

[Advisory Opinion 1996-17]

MEMORANDUM

TO: [Name1 withheld], County Executive
[Name2 withheld], President
Montgomery County Council

FROM: Laurie B. Horvitz, Chair [initialed]
Montgomery County Ethics Commission

SUBJECT: Advisory Opinion—Prestige of Office

DATE: November 13, 1996

A. Introduction

The Montgomery County Ethics Commission has received your request for an advisory opinion, dated July 25, 1996. Your memorandum seeks advice regarding Section 19A-14(a) of the Montgomery County Code. That section provides:

A public employee must not intentionally use the prestige of office for private gain or the gain of another. Performing usual and customary constituent services, without additional compensation, is not prohibited by this subsection.

According to your memorandum, each of you is often asked by organizations to “make speeches, attend events, or sign documents such as brochures, advertisements, or letters in support of a specific undertaking or the work of the organization in general.” You have requested advice regarding the scope of Section 19A-14(a) and the Section’s applicability to these activities.

Although these matters are ideally addressed when all relevant facts are presented to the Commission, the Commission is prepared to offer certain, general advice.

B. The Commission’s Five-Part Analysis

If the Commission is presented with a potential issue under Section 19A-14(a) involving an elected official, it will conduct a five-part analysis.

1. The Statute Only Prohibits Conduct That Benefits the Employee or a Private Party

First, the Commission will determine if the elected official’s conduct benefits the employee or a third party. Section 19A-14(a) prohibits conduct that provides a benefit to the public employee or to another. The public employee does not need to receive the gain in order to violate the section. If the employee’s conduct provides a financial benefit to a

third party, then the section may be violated. There is no violation if the conduct does not provide any benefit to the employee or to the third party. For example, a public employee may attend a meeting with a few business leaders in order to develop community policies without creating a problem under Section 19A-14(a). However, if the meeting is predominantly a press conference for a particular business, product or service, then the section may apply. The analysis must focus on whether the public employee's conduct provides the employee or a third party with a benefit.

In particular, the Commission will examine conduct that is specifically designed to endorse a product or to increase revenues of a company. The Commission will carefully review an employee's participation in advertising campaigns and fundraising events. These activities are directly related to the revenues of the third party and are likely to capitalize on the prestige associated with the public employee's position.

2. The Ethics Code Differentiates between Charitable and For-Profit Organizations

Second, the Commission will determine if the beneficiary of the elected official's conduct is a charitable institution. As your memorandum noted, there are special statutory provisions that address solicitations to charitable organizations. Section 19A-16(b)(5) authorizes elected officials to solicit gifts for charities, "while identifiable as an elected official". The elected official is required to list each organization to which the employee solicited a contribution in his or her public financial disclosure statement. Sections 19A-16(b)(5) and 19A-14(a) should be interpreted in a manner that resolves any possible inconsistencies between these two provisions. Therefore, the Commission is not inclined to find violations of Section 19A-14(a) when the requirements of Section 19A-16(b)(5) have been fully satisfied. Consequently, an elected official may, while identifiable as a government official, solicit donations for charitable organizations. Absent extenuating circumstances, the Commission does not believe that such conduct will violate Section 19A-14(a).

This rationale does not apply to endorsements and solicitations involving for-profit organizations. In those circumstances, Section 19A-16(b)(5) is inapplicable.

3. The Statute Only Prohibits "Intentional" Conduct

Third, the Commission will decide whether the conduct is "intentional." For example, the elected official is not likely to have acted "intentionally" if his or her comments are in response to unanticipated questions at a press conference or at a public event. By contrast, an approved endorsement of a product in an advertisement is more likely to satisfy this element of the statute.

4. The Prohibited Conduct Must Involve the "Prestige of Office"

Fourth, the Commission will determine whether the elected official has used the "prestige of office." Generally, Section 19A-14(a) does not regulate the private conduct

of public officials. Obviously, every private citizen chooses to conduct business with specific vendors. In his or her private capacity, an elected official may demonstrate a preference for certain products and establishments. Usually, the exercise of personal preferences and choices is not restricted by Section 19A-14(a) because the elected official is not intentionally using the “prestige of office” for the gain of another.

The Commission is most troubled by statements endorsing a product or service in which the elected official identifies himself or herself by title. Once the elected official uses his or her title to promote a product or service, then he or she may be using the “prestige of office” for the gain of another. The use of an official’s name, without a title, is less troubling but may nonetheless present a problem under certain circumstances. A case-by-case review of those circumstances is usually necessary. The official’s authorized use of his or her photograph, without the use of any name or title, may also present an issue if the elected official is easily recognized by the public.

5. “Usual and Customary Constituent Services” Are Permitted

Fifth, the Commission will decide whether the conduct constitutes “usual and customary constituent services.” This analysis will focus on the particular position of the elected official and the services that are normally provided by such officials. For example, County Executives often participate in ground breaking ceremonies. Normally, such participation constitutes a “usual and customary constituent service.” The County Executive is present to acknowledge a new business in the community and to celebrate the anticipated contribution of that business to the public. Attendance at such a function is not tantamount to the endorsement of one business over another. Time permitting, the County Executive probably would attend many more of these ceremonies. His or her attendance is not normally interpreted by the public as a specific endorsement of the business’s services or products.

Similarly, elected officials are often asked to make speeches recognizing the accomplishments of local businesses. Elected officials are expected, as part of their “usual and customary constituent services,” to comment favorably about businesses within their communities. Elected officials are also expected to promote the development and retention of businesses within their communities. Therefore, favorable comments about an individual company will generally qualify as “usual and customary constituent services” if the comments focus on the contributions of the company to the community, e.g. civic and charitable activities, increased employment for the region, participation in educational and re-training programs.

However, the Ethics Code may prohibit comments that do not focus on a business’s contributions to the community and, instead, constitute specific endorsements of a particular product or establishment. An elected official is not likely to be performing a “usual and customary constituent service” when his or her comments are clearly designed to express a preference for one constituent company over another constituent company. Officials do not usually differentiate among constituent companies by selecting only one for endorsement. Therefore, an elected official’s “usual and customary

constituent services” do not usually include the signing of brochures for specific products or participation in an advertising campaign that seeks to promote a particular business.

Your memorandum also mentions attendance at private events. An elected official’s mere attendance at a private event is not likely to create a problem under Section 19A-14(a). It is a “usual and customary constituent service” for elected officials to attend public and private events, even though the elected official is presumably invited because of his or her government position. However, as stated above, events that are primarily fundraisers or advertising/promotional events, may present unique issues that should be presented to the Commission for case-by-case review. Furthermore, this memorandum does not address issues relating to the costs associated with the elected official’s attendance at such events. Other sections of the Ethics Code govern whether or not a public official may attend without paying his or her share of the costs.

C. Conclusion

As always, the Commission is available to provide advice regarding specific matters. This memorandum merely seeks to identify the issues and analysis that the Commission will endeavor to use when confronted with particular matters. Hopefully, this memorandum will provide general guidance regarding the scope of Section 19A-14(a).