



WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

Senator Mark Maynard, Co-Chair
Delegate Kelli Sobonya, Co-Chair

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November 19, 2015

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

To: Natalie E. Tennant, Secretary of State, State Register
To: Rebecca L. Stepto
Ethics Commission, WV
210 Brooks Street
Suite 300
Charleston, WV 25301-1804
From: Legislative Rule-Making Review Committee
Proposed Rule: Public Use of Names or Licenses, 158CSR21

FILED
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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

The Legislative Rule-Making Review Committee Recommends that the West Virginia Legislature

- 1. Authorize the agency to promulgate the Legislative rule:
(A) as originally filed
(B) as modified by the agency
2. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
4. Recommends that the Legislature rule be withdrawn; a statement of reasons for the recommendation is attached.

**Committee Amendment
Public Use of Name or Likeness (158CSR21)**

The Legislative Rule-Making Review Committee moved to amend the West Virginia Ethics Commission's proposed rule, Public Use of Name or Likeness (158 CSR 21), on page one, following section one, by striking out the remainder of the proposed rule, and inserting in lieu thereof the following:

“§158-21-2. Definitions.

2.1. “Advertising” means publishing, distributing, disseminating, communicating or displaying information to the general public through audio, visual, or other media tools. This includes, but is not limited to, billboard, radio, television, mail, electronic mail, publications, banners, table skirts, magazines, social media, websites, and other forms of publication, dissemination, display or communication.

2.2. “Agent” means any volunteer or employee, contractual or permanent, serving at the discretion of a public official or public employee.

2.3. “Educational materials” means publications, guides, calendars, handouts, pamphlets, reports or booklets intended to provide information about the public official or governmental office. This includes information or details about the office, services the office provides to the public, updates on laws and services, and other informational items that are intended to educate the public.

2.4. “Entertainment activities” means a gala, party, dance, reception, event or celebration whose primary purpose is social interaction, a performance, or a non-governmental function.

2.5. “Instructional material” means written instructions explaining or detailing steps for completion of a governmental agency document or form.

2.6. “Likeness” means a photograph, drawing, or other attempted depiction of an individual.

2.7 “Mass media communication” means communication through audio, visual, or other media tools (including U.S. mail, electronic mail, and social media) intended for general dissemination to the public. Examples include mass mailing by U.S. mail, list-serve emails, and streaming clips on websites.

2.7.1. This term does not include regular responses to constituent requests or questions during the normal course of business.

2.7.2. This term does not include communications that are authorized or required by law to be publicly disseminated (e.g. legal notices).

2.8. "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body, and their respective boards, agencies, departments and commissions, or in any other regional or local governmental agency.

2.9. "Public official" means any person who is elected or appointed to any state, county or municipal office or position, including boards, agencies, departments and commissions, or in any other regional or local governmental agency.

2.10. "Public payroll" means payment of public monies as a wage or salary from any state, county or municipal governmental body, or any other regional or local governmental agency, whether accepted or not.

2.11. "Social media" means forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content.

2.11.1. This term 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.

2.12. "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.

§158-21-3. Persons subject to W.Va. Code § 6B-2-5c.

3.1. These provisions shall apply to all elected and appointed public officials and public employees, their agents, and any other person on public payroll.

§ 158-21-4. Placement on publicly-owned vehicles

4.1. A public official's name or likeness may not be placed on any publicly-owned vehicle.

4.2. If, as of May 28, 2015, a public official's name or likeness is unable to be removed easily from the vehicle, or at a de minimis expense to the public official's agency, the public official may seek a written exemption from the West Virginia Ethics Commission for allowance of such name or likeness to remain on the vehicle.

4.2.1. Any exemption request must be publicly presented and considered by the Ethics Commission.

4.2.2. Any exemption for a permanently affixed name or likeness shall terminate upon the replacement of the vehicle or when there is a substantial repair or alteration of the vehicle.

4.2.3. During the duration of such exemption, the marked vehicle may not be utilized in parades, public appearances, or placed on public display during such public appearance or parade. In addition, the Ethics Commission may require additional conditions as part of an exemption in order to limit promotion of the public official, including limiting use or placement of the vehicle.

§ 158-21-5. Placement on Trinkets.

5.1. A public official's name or likeness may not be placed on any trinkets paid for with public funds.

5.2. When appropriate and reasonable, public officials are permitted to expend a minimal amount of public funds for the purchase of pens, pencils or other markers to be used during ceremonial signings.

§ 158-21-6. Advertising.

6.1. A public official's name or likeness may not be placed on any advertising, mass media communication, or non-emergency public service announcement that is paid for with public funds.

6.1.2. When necessary, reasonable, and appropriate to relay specific public safety, health or emergency information, a public official's name and likeness may be used in a mass media communication or other public announcement.

6.1.3. A public official's name and likeness may appear on an agency's social media and websites provided it complies with section § 9 of this rule.

6.1.4. Dissemination of office press releases or agency information via email, social media or other public media tools for official purposes is not considered advertising or prohibited under this rule, so long as it is intended for (a) a legitimate news or informational purpose, (b) is not intended as a means of promotion of the public official, and (c) is not being used as educational material. *See* §§ 8 and 11.1 of this rule.

6.2. If public funds are not used, use of the public official's name or likeness on advertising, media communication, or non-emergency public service announcement may still be prohibited and/or subject to other prohibitions of ethics act, including but not limited to use of public office for private gain, and endorsement. Under such a situation, written guidance should first be obtained from the Executive Director or the Ethics Commission prior to allowing or authorizing a

public official's name or likeness on the advertising, media communication, or non-emergency public service announcement.

§ 158-21-7. Entertainment Activities.

7.1. A public official, or his/her agent, may not use public funds or public employees for entertainment activities within forty-five days of a primary, general or special election in which he or she is a candidate.

7.1.1. This prohibition shall not apply to public employees performing security services, including, but not limited to, law enforcement, division of public safety personnel, or part-time security.

7.1.2. As used in in this rule and W.Va. Code § 6B-2-5c(a)(4), the phrase "within forty-five days" means forty-five days **prior to** the day designated for a primary, general or special election.

7.2. Outside of the forty-five day period, public officials and public employees are still subject to the Ethics Commission rules governing use of public funds for employee retirement and recognition events, as well as the prohibition against use of public office for private gain.

7.2.1. Nothing shall be inferred or construed to infer that the expenditure of public funds for entertainment activities outside of the forty-five day period is otherwise permitted under the Ethics Act or this rule.

§ 158-21-8. Educational Materials.

8.1. A public official's name or likeness may not be placed on any educational material that is paid for with public funds.

8.1.1. This prohibition shall not apply to the submission of a report required to be issued by law.

8.2. If public funds are not used, use of the public official's name or likeness on educational materials may still be prohibited and/or subject to other prohibitions of ethics act, including but not limited to use of public office for private gain. Under such a situation, written guidance should first be obtained from the Ethics Commission or its Executive Director prior to allowing or authorizing a public official's name or likeness on educational materials.

§ 158-21-9. Public Agency Social Media; Website

9.1. A public official's name and likeness may appear on a public agency's website and social media subject to the following restrictions:

- a. The public official's name may appear throughout the website so long as it is reasonable, incidental, appropriate, and has a primary purpose to promote the agency's mission and services rather than to promote the public official.
- b. The public official's likeness may only appear on the agency's website home page and on any pages or sections devoted to biographical information regarding the official.
- c. The public official's name and likeness may appear on the agency's social media so long as it is reasonable, incidental, appropriate, and has a primary purpose to promote the agency's mission and services rather than to promote the public official.

9.2. In such situations in which the name or likeness is authorized, it shall not be overemphasized or otherwise used as a means to promote the public official.

9.3. These restrictions shall not apply to a public official's or employee's personal or campaign social media accounts.

9.4. Public officials and employees are cautioned against using public resources to manage or post to personal or campaign social media as it may violate the prohibition of use of public office for private gain under the Ethics Act.

9.5. An agency's website or social media may not provide links or reference to a public official's or public employee's personal or campaign social media or website.

§ 158-21-10. Use of public resources to display/distribute

10.1. Unless otherwise permitted in this rule or W.Va. Code § 6B-2-5c, public officials and employees may not use public resources to display or distribute trinkets, educational material or advertising with their name or likeness.

10.1.1. This prohibition includes trinkets, educational material or advertising paid for with non-public funds, personal funds, third-party funds, campaign funds, and those that have been provided through an in-kind gift to the public agency or official.

10.1.2. The prohibition against using public resources includes offices, counters, vehicles, and other public spaces maintained or controlled by the public official's or employee's agency.

§ 158-21-11. Exceptions to Use of Name or Likeness

11.1. Public officials are not prohibited 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.

11.1.1. Other official documents used in the normal course of duties for the agency may include the public official's name, including but not limited to, facsimile cover sheets, press release headers, office signage, and envelopes.

11.1.1.1. Banners and table skirts are deemed advertising and may not include the public official's name or likeness.

11.1.1.2. If such official documents are reproduced for distribution or dissemination to the public as educational material, the items are subject to the prohibitions contained in § 8 of this rule.

11.1.1.3. Nothing shall 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.

11.1.2. If used, the public official's name and likeness shall not be overemphasized, used as a means to promote the public official, or violate other provisions of the Ethics Act, including specifically use of public office for private gain.

11.2. When appropriate and reasonable, the West Virginia Division of Tourism may use a public official's name and likeness on material use for tourism promotion.

11.2.1. If used, the public official's name and likeness shall not be overemphasized, used as a means to promote the public official, or violate other provisions of the Ethics Act, including specifically use of public office for private gain.

11.3. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply to any person who is employed as a member of the faculty or staff, including administration, of a public institution of higher education and who is engaged in teaching, research, consulting or publication activities in his or her field of expertise with public or private entities and thereby derives private benefits from such activities when the activity is approved as a part of an employment contract with the governing board of the institution or has been approved by the employee's department supervisor or the president of the institution by which the faculty or staff member is employed.

11.4. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply to a public official's campaign-related expenditures or materials.

11.5. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply to items paid for with the public official's personal money.

11.6. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply to items or materials required by law to contain the public official's name or likeness.

§158-21-12. Existing Items as of the Effective Date

12.1. If a public official, public employee, or public agency possesses items or materials in contravention of this rule or W.Va. Code § 6B-2-5c that were purchased prior to the effective date of the statute (May 28, 2015), the public official, public employee or public agency may not continue to distribute, disseminate, communicate or display publicly these items or materials.

12.1.1. The materials may be used publicly if the public official's name or likeness are permanently removed or covered (e.g. stickers across the names, names marked out, etc.).

12.1.2. The public agency may utilize such items or material for internal use (e.g. pencils, pens) so long as they are not publicly distributed, disseminated, communicated or displayed.

12.1.3. When appropriate and in compliance with law, a public agency may donate such items to surplus, charity, or an organization serving the poor and needy.

12.2. If, as of May 28, 2015, a public official's name or likeness on an item or material is unable to be removed easily or at a de minimis expense to the public official's agency, the public official may seek a written exemption from the West Virginia Ethics Commission for allowance of such name or likeness.

12.2.1. Any exemption request must be publicly presented and considered by the Ethics Commission."

Statement of Reason

The Committee amendment strikes the proposed rule in its entirety and rewrites it to include definitions, specific prohibitions, specific exceptions, and use of material after the effective date of the statute. The amendment additionally captures and includes aspects of advisory opinions issued by the Ethics Commission following the filing of its proposed rule.