ADVISORY OPINION 2015-13

Issued on September 1, 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:
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> ...
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> (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.
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> ...
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> (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.

<u>The Commission's Answer to Question 2 – Official Social Media</u>

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.

<u>The Commission's Answer to Question 3 – Personal Social Media</u>

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.