ADVISORY OPINION 2015-23

Issued on December 3, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected State Official** asks whether it is permissible to host telephonic town hall meetings and to use his name in pre-recorded messages left in conjunction with these meetings.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an Elected State Official whose statutory duties include enforcing consumer protection laws, educating consumers on their rights and duties, and establishing educational programs for consumers on credit and leasing problems.

In furtherance of these statutory duties, the Requester regularly hosts and participates in live town hall meetings. The Requester's office uses public funds and resources to host these meetings.

He states that the purpose of these town hall meetings is to educate consumers and raise awareness concerning various scams. The Requester submits that "[t]hese town hall meetings also serve as a forum for West Virginia residents to voice their questions and raise their own concerns."

The Requester states he has, in the past, also hosted town hall meetings via automated telephone calls which contain recorded messages. Before resuming these telephonic meetings, he seeks to determine whether the meetings, and the use of his name in conjunction with the meetings, complies with the Ethics Act in light of changes made to the Act during the 2015 Legislative Session.

According to the Requester, his office conducts the telephonic town hall meetings as follows. A vendor provides the office telephone numbers for households by geographical area.[1] The Requester states they do not and will not request lists based on any qualifiers such as political party affiliation or whether a member of the household is a registered voter. The Requester's office selects the vendor in accordance with applicable purchasing rules.

[1] The office is provided numbers for landlines, not cellular telephones.

Households are invited to participate in the town hall meetings by geographical area. The Requester states that the only circumstance the office would foresee which would cause them to vary from this practice would be if the office identifies a scam which is being directed to a particular demographic such as senior citizens.

To initiate the meetings the Requester's office contacts citizens via an automated telephone call. If they answer their phone, they hear a pre-recorded message from the Requester's office. The message identifies the Requester by name (and title) and invites the citizens to stay on the line if they wish to participate in the town hall meeting or to submit questions.

The message states that if the citizens prefer to not receive these calls in the future, they may opt out by pressing 9 and they will be placed on the office's "Do Not Call List." If they elect to participate in the telephonic meeting, they stay on the line. After the meeting, the Requester offers participants the opportunity to submit questions.

If a citizen does not answer the phone call, he or she receives an automated voice message which identifies the Requester by name (and title) and states that he has called to invite them to participate in a live telephone town hall meeting to discuss consumer protection issues. The message generally states that he is sorry he missed them and, if they have any questions, they may contact his office. The message ends with the Requester again stating his name and thanking the person for his or her time.

The recorded message script generally stays the same for each telephonic town hall meeting. One exception is if there is a live town hall scheduled in a particular county, the message may also notify the citizen of the upcoming meeting in his or her county.

The Requester states that there is no follow-up with the participants unless the participant specifically poses a question during or after the town hall meeting. In those instances, the Requester's office will follow-up with that individual by letter, phone or electronic mail.

The Requester represents "[t]he content of these meetings are 'neutral.'" He further states they "serve no political purpose." Nevertheless, out of an abundance of caution, the Requester states unless otherwise directed by the Commission he will not hold the telephonic town hall meetings in the "60 days immediately preceding a primary, general or special election."

The Requester states that "[a]side from the method of communication (in person compared to telephonically), there are no distinguishing characteristics between town hall meetings hosted telephonically as opposed to those hosted at a live venue." He further asserts these meetings are an easier and cost effective means of connecting with citizens across the state.

In regard to the use of his name in the automated messages, the Requester submits that "[w]e believe it is critical to state my name and title, as well as the purpose of my communication, to a potential telephonic hall participant so that the consumer will be assured that the event is credible and that the information being relayed is reliable. No one wants to speak to a person on the phone who will not identify themselves." The Requester submits that the recorded messages do not place an unnecessary emphasis on his name or title.

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 in relevant part:

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

(2) Place the public official's name or likeness on trinkets paid for by public funds;

(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.

(b) For purposes of this section:

(2) "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.

(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.

(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.

The emergency Legislative Rule promulgated by the Ethics Commission, 158 CSR 21-1 *et. seq.,* reads in relevant part:

> 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)*

ADVISORY OPINION

Based upon the plain language of W.Va. Code§ 6B-2-5c, the Emergency Legislative Rule and prior Advisory Opinions interpreting these provisions, the Ethics Commission finds that the telephonic town hall meetings are permissible; however, the use of the Requester's name in the recorded messages is not.

The Commission takes notice that, historically, elected state officials have held town hall meetings for purposes of communicating with constituents. With advances in technology, it is now possible to conduct similar meetings telephonically or via the Internet. Conducting meetings with this technology is one means which public officials

may use to communicate with citizens on matters which fall within the jurisdiction of the public official's office. Here, the statutory duties of the Requester include a duty to educate consumers on the laws intended to protect them.

In Advisory Opinion 2015-11, the Commission held it was permissible for an elected state official to appear in television shows and YouTube videos. *See also* Advisory Opinion 2015-13. The Commission held in relevant part "[t]he Requester's appearance in television shows, YouTube videos and other such presentations arguably assists the Requester in communicating with the public regarding the services which the Requester's office provides." !fl at 5. The Commission found that these activities complied with the Ethics Act and it relied upon the statute, including the provision which expressly states, "[t]his 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 ... "W.Va. Code§ 6B-2-5c(d). [2]

Similarly, in the instant situation the Commission finds that town hall meetings, whether conducted in-person or by telephone, are permissible so long as the purpose of these meetings is to provide information to citizens about the laws administered by the public official's office. The Commission finds that the telephonic town hall meetings described by the Requester constitute a communication authorized by the plain language in the statute, which authorizes communications "with constituents in the normal course of their duties as public officials ..." W.Va. Code§ 6B-2-5c(d). Further, attending informational or educational meetings with citizens, either in-person or via telephone, constitutes "[t]he performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services ... " as authorized by W.Va. Code§ 6B-2-5(b).

The Commission finds there is nothing in the Ethics Act, W.Va. Code§ 6B-2-5c, which prohibits telephonic town hall meetings. Nevertheless, to ensure they are not used by a public official for the overriding purpose of promoting his or her re-election, the Commission holds they may not be held during the 60 days immediately before a primary, special or general election. This conclusion is consistent with the spirit and intent of the Commission's holding in Advisory Opinion No. 2014-20, where it held state legislators may not mail certain letters to their constituents "during the sixty days immediately before a primary or general election... " This conclusion is further in accordance with the Requester's representation that out of an abundance of caution he will not hold these meetings close to "election season."

The Commission also must consider whether the Requester's use of his name in the **recorded messages** *(emphasis added)* complies with the Ethics Act. The Commission finds that the use of the name of a public official in an automated voice message

[2] The Commission further finds that the telephonic town hall meetings do not constitute prohibited advertising as the meetings constitute the permissible "[d]issemination of ... official information via e-mail, social media or other public media tools for official purposes ... " 158 CSR 21-4.1 (Emergency Rule).

offering citizens the opportunity to participate in a town hall meeting constitutes prohibited advertising for purposes of W.Va. Code§ 6B-2-5c(a)(3). The basis for this conclusion is that this message is not an integral part of the educational/informational meeting itself. The Commission finds it is not intended for legitimate informational purposes as contemplated by the statute.

As such, public officials may **not** use their names in this type of recorded message. The messages may identify the state office hosting the event and may further identify by title, but not by name, the state official or employee who will be making the presentation.

Once the meeting commences, the Requester may identify himself by name in his opening and closing remarks. The Commission finds that when a public official introduces him or herself during a live telephone town hall meeting, it constitutes "the performance of usual and customary duties associated with the office or position" as authorized by W.Va. Code§§ 6B-2-5(b) and 6B-2-5c(d). Further, it is normal and customary for persons to identify themselves when they are a speaker at an event.

In conclusion, the Requester may conduct telephonic town hall meetings. The Requester's name may not be used in the recorded messages. Further, the Requester may not conduct telephonic town hall meetings in the 60 days immediately before a primary, special or general election. These limitations do not apply to telephonic town halls conducted by the Requester with campaign funds expended and reported in accordance with applicable election laws; however, the Requester may not use public funds or resources for campaign-related activities.

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 § 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W Va. Code § 68-2-2, 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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