

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 210

BY SENATOR MAYNARD

[Introduced January 13, 2016; Referred to the
Committee on the Judiciary.]

1 A BILL to amend and reenact article 2, chapter 64 of the Code of West Virginia, 1931, as
2 amended, relating to authorizing the Ethics Commission to promulgate a legislative rule
3 relating to the public use of names or likenesses.

Be it enacted by the Legislature of West Virginia:

1 That article 2, chapter 64 of the Code of West Virginia, 1931, as amended, be amended
2 and reenacted to read as follows:

**ARTICLE 2. AUTHORIZATION FOR DEPARTMENT OF ADMINISTRATION TO
PROMULGATE LEGISLATIVE RULES.**

§64-2-1. Ethics Commission .

1 The legislative rule filed in the State Register on June 30, 2015, authorized under the
2 authority of section five-c, article two, chapter six-b, of this code, relating to the Ethics Commission
3 (public use of names or likenesses, 158 CSR 21), is authorized with the amendment set forth
4 below:

5 On page one, following section one, by striking out the remainder of the proposed
6 rule, and inserting in lieu thereof the following:

7 “§158-21-2. Definitions.

8 2.1. “Advertising” means publishing, distributing, disseminating, communicating or
9 displaying information to the general public through audio, visual, or other media tools.
10 This includes, but is not limited to, billboard, radio, television, mail, electronic mail,
11 publications, banners, table skirts, magazines, social media, websites, and other forms
12 of publication, dissemination, display or communication.

13 2.2. “Agent” means any volunteer or employee, contractual or permanent, serving
14 at the discretion of a public official or public employee.

15 2.3. “Educational materials” means publications, guides, calendars, handouts,

16 pamphlets, reports or booklets intended to provide information about the public official or
17 governmental office. This includes information or details about the office, services the
18 office provides to the public, updates on laws and services, and other informational items
19 that are intended to educate the public.

20 2.4. "Entertainment activities" means a gala, party, dance, reception, event or
21 celebration whose primary purpose is social interaction, a performance, or a non-
22 governmental function.

23 2.5. "Instructional material" means written instructions explaining or detailing steps
24 for completion of a governmental agency document or form.

25 2.6. "Likeness" means a photograph, drawing, or other attempted depiction of an
26 individual.

27 2.7. "Mass media communication" means communication through audio, visual, or
28 other media tools (including U.S. mail, electronic mail, and social media) intended for
29 general dissemination to the public. Examples include mass mailing by U.S. mail, list-
30 serve emails, and streaming clips on websites.

31 2.7.1. This term does not include regular responses to constituent requests or
32 questions during the normal course of business.

33 2.7.2. This term does not include communications that are authorized or required
34 by law to be publicly disseminated (e.g. legal notices).

35 2.8. "Public employee" means any full-time or part-time employee of any state,
36 county or municipal governmental body, and their respective boards, agencies,
37 departments and commissions, or in any other regional or local governmental agency.

38 2.9. "Public official" means any person who is elected or appointed to any state,

39 county or municipal office or position, including boards, agencies, departments and
40 commissions, or in any other regional or local governmental agency.

41 2.10. "Public payroll" means payment of public monies as a wage or salary from
42 any state, county or municipal governmental body, or any other regional or local
43 governmental agency, whether accepted or not.

44 2.11. "Social media" means forms of electronic communication through which
45 users create online communities to share information, ideas, personal messages, and
46 other content.

47 2.11.1. This term includes web and mobile-based technologies which are
48 used to turn communication to interactive dialogue among organizations, communities,
49 and individuals. Examples are: Facebook, MySpace, Twitter, YouTube, etc.

50 2.12. "Trinkets" means items of tangible personal property that are not vital or
51 necessary to the duties of the public official's or public employee's office, including, but
52 not limited to, the following: magnets, mugs, cups, key chains, pill holders, band-aid
53 dispensers, fans, nail files, matches and bags.

54 §158-21-3. Persons subject to W.Va. Code § 6B-2-5c.

55 3.1. These provisions shall apply to all elected and appointed public officials and
56 public employees, their agents, and any other person on public payroll.

57 § 158-21-4. Placement on publicly-owned vehicles

58 4.1. A public official's name or likeness may not be placed on any publicly-owned
59 vehicle.

60 4.2. If, as of May 28, 2015, a public official's name or likeness is unable to be
61 removed easily from the vehicle, or at a de minimis expense to the public official's agency,

62 the public official may seek a written exemption from the West Virginia Ethics Commission
63 for allowance of such name or likeness to remain on the vehicle.

64 4.2.1. Any exemption request must be publicly presented and considered
65 by the Ethics Commission.

66 4.2.2. Any exemption for a permanently affixed name or likeness shall
67 terminate upon the replacement of the vehicle or when there is a substantial repair or
68 alteration of the vehicle.

69 4.2.3. During the duration of such exemption, the marked vehicle may not
70 be utilized in parades, public appearances, or placed on public display during such public
71 appearance or parade. In addition, the Ethics Commission may require additional
72 conditions as part of an exemption in order to limit promotion of the public official,
73 including limiting use or placement of the vehicle.

74 § 158-21-5. Placement on Trinkets.

75 5.1. A public official's name or likeness may not be placed on any trinkets paid for
76 with public funds.

77 5.2. When appropriate and reasonable, public officials are permitted to expend a
78 minimal amount of public funds for the purchase of pens, pencils or other markers to be
79 used during ceremonial signings.

80 § 158-21-6. Advertising.

81 6.1. A public official's name or likeness may not be placed on any advertising,
82 mass media communication, or non-emergency public service announcement that is paid
83 for with public funds.

84 6.1.2. When necessary, reasonable, and appropriate to relay specific public

85 safety, health or emergency information, a public official's name and likeness may be
86 used in a mass media communication or other public announcement.

87 6.1.3. A public official's name and likeness may appear on an agency's
88 social media and websites provided it complies with section § 9 of this rule.

89 6.1.4. Dissemination of office press releases or agency information via email,
90 social media or other public media tools for official purposes is not considered advertising
91 or prohibited under this rule, so long as it is intended for (a) a legitimate news or
92 informational purpose, (b) is not intended as a means of promotion of the public official,
93 and (c) is not being used as educational material. See §§ 8 and 11.1 of this rule.

94 6.2. If public funds are not used, use of the public official's name or likeness on
95 advertising, media communication, or non-emergency public service announcement may
96 still be prohibited and/or subject to other prohibitions of ethics act, including but not limited
97 to use of public office for private gain, and endorsement. Under such a situation, written
98 guidance should first be obtained from the Executive Director or the Ethics Commission
99 prior to allowing or authorizing a public official's name or likeness on the advertising,
100 media communication, or non-emergency public service announcement.

101 § 158-21-7. Entertainment Activities.

102 7.1. A public official, or his/her agent, may not use public funds or public employees
103 for entertainment activities within forty-five days of a primary, general or special election
104 in which he or she is a candidate.

105 7.1.1. This prohibition shall not apply to public employees performing security
106 services, including, but not limited to, law enforcement, division of public safety personnel,
107 or part-time security.

108 7.1.2. As used in this rule and W.Va. Code § 6B-2-5c(a)(4), the phrase “within
109 forty-five days” means forty-five days prior to the day designated for a primary, general or
110 special election.

111 7.2. Outside of the forty-five day period, public officials and public employees are
112 still subject to the Ethics Commission rules governing use of public funds for employee
113 retirement and recognition events, as well as the prohibition against use of public office
114 for private gain.

115 7.2.1. Nothing shall be inferred or construed to infer that the expenditure of public
116 funds for entertainment activities outside of the forty-five day period is otherwise permitted
117 under the Ethics Act or this rule.

118 § 158-21-8. Educational Materials.

119 8.1. A public official’s name or likeness may not be placed on any educational
120 material that is paid for with public funds.

121 8.1.1. This prohibition shall not apply to the submission of a report required to be
122 issued by law.

123 8.2. If public funds are not used, use of the public official’s name or likeness on
124 educational materials may still be prohibited and/or subject to other prohibitions of ethics
125 act, including but not limited to use of public office for private gain. Under such a situation,
126 written guidance should first be obtained from the Ethics Commission or its Executive
127 Director prior to allowing or authorizing a public official’s name or likeness on educational
128 materials.

129 § 158-21-9. Public Agency Social Media; Website

130 9.1. A public official’s name and likeness may appear on a public agency’s

131 website and social media subject to the following restrictions:

132 a. The public official's name may appear throughout the website so long as it
133 is reasonable, incidental, appropriate, and has a primary purpose to promote the agency's
134 mission and services rather than to promote the public official.

135 b. The public official's likeness may only appear on the agency's website home
136 page and on any pages or sections devoted to biographical information regarding the
137 official.

138 c. The public official's name and likeness may appear on the agency's social
139 media so long as it is reasonable, incidental, appropriate, and has a primary purpose to
140 promote the agency's mission and services rather than to promote the public official.

141 9.2. In such situations in which the name or likeness is authorized, it shall not be
142 overemphasized or otherwise used as a means to promote the public official.

143 9.3. These restrictions shall not apply to a public official's or employee's personal
144 or campaign social media accounts.

145 9.4 Public officials and employees are cautioned against using public resources
146 to manage or post to personal or campaign social media as it may violate the prohibition
147 of use of public office for private gain under the Ethics Act.

148 9.5. An agency's website or social media may not provide links or reference to a
149 public official's or public employee's personal or campaign social media or website.

150 § 158-21-10. Use of public resources to display/distribute

151 10.1. Unless otherwise permitted in this rule or W.Va. Code § 6B-2-5c, public
152 officials and employees may not use public resources to display or distribute trinkets,
153 educational material or advertising with their name or likeness.

154 10.1.1. This prohibition includes trinkets, educational material or advertising paid
155 for with non-public funds, personal funds, third-party funds, campaign funds, and those
156 that have been provided through an in-kind gift to the public agency or official.

157 10.1.2. The prohibition against using public resources includes offices, counters,
158 vehicles, and other public spaces maintained or controlled by the public official's or
159 employee's agency.

160 § 158-21-11. Exceptions to Use of Name or Likeness

161 11.1. Public officials are not prohibited from using their names or likenesses on
162 any official record or report, letterhead, document or certificate, or instructional material
163 issued in the course of their duties as public officials.

164 11.1.1. Other official documents used in the normal course of duties for the
165 agency may include the public official's name, including but not limited to, facsimile cover
166 sheets, press release headers, office signage, and envelopes.

167 11.1.1.1. Banners and table skirts are deemed advertising and may
168 not include the public official's name or likeness.

169 11.1.1.2. If such official documents are reproduced for distribution or
170 dissemination to the public as educational material, the items are subject to the
171 prohibitions contained in § 8 of this rule.

172 11.1.1.3. Nothing shall be interpreted as prohibiting public officials
173 from using public funds to communicate with constituents in the normal course of their
174 duties as public officials so long as such communications do not include any reference to
175 voting in favor of the public official in an election.

176 11.1.2. If used, the public official's name and likeness shall not be

177 overemphasized, used as a means to promote the public official, or violate other
178 provisions of the Ethics Act, including specifically use of public office for private gain.

179 11.2. When appropriate and reasonable, the West Virginia Division of Tourism may
180 use a public official's name and likeness on material use for tourism promotion.

181 11.2.1. If used, the public official's name and likeness shall not be
182 overemphasized, used as a means to promote the public official, or violate other
183 provisions of the Ethics Act, including specifically use of public office for private gain.

184 11.3. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
185 to any person who is employed as a member of the faculty or staff, including
186 administration, of a public institution of higher education and who is engaged in teaching,
187 research, consulting or publication activities in his or her field of expertise with public or
188 private entities and thereby derives private benefits from such activities when the activity
189 is approved as a part of an employment contract with the governing board of the institution
190 or has been approved by the employee's department supervisor or the president of the
191 institution by which the faculty or staff member is employed.

192 11.4. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
193 to a public official's campaign-related expenditures or materials.

194 11.5. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
195 to items paid for with the public official's personal money.

196 11.6. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
197 to items or materials required by law to contain the public official's name or likeness.

198 §158-21-12. Existing Items as of the Effective Date

199 12.1. If a public official, public employee, or public agency possesses items or

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

204 12.1.1. The materials may be used publicly if the public official's name or
205 likeness are permanently removed or covered (e.g. stickers across the names, names
206 marked out, etc.).

207 12.1.2. The public agency may utilize such items or material for internal use
208 (e.g. pencils, pens) so long as they are not publicly distributed, disseminated,
209 communicated or displayed.

210 12.1.3. When appropriate and in compliance with law, a public agency may
211 donate such items to surplus, charity, or an organization serving the poor and needy.

212 12.2. If, as of May 28, 2015, a public official's name or likeness on an item or
213 material is unable to be removed easily or at a de minimis expense to the public official's
214 agency, the public official may seek a written exemption from the West Virginia Ethics
215 Commission for allowance of such name or likeness.

216 12.2.1. Any exemption request must be publicly presented and considered by the
217 Ethics Commission."

NOTE: The purpose of this bill is to authorize the Ethics Commission to promulgate a legislative rule relating to the Public Use of Names or Likenesses.

This section is new; therefore, strike-throughs and underscoring have been omitted.