

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4143

BY DELEGATES SOBONYA, FRICH AND MOFFATT

[Introduced January 18, 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:

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

§64-2-1. Ethics Commission .

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

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

11 “§158-21-2. Definitions.

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

17 2.2. “Agent” means any volunteer or employee, contractual or permanent, serving
18 at the discretion of a public official or public employee.

19 2.3. “Educational materials” means publications, guides, calendars, handouts,

20 pamphlets, reports or booklets intended to provide information about the public official or
21 governmental office. This includes information or details about the office, services the
22 office provides to the public, updates on laws and services, and other informational items
23 that are intended to educate the public.

24 2.4. "Entertainment activities" means a gala, party, dance, reception, event or
25 celebration whose primary purpose is social interaction, a performance, or a non-
26 governmental function.

27 2.5. "Instructional material" means written instructions explaining or detailing steps
28 for completion of a governmental agency document or form.

29 2.6. "Likeness" means a photograph, drawing, or other attempted depiction of an
30 individual.

31 2.7. "Mass media communication" means communication through audio, visual, or
32 other media tools (including U.S. mail, electronic mail, and social media) intended for
33 general dissemination to the public. Examples include mass mailing by U.S. mail, list-
34 serve emails, and streaming clips on websites.

35 2.7.1. This term does not include regular responses to constituent requests or
36 questions during the normal course of business.

37 2.7.2. This term does not include communications that are authorized or required
38 by law to be publicly disseminated (e.g. legal notices).

39 2.8. "Public employee" means any full-time or part-time employee of any state,
40 county or municipal governmental body, and their respective boards, agencies,
41 departments and commissions, or in any other regional or local governmental agency.

42 2.9. "Public official" means any person who is elected or appointed to any state,

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

45 2.10. "Public payroll" means payment of public monies as a wage or salary from
46 any state, county or municipal governmental body, or any other regional or local
47 governmental agency, whether accepted or not.

48 2.11. "Social media" means forms of electronic communication through which
49 users create online communities to share information, ideas, personal messages, and
50 other content.

51 2.11.1. This term includes web and mobile-based technologies which are
52 used to turn communication to interactive dialogue among organizations, communities,
53 and individuals. Examples are: Facebook, MySpace, Twitter, YouTube, etc.

54 2.12. "Trinkets" means items of tangible personal property that are not vital or
55 necessary to the duties of the public official's or public employee's office, including, but
56 not limited to, the following: magnets, mugs, cups, key chains, pill holders, band-aid
57 dispensers, fans, nail files, matches and bags.

58 §158-21-3. Persons subject to W.Va. Code § 6B-2-5c.

59 3.1. These provisions shall apply to all elected and appointed public officials and
60 public employees, their agents, and any other person on public payroll.

61 § 158-21-4. Placement on publicly-owned vehicles

62 4.1. A public official's name or likeness may not be placed on any publicly-owned
63 vehicle.

64 4.2. If, as of May 28, 2015, a public official's name or likeness is unable to be
65 removed easily from the vehicle, or at a de minimis expense to the public official's agency,

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

68 4.2.1. Any exemption request must be publicly presented and considered
69 by the Ethics Commission.

70 4.2.2. Any exemption for a permanently affixed name or likeness shall
71 terminate upon the replacement of the vehicle or when there is a substantial repair or
72 alteration of the vehicle.

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

78 § 158-21-5. Placement on Trinkets.

79 5.1. A public official's name or likeness may not be placed on any trinkets paid for
80 with public funds.

81 5.2. When appropriate and reasonable, public officials are permitted to expend a
82 minimal amount of public funds for the purchase of pens, pencils or other markers to be
83 used during ceremonial signings.

84 § 158-21-6. Advertising.

85 6.1. A public official's name or likeness may not be placed on any advertising,
86 mass media communication, or non-emergency public service announcement that is paid
87 for with public funds.

88 6.1.2. When necessary, reasonable, and appropriate to relay specific public

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

91 6.1.3. A public official's name and likeness may appear on an agency's
92 social media and websites provided it complies with section § 9 of this rule.

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

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

105 § 158-21-7. Entertainment Activities.

106 7.1. A public official, or his/her agent, may not use public funds or public employees
107 for entertainment activities within forty-five days of a primary, general or special election
108 in which he or she is a candidate.

109 7.1.1. This prohibition shall not apply to public employees performing security
110 services, including, but not limited to, law enforcement, division of public safety personnel,
111 or part-time security.

112 7.1.2. As used in this rule and W.Va. Code § 6B-2-5c(a)(4), the phrase “within
113 forty-five days” means forty-five days prior to the day designated for a primary, general or
114 special election.

115 7.2. Outside of the forty-five day period, public officials and public employees are
116 still subject to the Ethics Commission rules governing use of public funds for employee
117 retirement and recognition events, as well as the prohibition against use of public office
118 for private gain.

119 7.2.1. Nothing shall be inferred or construed to infer that the expenditure of public
120 funds for entertainment activities outside of the forty-five day period is otherwise permitted
121 under the Ethics Act or this rule.

122 § 158-21-8. Educational Materials.

123 8.1. A public official’s name or likeness may not be placed on any educational
124 material that is paid for with public funds.

125 8.1.1. This prohibition shall not apply to the submission of a report required to be
126 issued by law.

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

133 § 158-21-9. Public Agency Social Media; Website

134 9.1. A public official’s name and likeness may appear on a public agency’s

135 website and social media subject to the following restrictions:

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

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

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

145 9.2. In such situations in which the name or likeness is authorized, it shall not be
146 overemphasized or otherwise used as a means to promote the public official.

147 9.3. These restrictions shall not apply to a public official's or employee's personal
148 or campaign social media accounts.

149 9.4 Public officials and employees are cautioned against using public resources
150 to manage or post to personal or campaign social media as it may violate the prohibition
151 of use of public office for private gain under the Ethics Act.

152 9.5. An agency's website or social media may not provide links or reference to a
153 public official's or public employee's personal or campaign social media or website.

154 § 158-21-10. Use of public resources to display/distribute

155 10.1. Unless otherwise permitted in this rule or W.Va. Code § 6B-2-5c, public
156 officials and employees may not use public resources to display or distribute trinkets,
157 educational material or advertising with their name or likeness.

158 10.1.1. This prohibition includes trinkets, educational material or advertising paid
159 for with non-public funds, personal funds, third-party funds, campaign funds, and those
160 that have been provided through an in-kind gift to the public agency or official.

161 10.1.2. The prohibition against using public resources includes offices, counters,
162 vehicles, and other public spaces maintained or controlled by the public official's or
163 employee's agency.

164 § 158-21-11. Exceptions to Use of Name or Likeness

165 11.1. Public officials are not prohibited from using their names or likenesses on
166 any official record or report, letterhead, document or certificate, or instructional material
167 issued in the course of their duties as public officials.

168 11.1.1. Other official documents used in the normal course of duties for the
169 agency may include the public official's name, including but not limited to, facsimile cover
170 sheets, press release headers, office signage, and envelopes.

171 11.1.1.1. Banners and table skirts are deemed advertising and may
172 not include the public official's name or likeness.

173 11.1.1.2. If such official documents are reproduced for distribution or
174 dissemination to the public as educational material, the items are subject to the
175 prohibitions contained in § 8 of this rule.

176 11.1.1.3. Nothing shall be interpreted as prohibiting public officials
177 from using public funds to communicate with constituents in the normal course of their
178 duties as public officials so long as such communications do not include any reference to
179 voting in favor of the public official in an election.

180 11.1.2. If used, the public official's name and likeness shall not be

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

183 11.2. When appropriate and reasonable, the West Virginia Division of Tourism may
184 use a public official's name and likeness on material use for tourism promotion.

185 11.2.1. If used, the public official's name and likeness shall not be
186 overemphasized, used as a means to promote the public official, or violate other
187 provisions of the Ethics Act, including specifically use of public office for private gain.

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

196 11.4. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
197 to a public official's campaign-related expenditures or materials.

198 11.5. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
199 to items paid for with the public official's personal money.

200 11.6. The prohibitions contained in this rule or W.Va. Code § 6B-2-5c do not apply
201 to items or materials required by law to contain the public official's name or likeness.

202 §158-21-12. Existing Items as of the Effective Date

203 12.1. If a public official, public employee, or public agency possesses items or

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

208 12.1.1. The materials may be used publicly if the public official's name or
209 likeness are permanently removed or covered (e.g. stickers across the names, names
210 marked out, etc.).

211 12.1.2. The public agency may utilize such items or material for internal use
212 (e.g. pencils, pens) so long as they are not publicly distributed, disseminated,
213 communicated or displayed.

214 12.1.3. When appropriate and in compliance with law, a public agency may
215 donate such items to surplus, charity, or an organization serving the poor and needy.

216 12.2. If, as of May 28, 2015, a public official's name or likeness on an item or
217 material is unable to be removed easily or at a de minimis expense to the public official's
218 agency, the public official may seek a written exemption from the West Virginia Ethics
219 Commission for allowance of such name or likeness.

220 12.2.1. Any exemption request must be publicly presented and considered by the
221 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.