Advisory Opinion 2016-11

Issued on August 4, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A State Legislator asks whether he may purchase business cards with private funds that replicate his State-issued business card on one side and display his re-election campaign information on the other.

FACTS RELIED UPON BY THE COMMISSION

The Requester wishes to purchase business cards with private funds that feature both the contact information of his legislative office as well as information regarding his re-election campaign. He provided a sample of the proposed business card to the Ethics Commission.

One side of the card would set forth contact information for his state legislative office. This side of the card would be identical to the business card provided to Requester by the State through the use of public funds. It would identify the legislative branch of which the Requester is a member and the legislative district in which he serves, and would include the State seal. This side also would provide the Requester's name, state email address, legislative address and phone number, as well as his personal address and cell phone number.

The other side of the card would feature the Requester's re-election campaign slogan and would identify him as a candidate for his legislative district. This side also would provide the Requester's campaign email address, website address, and personal cell phone number. The bottom of this side of the card would include a line stating that it has been paid for by the Requester.

Finally, the Requester states that purchasing the proposed two-sided cards would benefit him by not having to carry two business cards and would provide a cost savings to the State.

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.

W.Va. Code § 6B-2B-4 provides:

(d) The prohibitions contained in section two of this article do not apply to a public official's campaign-related expenditures or materials.

(e) The prohibitions contained in section two of this article do not apply to items paid for with the public official's personal money.

158 CSR 6-5.2 provides:

Improper Use - Public officials and public employees shall not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property.

ADVISORY OPINION

The Ethics Commission has held in two prior Advisory Opinions that a public official's business card, which is used in the usual and customary course of an official's public job duties, is permissible under the Ethics Act. Advisory Opinion 2015-19; Advisory Opinion 2015-20. In each of these Opinions, the public officials' business cards included the officials' names, titles and office contact information, and were paid for with public funds. *Id.* In determining that the cards were permissible, the Commission considered both the Ethics Act's prohibition on the use of a public official's office for private gain and the Ethics Act's provisions regarding the use of a public official's name or likeness. *Id.;* W.Va. Code §§ 6B-2-5(b)(1), 6B-2-5c(c) and (d) (2015).

In the instant situation, one side of the Requester's business cards would display the same contact information that the Commission has previously approved. However, the other side of the proposed business cards would contain the Requester's personal campaign information. In addition, public funds would not be used to purchase the proposed business cards.

Name or Likeness

The Ethics Commission will first consider the Ethics Act's limitations on a public official from using his or her name or likeness as they apply to Requester's proposed business cards. Subsequent to the issuance of the two Advisory Opinions cited above, the West Virginia Legislature enacted a new article in the Ethics Act pertaining to the use of a public official's name or likeness. W.Va. Code§§ 68-28-1 through 68-28-6. W.Va. Code§ 68-28-2 contains the limitations regarding the use of a public official's name or likeness on trinkets, advertising, vehicles, and educational materials. However, two provisions in the newly enacted article make the limitations in W.Va. Code § 68-28-2 inapplicable to Requester's proposed business cards. First, W.Va. Code §6B-2B-4(d) provides that "[t]he prohibitions contained in section two of this article do not apply to a public official's campaign-related expenditures or materials." Furthermore, W.Va. Code § 6B-2B-4(e) provides that "[t]he prohibitions contained in section two of this article do not apply to items paid for with the public official's personal money." **Given these two provisions, the limitations found in W.Va. Code § 6B-2B-2 do not apply to the Requester's campaign-related business cards purchased with his personal money.**

Private Gain

The Ethics Commission will now consider the Ethics Act's prohibition on the use of office for private gain as it applies to Requester's proposed business cards.

The Commission previously relied on W.Va. Code § 6B-2-5(b) to hold that "the office space, phones, stationary and *other items provided to the public employee* for use in the performance of his public responsibilities may not be used to subsidize an election campaign." Advisory Opinion 96-14 *(emphasis added).* In the instant situation, the Requester states that he will not be using the business cards provided to him by the State, but would instead purchase his own business cards that will provide contact information for both his legislative office and his campaign. While public funds would not be used to purchase the proposed cards, the Requester nonetheless would be using precisely the same design and format that is displayed on the business cards provided to him by the State on the side of the business card that provides Requester's legislative office contact information. This includes use of the State seal.

The Ethics Act does not prohibit the Requester from using his public title while campaigning. Advisory Opinion 95-34 Revised; Advisory Opinion 2012-15. The novel question presented here is whether replicating the design and format of the business card that was paid for with state funds constitutes a violation of the Ethics Act. The Ethics Commission is unaware of the amount of State resources used to create the design and format of the business card. However, the Commission nonetheless finds that the gain associated with re-creating the design and format of an official state business card is de minimis. **Accordingly, the Commission holds that using the design and format of the business card in this manner is an incidental use of public resources resulting in *de minimis* private gain.** *See* Advisory Opinion 95-34 Revised ("While a significant use of public resources to endorse a candidate would be a violation of the Ethics Act, the

use of secretarial assistance, letterhead stationery and office equipment to produce an occasional letter of endorsement would not be. Such limited use of resources is de minimis, and is not a material violation."). The Ethics Commission cannot opine whether the Requester's replication of his State-issued business card complies with the rules of the legislative branch in which he serves or any rules of the Office of the West Virginia Secretary of State or other entity regarding his personal use of the State seal.

Finally, the Commission will address whether the presence of campaign information on the other side of the Requester's business card violates the Ethics Act's prohibition on the use of office for private gain. The Ethics Act prohibits the Requester from using more than an incidental amount of public resources in furtherance of his own campaign. Advisory Opinion 96-14; W. Va. Code§ 6B-2-5(b). However, this prohibition does not include any political gain that may accrue to Requester through having his campaign information on the same card as his legislative contact information. See Advisory Opinion 95-34 Revised ("[A]lthough the official endorsement of an incumbent public official may have substantial 'political' value, such an endorsement does not create the type of private gain contemplated by the Act[.)"). Thus, the issue is whether providing campaign information on the same business card as Requester's legislative office contact information is such that the Requester is effectively authorizing the use of Requester's legislative contact information and office for campaign-related business. **The Commission finds that each side of Requester's proposed card is sufficiently separated as to leave little doubt that the information provided on one side of the card is to be used for campaign purposes, and the information on the other side is to be used for Requester's public duties as a legislator. However, the Commission concludes that Requester must state on both sides of his proposed business cards that the card is paid for by Requester.**

The Ethics Commission accordingly holds that the Requester may purchase the proposed business cards with private funds that feature the contact information of his state legislative office on one side and his campaign information on the other provided that both sides of Requester's proposed business cards state that they are paid for by Requester. The Commission cautions the Requester that the Ethics Act prohibits any use of state resources, including his state telephone and email address, in furtherance of his personal re-election campaign.

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 Ethics 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 through 6B-3-11 and does not purport to interpret other laws or rules. In accordance with W Va. Code§ 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ Robert J. Wolfe, Chairperson
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