending public funds to purchase pens, pencils, or other markers used during ceremonial signings.

ADVISORY OPINION

Website

The Requester's agency's website was viewed in preparation for this Advisory Opinion. A photograph and biographical information regarding the Requester appear on a separate page which is accessible from the website's home page.

In evaluating the propriety of the use of the photograph under W.Va. Code § 6B-2-5c and the emergency Legislative Rules, it is found that the website is not "advertising" but is instead an acceptable method for the agency to communicate with and educate the public. The website likewise contains no reference to voting in favor of the Requester as prohibited by W.Va. Code § 6B-2-5c(d).

In deciding whether a public official may include his/her photograph on the website, one must weigh the value of the official identifying himself or herself to the public versus his or her potential use of the photograph for self-promotion. **The Ethics Commission concludes that public officials' websites may include the official's photograph on their home pages or on sections or pages devoted to biographical information regarding the official. However, multiple photographs of the official throughout the website should not be used.**

Educational materials

The Requester also seeks guidance concerning written educational materials, examples of which were reviewed in conjunction with the request for this Advisory Opinion. Some of these documents were printed using private funds, so at first blush one could conclude that the "trinkets" statute is not applicable because "public funds" were not used. However, to the extent that the Requester participates in the selection or editing of the content and approval of these materials, their use is subject to the Ethics Act. Public servants may not thwart the intent or purpose of W. Va. Code § 6B-2-5c by allowing or requesting third parties to finance the materials which are disseminated on their behalf.

Some of these educational materials include photographs of the Requester and, in one instance, a full page is devoted to the Requestor's name and photograph.

The Ethics Commission concludes that the Requester's inclusion of his/her own photograph in educational materials in which he/she has played a role in the selection, editing or approval of the content and which are disseminated to the public by his/her office may include the official's photograph. However, multiple photographs of the official throughout the materials should not be used.

The covers of other written educational materials provided by the Requester include his/her name and title in prominent sized type. In some instances, the Requester's name is larger than the title of the document. **Public officials should use caution in**

overemphasizing their names in any type of report, educational material or other publicly-disseminated document.

Items purchased before May 28, 2015

The Requester also asks whether materials which include his/her name or photograph and were purchased before the effective date of the "trinkets" statute may continue to be used. The Requester indicates that these materials include banners, table skirts and similar items.

W.Va. Code § 6B-2-5c(a) provides that public officials may not use their name or likeness on "trinkets" paid for by public funds, and that public funds may not be used to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising.

The items described by the Requester are not "trinkets" under W.Va. Code § 6B-2-5c(b)(2). However, they have been paid for with public funds, and are therefore subject to the statute.

The Ethics Commission concludes that the Requester may not use any items classified as "trinkets" under W.Va. Code § 6B-2-5c which were purchased prior to the effective date of the statute (May 28, 2015.)

Banners and table skirts which contain the Requester's name and photograph -- whether purchased before or after May 28, 2015 -- may not be used.

TV/YouTube videos

The Requester's appearance in television shows, YouTube videos and other such presentations arguably assists the Requester in communicating with the public regarding the services which the Requester's office provides. The purpose of this type of communication does not appear to be for advertising or to earn votes, but rather to promote services provided by the Requester's agency. The Requester may choose to appear in person in these presentations or designate other representatives to do so.

As public employees and officials such as the Requester perform their duties, they should be mindful of the public, rather than personal, nature of their work. Public employees' and officials' efforts and expenditures should focus upon their public mission and should not include any pursuits which draw the public's attention away from that mission. **If the public mission or services which the public employee or official provides do not require, and are not assisted or improved by, the inclusion of his/her photograph, his/her photographs should be omitted from public materials. Public employees and officials may use their name and title where necessary to identify themselves and/or their public office. However, the appearance of a public employee's or official's name and/or title should not be a**

unique, prominent detail which receives more emphasis than the surrounding information or text.

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 § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-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.

Michael Greer, Acting Chairperson
WV Ethics Commission

ADVISORY OPINION 2015-13

Issued on September 3, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks whether public officials may publicly recognize new or expanding private businesses and individuals for their contributions to economic development, charitable services and other services for the greater benefit of the public; and asks for guidance under the "name and likeness" provision of the Ethics Act, W.Va. Code § 6B-2-5c, as to public officials' use of social media.

FACTS RELIED UPON BY THE COMMISSION

The Requester asks the following questions:

1. When is it permissible for elected public officials to recognize a private business or individual? For example, is it permissible to attend an opening ceremony or "ribbon cutting" for a new or expanding business? May a County Commissioner publicly recognize a business or individual through a resolution or proclamation during a public meeting or would such conduct be an improper endorsement under the Ethics Act?

2. Is it permissible for public officials to post pictures of themselves attending public events, such as ribbon cuttings or public meetings, on the officials' agency's social media sites, such as Facebook and Twitter? Is it permissible for more than one picture of an elected official to appear in an official government's social media?

3. Are there restrictions for publication of information on public officials' *personal* social media, such as Facebook, related to pictures or information regarding public meetings and events? May public resources be used to manage or post on public officials' *personal* Facebook pages?

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-1-2 (a) provides:

> The Legislature hereby finds that the holding of a public office or public employment is a public trust. Independence and impartiality of public officials and public employees are essential for the maintenance of the confidence of our citizens in the operation of a democratic government. The decisions and actions of public officials and public employees must be made free from undue influence, favoritism or threat, at every level of

government. *Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or 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.* (Emphasis added)

W.Va. Code § 6B-2-5(b)(1) provides:

> 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.

W.Va. Code § 6B-2-5c provides:

> (a) Public officials, their agents, or anyone on public payroll may not:
>
> ...
>
> (3) Use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public.
>
> ...
>
> (c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.
>
> (d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

(e) The commission may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official. Dissemination of office press releases or official information via e-mail, **social media**[1] or other public media tools for official purposes is not considered advertising under W.Va. Code § 6B-2-5c(a)(3). (Emphasis added)

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[1] The Ethics Act and Rule do not define social media.

The State of West Virginia Office of Technology Policy has defined social media as follows:

Social Media Access and use WVOT-PO1017, January 26, 2011 Revised: July 1, 2015. 6.2 Social media – Social media includes web and mobile-based technologies which are used to turn communication to interactive dialogue among organizations, communities, and individuals. Examples are: Facebook, MySpace, Twitter, YouTube, etc.

Social media has been defined by federal agencies as follows:

FDIC FIL-56-2013 December 11, 2013:

For purposes of this Guidance, social media is considered to be a form of interactive online communication in which users can generate and share content through text, images, audio, and/or video. Social media can take many forms, including but not limited to, micro-blogging sites (e.g., Facebook, Google Plus, MySpace and Twitter); forums, blogs, customer review web sites and bulletin boards (e.g., Yelp); photo and video sites (e.g., Flickr and YouTube); sites that enable professional networking (e.g., LinkedIn); virtual worlds (e.g., Second Life); and social games (e.g., FarmVille and CityVille).

National Archives and Records Administration Bulletin 2014-02:

Social media refers to the various activities integrating web technology, social interaction, and user-generated content. Social media includes blogs, wikis, social networks, photo libraries, virtual worlds, location-based services, and video sharing sites. Agencies use social media internally and externally to share information, support business processes, and connect people to government.

Found at: http://www.oge.gov/Education/National-Government-Ethics-Conference/National-Government-Ethics-Summit/Sessions/Forum-1/Government-Ethics-and-the-Use-of-Social-Media/

ADVISORY OPINION

Recognizing Private Businesses and Individuals

The Ethics Act prohibits a public official from using his or her office "or the prestige of his or her office" for private gain. W.Va. Code § 6B-2-5(b)(1). The Ethics Act specifically allows, however, for the "performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services" by public officials. W.Va. Code § 6B-2-5(b)(1).

The Ethics Commission has steadfastly followed this general rule: "[A] public official may not endorse a particular product or business.[2] A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit." Advisory Opinions 95-05 and 2015-04, *citing* Advisory Opinion 2005-10. *See also* Advisory Opinions 2012-21 and 2014-15.

The Commission will begin by determining whether the Requester's recognition of businesses and business persons at ribbon cuttings and public meetings would be improper endorsements. In Advisory Opinion 2005-10, the Commission held that a Division Director of the State agency that regulates motor vehicles may not provide a radio testimonial and his picture in a printed advertisement concerning the quality of the vehicle he purchased from a car dealership. The Commission stated, "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." Public officials may not provide "a subjective evaluation of the product in affirmative, if not laudatory, terms." Advisory Opinions 2000-19 and 2000-21.

In Advisory Opinion 98-22, on the other hand, the Commission held that it would not violate the Ethics Act for a state agency to be referenced in a private industry brochure that did not contain a product endorsement from the State agency. The Commission further explained, in Advisory Opinion 2012-31, "It is permissible for a public official or entity to be listed on a vendor's promotional materials solely as a previous customer."

The Commission's Answer to Question 1 - Endorsement

The Commission holds that public officials may recognize businesses and individuals for their contributions to economic development and charitable purposes by attending "ribbon cuttings" and through resolutions or proclamations. These activities are performed as "usual and customary duties associated with the office or position or the advancement of public policy goals

[2] A public official may continue to appear and provide voice-overs for print, radio and television advertising for his own personal business. The Requester may not, however, use his title or any public resources to promote his business. Advisory Opinion 2015-04.

or constituent services" and are not improper endorsements under the Ethics Act.

While public officials may applaud businesses and business persons for their contributions to economic development and charitable purposes, public officials may not endorse a business's or individual's products or services. Recognizing a business is entirely different than endorsing its products and services. A basic concept of the Ethics Act, as stated in the Act's Legislative findings, is 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). For example, public officials may not provide a favorable evaluation of a restaurant's food and service while attending a ribbon cutting.

The Commission finds that providing testimonials or favorable reviews of a business's products or services is not permissible because endorsing one local business could have a negative effect on competing businesses.

Social Media

This is the Commission's first opportunity to provide guidance to public officials on their use of public and personal social media, such as Facebook and Twitter.

In Advisory Opinion 2015-11, the Commission evaluated the propriety of using photographs of a public official on his/her agency's official website under W.Va. Code §§ 6B-2-5(b)(1), 6B-2-5c and the Emergency Legislative in Rules158 C.S.R. 21. These Rules, in 21.4.1, define advertising as "any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official. Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising...."

Accordingly, in deciding whether a public official may include his/her photograph on the agency's website in Advisory Opinion 2015-11, the Commission weighed the "value of the official identifying himself or herself to the public versus his or her potential use of the photograph for self-promotion." [3] The Commission concluded that "public officials' public website may include the official's photograph on its home pages or on sections or pages devoted to biographical information regarding the official. However, multiple photographs of the official throughout the website should not be used. . . . [, and] [p]ublic officials should use caution in overemphasizing their names in any type of report, educational material or other publicly-disseminated document." Id.

[3] The Commission notes that the Ethics Act does not limit or restrict lawful political contributions as defined by law. W.Va. Code § 6B-2-4(4).

The Commission further sanctioned, in Advisory Opinion 2015-11, the Requester's appearance in television shows, YouTube videos and other such presentations to assist in communicating with the public regarding the services which the Requester's office provides because the "purpose for this type of communication does not appear to be for advertising or to earn votes, but rather to promote services provided by the Requester's agency."

The Commission does not interpret Advisory Opinion 2015-11 to place a specific limit on the number of photographs of a public official that may appear on an agency website. Rather, the Commission utilized a balancing test, weighing the value of the official identifying himself or herself to the public versus his or her potential use of the photographs for self-promotion, to determine whether the photographs result in self-promotion. Viewing the Requester's agency website in Advisory Opinion 2015-11, the Commission established that it is permissible for public officials' websites to include the officials' photographs on home pages or on sections or pages devoted to biographical information because photographs on these pages would not constitute "'advertising' but is instead an acceptable method for the agency to communicate with and educate the public." A.O. 2015-11.

The Commission's Answer to Question 2 – Official Social Media

The Commission concludes that, consistent with Advisory Opinion 2015-11, a public official may post his/her portrait photograph and photographs of him or her attending public events on his/her agency's official social media as long as the primary purpose is to communicate with the public to promote the agency's mission or services rather than to promote the public official.

The Requester further asks whether more than one picture of an elected public official may appear on official government social media sites such as Facebook and Twitter. Consistent with Advisory Opinion 2015-11, the Commission does not place a specific limit on the number of photographs of a public official that may appear on an agency's social media.

The Commission's Answer to Question 3 – Personal Social Media

Generally, the Ethics Act does not restrict public officials' use of personal social media. Public officials may not, however, use public resources to manage or post on their personal or campaign social media. W. Va. Code § 6B-2-5(b)(1). A public official may not use photographs taken by the public agency or for the agency's use in his/her personal or campaign social media. Further, a public

agency's website and social media may not provide links to public officials' personal or campaign's social media or websites.[4]

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 § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-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.

Robert J. Wolfe, Chairperson
WV Ethics Commission

[4] In Advisory Opinion 2000-04, the Commission held that the link from a Board of Education's website to a member's personal site was permissible "assuming a similar opportunity is offered to all candidates." To the extent the instant Advisory Opinion is in conflict with Advisory Opinion 2000-04, it is overruled.
In Advisory Opinion 2005-04, the state agency that is dedicated to facilitating small business development was permitted to put a link on its official website to a particular software company which offered accounting software to small businesses. By using the link, all small business owners would receive a 20% discount and the state agency would receive a commission. That Opinion was limited to the particular facts presented by the Requester and was accordingly not precedential. Therefore, the Commission does not rely upon it in the instant Opinion.

ADVISORY OPINION 2015-19

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks whether his office may use envelopes and business cards bought with public funds which contain his name, and whether he may distribute calendar books and pens, which also contain his name and which were bought with his private funds, in his public office without violating the "trinkets" or "name and likeness" provision of the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester provided samples of envelopes and business cards used by his office that display his name, title and the Assessor's office address. His name is somewhat larger and bolder than his title and address on both items. The envelopes and business cards are paid for with public money and are used on a daily basis to send official correspondence from the Assessor's Office.

The calendar or appointment books, which were purchased with the Requester's personal funds, have a vinyl cover and cost the Requester $2.57 each when bought in large quantities. The cover of each book states, "Compliments of" the Requester and his public title. The Requester states that he hands out these calendar or appointment books each December.

The Requester asks whether he may provide the appointment books to individuals while he is working in his public job outside of the county building, *i.e.*, while he is assessing real property. He also asks whether he may provide the appointment books to individuals who, apparently knowing of his practice in distributing such books, request copies of them while they are in the county building conducting business.

The Requester also wants to leave ink pens which contain his name and public title on the counter of the Assessor's office for the public to use or take.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

> 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. *(emphasis added)*

W.Va. Code § 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:

...

(3) Use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the **purpose of advertising** including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. *(emphasis added)*

...

(b)(2) "Trinket" means items of tangible personal property that are not vital or necessary to the duties of the public official's or pubic employee's office, including, but not limited to, the following: magnets, mugs, cups, key chains, pill holders, band-aid dispensers, fans, nail files, matches and bags.

(c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued **in the course of their duties as public officials**, or on promotional materials used for tourism promotion. *(emphasis added)*

(d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

(e) The commission may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

> 3.1 Incidental use of public resources for personal or business gain resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.
>
> ...
>
> 4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the **primary intent or effect of promoting a public official.** Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising under W.Va. Code § 6B-2-5c(a)(3). *(emphasis added)*

ADVISORY OPINION

Envelopes and Business Cards

The prohibition in the Ethics Act against public officials using their names and likenesses on publicly-owned vehicles, on trinkets and for purposes of advertising does not prohibit public officials from using their names on official letterhead or related official documents. As set forth in the "trinkets" section of the Act:

> This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.

W.Va. Code § 6B-2-5c(c).

The envelopes and business cards are clearly not vehicles or trinkets, so the only provision which could potentially apply is if these items are construed to be advertising. Public funds may not be used to distribute, disseminate, publish or display advertising, which includes, but is not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. W.Va. Code § 6B-2-5c(a)(3). "Advertising" is defined in the Emergency Legislative Rules as "any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official." 158 C.S.R. 21-4.1.

The Commission finds that the envelopes and business cards at issue do not have "the primary intent or effect of promoting a public official" and are therefore not prohibited advertising under W.Va. Code § 6B-2-5c(a)(3) and 158 C.S.R. 21.4.1. These materials are used in the usual and customary course of the Requester's

public job duties and are accordingly permissible. W.Va. Code §§ 6B-2-5(b)(1), 6B-2-5c(c) and (d).

Calendar Books and Pens

Nothing in the Ethics Act, including the "trinkets" provision, prohibits the Requester from using his private funds to purchase and distribute the calendar or appointment books and pens which contain his name. The Requester also may use his public title on these calendar books and pens.[1]

However, the Requester may not use public funds or public resources to offer or distribute these calendar books and pens to the public. Accordingly, the Requester and/or his staff may not place the calendar books and pens on a counter in the Assessor's office, may not distribute them while in the field assessing property, and may not give them to individuals who request them while he is performing his public job duties.

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 § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-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.

Robert J. Wolfe, Chairperson
WV Ethics Commission

[1] In Advisory Opinion 2012-15, the Commission ruled that a sheriff could use his public title to endorse a candidate for public office.

ADVISORY OPINION 2015-20

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks whether his office letterhead, envelopes, business cards, Personal Property Forms, door hangers, calendars and website paid for with public funds are in compliance with the "trinkets" (name and likeness) provision of the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester provided samples of his office letterhead, envelopes, self-addressed return envelopes and business cards that display his name, title and the Assessor's office contact information. The Requester also asks whether business cards for himself and for his Chief Deputy, which differ from one another, comply with the Act.

The Assessor's Office's field representatives use "door hangers" to inform occupants that staff had been there in their absence to review the property. The door hanger requests property owners to correct any erroneous information set forth on a Property Record Information/Update form. These door hangers do not contain the Requestor's name or likeness. The Requester also submitted for review a form letter which acknowledges receipt of a homeowner's completed door hanger. The form simply contains the Requester's name as the sender of the letter.

The Requester also submitted for review a blank Personal Property Return which property owners must complete. The form, which appears to be a tri-fold brochure, directs those completing the form to return it to the Requester. The Requester's name, title and address appear on the back of the form/brochure.

The Requester asks whether an office may place calendars on the counter for the public to take, and also whether calendars may be distributed at events or at other sites. The calendars would contain dates relevant to the Assessor's Office but would not contain the name or photo of an elected official.

Finally, the Requester's official website was reviewed for this Opinion. It contains only one small photograph of the Requester and his name on the site's home page.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

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. *(emphasis added)*

W.Va. Code § 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:

...

(3) Use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the **purpose of advertising** including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. *(emphasis added)*

...

(b)(2) "Trinket" means items of tangible personal property that are not vital or necessary to the duties of the public official's or pubic employee's office, including, but not limited to, the following: magnets, mugs, cups, key chains, pill holders, band-aid dispensers, fans, nail files, matches and bags.

(c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued **in the course of their duties as public officials**, or on promotional materials used for tourism promotion. *(emphasis added)*

(d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

> (e) The commission may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

> 3.1 Incidental use of public resources for personal or business gain resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.
>
> ...
>
> 4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the **primary intent or effect of promoting a public official.** Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising under W.Va. Code § 6B-2-5c(a)(3). *(emphasis added)*

ADVISORY OPINION

The prohibition in the Ethics Act against public officials using their names and likenesses on publicly-owned vehicles, on trinkets and for purposes of advertising does not prohibit public officials from using their names on official letterhead or other official documents. As set forth in the "name and likeness" section of the Act:

> This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.

W.Va. Code § 6B-2-5c(c).

The letterhead, business cards, door hangers, form letters and Personal Property Returns are clearly not vehicles or trinkets, so the only provision of the "trinkets" portion of the Ethics Act which could potentially apply is if these items are construed to be advertising.

Public funds may not be used to distribute, disseminate, publish or display advertising, which includes, but is not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. W.Va. Code § 6B-2-5c(a)(3). "Advertising" is defined in the Emergency Legislative Rules as "any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official." 158 C.S.R. 21-4.1.

The Requester also asks whether calendars not containing a public official's name (or presumably likeness) comply with the Ethics Act. **The "trinkets" or name and likeness provision of the Act simply does not apply to calendars which do not contain an official's name or likeness.**

The Assessor's Office's website contains only one small picture of the Requester adjacent to his name and title on the website's home page. Use of the name and photo are allowable pursuant to Advisory Opinion 2015-11, which held that, "The Ethics Commission concludes that public officials' websites may include the official's photograph on their home pages or on sections or pages devoted to biographical information regarding the official."

The Ethics Commission concludes that the Requester's letterhead, envelopes, business cards, Personal Property Form, door hangers, form letter and website do not have "the primary intent or effect of promoting a public official" and are therefore not "advertising" pursuant to W.Va. Code § 6B-2-5c(a)(3) and 158 C.S.R. 21.4.1. These materials are used by the Requester in the performance of the usual and customary duties associated with his office or position and are accordingly permissible under the Ethics Act. W.Va. Code §§ 6B-2-5(b)(1), 6B-2-5c(c) and (d).

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 § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-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.

Robert J. Wolfe, Chairperson
WV Ethics Commission