ADVISORY OPINION 2015-20

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks whether his office letterhead, envelopes, business cards, Personal Property Forms, door hangers, calendars and website paid for with public funds are in compliance with the "trinkets" (name and likeness) provision of the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester provided samples of his office letterhead, envelopes, self-addressed return envelopes and business cards that display his name, title and the Assessor's office contact information. The Requester also asks whether business cards for himself and for his Chief Deputy, which differ from one another, comply with the Act.

The Assessor's Office's field representatives use "door hangers" to inform occupants that staff had been there in their absence to review the property. The door hanger requests property owners to correct any erroneous information set forth on a Property Record Information/Update form. These door hangers do not contain the Requestor's name or likeness. The Requester also submitted for review a form letter which acknowledges receipt of a homeowner's completed door hanger. The form simply contains the Requester's name as the sender of the letter.

The Requester also submitted for review a blank Personal Property Return which property owners must complete. The form, which appears to be a tri-fold brochure, directs those completing the form to return it to the Requester. The Requester's name, title and address appear on the back of the form/brochure.

The Requester asks whether an office may place calendars on the counter for the public to take, and also whether calendars may be distributed at events or at other sites. The calendars would contain dates relevant to the Assessor's Office but would not contain the name or photo of an elected official.

Finally, the Requester's official website was reviewed for this Opinion. It contains only one small photograph of the Requester and his name on the site's home page.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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. *(emphasis added)*

W.Va. Code§ 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:

(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. *(emphasis added)*

(b)(2) "Trinket" means items of tangible personal property that are not vital or necessary to the duties of the public official's or pubic 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.

(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. *(emphasis added)*

(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:

> 3.1 Incidental use of public resources for personal or business gain resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.

> 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 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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The prohibition in the Ethics Act against public officials using their names and likenesses on publicly-owned vehicles, on trinkets and for purposes of advertising does not prohibit public officials from using their names on official letterhead or other official documents. As set forth in the "name and likeness" section of the Act:

> 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.

W.Va. Code§ 6B-2-5c(c).

The letterhead, business cards, door hangers, form letters and Personal Property Returns are clearly not vehicles or trinkets, so the only provision of the "trinkets" portion of the Ethics Act which could potentially apply is if these items are construed to be advertising.

Public funds may not be used to distribute, disseminate, publish or display advertising, which includes, but is 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. W.Va. Code § 6B-2-5c(a)(3). "Advertising" is defined in the Emergency Legislative Rules 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." 158 C.S.R. 21-4.1.

The Requester also asks whether calendars not containing a public official's name (or presumably likeness) comply with the Ethics Act. **The "trinkets" or name and likeness provision of the Act simply does not apply to calendars which do not contain an official's name or likeness.**

The Assessor's Office's website contains only one small picture of the Requester adjacent to his name and title on the website's home page. Use of the name and photo are allowable pursuant to Advisory Opinion 2015-11, which held that, "The Ethics Commission concludes that public officials' websites may include the official's photograph on their home pages or on sections or pages devoted to biographical information regarding the official."

The Ethics Commission concludes that the Requester's letterhead, envelopes, business cards, Personal Property Form, door hangers, form letter and website do not have "the primary intent or effect of promoting a public official" and are therefore not "advertising" pursuant to W.Va. Code § 68-2-5c(a)(3) and 158 C.S.R. 21.4.1. These materials are used by the Requester in the performance of the usual and customary duties associated with his office or position and are accordingly permissible under the Ethics Act. W.Va. Code§§ 68-2-5(b)(1), 68-2-Sc(c) and (d).

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.*

/s/ Robert J. Wolfe, Chairperson
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