



# KEEPING IT LEGAL

## A Guide for WV Broadcasters



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# INTRODUCTION

The West Virginia Broadcasters Association and Jackson Kelly PLLC are pleased to bring you the *8th Edition of Keeping It Legal, A Guide For West Virginia Broadcasters*. Shortly after Jackson Kelly began representing the Broadcasters Association in 1991, we developed answers to questions which were commonly asked by radio and television broadcasters. Since that time, we have made every effort to provide explanations that are both readable and relatively short. Our goal with this publication is to provide a starting point to assess legal issues and to help broadcasters to know when to seek outside help. This 8<sup>th</sup> Edition contains numerous additions, including a discussion of updated political requirements, and political file requirements and such changing topics as e-cigarette advertising.

As always, the usual disclaimer must be stated that this handbook does not replace competent legal advice. We encourage every member station to call if you need clarification or have questions that are not addressed by this handbook. The law of broadcasting changes rapidly with both the Legislature and the courts handing down decisions which may impact your business. Probably the fastest changing area has been that of political questions and we make every effort in every political season to provide the most up-to-date guidance possible in this area. We strongly encourage you to check for changes and updates in the member section of the WVBA website.

Jackson Kelly looks forward to the opportunity to serve you in the years to come and we look forward to your comments or suggestions regarding this handbook and our representation of your Association. On behalf of the Broadcasters Association, I hope that you find this edition of *Keeping It Legal* to be a genuinely helpful resource.

**David Allen Barnette**  
**Charleston 2019**

### **Contact Numbers**

Michele C. Crist  
Executive Director, West Virginia Broadcasters Association  
(304) 744-2143; [mcrist@wvba.com](mailto:mcrist@wvba.com)

David Allen Barnette, Jackson Kelly PLLC  
(304) 340-1327; [dbarnette@jacksonkelly.com](mailto:dbarnette@jacksonkelly.com)

Vivian Hatzi Basdekis, Jackson Kelly PLLC  
(304) 340-1094; [vhbasdekis@jacksonkelly.com](mailto:vhbasdekis@jacksonkelly.com)

Chelsea A. Creta, Jackson Kelly PLLC  
(304) 340-1042; [chelsea.creta@jacksonkelly.com](mailto:chelsea.creta@jacksonkelly.com)

# ADVERTISING

## ADVERTISING OF ALCOHOLIC BEVERAGES

Radio and television in West Virginia may advertise the retail sale of beer by brand and by price and may advertise private clubs, wineries and national liquor advertising. However, broadcasters are encouraged to avoid advertising which encourages the intemperate use of alcohol or underage drinking.

### What was the effect of *Liquormart, Inc. v. Rhode Island*?

In 1996, the United States Supreme Court decided a case known as *Liquormart v. Rhode Island* in which the Court struck down a Rhode Island law preventing the advertising of prices of alcoholic beverages. The Court created a very high standard for laws that prohibit the truthful advertising of legal products even where the product is subject to abuse. The result of this high standard is that blanket bans on advertising are almost always invalidated.

After the *Liquormart* decision, Go-Mart, Inc. sued Richard Atkinson, the West Virginia Alcohol Beverage Control Commissioner and West Virginia Non-Intoxicating Beer Commissioner, to strike down certain regulations preventing the advertising of beer prices and brands on radio, television and other advertising mediums.

After lengthy negotiations, an agreed-upon order was entered by The Honorable Andrew MacQueen on July 30, 1996. This order holds that: "the State no longer may lawfully maintain a blanket ban on brand and price advertising of non-intoxicating beer and other alcohol related products . . . ." The Court's order went on to state that: "Go-Mart and other similarly situated retailers may advertise the brand and price of non-intoxicating beer and other alcoholic beverages on signs, reader boards, bill boards, radio, television, cable and other electronic mediums." The order struck down certain regulations including Section 7.1.3 which limited advertisements to newspapers and advertising

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circulars. It also struck down Section 7.2.2 banning the display of non-intoxicating beer or advertisements in show windows, Section 7.6 banning signs in windows or doors, Section 7.7 banning exterior signs and Section 7.8 banning signs of electrical or mechanical construction.

Because questions still remained as to the legality of advertising the brand and price of alcohol and beer, your Association backed litigation brought by Fiesta Bravo, a Huntington restaurant, against Thomas Keeley, Commissioner of the Alcoholic Beverage Control Commission. Commissioner Keeley agreed to a Consent Order which was entered on August 21, 2002. In this final order the Court found that the State of West Virginia may no longer prohibit brand or price advertising of alcohol and beer. The Court ordered that all private clubs, retail establishments and other entities licensed by the State of West Virginia for the sale of alcoholic beverages and beer may advertise on radio and television. To the extent that there are existing rules and regulations of the ABCC which conflict with the Order, those regulations are now deemed to be unenforceable. As a result, there is no longer any prohibition on the advertising of the sale of alcoholic beverages or beer by private clubs, retail establishments, convenience stores, supermarkets or any other licensed entity.

W. Va. Code St. R. § 175-1-1 *et seq.*

*Go-Mart, Inc. v. Atkinson*, No. 96-C-1109 (W. Va. Cir. Ct. 13<sup>th</sup> Cir. July 30, 1996).

*Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

*Fiesta Bravo v. Thomas Keeley* (W. Va. Cir. Ct. 13<sup>th</sup> Cir. August 21, 2001).

(Updated October 2019.

## ADVERTISING OF LOTTERIES

The West Virginia State Constitution prohibits games that are considered “lotteries” within the boundaries of the state. However, broadcasters generally are allowed to advertise lotteries conducted by non-profit groups with an appropriate state license and governmental entities. More recently, commercial lotteries in other states have been added to the list of permissible advertisements, and mentioning or advertising a commercial lottery conducted in another state is condoned as long as the lottery is legal in that state. Some lotteries have been made legal by West Virginia state statute, and some of these may be advertised legally.

## WHAT IS A LOTTERY?

Three elements must be present for a contest to be a lottery:

1. Prize. Anything of value offered to a contest participant qualifies as a prize.
2. Chance. The element of chance exists when the prize is to be gained not by skill, but predominantly by luck. Where the elements of both skill and chance are present and chance predominates, even though skill or judgment may enter to some extent in the operation of a particular scheme or device, the scheme or device is a lottery.
3. Consideration. This element is present when something of value, such as money or a substantial amount of time, is given by the participant as part of the promotion.
  - Some examples of consideration are: making a purchase, paying an admission charge or cover charge, requiring possession of a product or proof of purchase, requiring frequent visits to a store, or conducting a test drive where a salesperson goes along.
  - A key to determining whether consideration is present is determining whether the consideration flows to the

promoter. The pertinent question is whether the person who is promoting the contest is receiving any percentage of the fee it costs to enter the contest or anything else of value from the contestant.

### **How can the "lottery" designation be avoided?**

Because it is illegal in the State of West Virginia to operate a lottery, it is important to avoid that designation. For a promotion to fail to rise to the level of a "lottery," one of the three essential elements of a lottery (prize, chance or consideration) must be lacking. A promotion that contains no prize is not likely to be an effective one; therefore, it is necessary to concentrate on the other two elements of a lottery: chance and consideration.

The "lottery" classification may be avoided by eliminating the element of chance in a promotion. To do this, the winner or the value of the prize must be determined totally by skill. However, whether actual "skill" is present may be difficult to determine. Accordingly, the elimination of consideration is the easiest way to ensure that a particular promotion will not be considered a lottery.

The element of consideration is present when an item of value, such as payment of money or the expenditure of substantial time or energy by a participant, is part of the promotional plan. This generally does not include mailing an entry form, calling a toll-free number, watching a television show, listening to a radio show or completing a brief survey. If a promoter can avoid requiring consideration for promotion through the use of these or similar entry methods, then the promotion will be within the law.

**Is there an exception for charitable lotteries?**

Yes. Charitable or public service organizations may conduct “raffles” under certain circumstances. A raffle may be held by a charitable or public service organization if it has been in existence in West Virginia for two years and it has obtained a license. No raffle license issued pursuant to requirements of the West Virginia Code may be transferred. However, a charitable organization that has been in existence in this state for at least one year may hold a raffle, without a license, if the gross proceeds derived by the organization from all raffle occasions do not exceed \$15,000 during any calendar year and no prize awarded in any single raffle occasion exceeds \$4,000.

**Are “snow ads” acceptable forms of advertising?**

One variation on the lottery issue is what are called “snow ads.” Generally, the promotion is that if it snows so many inches on Christmas day or on New Year’s Day, then all purchases made by the participant on that day will be refunded. This is a classic example of a lottery where prize, chance and consideration are present. As such, snow ads violate the State Constitutional prohibition against gambling. In a snow ad, it is virtually impossible to remove the element of consideration. So, our general advice is that snow ads are not acceptable forms of advertising.

**Can you advertise lottery games which have been made legal by West Virginia state statute?**

You can advertise state lotteries but not privately run video lottery terminals. Currently there are four kinds of lottery games which are legal in West Virginia. The first two authorized in 1985 by the West Virginia Legislature were the scratch off “instant” lottery games and the on-line numbers games such as Power Ball. In 1994, race track video lottery, was authorized, and in 2001 video lottery games were legalized. There is no advertising ban on the first three kinds of lotteries. However, in 2001, the West Virginia Legislature chose to make it a condition of licensure that the retailer and operator licensees could not advertise the fact that they offer video lottery games. West Virginia’s video lottery advertising restrictions were challenged as

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unconstitutional but were reinstated by a unanimous three-judge panel of the Fourth Circuit Court of Appeals in *West Virginia Ass’n of Club Owners v. Musgrave*, 553 F.3d 292 (4th Cir. 2009). The Fourth Circuit held that “[t]he state has a long-standing and substantial interest in regulating the implementation and promotion of its own lottery,” which it has done “by attempting to raise revenues necessary for education and infrastructure without magnifying the social maladies often associated with gambling additions.” *Id.* (For more information on the prohibition on advertising video lottery terminals, see the section entitled “Advertising of Video Lottery Terminals.”)

W. Va. Const. art. VI, § 36.

W. Va. Code §§ 61-10-1 through 14.

W. Va. Code §§ 47-21-3, 47-21-4.

W. Va. Code St. R. 110-37-1 *et seq.*

State Lottery Act, W. Va. Code §§ 29-22-1 *et seq.*

*State v. Hudson*, 37 S.E.2d 553 (W. Va. 1946).

*Club Ass’n of W. Va., Inc. v. Wise*, 156 F. Supp. 2d 599, 604-09 (S.D. W. Va. 2001).

*WV Ass’n of Club Owners v. Musgrave*, 553 F.3d 292 (4th Cir. 2009).

(Updated October 2019.)

## ADVERTISING OF TOBACCO

Under federal statutes, it is a criminal offense to advertise cigarettes, smokeless tobacco and little cigars. These laws were enacted in stages, beginning with cigarettes in 1971, smokeless tobacco in 1986 and little cigars in 1993. The federal statutes have a blanket prohibition on the advertisement of all three products on any medium of electronic communication subject to the jurisdiction of the Federal Communication Commission. Further, the statute prohibiting the advertisement of smokeless tobacco also requires warning statements to be placed on the package, in print advertisements, and audiovisual or audio advertising, such as promotional films, unless the advertisement is an outdoor billboard.

Broadcasters should note that, along with the FCC, the DOJ and FDA also have jurisdiction over tobacco advertising. Since 2009, the U.S. Food and Drug Administration has regulated the manufacturing, distribution, and marketing of cigarettes, smokeless, and roll-your-own tobacco. The FDA finalized a rule, effective August 8, 2016, to extend the FDA's regulatory authority to all tobacco products, including e-cigarettes, cigars, and hookah and pipe tobacco, as part of its goal to improve public health.

### **May television or radio stations advertise stores that specialize in the sale of tobacco products?**

Generally, television and radio stations can advertise businesses which sell cigarettes, little cigars, smokeless tobacco and other tobacco products. However, the advertisement may not contain the word "cigarette," even if the word "cigarette" is included in the name of the shop, as in "Bob's Cigarette and Grocery." Any mention of the word "cigarette" in the name of the advertiser or within the advertisement will be deemed as prohibited cigarette advertising and subject to an enforcement action by the Department of Justice. Indeed, the word "cigarette" is prohibited from advertisements having absolutely no relation to tobacco products. For example, "Bob's Cigarette and Grocery" could not advertise a weekly special on tomatoes and mention the word

“cigarette” in the name of the store.

There is no law that expressly states that advertising a store name with the word “tobacco” in it is prohibited. Thus, it is arguable whether the use of names such as “Tobacco Cabin” or “House of Tobacco” is acceptable for television and radio advertising. However, our best advice is that the use of the word tobacco or the name of another prohibited tobacco product violates the law, is nothing more than a hidden advertisement that could subject broadcasters to possible criminal conviction and fines and could adversely affect the ability of a broadcaster to renew its station license. We advise the broadcast media not to accept this type of advertising.

#### **What may television and radio stations advertise?**

Simply, an advertisement void of cigarettes, smokeless tobacco and little cigars does not violate the statutes prohibiting tobacco advertising. For example, the statutes do not prohibit the advertising of smoking paraphernalia, such as cigar humidors, rolling paper, pipes, pipe tobacco or cigars not defined as little cigars. Also, these statutes do not prohibit the incidental use of a cigarette name, such as “Marlboro 500” or the advertising of specific brands of cigars and pipe tobacco.

#### **What about advertisements for vaping?**

It appears that vaping advertisements are not expressly prohibited at this time, but broadcasters should be warned that they are taking some risk by accepting and running e-cigarette and vaping advertisements. Although e-cigarettes have been found to be a tobacco product, they are neither “cigarettes” nor “smokeless tobacco” under the statutory definitions. 15 U.S.C.A. § 1332 defines “cigarette” to include “any roll of tobacco.” E-cigarettes do not fit this definition. Therefore, the existing prohibition, 15 U.S.C.A. § 1335, which makes it unlawful to advertise “cigarettes” on any medium of electronic communication probably does not apply to e-cigarettes. The statutory gaps make their

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regulation unclear at this time, but legislation in other states has already been proposed to regulate e-cigarette products.

Effective August 8, 2016, the FDA's regulatory authority extends to all tobacco products, including e-cigarettes, cigars, and hookah and pipe tobacco, as part of its goal to improve public health. Of particular note for broadcasters are new FDA requirements for health warnings in advertisements for all tobacco products, including e-cigarettes. The FDA did not extend the Congressionally-imposed ban on advertising on radio and television, but instead requires health warnings to be included both in the packaging and advertising of tobacco products. Importantly, the required disclosures need to be included in all advertising, no matter the medium. In addition, the FDA prohibits e-cigarette and vaping advertisements from making claims that they are less harmful or healthier than cigarettes, as well as other prohibited deceptive advertising.

Even though truthful advertising about e-cigarettes or vaping may currently run on radio and television in West Virginia, broadcasters should be aware of the restrictions on advertising such products and should be careful to avoid advertisements which appear to target minors.

15 U.S.C. §§ 1335, 4402.

81 FR 28973 (May 10, 2016).

W.Va. Code §§ 16-9A-1, 16-9A-2.

(Updated October 2019.)

## **ADVERTISING MEDICAL MARIJUANA AND CBD**

West Virginia legalized medical marijuana in 2017, but the use, possession, cultivation, or distribution of marijuana remains illegal under federal law, as marijuana is still regulated as a Schedule I substance. Cannabidiol (CBD) oils, a relative of marijuana taken from the non-THC containing portions of the cannabis plant, are exploding in popularity, but they generally remain illegal under federal law as Schedule I substances, with limited exceptions. Accordingly, advertisements for marijuana and many CBD oils are prohibited under the Controlled Substances Act. Due to overlapping state and federal jurisdictions, and conflicting state and federal law enforcement priorities, broadcasters considering airing medical marijuana or CBD oil advertisements should be aware that they run the risk of federal prosecution.

### **Regulations on advertising medical marijuana**

The West Virginia Medical Cannabis Act legalizes the use of medical marijuana, but regulates that any advertisement of medical marijuana must be done subject to "the Federal rules and regulations governing prescription drug advertising and marketing." Any such advertisements cannot contain statements that are deceptive, false or misleading, contain any content that can reasonably be considered to target individuals under the age of 21, specifically encourage the transportation of medical marijuana across state lines, or otherwise encourage illegal activity, or display consumption of medical marijuana. Advertisements must also include warnings against the operation of vehicles or machinery while under the influence of medical marijuana, and warnings to keep medical marijuana out of the reach of children. Finally, medical marijuana advertisements may not be published unless the advertising organization reasonably expects that no more than 30% of the audience constitute minors.

Unfortunately, West Virginia's medical marijuana program conflicts directly with federal law, which still considers marijuana (including medical marijuana) to be a Schedule I controlled substance. Broadcasters advertising medical marijuana in compliance with West Virginia law should be aware that they may still face criminal liability under the existing federal statutes.

### **Regulations on advertising CBD oils and CBD products**

CBD oils and CBD products are a rapidly growing area of stress-relief products. CBD is not federally regulated as a controlled substance, as long as it meets certain criteria. Advertisements for CBD may be legal if certain factors are met, although such advertisements remain high-risk and ill-advised at the present due to the stringent criteria imposed by federal law for the legality of CBD.

The federal Agriculture Improvement Act of 2018 changed the definition of marijuana to exclude "hemp." Hemp is defined as a derivative of the cannabis plant that contains less than 0.3% THC, the part of marijuana that gives the user a "high." The Drug Enforcement Agency confirmed in August 2019 that it does not consider hemp and hemp-derived CBD preparations to be a controlled substance. Accordingly, by the letter of the law, broadcasters may be able to advertise CBD and CBD products derived from cannabis products with less than 0.3% THC without running afoul of federal law.

### **Risks when advertising CBD oils and CBD products**

Broadcasters must be aware that they run significant risks when advertising CBD and CBD products because the legality of their actions depends upon the legality of the CBD producer. The federal law removing hemp from the definition of marijuana did not broadly legalize CBD; it only recognized that certain CBD products derived from cannabis products containing less than 0.3% THC were not illegal. If a broadcaster publishes an advertisement for CBD or CBD products, it will have to rely on the word of its customer that the CBD or CBD products are legal under federal law. This is a significant risk that must be seriously considered, particularly because broadcasters maintain federal licenses. As a result, we would recommend refraining from broadcasting advertisements containing CBD or CBD products at this time.

(Updated October 2019.)

## ADVERTISING OF LEASES

When advertising consumer leases in West Virginia, advertisers must satisfy both the West Virginia Consumer Credit Protection Act and Regulation M of the Federal Reserve System Rules and Regulations related to consumer leasing. In general, lease advertisements that contain certain terms must also contain certain disclosures. Because the detailed disclosure requirements can be burdensome for radio and television, some relief from the disclosures is permitted by referencing a toll-free number or a written advertisement in regards to where the consumer can obtain the required information.

### **How do the West Virginia and federal laws act to regulate the advertising of leases?**

The West Virginia Consumer Credit and Protection Act, while requiring certain lease disclosures, makes no mention of a requirement that lease disclosures be made in radio and television advertising. The West Virginia statute requires truth in advertising, but, in general, the West Virginia requirement affects leases, not the advertisement of them.

The West Virginia statute, W. Va. Code § 46A-6-105, contains a specific exemption which states:

This article does not apply to acts done by the publisher, owner, agent or employee of the newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement and did not have a direct financial interest in the sale or distribution of the advertised goods or services.

A similar provision is found in Regulation M. In the Official Staff Commentary to Regulation M § 213.7(a):

[O]wners and personnel of the media in which an advertisement appears or through which it is disseminated are not subject to civil liability for violations under section 185(b) of the [Truth

in Lending Act].

Regulation M applies to all consumer leasing, i.e., the leasing of personal property to individuals for a period of time greater than four months and for less than \$57,200 (threshold amount adjusted annually).

**What are “triggering terms” and what disclosures do they necessitate?**

Once an advertisement mentions a “triggering term,” then the advertisement must also contain detailed disclosures. Under Regulation M, a consumer leasing advertisement “triggers” the disclosure requirements if it mentions: (1) the amount of any payment; or (2) that any or no down payment or other payment is required prior to or at consummation or by delivery, if delivery occurs after consummation.

If one of the triggering terms is mentioned in a consumer lease advertisement, then the advertisement must disclose:

- (1) That the transaction is a lease;
- (2) The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
- (3) The number, amounts, and due dates or periods of scheduled payments;
- (4) A statement of whether a security deposit is required; and
- (5) A statement that an extra charge may be imposed at the end of the lease term where the lessee’s liability, if any, is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

**What are the simplified disclosure requirements for radio and television advertisements?**

Congress has recognized the problems with making detailed disclosures on radio and television and has allowed an alternate rule for such advertisements even when they contain triggering terms. Such advertisements must disclose:

- (1) That the transaction is a lease
- (2) The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;

- (3) The amount of any payment required at the inception of the lease or that no such payment is required, if that is the case;
- (4) The number, amounts, and due dates or periods of scheduled payments; and
- (5) A reference to a toll-free telephone number or written advertisement where consumers may obtain all general disclosures required by the regulations.

The toll-free telephone number must be available no fewer than ten days beginning on the date of the broadcast. The written advertisement must be in a publication of general circulation in the community served by the same broadcast station, and reference to it must include the name and date of publication with a statement that information required by the Regulation is included in the advertisement. The written advertisement must be published beginning at least three days before and ending at least ten days after the broadcast on radio or television.

**How do the federal regulations prevent “bait and switch” tactics in advertisements?**

Regulation M also requires that a lease advertisement for a consumer lease must state that a specific lease of property at specific amounts or terms is available, only if the lessor usually and customarily leases or will lease the property at those amounts or terms. This does not preclude the advertisement of a single item or the promotion of a new or one-time leasing program, but it does prohibit the advertising of terms that are not and will not be available to the consumer. This is designed to prevent “teaser” advertisements and “bait and switch” tactics.

**How must the disclosures appear in the advertisement?**

Regulation M uses a clear and conspicuous standard which requires that disclosures be made clearly and conspicuously. There are no specific requirements for type size or length of time an image appears on screen. However, the information must be legible and reasonably understandable. Also, the Regulation requires that the amount due at lease signing be

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identified and, if a lease rate is advertised, that it not be more prominent than any of the other disclosures required by Regulation M. The bottom line is that a consumer should be able to see, read or comprehend the disclosed information.

### **What if a business from another state wants to advertise in West Virginia?**

Stations should be aware that when accepting advertising from businesses located in the border states, the law of that border state will govern the content of the advertisement. Therefore, for example, the copy of an Ohio automobile dealer's advertisement on a West Virginia station must conform not only to Federal regulations but also to the Ohio statutory and regulatory scheme.

W. Va. Code §§ 46A-1-101 *et seq.*

12 C.F.R. §§ 213.1 *et seq.*

15 U.S.C. §§ 1601, *et. seq.*

12 C.F.R. App'x Supp. I to Part 213-Official Staff Commentary to Regulation M.

(Updated October 2019.)

## ADVERTISING OF VIDEO LOTTERY TERMINALS

### Is advertising of video lottery permitted?

In 2001, the West Virginia Legislature legalized limited video lottery under strict regulations. Among other things, these regulations prohibit advertising. Specifically, no retailer who operates video lottery terminals on its premises may advertise or promote its video lottery business. Further, it may not use the words "video lottery" in the names of the locations or in any directions or advertising visible from outside the retailer's establishment. The restriction on advertising extends to operators who own and lease video lottery terminals and to the West Virginia Lottery Commission and its Director.

The West Virginia Lottery furnishes each limited video lottery retailer with a red decal that may be placed on the exterior of the business to alert the public that the location offers West Virginia Lottery products. No other form of advertising is permitted by law. This includes advertising on social media.

The State Lottery Commission of West Virginia on September 28, 2005, adopted Policy Statement 05-02 that video lottery retailers are not precluded from advertising or promoting other lawful activities that are co-located on the same premises as video lottery terminals. The policy goes on to state that the retailer may engage in commercial activities that include or refer to as lawful activities. The Lottery Commission, however, condemns the use of euphemism advertising or advertising suggestive of the presence of video lottery terminals. As a result, broadcasters should not encourage or accept advertising from businesses that are licensed for video lottery terminals unless that advertisement is directly related to another lawful activity located at the same location. As an example, a hotel which is licensed for video lottery terminals could advertise weekend room specials, a bar that has video lottery terminals could advertise drink specials, a restaurant which has video lottery terminals could advertise food specials.

**Why are the racetracks able to advertise video lottery?**

The statute governing retailers is not to be confused with the legislation passed specifically for racetrack video lottery. These facilities are permitted to advertise but only with the prior written approval of the director of the state lottery office.

(For more information on advertising lotteries in general, see the section entitled "Advertising Lotteries.")

W. Va. Code § 29-22A-1, *et seq.*

W. Va. Code § 29-22B-404, -702, -706.

West Virginia Lottery Commission, *WV Lottery Limited Video Lottery Retailer Handbook* (Feb. 2018), <https://wvlottery.com/assets/pdf/licensing/lvl/LvLLicensingFaq.pdf> (Updated October 2019.)

## ADVERTISING INTERNET OR OFFSHORE GAMBLING

### Is advertising Internet or off-shore gambling permitted?

For years, the U.S. Department of Justice regarded Internet gambling and offshore sports books operations as illegal, and warned that any entities and individuals placing these advertisements may be violating various state and federal laws. The DOJ even advised the National Association of Broadcasters that individuals who accept and run Internet advertisements for such entities may be aiding and abetting these illegal activities.

The DOJ's longstanding position that states could not legalize online gambling was the subject of legal and political debate, with federal courts issuing conflicting rulings on the matter. In December 2011, the DOJ's Office of Legal Counsel ("OLC") analyzed the scope of the 1961 Wire Act, 18 U.S.C. § 1084, and in a surprising shift, issued a legal opinion that the Act only prohibited online sports betting, not online casino games. However, on January 14, 2019, the DOJ released a memorandum opinion reversing its 2011 opinion (more on that below).

On May 14, 2018, the United States Supreme Court issued its ruling in the New Jersey sports betting case, *Murphy v. NCAA, et al.* In its ruling, the Court struck down as unconstitutional a federal law that made it unlawful for state, local, and tribal governments to operate, promote, license or authorize sports betting pursuant to state, local, or tribal law. Importantly, the Supreme Court's opinion did not make sports betting legal throughout the United States. Instead, the opinion struck down a federal law that prohibited states from authorizing and regulating sports betting, should they wish to do so. Thus, states are now free to decide for themselves whether sports betting should be permitted within their boundaries.

In response, the DOJ released a memorandum opinion on January 14, 2019 interpreting the federal Wire Act (18 U.S.C. § 1084). The Wire Act is the federal statute that prohibits the transmission by gambling businesses across state or international borders of sports bets and information assisting sports bets, using a wire communication facility. The January 2019 opinion interpreting the Wire Act instructs that the Wire Act is applicable to any form of gambling that uses a wire communication and crosses state lines. As drafted, this includes online gambling and

online lotteries.

Accordingly, the federal Wire Act remains intact. Due to the Wire Act's prohibitions, states authorizing sports betting are doing so exclusively on an intra-state basis. This means that they require sports bettors to be physically located within the state's borders when initiating sports bets, and all sports bets be received and accepted within that same authorizing state.

West Virginia legalized sports betting in 2018. The West Virginia Lottery Commission regulates and oversees legal sports betting within the state. Under the West Virginia Lottery Sports Wagering Act, W.Va. Code §§ 29-22D-1, *et seq.*, licenses cannot be granted to companies or individuals who have been directly employed by any illegal or offshore book operation that serviced the United States or otherwise accepted black market wages from individuals located in the United States.

While the online gambling industry is a prime example of a rapidly changing legal landscape, it is clear that broadcasters should heed the DOJ's warning and not accept or run advertisements for offshore sports book operations, which remain illegal.

Where online gaming is authorized by state law, however, advertisements for legal online gaming operations would presumably be legal as well. However, broadcasters should be careful when running advertisements for state-authorized sports betting operations that may include transmission or bet receipt across state lines. Broadcasters also should be careful not to run advertisements for state-authorized sports betting operations appealing primarily to those under the legal gambling age.

18 U.S.C. §§ 1084, 1952, 1955.

*Murphy v. NCAA, et al.*, 138 S.Ct. 1461 (2018).

W.Va. Code §§ 29-22D-1, *et seq.*

American Gaming Association, *Responsible Marketing Code for Sports Wagering* (May 2019) [https://www.americangaming.org/wp-content/uploads/2019/05/Responsible-](https://www.americangaming.org/wp-content/uploads/2019/05/Responsible-Marketing-Code-for-Sports-Wagering.pdf)

[Marketing-Code-for-Sports-Wagering.pdf](https://www.americangaming.org/wp-content/uploads/2019/05/Responsible-Marketing-Code-for-Sports-Wagering.pdf)

(Updated October 2019.)

## **RULES FOR ADVERTISING UNDER THE WEST VIRGINIA LOTTERY SPORTS WAGERING LAWS**

**Following the legalization of sports wagering in West Virginia, the West Virginia Lottery Commission issued the following rules for the advertisement of sports wagering in the state:**

### **General requirements for advertisements:**

All advertisements for sports wagering in West Virginia must contain the following:

- (1) The West Virginia Lottery Table Games logo;
- (2) The minimum age requirement for participating in sports wagering; and
- (3) The standard Problem Gambling disclaimers.

Most importantly, all sports wagering advertisements and promotions must be sent to the West Virginia Lottery Commission for approval before they are published. We suggest that broadcasters retrieve the West Virginia Lottery Commission's approval in writing before publishing or broadcasting.

It is the casino's sole responsibility to provide and communicate the requirements contained in this section to the casino's sports wagering partner and/or advertising agency. A casino **MUST** obtain approval from the West Virginia Lottery prior to production or broadcast.

### **Additional requirements specific to phone-app advertisements:**

If the advertisement is on a phone application, it must contain the sports wagering partner's West Virginia affiliate property logo or property name.

### **Additional requirements specific to radio advertisements:**

If the advertisement is on a radio spot, it must mention the name of the sports wagering partner's West Virginia affiliate, and contain the following language: "All games regulated by the West Virginia Lottery. Please play responsibly." This language may be included quickly at the end of the advertisement.

**Additional requirements specific to television advertisements:**

If the advertisement is on a television spot intended to be broadcast in West Virginia, it must mention the sports wagering partner's West Virginia affiliate by either (i) using the casino's logo in the advertisement; (ii) mentioning the casino by name through text in the advertisement; or (iii) mentioning the casino by name through voiceover language in the advertisement.

**What do the NFL Guidelines say?**

The 2018-2019 NFL Guidelines state that stations will not, within any NFL Game or programming containing NFL footage, accept, telecast, broadcast or otherwise distribute any advertising or promotion for any product or service relating in any way to gambling or sports betting or lotteries or any advertising or promotional spot which depicts or mentions, or includes any reference to, gambling or sports betting or lotteries (except that ads for state lotteries will be permitted as outlined in the FOX TV agreement and the League's prohibited advertising guidelines).

W. Va. Code 29-22D-1 *et seq.*

W. Va. CSR 179-9-21.

West Virginia Lottery Commission, Sports Wagering Advertising Rules as of 1-9-2019.

(Updated October 2019.)

## ADVERTISING "GOING OUT OF BUSINESS" SALES

A series of West Virginia laws were enacted in 1967 to protect citizens from being misled by advertisements promising discounts during going out of business sales, liquidations, or other similarly advertised sales where the intention of the retailer is not truly to cease business operations, but simply to promote sales of goods. Broadcasters must take care to avoid violating these laws by promoting unauthorized sales.

### What types of sales are covered by these laws?

The West Virginia law governs three different types of sales - "closing-out sales," the "sale of goods damaged by fire, smoke or water," and "defunct business sales."

Closing-out sales include advertising that gives notice to the public that the sale will come before the abandonment of a particular business location and are indicated by the phrases:

quitting business, going out of business, discontinuance of business, selling out, liquidation, lost our lease, must vacate, forced out, removal, branch store-discontinuance, building coming down, end, final days, last days, lease expires, we give up sale, we quit sale, warehouse closing sale, and reorganization sale.

Sale of goods damaged by fire, smoke or water are signified by terms such as:

fire sale, smoke damage sale, water damage sale, flood damage sale, and insurance sale.

Defunct business sales include advertising that gives notice to the public of a sale resulting from death, business failure, or other adversity, including the following:

adjuster's sale, administrator's sale, assignee's sale, bankrupt sale, bankrupt stock sale, benefit of administrator's sale, benefit of creditor's sale, benefit of trustee's sale, creditor's committee sale, creditor's sale, executor's sale, insolvent sale, mortgage sale, receiver's sale, and trustee's sale.

**What conditions are necessary to qualify as a true “going out of business” sale?**

In order to represent that a sale is a closing-out sale, a sale of goods damaged by fire, smoke or water, or a defunct business sale, a license must first be obtained by the seller of goods making a written application to the State Commissioner of Labor. Once the application is filed, the required fees and bond are paid, and a license is issued, the sale can only continue for thirty days. It can then be renewed once for another thirty days if the applicant pays a renewal fee, includes a new inventory listing, and files an affidavit stating that no new goods have been purchased and the existing inventory has not been disposed of. The renewal application cannot be filed more than ten days before the license expires.

With respect to chain stores, a license to conduct a regulated sale applies to that store only and advertising cannot suggest that other branches are participating or cooperating in the sale. Also, the sale can only be conducted at the location of the particular store for which the license was obtained, and goods from other branch stores cannot be brought in for the sale. Substitutions or additions of goods or changes in time or place of the sale are prohibited, as is the commingling of the goods to be sold in a regulated sale with other non-approved goods.

The applicant must post a copy of the license at the sale. The applicant must also keep records of the sale and file a statement upon termination of the sale listing the total value of the goods not disposed of during the sale and what happened to those goods after the sale. Once the sale is over, a new license may not be issued for one year, except in the case of a “sale of goods damaged by fire, smoke or water.”

There is an exception for persons acting pursuant to court orders, persons who are required to file an accounting with a court, persons acting in accordance with their duties as public officers, and persons conducting sales by or on behalf of licensed insurers.

**How are broadcasters affected by the laws?**

The laws apply to anyone who advertises or conducts any of the types of sales mentioned above. The laws contain an exception for broadcasters, but only if the broadcaster is acting in good faith without knowledge that the advertisement is false, deceptive, and misleading, and without knowledge that the advertisement violates any provision of the laws.

This, however, is a narrow exception because broadcasters should know that a license from the State Commissioner of Labor is required to conduct this type of sale and should not advertise such sales without evidence that a license has been obtained.

**What disclosures must advertisements of such sales contain?**

Any advertisement or announcement of the sale must display the number of the license, its date of expiration, and, if applicable, where the business is moving. The statute does not specifically direct that radio advertisements must announce this, but we recommend that radio broadcasters announce such information in their radio advertisements.

**What are the penalties for violations of the Article?**

It is a violation of the law to use any “false, misleading or deceptive statements” in the advertising of going out of business sales. A person violating any provision of the article is guilty of a misdemeanor. Penalties can include a fine of up to one hundred dollars and thirty days imprisonment. Each day a prohibited sale continues is a separate violation. Although the statute does not specifically address whether each day a prohibited advertisement continues is a separate violation, it could be interpreted as such.

W. Va. Code §§ 47-11B-1 *et seq.* (2001).

(Updated October 2019.)

## ADVERTISING "TAX FREE" SALES

**Can an advertiser state in an ad that it will assume, absorb, or rebate the state sales tax?**

No, West Virginia Code § 11-9-7 makes it a crime to represent, advertise or state to the public or to any purchaser that a merchant will absorb or assume payment of any part of the sales tax or that the sales tax is not to be considered as part of or added to the sales price of a good or service. This statute makes it a misdemeanor which upon conviction can result in a fine of not less than \$100 or more than \$1,000 or subjects an individual to imprisonment for not more than six months or potentially for both fine and imprisonment.

The statute is clear, unambiguous and the State Tax Department has shown a willingness to enforce this particular provision. In the past the West Virginia State Tax Department has sent letters to merchants who have undertaken advertising of this type. The letters warn that upon a second run of advertisements of this type, that the Tax Department will treat this as a criminal act.

We strongly urge stations to discourage this type of advertising.

**Can an advertiser offer to discount a purchase in the same amount that the customer pays in sales tax?**

Yes, the advertiser may offer a percent discount that is equal to the amount that the customer pays in sales tax. The key here is that the customer, not the advertiser, pays the state sales tax.

## ADVERTISING CONTESTS, PRIZES, AND GIFTS

Enacted in 1992, the West Virginia Prizes and Gifts Act protects citizens from misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement. Advertisers should scrutinize advertisements coming in from clients, as well as scrutinize their own promotions and contests to avoid violations of West Virginia's Prizes and Gifts Act.

### **What conditions must an advertiser meet to advertise that a person has won something of value or is the winner of a contest?**

In order for an advertiser to represent that a person has won something of value or is the winner of a contest, the following conditions must be met:

- (1) The person received the prize or gift without obligation; and
- (2) The prize or gift is delivered to the recipient at no expense to him or her within ten days of the representation.

It is unlawful under the Act to notify a person that, upon acceptance or response, he or she will receive a gift or prize when as a condition to receipt he or she must pay money or purchase, lease or rent any goods or services, unless that has been clearly and conspicuously disclosed in all advertisements. Also, giveaways are not permitted where the shipping charges exceed the cost of postage or the charge for shipping a package of like size, weight, and kind. The handling charge must not exceed the lesser of five dollars or the actual cost of handling the item.

### **What disclosures are required to advertise that a person is eligible to win a prize?**

In order to represent that a person is eligible or has a chance to win a prize, an advertiser is required to clearly and conspicuously disclose on whose behalf the contest or promotion is conducted, as well as all material conditions which a participant must satisfy to be

eligible to win a prize. For television stations, this disclosure must be in at least ten point bold face type and contain the true value of each item or prize, the actual number of each gift or prize to be awarded, and the odds of receiving such gift or prize. Radio stations must make these statements orally.

### **Who is covered by the Act?**

The statute contains an exemption for owners, agents, or employees of radio or television stations arising out of the publication or dissemination of any advertisement or promotion stating someone is eligible or has a chance to win or receive a prize when the owner, agent, or employee did not know that the advertisement or promotion violated the requirements of the Act. This exemption only applies where you did not know the advertisement violates this section.

### **What kind of language in advertisements is specifically covered under the Act?**

The Act governs the use of language that would lead a reasonable person to believe that he has won a contest or prize. Some examples include "Congratulations," or "You have won," or "You are the winner of. . . ." The Act also governs the use of language that would lead a reasonable person to believe he has been specifically selected in connection with the sale, lease or solicitation unless the selection process is actually designed to reach a particular type of person. Examples include "Carefully selected," or "You have been selected to receive," or "You have been chosen."

### **What recourse is available to consumers under the Act?**

Prior to proving actual loss under the Act, the attorney general may apply to the court for a temporary injunction or restraining order against the allegedly violative practice pending final determination of violations of the Act. A consumer who suffers loss by reason of a violation of the Act may bring a civil action and can recover attorney's fees if successful.

**What was the effect of the *Suarez* litigation on advertisers?**

The *Suarez* litigation created a heightened awareness in the State Attorney General's office regarding compliance with the Prizes and Gifts Act, and thus advertisers should be especially careful to comply with the provisions of the Act.

**What is the importance of contest rules?**

Pursuant to 47 C.F.R. § 73.1216, a licensed station that broadcasts information about a contest must do so in a manner that fully and accurately discloses the material terms of the contest and requires the contest to be conducted substantially as announced or advertised. This section also prohibits deceptive, misleading, or false advertising with respect to any material term of the contest. The FCC has brought enforcement actions and has fined broadcasters for failing to comply with the material terms of the contest or for failing to announce all the material terms on the air.

**Which contest rules are important?**

Official contest rules should clearly define the specific rules, terms, and conditions binding participants in the contest, including among others, the following provisions: (i) eligibility, (ii) restrictions and drawing (e.g., only one entry per person per visit and must claim prize within 30 days of drawing), (iii) limitations on liability, (iv) a statement that the prize is non-transferable and non-exchangeable, (iv) how to claim the prize (e.g., proof of identification, requirement to execute an Agreement and Release, notification that the winner will receive an IRS Form 1099 at the end of the calendar year and a copy of such form will be filed with the Internal Revenue Service, and a statement that any additional costs related to the prize and occurring as to the result of accepting the prize are the sole responsibility of the winner), (v) disqualifications and penalties, (vi) publicity release (sponsor's right to use the participant's name, voice, biographical data and likeness for promotional purposes), and (vii) a statement that the interpretation of contest rules is in the sole discretion of the sponsor.

**What online contest disclosures are required?**

As of September 17, 2015, the FCC now permits online contest disclosures. The revised rule now requires a licensee to: (i) broadcast the relevant website address periodically with information making it easy for a consumer to find the material contest terms online; (ii) establish a link or tab to material contest terms on the website's home page; (iii) maintain contest terms online for a minimum of thirty days after the contest ends; and (iv) where applicable, within 24 hours of a material change in contest rules and periodically thereafter, announce that the material terms have changed and direct participants to the website to view the changes. In addition, any material terms disclosed on a website "must conform in all substantive respects" to the terms disclosed over the air.

The FCC noted that the rules should be posted to the station's or licensee's website, but in the event of no such website, it should be posted to any other website that is "designed to be accessible to the public 24/7, for free, and without any registration requirement." The FCC also agreed with commentators that a literal interpretation of the "complete and direct" website announcement requirement would be unduly burdensome. Instead, broadcasters can use "simple instructions or natural language (e.g., 'for contest rules go to kxyz.com and then click on the contest tab')."

However, the issue of how often a broadcaster must announce the web address was not discussed. Instead, the FCC stated that "the public interest would be better served by providing licensees with flexibility to determine the frequency with which they broadcast the website address where contest terms are made available to the public." If the FCC were to find "that licensees are failing to broadcast the website address with adequate frequency," the Commission will revisit this issue in the future.

W. Va. Code § 46A-6D-1 *et seq.*

W. Va. Code § 46A-7-110.

The "*Suarez* litigation":

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*State by and through McGraw v. Imperial Marketing*, 472 S.E.2d 792 (W. Va. 1996) cert. denied. 519 U.S. 966.

*Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (4<sup>th</sup> Cir. 2000).

*Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4<sup>th</sup> Cir. 1997).

*State ex rel McGraw v. West Virginia Ethics Comm’n*, 490 S.E.2d 812 (W. Va. 1997).

*Better Gov’t Bureau, Inc. v. McGraw*, 924 F.Supp. 724 (S.D. W. Va. 1996).

Commission Updates Contest Rule to Permit Online Disclosure, FCC Rcd. 15-118, <https://www.fcc.gov/document/commission-updates-contest-rule-permit-online-disclosure> (Sept. 17, 2015).

(Updated October 2019.)

## INTERNET ADVERTISING

### **Are radio and television broadcasters required to collect WV sales tax on Internet advertising?**

No, West Virginia Code § 11-15-9h(5) exempts sales of Internet advertising of goods and services from the sales tax.

### **Are radio and television broadcasters required to pay the City's B&O tax on gross income from Internet advertising?**

It is less clear whether radio and television broadcasters are exempt from municipal business and occupation (or "B&O") taxes on Internet advertising revenues. Under W. Va. Code § 8-13-5, municipalities are authorized to impose their B&O taxes on any activity on which the state imposed its B&O tax prior to July 1, 1987.

While there was obviously no Internet advertising in 1987, the state did impose B&O taxes on the activity of advertising generally. Nevertheless, based on the broad exemption in W. Va. Code § 8-13-5(d), it is likely that radio and television broadcasters are exempt from municipal B&O taxes on Internet advertising revenues.

See W. Va. Code § 11-15-9h(5).

See W.Va. Code § 8-13-5.

(Updated October 2019.)

## COMPLYING WITH SALES AND USE TAX REQUIREMENTS

### What are sales and use taxes?

Sales and use taxes are required taxes that must be paid whenever products or services are sold. As of October 2019, the West Virginia use tax rate is 6%.

### How do sales and use taxes apply to broadcasters?

Broadcasters are exempt from paying sales and use taxes when they sell radio or television broadcasting time. However, if a broadcaster sells actual goods or services (e.g., sells tapes of broadcasts, rents out its studios, or provides actors, technicians, or props to a customer), those transactions are taxable. In those instances, the broadcaster has a duty to collect the applicable tax from the customer and pay it to the State of West Virginia (unless the customer has proof that it is tax-exempt).

### What if a customer buys broadcasting time for the purpose of advertising goods and services?

A broadcaster is not responsible to pay sales and use tax when it sells broadcasting time to a customer for the purpose of advertisement. Instead, the duty to collect and pay sales and use tax is then transferred to the customer, making them liable to collect and pay these taxes, not the broadcaster.

### What if a customer buys broadcasting time for the purpose of advertising goods and services combined with internet advertising?

If a broadcaster sells packages with spots of broadcasting time for advertising combined with non-exempt internet advertising (example: a banner on the website), we recommend broadcasters have a clear allocation or division on the rate card between the exempt and non-exempt advertising for purposes of sales and use tax. If there is no clear allocation or division on the rate card, broadcasters should at least maintain a consistent method of computing the sales and use tax for the non-exempt internet advertising.

**Do broadcasters have to pay sales and use taxes when they make purchases?**

Broadcasters are exempt from having to pay taxes on their purchases when those purchases are integral to their business in communications. If those purchases are nonessential or made for the purpose of convenience, however, they are taxable. For example, items required for broadcasting (microphones, cameras, props, etc.), are exempt from sales and use tax, but items not required for the specific purpose of broadcasting (office supplies, promotional material, etc.), are not exempt.

To take advantage of these tax exemptions, broadcasters need a "direct pay permit," which can be obtained from the Department of Tax and Revenue.

**What if a supplier does not collect sales and use tax when they are supposed to?**

If a broadcaster makes a taxable purchase, and the supplier does not collect sales and use tax, the broadcaster still needs to pay the tax to the WV State Tax Department. Broadcasters without sales and use tax accounts with the WV State Tax Department should set those accounts up immediately. Once that is accomplished, the WV State Tax Department will provide the broadcaster with all necessary forms prior to the date that the taxes are due.

W. Va. Code § 11-15A-6a.

[www.wvtax.gov](http://www.wvtax.gov)

TSD-372, W. Va. State Tax Department

(Updated October 2019.)

## ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

### May advertisements utilize endorsements and testimonials?

Yes, the Federal Trade Commission Act (15 U.S.C. § 45) allows the use of endorsements and testimonials in advertising. However, advertisers must be careful when using endorsements or testimonials in their advertisements, as they are subject to liability for any false or unsubstantiated statements. Whether a particular endorsement or testimonial will be considered deceptive, and thusly unlawful under the Act, depends on the specific factual circumstances surrounding the advertisement at issue. Further, advertisers can also be held liable for failing to disclose material connections between themselves and their endorsers.

### What is an endorsement?

An endorsement is “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” The party whose beliefs, opinions, findings, and experiences are being portrayed will be deemed an “endorser.” An endorser may be a person, group, institution, or organization.

Endorsements must reflect the honest opinions of the endorser. They may not provide any express or implied representation that would be deceptive if the statement was made by the advertiser directly. While an advertiser does not need to use the exact language or words of the endorser, the endorsement utilized by the advertisement may not misrepresent the endorser’s opinion or experience with the product.

If an advertisement utilizes an endorsement that states the

endorser uses the product, then the advertiser must be sure that the endorser is, in fact, a “bona fide user of the product.” A bona fide user of a product is an endorser who uses the product him or herself. The advertisement may continue to be used so long as the advertiser has “good reason to believe that the endorser remains a bona fide user of the product.” The advertiser can satisfy this requirement by periodically checking with the endorser to ensure that he or she is still using the product, especially if any new information on the performance or effectiveness of the product becomes available, a material alteration in the product occurs, changes to a competitor’s product transpires, or the advertiser’s contract commitments are modified.

**What is a testimonial?**

A testimonial, for all intents and purposes, is an endorsement. The Commission treats endorsements and testimonials identically. Hereinafter the term “endorsement” will be utilized to cover both terms and situations.

**May an advertisement utilize consumer endorsements?**

Consumers may provide endorsements about the “performance of an advertised product or service.” Because consumer endorsements are likely to be interpreted as representing that consumer’s true and honest experience with the product or service, before using the endorsement the advertiser should possess and rely on “adequate substantiation, including, when appropriate, competent and reliable scientific evidence,” to support the claims made by the consumer representative. Consumer endorsements in and of themselves are not considered “competent and reliable scientific evidence.” If the advertiser does not have such substantiation, the advertisement must “clearly and conspicuously disclose the generally expected performance in the depicted circumstances.”

Generally, the Commission has found that disclosures such as “Results not typical,” or “These testimonials are based on the experiences of a few people and you are not likely to have similar results,” are not strong enough to be effective. However, if the

advertiser possesses “reliable empirical testing demonstrating that the net impression of the advertisement” with one of the above disclaimers is non-deceptive, the advertiser will be able to avoid the risk of the Commission bringing an action for false advertising.

Additionally, if the advertisement represents that the endorsement is an “actual consumer’s” testimonial, the advertiser must utilize the actual consumer in the audio and video portions of the ad. If the actual consumer is not being used for whatever reason, the advertiser must then “clearly and conspicuously disclose” that the persons in the advertisement are not “actual consumers of the advertised product.”

### **May an advertiser utilize expert endorsements?**

An expert endorser possesses superior knowledge and skill in a particular area as a result of experience, study, or training. An advertiser may utilize an endorsement from an expert, or even a celebrity, so long as the advertiser has reason to believe that the expert or celebrity continues to subscribe to the views provided in the endorsement. Reasonability must be judged in the same manner as an advertiser would use to determine if he should continue to use an endorsement made by an ordinary consumer: by checking back with the endorser, especially if any new information on the performance or effectiveness of the product becomes available, a material alteration in the product occurs, changes to a competitor’s product transpires, or the advertiser’s contract commitments are modified.

Whenever an advertisement represents that an expert is endorsing a product or service, the endorser’s qualifications must rise to the level of expertise that he or she represents possessing in the advertisement. Further, the endorsement provided by the expert must use the expert’s superior knowledge or skillful understanding of the advertised product or service. The expert must have evaluated the product’s features or characteristics and examined or tested the product to the extent necessary to support the conclusions that the expert presented in his or her endorsement.

If the advertisement implies that the endorsement is based upon a comparison of the advertised product or service and another similar product or service, such comparison must have been conducted by the expert providing the endorsement. The comparison must be done through the expert's examination or evaluation of the two competing products or services. For an ad to utilize such a comparison, the expert must conclude that the service or product being advertised is at least equal to a competitor's products. If the advertisement goes beyond comparing, instead stating that the product or service is superior to the competitor's, then the expert must have actually found such superiority in his or her examination of the products.

**May an advertiser utilize endorsements made by an organization?**

Yes, but such an endorsement must be produced by a process sufficient to "ensure that the endorsement fairly reflects the collective judgment of the organization." Further, if the organization is considered an "expert organization," then, in conjunction with the above rules regarding expert endorsements, the organization must also "utilize an expert, or experts, recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of the products."

**Must material connections between the endorser and the seller of the advertised product be disclosed?**

When a connection exists between the endorser and the seller that "might materially affect the weight or credibility of the endorsement," such connection must be fully disclosed. For example: when an endorser who appears in a television commercial that is not an expert or celebrity (meaning a person who is not known to a significant portion of the viewing public), the advertiser must "clearly and conspicuously" disclose either the payment received or the promise of payment (including non-monetary forms of payment, such as the promise that the endorser would appear on television or that the endorsement would benefit the endorser in some way) prior to the endorsement.

**Is “natively formatted advertising” considered deceptive?**

The recent proliferation of natively formatted advertising in digital media has raised questions about whether these advertising formats deceive consumers by blurring the distinction between advertising and non-commercial content. “Natively formatted advertising” encompasses a broad range of advertising and promotional messages that match the design, style, and behavior of the digital media in which it is disseminated. The ads can appear in a wide variety of forms, including written narratives, videos, infographics, images, animations, in-game modules and playlists on streaming services. Often, natively formatted ads are inserted into the stream of regular content a publisher offers, generally referred to as a “publisher site,” such as news and news aggregator sites and social media platforms. Advertising and promotional messages also can be embedded into entertainment programming, including professionally produced and user-generated videos on social media.

Regardless of an ad’s format or medium of dissemination, broadcasters should be careful to ensure that such ads are conforming with the FTC’s deceptive format policy. For example, broadcasters should make clear that any ads formatted to look like infomercials or news programs are in fact advertisements and conform with the FTC’s deceptive format policy. Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material. Such misleadingly formatted ads are deceptive even if the product claims communicated are truthful and non-misleading.

15 U.S.C. §§ 41–58.

16 C.F.R. §§ 255.0–255.5

*FTC, Commission Enforcement Policy Statement on Deceptively Formatted Advertisements* (Dec. 22, 2015),

[https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf)

(Updated October 2019.)

## INTERNET ADVERTISING

### May advertisers utilize music in television or radio advertisements?

Yes, but only if the advertiser obtains the rights to do so from the owner of the copyright. Pursuant to the United States Code (17 U.S.C. § 106), the owner of a copyright has the exclusive rights to (1) reproduce or authorize the reproduction of the copyrighted material; (2) to prepare or authorize the preparation of derivative works of the copyrighted material; (3) to distribute or authorize the distribution of the copyrighted material; (4) to publicly perform or authorize the public performance of the copyrighted material; (5) to display or authorize another to display the copyrighted material; and (6) to perform or authorize the performance of the copyrighted material by means of a digital audio transmission. These rights are subject to the “fair use” exception, which provides for the general public’s use of copyrighted materials without permission so long as that use involves criticism or comment on the original work, or the original work is being utilized for “news, reporting, teaching, scholarship, or research” purposes. As such, the “fair use” exception does not include using the copyrighted work in advertisements. Unless the owner of the copyright has authorized the advertiser’s use of their work, the advertisement will be seen as an infringement of the owner’s copyright.

Generally, there may be several owners of a copyright on a popular song. The advertiser will have to gain permission from all owners of copyrights associated with the song the advertiser would like to use. Normally, the underlying musical composition (meaning the words and musical notes to the song) and a particular recording of a song (the “sound recording” or “master recording”) both have copyright owners. To gain the necessary permission, the advertiser may need to contact, and negotiate with, the record company or performing artist whose recording the advertiser wants to use, as well as the publishing company that represents the composer of the music.

**May advertisers utilize only the tune of a familiar song in television or radio advertisements?**

Yes, but even using the tune of a familiar song in one's advertisement, with no words or different words, is not permitted without getting the rights to do so from the copyright owner. Pursuant to the United States Code (17 U.S.C. § 106), a copyright owner has the right to "prepare" or "authorize the preparation" of derivative works. A derivative work is one that uses the original copyrighted material, but changes it in some way, like taking out the words and replacing them with new lyrics. Although the Code (17 U.S.C. § 107) allows for the "fair use" of copyrighted materials, the making of a new song—even a parody—from the original tune will only be considered "fair use" if the new lyrics make some commentary on, or criticism of, the original song.

17 U.S.C. § 106.

17 U.S.C. § 107.

(Updated October 2019.)

## **AVOIDING PAYOLA AND PLUGOLA LIABILITY**

### **What is payola?**

Payola, the undisclosed acceptance of anything of value in return for airing or promoting a product or service, is a violation of the sponsorship identification rule. It is forbidden by Sections 317 and 508 of the Communications Act of 1934, and by the FCC's Rules. An employee who accepts money for playing a song without disclosing the payment engages in illegal payola. (When the station then airs the song without disclosing that it was paid for, the station is guilty of violating the sponsorship identification rule.) However, because the lack of disclosure is an essential element of payola, it does not exist when full disclosure is made.

### **What is plugola?**

Plugola occurs when a station employee promotes (or "plugs") on the air goods or services in which he or she has a financial interest without disclosing that interest to the station licensee and to the public.

### **What penalties arise from payola and plugola violations?**

The penalties for violations can include a \$10,000 fine and up to one year's imprisonment for each offense. In addition to financial liability, violations of payola or plugola may result in a regulatory threat to a station's FCC license.

### **How does a broadcaster avoid payola and plugola violations and liability?**

To avoid payola liability, a broadcast licensee must explicitly identify, at the time of broadcast, all sponsored material as paid for and by whom. Accordingly, it is important for broadcasters to require their employees to disclose the existence of any payment to station management, which in turn must disclose the sponsorship during the paid-for broadcast.

Similarly, plugola is legal only when proper disclosures are met.

Here too, employees must advise station management of the nature and extent of the personal interest, and then the station must identify the sponsorship over the air. Employees who potentially have conflicts of interest with station programming should be required to fully disclose these interests to management.

The Communications Act and FCC's rules require that: (i) when a broadcast licensee has received or been promised payment for airing program material, then the station must disclose that fact at the time material is aired and identify who is paying for it; (ii) all sponsored material must be explicitly identified except when it is clear that the mention of a product or service constitutes sponsorship identification; (iii) any broadcast station employee who has accepted or agreed to accept payment for the airing of program material, and the person making or promising to make the payment, must disclose this information to the station prior to airing; (iv) any person involved in the supply, production or preparation of a program who is receiving or making payment for its airing, or knows of such arrangements, must disclose this information prior to the airing; (v) broadcast licensees must make reasonable efforts to obtain from their employees and program suppliers information necessary to make required sponsorship announcements; and (vi) the information must be provided up the chain of production and distribution before the time of broadcast.

It is advisable for a station to implement a sufficiently comprehensive payola/plugola compliance plan. Although there is no standardized compliance plan, a station should (i) have a written policy prohibiting all forms of payola and plugola; (ii) ensure distribution of the written policy to all employees; (iii) address the treatment of employees' outside business interests; (iv) require regular collection of affidavits of compliance from employees; (v) have a mechanism for actively spotting and investigating suspicious activities; and (vi) ensure that appropriate sponsorship identification is placed on all material aired.

47 U.S.C. § 317.

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47 U.S.C. § 508.

47 C.F.R. § 73.1212.

FCC, *Payola Rules Consumer Guide* (last reviewed Dec. 4, 2017),  
<https://www.fcc.gov/sites/default/files/payola-rules.pdf>

(Updated October 2019).

## POLITICAL BROADCASTING

Because the Federal Communication Commission (FCC) places great importance on the enforcement of regulations governing political advertising, and given the severity of penalties for violations of the rules, compliance should be of prime importance to broadcasters. As a general rule, broadcasters must not discriminate between candidates as to the use of their station, the amount of time they give or sell, or anything else. Violations of the political rules can lead to substantial fines, and a broadcast station's license can be revoked for willful failure to provide federal candidates with reasonable access. As of July 1, 2016, fines total \$47,340 for each violation (or each day of continuing violation). The only exception is for indecency which totals \$383,038 for any single indecent broadcast up to a maximum of \$3,535,74 for a continuing violation of the indecency laws.

This area of law is complex and ever-changing. The contents of this article are intended to identify some of the major issues but are not all-inclusive. Specific questions regarding political broadcasts should be directed to your association or legal counsel.

### **Who is a "legally qualified candidate" under the FCC?**

A legally qualified candidate for FCC purposes is a person who has publicly announced that he or she is a candidate for office, has met the qualifications prescribed by the applicable laws for the office he or she seeks, and has met additional requirements, depending on the office sought and the type of election.

For a person seeking election to any public office including President or Vice President of the United States, or nomination for any public office except President or Vice President, by means of a primary, general or special election, he or she must also have qualified for a place on the ballot or must have met the requirements for election by the write-in method and made a substantial showing that he or she is a

bona fide candidate for nomination or office.

For a person seeking nomination to any public office except President or Vice President by means of a convention, caucus, or similar procedure, he or she must also make a substantial showing that he or she is a bona fide candidate for the office sought. This method of showing legal qualification only applies during the ninety days before the beginning of the convention or caucus.

For a person seeking nomination for the office of President or Vice President, he or she must also show that he or she has qualified for the primary or presidential preference ballot in the relevant state, or make a substantial showing of bona fide candidacy for nomination in the relevant state. Any candidate for President or Vice President who meets these qualifications in ten states (or nine states + the District of Columbia) is considered to be legally qualified in all states.

A person seeking the benefits afforded candidates by the political broadcasting rules must prove that he or she is a legally qualified candidate. A determination of whether and when a candidate has made that showing is a matter of the good faith judgment of the station.

#### **What is a “use”?**

The “use” of broadcast facilities by one candidate gives rise to obligations of equal opportunities and reasonable access to other candidates for the same office. It also determines whether a station may censor the broadcast. Therefore, determining whether a “use” has occurred is of critical importance.

Any positive broadcast of a candidate’s identified or identifiable voice or picture, whether authorized or not, constitutes a “use.” Spots by an independent political group promoting a candidate, or even appearances of a candidate in old movies or TV shows, are considered “uses.” However, an ad attacking a candidate, even if it contains the candidate’s voice or picture, is not considered a “use” by the candidate being attacked.

There are four kinds of programming, however, which never constitute a use:

- bona fide newscasts, including specialized news shows;
- bona fide news interviews, including even talk shows where the host controls the interview;
- bona fide news documentaries if the candidate's appearance is only incidental to the subject; and
- on-the-spot coverage of bona fide news events.

As discussed in greater detail below, a political campaign "use" triggers several FCC political broadcasting requirements and policies, including the following:

- equal opportunities and/or lowest unit charge requirements;
- reasonable access requirements for federal candidates;
- the prohibition on a station censoring a political spot or program;
- station protection against liability for defamatory statements that might occur in a political spot or program;
- extensive public file requirements; and
- sponsorship identification requirements.

**What is an "equal opportunity," and when must it be given?**

When a legally qualified candidate for federal, state or local public office "uses" broadcast facilities, that use will trigger "equal opportunities" rights. This means that when one candidate uses a broadcast facility, all other opposing candidates are entitled to an equal opportunity to buy time at the same rates paid by the first candidate, if the first candidate bought time, or to receive free time, if the first candidate received free time. The equal opportunity requirement applies with equal vigor with regard to use of a station's website. Thus, if a broadcaster sells Internet spots to one candidate as part of a package with broadcast spot time, then the same offer should be made to competitors of the candidate.

However, this equal opportunity right survives only for seven days

after the first prior “use” by the competing candidate. The equal opportunity right thus applies to times before the “political window” (45 days before primary and 60 days before general election). After seven days the privilege arising out of any use expires, though subsequent uses may trigger more equal opportunities rights. A caveat is that this period may be extended if the “use” is not timely noted in the public file.

### **What qualifies as “equal”?**

“Equal opportunities” does not mean “equal” times, but rather a “comparable” time period. The audience share and demographics must be comparable. Also, if you allow one candidate to use your facilities for other functionality, for example production capabilities, you must do the same for that candidate’s opponents, if requested.

Further, “equal opportunities” does not require a broadcaster to notify opposing candidates when a “use” has occurred on its station or about requests for time by his or her opponent. However, it does require equal treatment, so if you do so for one candidate, you must do so for that candidate’s opponents.

The “Zapple Doctrine” extended this equal treatment to supporters of a legally qualified candidate (such as political action committees or spokespersons) who urged their candidate’s election, discussed campaign issues, or criticized a competing candidate on the air during campaign periods. Therefore, a broadcaster who sold time to one candidate’s supporters or spokespersons had to afford the opponent’s supporters or spokespersons comparable time, if requested. In May 2014, the FCC declared that the Zapple Doctrine has no legal effect.

### **What is “reasonable access,” and who is entitled to it?**

Stations are required to provide legally qualified candidates for *federal* elective office with “reasonable access” to “reasonable amounts of time” to promote their candidacy. “Reasonable access” applies only to commercial stations and arises when a candidate is requesting a “use.” The requirement begins once the campaign gets underway and is, thus, not

limited by any time frame.

“Reasonable access” does not mean commercial stations are required to make free time available to federal candidates. However, if you make free time available to one candidate, the equal opportunities requirement may require you to accommodate his opponents in a similar fashion.

Further, “reasonable access” does not mean that candidates have rights to any particular programming or that a station must make all of its advertising time available to candidates or so much time that it is forced to preempt an excessive amount of other programming. However, broadcasters may not set limits in advance based upon how much or what type of time it will make available to federal candidates. Each request for reasonable access must be evaluated individually, using such factors as:

- the individual needs of the candidate, as expressed by the candidate;
- the amount of time previously provided to the candidate;
- potential disruption of regular programming;
- the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before it; and
- the timing of the request.

One exception to the general “reasonable access” requirement is that candidates have no right of access to news programming. Stations have wide latitude in determining whether to sell political advertising during all news programming, some news programs, or any portion of a specific news program. Another potential limit on “reasonable access” is the rule regarding weekend access. Stations that have provided weekend access to any commercial advertiser in the year preceding the pre-election period must provide access to federal candidates the weekend before the election. However, stations need only offer candidates the kinds of weekend services that previously have been made available to commercial advertisers.

Finally, “reasonable access” does not mean that stations must give candidates ordering deadlines different from those that are applied to commercial advertisers, so long as the deadlines do not interfere with reasonable access or equal opportunities rights. Thus, when a federal candidate requests access or when any candidate makes a valid equal opportunities demand, ordering deadlines and other matters of procedure may need to be waived to ensure that reasonable access and equal opportunities are provided.

**May a broadcaster censor the content of political broadcasts?**

A broadcaster may not edit or censor the content of a federal candidate’s “use” of its station (an ad by a candidate’s campaign containing the candidate’s recognizable voice or picture), and in return the broadcaster is immune from a defamation action that may arise from the “use.” This means the broadcaster may not edit or censor defamatory material, poor quality or negative ads or ads that contain an outrageous message. Note, however, that this immunity only applies to broadcast material, i.e. potential liability may result if a station chooses to stream its signal online.

An exception exists for a “use” which is in conflict with another federal statute, such as a use that is obscene. Such material may be edited or censored. Additionally, a station may censor non-“use” political broadcasts, including broadcasts by supporters of legally qualified candidates. Because stations have the power of censorship in these circumstances, they are not immune from liability for defamatory statements.

Although a “use” may not be censored, broadcasters may ask to review material in advance to ensure that it constitutes a “use,” that it contains the necessary sponsorship identification, and that it stays within the agreed length. If a station asks to review such a broadcast, it must inform the candidate that it is prohibited from censoring the material. If the spot does not contain the proper sponsorship identification, the identification must be added, even if that requires overdubbing a portion of the spot. A candidate may be charged normal

production rates for the cost of correcting a sponsorship identification.

However, in the case of a “non-use” political spot or program, including ads by third-party groups, broadcast stations are under no obligation to run the ads and may censor or reject them based on their content. As with Internet spots, the station’s discretion as to whether to run a non-use political spot gives rise to its potential liability for defamation or other civil liabilities based on the content of the advertisement. Accordingly, because broadcasters are not immune from liability, station management should scrutinize non-use spots and, when necessary, demand content changes as a condition to airing those advertisements.

**May a broadcaster censor political spots on the station’s website?**

Yes, but its right to do so gives rise to potential liability for the content of its Internet spots. The rule that broadcasters cannot censor political spots on their broadcasts – and therefore are generally immune from liability – does not apply with respect to political spots on a station’s website.

Because a broadcaster can censor or reject Internet ads based on their content, the broadcaster is potentially liable if those ads are defamatory, are copyrighted, or infringe on other rights. This rule applies even though the broadcaster could run the identical spot on the air without incurring any liability.

**Must political broadcasts include sponsorship identification?**

Yes. Proper sponsorship identification must indicate: (1) that the announcement is “paid for” or “sponsored by” a particular candidate or organization; and (2) the name of the candidate or organization that paid for the time. The language “paid for” or “sponsored by” must be used, and the name of the paying entity, a specific person or entity, must be specifically identified. If an announcement is paid for by someone other than the candidate, it must also state whether the candidate has authorized the announcement.

Again, we remind stations that the individual or entity paying for the ad should be the same as that disclosed in the tag line of the ad. Stations should take reasonable steps to ensure that the advertisements are being run by individuals or entities which are not fictitious. In some instances, a broadcaster may be required to look behind the named sponsor and identify the party with true financial and editorial control over the message. Nonetheless, broadcasters need only exercise reasonable diligence to obtain the information necessary to assure that a proper sponsorship identification has been made.

For television spots, the identification must be written and made in letters equal to 4% of the picture height and must be broadcast for four seconds. Aural identification is optional for television spots. Additionally, if the announcement runs five or more minutes, the sponsorship identification must be made at both the beginning and the end of the material.

For political advertising, federal candidates or their authorized committee must include in any radio political spot, an audio statement by the candidate identifying the candidate by name, that the candidate approved the broadcast and that the candidate or his or her committee authorized this commercial for broadcast. If the broadcast refers to an opposing candidate in any manner, it must also identify the office being sought. The sponsorship identification should be of such a duration that is easily understood by the radio listener. For state candidates, the same requirement applies, but any political committee should be clearly identified, and if not an incorporated entity should include a significant officer such as the treasurer or secretary.

#### **How much can a station charge for political broadcasts?**

So long as the "use" is in connection with their campaigns, legally qualified candidates are entitled to purchase time at rates comparable to that of other advertisers.

However, during the 45 days before a primary or primary runoff election and 60 days before a general election, stations may not charge

legally qualified candidates more than its “lowest unit charge” for the same rate category of advertisement to air “uses.”

**Are there recordkeeping requirements associated with political broadcasts?**

Yes. Section 315 of the Communications Act and Section 73.1943 of the FCC’s rules require all stations to maintain online political files. Broadcasters must keep in their public inspection file and post on the station’s website records of all requests for political broadcast time made by or on behalf of all legally qualified candidates, along with a notation indicating whether the station granted the request. The file should indicate the schedule of time provided or purchased, spot length, classes of time, rates charged, when each spot actually aired, whether any rebates were paid, and the amount and date of rebates. The file should also include a list of the executive offices and members of the board of directors and executive committees of all organizations sponsoring political broadcasts or furnishing programming of controversial issues. When free time is provided, that must also be indicated in the file. Any “use” by a candidate, whether paid for, provided at no charge, or even inadvertent uses, should also be noted in the files.

The FCC expects stations to update political files with new information immediately under normal circumstances and to place a copy of the contract between the station and the candidate in the file in usual cases. While stations need not update exact times of political spots immediately, they must provide some method for opposing candidates to ascertain the exact time an opponent’s spot aired. If the station does not update its political file immediately to indicate exact times, then the file should contain a notation that the station, upon request, will provide the actual air times.

Finally, political file materials must be kept for only two years unless a claim is made against the license holder or an investigation is being conducted by the FCC. After that time period has lapsed, the political file material may be discarded.

West Virginia Code § 3-8-2(d) requires any person who has contributed an independent expenditure in the amount of \$5,000 or more in any statewide legislative or multi-county judicial race or \$500 or more for any county office to file a campaign financial statement form with the Secretary of State. Section 3-8-2B(e) requires that any advertisement must include a clear and conspicuous public notice that identifies the name of the person who paid for the expenditure. Provided, that if the advertisement appears on or is disseminated by broadcast, cable or satellite transmission, the statement required must be both spoken clearly and appear in clearly readable writing at the end of the communication. The advertisement must also state that the communication is not authorized by the candidate or his or her committee. Care should be taken by each broadcaster to ascertain that the name set forth on the advertisement, as well as the individual paying for the advertisement, are one and the same.

**Are stations responsible for putting network political advertising in their online political files?**

No. Stations are not responsible for reporting the network's political advertising in their online political files.

**What is the impact of the United States Supreme Court decision in *Citizens United v. Federal Election Commission*?**

On January 21, 2010, the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* overturned prior precedent and struck down as unconstitutional provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that expressly advocated the election or defeat of a political candidate. In a 5-4 decision, the majority held that the First Amendment's most basic free speech principle – that the government has no business regulating political speech – trumped federal statutes attempting to limit free speech by corporations.

With regard to existing West Virginia law, *Citizens United* should have a substantial impact on statutes passed by the West Virginia

Legislature in response to third-party ads at issue in the State Supreme Court race and the resulting federal court litigation in *Center for Individual Freedom, Inc. v. Tennant, et al.*

In the wake of the Court's momentous decision, businesses and corporations are left with many unanswered questions concerning their newly-acquired First Amendment rights and what they can do by way of political advertising. Fortunately, the following points should serve as guideposts:

- The ban on a corporation's ability to spend money supporting or opposing a candidate no longer exists.
- There are no limits as to the amounts which may be spent by a corporation from its general treasury funds in support of or in opposition to a candidate.
- Such support must be independent and must not be coordinated support with a political candidate.
- Corporations may not contribute directly to a candidate.
- Congress, and by implication states, can require corporations to disclose their spending and run disclaimers with their advertisement. Such requirements currently exist in West Virginia.
- As third-party ads, the broadcast media is not required to accept such ads even where the ads address a particular candidate.
- The ads must be truthful and a broadcaster or newspaper can be held liable for the publication of ads with false content.

**How is "electioneering communication" defined in the latest revision of the West Virginia campaign finance statute?**

On April 12, 2013, following two prior amendments to provisions of the West Virginia campaign finance statute, the West Virginia legislature passed an amendment to W. Va. Code § 3-8-1a, expanding the definition of "electioneering communication" to include mailing, telephone bank, and billboard advertisements and relating to the regulation and control of elections generally. The law, which became effective on July 11, 2013, provides as follows:

(12) (A) "Electioneering communication" means any paid communication made by broadcast, cable or satellite signal, mass mailing, telephone bank, billboard advertisement or publication in any newspaper, magazine or other periodical that:

(i) Refers to a clearly identified candidate for Governor, Secretary of State, Attorney General, Treasurer, Auditor, Commissioner of Agriculture, Supreme Court of Appeals or the Legislature;

(ii) Is publicly disseminated within:

(I) Thirty days before a primary election in which the nomination for office sought by the candidate is to be determined; or

(II) Sixty days before a general or special election in which the office sought by the candidate is to be filled; and

(iii) Is targeted to the relevant electorate.

"Electioneering communication" does not include:

(i) A news story, commentary, or editorial disseminated through the facilities of any broadcast, cable or satellite television, radio station, newspaper, magazine, or other periodical publication not owned or controlled by a political party, political committee, or candidate: Provided, That a news story disseminated through a medium owned or controlled by a political party, political committee, or candidate is nevertheless exempt if the news is:

(I) A bona fide news account communicated in a publication of general circulation or through a licensed broadcasting facility; and

(II) Is part of a general pattern of campaign-related news that gives reasonably equal coverage to all opposing candidates in the circulation, viewing, or listening area;

(ii) Activity by a candidate committee, party executive committee, a caucus campaign committee, or a political action

committee that is required to be reported to the State Election Commission or the Secretary of State as an expenditure pursuant to §3-8-5 of this code or the rules of the State Election Commission or the Secretary of State promulgated pursuant to such provision: Provided, That independent expenditures by a party executive committee, caucus committee, or a political action committee required to be reported pursuant to §3-8-2 of this code are not exempt from the reporting requirements of this section;

(iii) A candidate debate or forum conducted pursuant to rules adopted by the State Election Commission or the Secretary of State or a communication promoting that debate or forum made by or on behalf of its sponsor;

(iv) A communication paid for by any organization operating under Section 501(c)(3) of the Internal Revenue Code of 1986;

(v) A communication made while the Legislature is in session which, incidental to promoting or opposing a specific piece of legislation pending before the Legislature, urges the audience to communicate with a member or members of the Legislature concerning that piece of legislation;

(vi) A statement or depiction by a membership organization in existence prior to the date on which the individual named or depicted became a candidate, made in a newsletter or other communication distributed only to bona fide members of that organization;

(vii) A communication made solely for the purpose of attracting public attention to a product or service offered for sale by a candidate or by a business owned or operated by a candidate which does not mention an election, the office sought by the candidate, or his or her status as a candidate; or

(viii) A communication, such as a voter's guide, which refers to all of the candidates for one or more offices, which

contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history.

The revised statute defines “mass mailing” as “a mailing by United States mail, facsimile or electronic mail of more than five hundred pieces of mail matter of an identical or substantially similar nature within any thirty-day period. For purposes of this subdivision, “substantially similar” includes communications that contain substantially the same template or language, but vary in nonmaterial respects such as communications customized by the recipient’s name, occupation or geographic location.”

“Telephone bank” means “telephone calls that are targeted to the relevant electorate, other than telephone calls made by volunteer workers, regardless of whether paid professionals designed the telephone bank system, developed calling instructions or trained volunteers.”

“Billboard advertisement” is defined as “a commercially available outdoor advertisement, sign or similar display regularly available for lease or rental to advertise a person, place or product.”

47 C.F.R. § 73.1940 - § 73.1944.

47 U.S.C. § 315.

*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

W. Va. Code § 3-8-1 *et seq.*

(Updated October 2019.)

# DEFAMATION ISSUES

## WEST VIRGINIA'S LAW OF DEFAMATION (LIBEL AND SLANDER)

The West Virginia Constitution states that no law may abridge the freedom of the press. However, the Legislature may restrain the publication of defamatory statements by permitting civil actions to be brought by the aggrieved party to recover suitable damages for the defamation. Thus, media are held responsible for defamation to exactly the same extent as anyone else.

### What is defamation?

Defamation is the offense of injuring a person's character, fame or reputation by false and malicious statements. A statement is assumed to have injured a person's reputation if it tends to lower him in the estimation of the community or if the statement deters third parties from associating or dealing with him. Statements are defamatory if they tend to reflect shame, contumely and disgrace upon the plaintiff. For instance, falsely charging anyone with the commission of any crime is considered defamation. In addition, direct defamatory statements are not necessary to be actionable. Defamation may also be accomplished through inference, implication, innuendo or insinuation. There are two ways in which defamation can occur: libel and slander. Libel is defamation through published writings or through the publication of pictures or photographs. Slander is defamation through spoken words.

### Who may sue for libel or slander?

Any person whose reputation is injured by a published writing may sue for libel. Anyone whose reputation is injured by spoken words may sue for slander. In addition, when a group of unnamed but identifiable individuals, such as the city council of a named municipality, has been injured by libelous writings or spoken words, each council member may sue for libel or slander, respectively.

**Is an inaccurate statement a false statement?**

Minor inaccuracies do not amount to a false statement so long as the substance of the statement can be justified by facts. A statement is not considered false unless it had a different effect on the mind of the audience from that which the exact truth would have produced.

**Is there a difference between public figures and private individuals in defamation?**

There are different defamation standards, depending on whether the person injured is a public figure or a private individual. The different standards exist for two reasons. First, public figures have much greater access to the media and can thus defend themselves through the media much better than private individuals. Second, public figures, by virtue of their positions in the community or involvement in a particular matter of public concern, could be said to invite public comment and attention.

**Private Individual Standard**

To be held liable for the defamation of a private individual, six elements must be met. These elements include: (1) a defamatory statement; (2) a non-privileged communication to a third party; (3) a false statement; (4) reference to the defamed party; (5) negligence on the part of the person speaking or publishing the statement; and (6) a resulting injury to the defamed party.

**Public Figure Standard**

To be held liable for the defamation of a public figure, the standard is much higher. The public figure must prove that: (1) the defamatory statements were false or misleading; (2) the statements tended to defame the public figure and reflect shame, contumely and disgrace upon him; (3) the statements were published or spoken with knowledge at the time that they were false or misleading or were published or spoken with a reckless disregard of the truth; and (4) the publisher or speaker intended to injure the public figure by the defamatory statements. The fourth element, intent to injure, is commonly referred to as "actual malice."

Although a defamed public figure must prove that the publisher or

speaker intended to injure him by the defamatory statements, or actual malice, a court will infer an intent to injure if the media intentionally “avoids” the truth in its investigatory techniques or omitted facts in order to distort the truth.

### **Who is a public figure?**

A public figure, for the purposes of defamation, is, at the very least, a government employee who has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs. In addition, those who occupy a position of such persuasive power and influence in the community that they assume special prominence in the resolution of public questions and in the affairs of society may be considered public figures. People may be considered “limited purpose public figures” if: (1) they voluntarily engage in significant efforts to influence a public debate or voluntarily assume a position that would propel them to the forefront of a public debate on a matter of public concern; (2) the public debate or controversy and their involvement in it existed prior to the publication of the alleged defamatory statement; and (3) they had reasonable access to channels of communication that would permit them to make an effective response.

### **Who is liable for the republication of a defamatory statement?**

The author or originator of a defamatory statement is liable for the republication or repetition thereof by third parties, provided it is the natural and probable consequence of his act or if the author has authorized its republication. Along the same lines, the original author is not responsible if the republication is the independent and unauthorized act of a third party and not a natural consequence of the author’s act. The publisher may be held liable if the statement was not attributed to the source or the publisher knew the statement was untrue.

### **Are there any defenses to defamation?**

There are several defenses that provide either a complete bar to liability or at least reduce the amount of damages that can be assessed.

### **Truth**

Truth is an absolute defense to an allegation of defamation. It is not necessary to prove the literal truth of statements made. Slight inaccuracies of expression are immaterial so long as the alleged defamatory statement is true in substance. However, for truth to be an absolute defense to defamation, it must be shown that the alleged defamatory statement was not only true, but also was uttered with good motives and for justifiable ends.

### **Absolute and Qualified Privileges**

Two types of privileges are defenses to defamation. An absolute privilege is a complete defense to any defamation suit. Thus, if an absolute privilege exists, the defamation action must be dismissed. However, a qualified privilege only acts as a complete defense if no bad motives exist.

An absolute privilege is limited to those situations in which there is an obvious policy in favor of permitting complete freedom of expression without any inquiry as to the defendant's motives. For example, absolute privilege will provide a defense to statements of legislative, judicial, and quasi-judicial proceedings and other acts of the state. Also, where a plaintiff has consented to the defamation or instigated the publication of defamatory statements, where the broadcast of statements made by political candidates is involved, or where a petitioning of the government for a redress of grievances protected by the First Amendment is involved, an absolute privilege will be found.

A qualified privilege exists when a person publishes a statement in good faith about a subject in which he or she has an interest or duty and limits the publication of the statement to those parties who have a legitimate interest in the subject matter. A qualified privilege is based upon a public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of certain interests. For example, a qualified privilege includes: (1) the publication of defamatory material for the protection or advancement of the defendant's own interests; (2) the publication of defamatory material for the protection of the legitimate interests of others; (3)

where the communication between the publisher or speaker and the recipient is designed to promote a mutual interest; (4) where the communication is made to one discharged with the performance of a public duty; (5) reports of public proceedings; and (6) fair comment on matters of public concern.

However, a qualified privilege will not provide a defense if bad motives exist. In addition to a bad motive, the following will defeat a qualified privilege: (1) an intentional publication of false defamatory material; (2) a publication of false defamatory material in reckless disregard for its truth or falsity; (3) a publication of false defamatory material made to parties who have no reason to receive the information; or (4) a publication of false defamatory material with a primary purpose unrelated to the purpose of the privilege.

### **Statutory Privilege: Reporter's Shield Law**

In 2011, West Virginia enacted the Reporter's Privilege Law, which protects reporters from revealing their confidential sources, subject to three exceptions, i.e., unless such testimony is necessary to prevent imminent death, serious bodily injury or unjust incarceration. W. Va. Code § 57-3-10(b). See Parts II.D.2 & III.B.

§ 57-3-10. Reporters' Privilege: "(a) 'Reporter' means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public for a substantial portion of the person's livelihood, or a supervisor, or employer of that person in that capacity: *Provided*, That a student reporter at an accredited educational institution who meets all of the requirements of this definition, except that his or her reporting may not provide a portion of his or her livelihood, meets the definition of reporter for purposes of this section.

(b) No reporter may be compelled to: (1) Testify in any civil, criminal, administrative or grand jury proceeding in any court in this state concerning the confidential source of any published or unpublished information obtained by the reporter in the course of the above described activities without the consent of the confidential source, unless such testimony is necessary to prevent imminent death, serious bodily injury or unjust incarceration; or (2) Produce any information or testimony that would identify a confidential source, without

the consent of the confidential source, unless such testimony is necessary to prevent imminent death, serious bodily injury or unjust incarceration.

c) Nothing in this section shall be read to limit any existing constitutional protections afforded any person under the United States or West Virginia Constitutions."

The near absolute privilege afforded to reporters by the newly enacted state shield law, along with the Lincoln Journal decision granting a writ of prohibition against disclosure of confidential sources, demonstrates a reconfiguration of the balance between freedom of the press and claims of tortious conduct against the media.

The former standard required only a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. State ex rel. Hudok v. Henry, 389 S.E.2d 188, 17 Media L. Rep. (BNA) 1627 (W. Va. 1989). Now, only upon a finding that the "testimony is necessary to prevent imminent death, serious bodily injury or unjust incarceration will it be compelled." W. Va. Code § 57-3-10(b).

### **Opinion**

Any opinion is protected unless it implies that there are undisclosed defamatory facts that the author knows and the reader does not. In addition, any statement of fact involving an issue of public concern that does not contain a provable false assertion of fact is entitled to full constitutional protection.

### **Mitigation**

There are three mitigating circumstances that will serve as partial defenses in actions for defamation. These include intoxication of the publisher or speaker, provocation by the plaintiff that induces the statements, and retraction or apology. While these mitigating circumstances do not exonerate a publisher or speaker from liability for defamation, they do act to mitigate the assessment of damages.

**Do broadcasters have protection for defamatory statements of others that are published as part of a broadcast?**

In some contexts, yes. West Virginia Code § 55-7-14 provides that a broadcast station's owner, licensee or operator, including their agents, shall not be liable for any damages for a defamatory statement uttered over the facilities of such station or network by any legally qualified candidate for public office.

More generally, Section 55-7-14 provides that a broadcast station is not liable for a defamatory statement published or uttered in its broadcast, if that statement was made by one other than the broadcast owner, licensee or operator, or agent or employee thereof. However, liability against the broadcaster can nevertheless be found if the broadcaster failed to exercise due care to prevent the publication or utterance of the defamatory statement.

*Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983).

*Greenfield v. Schmidt Baking Co., Inc.*, 199 W. Va. 447, 485 S.E.2d 391 (1997).

*State v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996).

*Dixon v. Ogden Newspapers, Inc.*, 187 W. Va. 120, 416 S.E.2d 237 (1991).

W. Va. Code § 55-7-14.

W. Va. Code § 57-3-10.

(Updated October 2019.)

## WEST VIRGINIA'S LAW OF FALSE LIGHT (RIGHT OF PRIVACY)

Every person has a right to privacy. A simple definition of the right to privacy is, "the right to be let alone." The law of privacy has been developed in order to protect this right. As a result, every state now allows some form of redress for an invasion of privacy. There are four categories of invasion of privacy: intrusion, appropriation, unreasonable publicity, and false light.

### What is false light?

Publicity that unreasonably places another in a false light before the public is an invasion of privacy. Protection afforded by the law of privacy for such false light is restricted to persons of ordinary or reasonable sensibilities and does not extend to the supersensitive. Thus, the standard of whether a person was placed in a false light is contingent upon whether a person of reasonable sensibilities would believe he or she was placed in a false light.

### Are there any defenses to false light?

The same absolute and qualified privilege defenses that are available in defamation actions are also available in false light actions. (For more information, see the section entitled "West Virginia's Law of Defamation.") Newsworthiness and consent also act as defenses to false light actions.

#### Newsworthiness

Two classes of newsworthy subjects are privileged under privacy law: public figures and matters of legitimate public interest.

*Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983).

(Updated October 2019.)

## WEST VIRGINIA'S LAW OF PRIVACY

### **Does West Virginia law recognize a cause of action for invasion of the right of publicity?**

Yes, West Virginia law recognizes a cause of action for invasion of the right of publicity, which remedies the unjust enrichment caused by exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money, and effort. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 85 (W. Va. 1983). A claim is actionable only when the defendant takes the benefit of the commercial or other value of another's name or likeness. The fact that newspapers are sold for a profit does not make the incidental publication of a person's name or likeness a basis for a cause of action.

W.Va. Code § 6B-2B-1, *et seq.* under The Ethics Act is commonly referred to as the "trinkets statute." The statute provides that public officials, their agents or anyone on public payroll may not place the public official's name or likeness on trinkets paid for with public funds. The statute also provides that public officials, their agents or anyone on public payroll may not use public funds to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising to the public. Under the statute, "advertising" means publishing, distributing, disseminating, communicating or displaying information to the public through audio, visual or other media tools with the purpose of promoting the public official or a political party. "Advertising" may include billboard, radio, television, mail, social media, websites and other forms of publication, dissemination, display or communication.

### **Does unauthorized use of celebrity's name in a press release violate the right of publicity?**

Yes, because a press release will likely be regarded as an advertising vehicle, the unauthorized use of a third party's name in a press release may constitute a right of publicity violation. The United States District Court for the Eastern District of California recently

denied a motion to dismiss filed by a wireless carrier using the name of test pilot, Chuck Yeager, in a press release. Yeager sued the wireless carrier alleging that his name was used in the press release without his permission in violation of the Lanham Act and state law. The court concluded that the advertiser's use of Yeager's name was likely to cause confusion by consumers, and rejected the assertion that the use was merely incidental or fair use.

W.Va. Code § 6B-2B-2 does not prohibit the name and likeness of a public official to be included in a press release, produced with public funds and which is disseminated by any means, if that press release is intended for a legitimate news or informational purpose and, considered as a whole, does not feature or present the public official in a form, manner, or context which is intended to promote the official. A press release produced with public funds may not request, solicit or promote voting for any official or political party.

W.Va. Code §§ 6B-2B-1, *et. seq.*  
(Updated October 2019.)

## DEFAMATION – REPUBLICATION

### Are broadcasters protected when they publish the speech of another?

Like most answers in law, there is not a simple answer to this question. A limited number of cases, though none in West Virginia, have decided that republishing the defamatory statements of another is the same as making the defamatory statements yourself even when the words are attributed to the source or the truth of the words is disavowed. Broadcasters have available to them the same protections afforded all other First Amendment speech, but they should analyze these statements with the same scrutiny given to any other statements.

There are two common defenses to republishing the statements of another: (1) that the statements are true; or (2) that the statements are protected opinions. In West Virginia, to assert the defense of truth, you must prove that the statements were true and that they were made with good motives. This defense does not extend to a broadcaster who merely correctly and accurately (i.e. truthfully) republishes the words of another that contain defamatory statements. The statements themselves must be true.

Statements of opinion that cannot be reasonably interpreted as stating actual facts about an individual are protected as well. This defense centers around proving that the statements do not contain facts but are purely opinion. For example, the statement “I think Joe Smith is a liar” on its face appears to be an opinion. Actually, whether Joe Smith is a liar is a provable fact, and simply couching the statement in the form of opinion by beginning it with “I think” does not protect it. Therefore, if Joe Smith is not, in fact, a liar, he may have a defamation action.

There are many situations in which even scathing commentary is considered opinion and protected speech. For example, the United States Supreme Court decided that a newspaper article characterizing a real

estate developer's negotiating tactics as "blackmail" was not defamatory. The developer argued that the word "blackmail" implied that the developer committed a crime. However, the court held that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."

Besides the defenses of truth and opinion, other defenses to defamation may be available. (For more information, see the section entitled "West Virginia's Law of Defamation.")

### **Are letters to the editor offered any special protection?**

The purist form of republication is publishing "letters to the editor." There is no special protection afforded this speech, and the same analysis must be applied to them as well. However, there may be a built in assumption that letters to the editor are opinions simply based on their nature. These statements are not published as hard news on the front page of a newspaper but are contained in the editorial section generally reserved for public comment and opinion.

### **What about third-party postings (i.e., someone comments on your news posts online)?**

Recognizing the difficulty that a strict application of the republication law would present in online communications, Congress enacted Section 230 of the Communications Decency Act, which protects against liability for Internet "intermediaries" who provide or republish speech by others.

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This federal law expressly preempts any conflicting state laws: "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Thus, Internet publishers generally are not responsible for libelous information posted by their readers unless the publishers

exercise editorial control over the content. For example, news sites are not protected by Section 230 if they create or extensively edit the third-party comments rather than merely posting them online. As always, we encourage stations to review comments before they are posted to eliminate any that are clearly libelous.

In addition to providing protection against defamation claims, Section 230 has been used to protect intermediaries against a variety of other claims, including negligent misrepresentation, interference with business expectancy, breach of contract, intentional nuisance, violations of federal civil rights, and emotional distress claims.

47 U.S.C. § 230 (1996).  
(Updated October 2019.)

## DEFAMATION ALLEGATIONS BASED ON INDIRECT STATEMENTS

Although most broadcasters realize that the station could be sued for statements that are directly defamatory, reporters should also realize that they could be sued for indirect statements that imply a defamatory meaning. Defamation by implication can stem not from what is literally stated in a broadcast, but what is implied. Defamation by implication can involve omitting a material fact or a defamatory statement by insinuation.

### What is the law on defamation by implication in West Virginia?

Although all states do not recognize defamation by implication, the West Virginia Supreme Court of Appeals has held that defamation can be accomplished through inference, implication, innuendo, or insinuation. However, the court has previously held that a plaintiff cannot use an innuendo or insinuation to expand upon the normal meaning of the statement. Also, the court has the authority to determine if the statements can be interpreted as having a defamatory meaning.

One example of defamation by implication in West Virginia involved an advertisement in a Huntington newspaper alleging that a sheriff had been charged with several felonies. The allegation was false and the name of the particular sheriff was never mentioned. When the plaintiff, the current sheriff of the county, sued the newspaper for defamation, the paper claimed that the advertisement could have referred to any sheriff as it did not specifically mention the person's name. The court allowed the defamation case to continue because the identity of the sheriff was ascertainable to the public.

In another defamation case in West Virginia, the court allowed a member of a city council to continue his case based on an article published in the newspaper that insinuated that the council members had misused funds. The article did not specifically mention any particular council members' name. However, the court reasoned that since the allegations were directed towards a small, restricted group, any member

of that group could sue because the article implied that all members of the council had participated in the alleged wrongdoing.

Therefore, based on the current law in West Virginia, the station may want to strongly consider not airing any reporter's story where defamatory meaning could be implied by the way the story was edited. Because if a court holds that the implications have a defamatory meaning, the station could be sued.

*Greenfield v. Schmidt Baking Co., Inc.*, 199 W. Va. 447, 485 S.E.2d 391 (1997).

*Neal v. Huntington Pub. Co.*, 159 W. Va. 556, 223 S.E.2d 792 (1976).

*Swearingen v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 26 S.E.2d 209 (1943).

(Updated October 2019.)

# GENERAL

## EFFECT OF GAG ORDERS ON THE MEDIA

The West Virginia Constitution guarantees the right of the public to attend both criminal and civil trials. This right extends to other types of judicial and quasi-judicial proceedings, such as professional disciplinary proceedings. Yet, the public's right to attend any such proceedings is not absolute. Limits on access of the public and press may be imposed by a judge through a gag order. Gag orders may be issued in both criminal and civil trials.

### What is a gag order?

A gag order, often referred to as a closure order, is an order by a judge requiring the proceedings to be closed to the public and press. The order also prevents the disclosure of information revealed during the proceedings. This closure order is typically issued by the judge during the beginning of a court proceeding at the request of the defendant. A public hearing must be held before a gag order may be issued. During the public hearing, all interested parties are given an opportunity to be heard. Any member of the press has the right to speak at such a hearing. In addition, a judge must determine if any reasonable alternative is available before the gag order can be issued. For instance, the court may close only certain portions of the proceedings to the public in an effort to prevent banning the public from the entire proceedings. Finally, the reason for the issuance of a gag order must be given to the public.

### When are gag orders issued?

Gag orders are issued in criminal trials when they are necessary to ensure that a defendant will not suffer irreparable damage to his right to receive a fair and just trial. Such closure of the trial is necessary when there is prior hostile publicity and a probability that the issues involved in the proceedings will further aggravate adverse

publicity, impact the defendant's access to an unbiased jury. In civil proceedings, a gag order may be issued when the Legislature has specified proceedings which must be closed to the public to prevent the disclosure of confidential information protected by statute. For instance, any proceedings involving juvenile records, which are protected by statute, may be closed in order to prevent public disclosure of such confidential information. (For more information, see the section entitled "Reporting and Disclosing the Identity of Juveniles.")

### **What does it mean when a gag order has been issued?**

A gag order usually does two things. First, the proceedings are closed to the public and press. Second, the order forbids the disclosure of any information presented during the proceedings. However, some information concerning the proceedings may be disclosed even though the proceedings have been closed to the public. Whenever possible, the court will issue a redacted copy of information concerning the proceedings to the public. A redacted copy of information is simply a copy of the proceedings with names and/or other confidential information omitted.

### **Can gag orders be challenged?**

Not all gag orders are final. In some instances, a gag order issued by a judge may be challenged by anyone whose rights have been infringed upon as a result of such a closure order. The enforcement of a public right, such as access to court proceedings, may be sought by anyone who shares a common interest in that right with the public at large. Therefore, the press has the right to challenge a gag order issued by a judge in the proceedings.

W. Va. Const. art. III, §§ 14, 17.

*State v. Hoke*, 205 W. Va. 611, 520 S.E.2d 186 (1999).

*State v. Hamilton*, 165 W. Va. 103, 267 S.E.2d 544 (1980).

*State v. Hanna*, 267 S.E.2d 544, 378 S.E.2d 640 (1989).

(Updated October 2019.)

## REPORTING AND DISCLOSING THE IDENTITY OF JUVENILES

The State of West Virginia protects the confidentiality of juveniles by requiring that all records and information which are maintained by the Division of Juvenile Services, the Department of Health and Human Resources, the Board of Education, a child agency or facility, a court or a law-enforcement agency concerning a child or juvenile are kept confidential and not released or disclosed to anyone. Thus, as a general rule, all juvenile records are confidential and not public records.

### What about juvenile court proceedings?

The objective of the juvenile justice system is to provide for guidance and rehabilitation, not to fix criminal responsibility. In order to accomplish these important goals, it is essential that certain aspects of a juvenile criminal investigation do not become public. The state must take steps to keep the child's name from being associated with criminal activity. Therefore, judicial proceedings concerning juveniles are closed to the public. In addition, records of these proceedings are not public records and are sealed by the court. The records shall not be disclosed to anyone unless disclosure is otherwise authorized. For instance, if a juvenile case is transferred to the criminal jurisdiction of the Circuit Court, the Court may open the juvenile records for public inspection. Similarly, the name and identity of any juvenile tried or convicted of a violent or felonious crime may be made available to the public.

In general, anyone who reveals such confidential information is guilty of a misdemeanor. However, the West Virginia Supreme Court has had occasion to address the constitutionality of making it a criminal offense for the media to publish the names of juveniles in connection with juvenile justice system proceedings. In the case of *State ex rel. Daily Mail Publishing Co. v. Smith*, the West Virginia Supreme Court held, and the United States Supreme Court affirmed, that the publication of the names of juveniles by the media obtained in a lawful manner is not

subject to criminal offense.

**May some information that involves juveniles be disclosed?**

Yes. Not all records are prohibited from disclosure simply because the records contain some information concerning juveniles. In fact, there is a constitutionally protected right of the press and the public to a redacted copy of incident reports involving juveniles. A redacted copy is one which omits any information that could reasonably lead to the discovery of juveniles' identities. Therefore, when reporting an incident which involves juveniles, the following must be omitted from the information released:

- (1) The names of all juveniles.
- (2) The exact time coupled with the exact location of the incident.
- (3) The names of witnesses.
- (4) The identity of the complainant.
- (5) Any other information which may enable the press to conduct further research and interviews leading to disclosure of the names of the juveniles involved.

Regardless, the following information can be disclosed to the public:

- (1) The reported offense.
- (2) Booking information.
- (3) Notation of any release or transfer.
- (4) Details of the arrest.
- (5) Bonding information.

In summary, any information concerning a juvenile generally may not be made public. However, whenever possible, incident reports can be reported to the public so long as the names of the juveniles are omitted along with any other information that may reasonably lead to the disclosure of their identities.

W. Va. Code §§ 49-4-103, 49-4-104, 49-5-101, 49-5-103 (2019).

*State ex rel. Daily Mail Publishing Co. v. Smith*, 248 S.E.2d 269 (1978),

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aff'd 443 U.S. 97 (1979).  
(Updated October 2019.)

## **WEST VIRGINIA'S RULES GOVERNING COVERAGE OF COURT PROCEEDINGS**

Effective May 31, 2013, the West Virginia Supreme Court of Appeals adopted amended Trial Court Rules governing cameras, audio equipment, and media in the courtroom. The amendments require that "[t]he presiding officer shall give priority to Federal Communications Commission licensed broadcast media personnel agreeing to act as a pool for multiple television or radio broadcast stations." Rule 8.06 was amended to strike certain restrictions on the use of film and video cameras with audio pickup.

### **Which rules govern cameras, audio equipment, and media in the courtroom?**

Rules 8.01 through 8.10 of the West Virginia Trial Court Rules govern media access in all circuit court proceedings that are open to the public. Media access to oral arguments in the West Virginia Supreme Court of Appeals is governed by Rule 42 of the West Virginia Supreme Court Rules of Appellate Procedure and the Rules Governing Media Coverage of Courtroom Proceedings in the Supreme Court of Appeals.

The Rules generally permit the possession of cameras and audio equipment in and around the courtroom, subject to advance notice, compliance with all requirements, and the discretion of the Court. In particular, the Rules specify how to obtain and retain permission to cover proceedings, the amount and type of equipment and personnel that is permitted in the courtroom, and the conduct of media personnel permitted in the courtroom.

### **How is permission to cover proceedings obtained and preserved?**

The procedure under both sets of Rules is similar. Permission to possess a camera or audio equipment in and around a courtroom must be granted by the presiding judicial officer as far in advance of the

proceedings as practicable, and the judge has sole discretion as to whether cameras or audio equipment will be allowed in and around the courtroom. Objections to the presiding officer's decision can be made by a party, a witness, or an attorney. If an objection is made, it is the duty of the presiding officer to rule on the objection. Also, once permission has been granted for a media organization to cover the judicial proceedings, it is the decision of the individual media organization as to whether the organization will actually cover the event.

Once granted permission, media personnel have an obligation to confirm that they have read Rule 8 or Rule 42, as applicable, in its entirety. Also, media personnel have the obligation to sufficiently demonstrate, in advance of the proceedings and to the presiding officer, that the equipment to be used does not produce a distracting light or sound. If the media personnel fail to obtain advance equipment approval, the presiding officer is within his or her authority to preclude the use of the equipment in any proceedings. Also, the presiding officer may terminate coverage of any portion or remainder of the proceedings upon determining that the coverage will impede justice or deny any party a fair trial.

#### **What is permissible scope of coverage?**

While allowing cameras and audio equipment in and around the courtroom, the Rules permit coverage of only those proceedings which are open to the public. In order to protect the attorney-client privilege and the right to effective assistance of counsel, audio coverage or broadcasts of conferences between or among attorneys and their clients or between and among attorneys, clients and the presiding officer are not permitted. While coverage of any nonjudicial meeting or other courtroom gathering is permitted by the Rules, it is only permitted when the presiding officer and the group sponsoring the gathering concur. Of course, the coverage is to be conducted in accordance with the Rules. However, the Rules do not limit media coverage of ceremonial proceedings conducted in court facilities under terms and conditions established by

the prior consent of the presiding officer.

**What type of equipment and personnel is permitted?**

Along with prescribing the nature of events permitted to be covered, the Rules also prescribe the types of equipment and personnel permitted in the courtroom at any one time. For proceedings in the West Virginia Supreme Court of Appeals, Rule 42 requires broadcast media to arrive at least thirty minutes prior to oral arguments to set up equipment. All equipment must be in place and tested no less than fifteen minutes in advance of the time scheduled for the court proceeding.

The Rules establish the maximum equipment and broadcast personnel permitted to actively cover proceedings in the courtroom at any one time, providing for (i) one portable television or film camera with one operator each, and (ii) one still photographer with one camera and not more than two lenses and necessary related equipment. Only equipment that does not produce distracting sound or light is permitted in the courtroom. While no additional artificial lighting is permitted, the Rules permit the presiding officer to allow modifications or additions to existing courtroom lighting, as long as public expense is not involved.

For proceedings in the circuit courts, the Trial Court Rules also provide that the presiding officer must give permission if audio equipment of any type is to be employed in the courtroom. The Rules state that if permission is given by the presiding officer, a maximum of one radio broadcast audio system is permitted in the courtroom. If the courtroom is equipped with a suitable audio system for radio and television broadcasts, the existing system must be used. However, if a suitable system does not exist in the courtroom, microphones and related wiring must be unobtrusive and placed in areas designated in advance of the proceedings by the presiding officer. Trial Court Rule 8.06 was amended to strike the provision that “[o]nly film and video cameras without working audio pickup, unless otherwise approved by the presiding officer, shall be employed in the courtroom. Only still camera equipment

that does not produce distracting sound or light shall be employed in the courtroom.”

For oral arguments before the Supreme Court, Rule 42 provides that audio recording equipment of any kind is not permitted in the courtroom. Instead, members of the media must utilize the live audio feed in a designated location in the courtroom. The live audio feed is available as a microphone level or line level signal and requires a female XLR connector. Members of the media are responsible for providing their own equipment suitable to connect to the live audio feed.

#### **What is the proper location of equipment and personnel?**

When addressing the location of equipment and media personnel in a courtroom, the Rules prescribe that television equipment, camera equipment and audio equipment are to be placed in a position previously determined by the presiding officer. Once equipment is placed in a location, it cannot be moved during the proceedings. Also, media personnel and still camera photographers, which are not permitted to create disturbances or attract attention, are not permitted to move about the courtroom. The Rules further prescribe that television equipment, if possible, is to be placed outside the courtroom and all cables and wires are to be placed in a safe unobtrusive location.

#### **Who is responsible for pooling arrangements?**

Rule 8.08 of the Trial Court Rules was amended to provide that any pooling arrangements among those seeking to provide camera coverage “shall be the sole responsibility of media persons. The presiding officer will not resolve any dispute regarding the same.”. In the absence of an advance agreement on pooling by multiple broadcast media representatives, the presiding officer may exclude all contesting video media equipment from the courtroom.”

Rule 42, pertaining the proceedings in the Supreme Court, contains an exception when a case has attracted nationwide interest. In those instances, the public information officer and Clerk will be in charge of pooling arrangements.

**Is video or audio taken during a proceeding admissible as evidence in any other proceeding?**

Not surprisingly, the Rules address the admissibility of video or audio created during proceedings as evidence. The Rules conclude that none of the films, videotapes, photographs or audiotapes that are developed during a proceeding shall be admissible as evidence in any proceeding, unless the presiding officer has designated the media as part of the official record of the proceeding.

**Are members of the media permitted to disclose the identity of jurors?**

Members of the media are not permitted in any way to show or identify a juror without prior approval from the presiding officer. However, a juror is free to disclose his or her identity at the conclusion of the juror's term of service.

W. Va. T.C.R. 8.01-8.10.

W. Va. R. App. P. 42.

(Updated October 2019.)

## FREEDOM OF INFORMATION ACT (WEST VIRGINIA)

The West Virginia Freedom of Information Act was enacted to ensure that the public would have access to information concerning their government's activities. All persons are entitled to public records concerning the activities of government agencies and officials. However, there are categories of records not available for public inspection. These exemptions are strictly construed and are specified within the Act.

Beginning January 1, 2016, each public body that is in receipt of a freedom of information request shall provide information to the Secretary of State relating to, at a minimum, the nature of the request, the nature of the public body's response, the time-frame that was necessary to comply in full with the request; and the amount of reimbursement charged to the requester for the freedom of information request: provided, that the public body shall not provide to the Secretary of State the public records that were the subject of the FOIA request.

### **Which records are available to the public?**

All public records are available for public inspection and copying, except for the following categories of records specifically exempted by the Act:

- (1) Trade secrets;
- (2) Information of a personal nature, if the disclosure of the information would result in an invasion of privacy (i.e., medical records);
- (3) Test questions, scoring keys, and other examination data used to administer licensing, employment, or academic examinations;
- (4) Records of law enforcement agencies that deal with the investigation of crimes;

- (5) Information specifically exempted by statute;
- (6) Records, archives, documents or manuscripts describing the location of undeveloped archaeological or historic sites or constituting gifts to any public body upon which the donor has placed restrictions on its usage or, the handling of which could irreparably damage such record, archive, document or manuscript;
- (7) Information contained in or related to examination, operating or condition reports prepared by, or on behalf of, any agency responsible for the regulation of financial institutions, except for those reports required by law to be published in newspapers;
- (8) Internal memoranda or letters received or prepared by a public body;
- (9) Records assembled, prepared or maintained to prevent, mitigate or respond to terrorist acts or threat of terrorist acts, the public disclosure of which threaten the public safety or the public health;
- (10) Those portions of records containing specific or unique vulnerability assessments or specific or unique response plans, data, databases, and inventories of goods or materials collected or assembled to respond to terrorist acts; and communication codes or deployment plans of law enforcement or emergency response personnel;
- (11) Specific intelligence information and specific investigative records dealing with terrorist acts or the threat of a terrorist act shared by and between federal and international law-enforcement agencies, state and local law enforcement and other agencies within the department of military affairs and public safety;
- (12) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism;

- (13) Computing, telecommunications and network security records, passwords, security codes or programs used to respond to or plan against acts of terrorism which may be the subject of a terrorist act;
- (14) Security or disaster recovery plans, risk assessments, tests, or the results of those tests;
- (15) Architectural or infrastructure designs, maps or other records that show the location or layout of the facilities where computing, telecommunications or network infrastructure used to plan against or respond to terrorism are located or planned to be located;
- (16) Codes for facility security systems; or codes of secure applications for such facilities referred to in paragraph 15 above;
- (17) Specific engineering plans and descriptions of existing public utility plants and equipment;
- (18) Customer proprietary network information of other telecommunications carriers, equipment manufacturers and individual customers, consistent with 47 U.S.C. § 222; and
- (19) Records of the Division of Corrections and the Regional Jail Authority relating to design of corrections and jail facilities owned or operated by the agency, and the policy directives and operational procedures of personnel relating to the safe and secure management of inmates, that if released, could be utilized by an inmate to escape a corrections or jails facility, or to cause injury to another inmate or to facility personnel.
- (20) Information related to applications under § 61-7-4 of this code, including applications, supporting documents, permits, renewals, or any other information that would identify an applicant for or holder of a concealed weapon permit. That information in the aggregate that does not identify any permit holder other than by county or municipality is not exempted. However, that information or other records exempted under this subdivision may be disclosed to a law-enforcement agency

or officer to determine the validity of the permit, to assist in a criminal investigation or prosecution, or for other lawful law-enforcement purposes.

- (21) Personal information of law-enforcement officers maintained by the public body in the ordinary course of the employer-employee relationship. As used here "personal information" means a law-enforcement officer's social security number, health information, home address, personal address, personal telephone numbers, and personal email addresses, and those of his or her spouse, parents and children, as well as the names of the law-enforcement officer's spouse, parents and children.
- (22) Information provided by a person when he or she elects to remain anonymous after winning a draw game prize, pursuant to W.Va. Code § 29-22-15a.

The above exemptions are not intended to keep from the public any evidence of an immediate threat to public health or safety unrelated to a terrorist act or the threat thereof which comes to the attention of a public entity in the course of conducting a vulnerability assessment response or similar activity.

#### **How does one request a public record?**

A request must be made to the "custodian" of the public record. The custodian is the official charged with administering to the public body. All requests must reasonably specify the documents sought. After the request is made, the custodian has five days, not including weekends and holidays, to: (1) furnish copies of the requested materials; (2) advise the person requesting the materials of the time and place at which they may inspect and copy the materials; or (3) deny the request, stating in writing the reasons for the denial.

#### **Is there a charge for obtaining a public record?**

If copies are made, the public body may charge a reasonable fee to cover the cost of the copies.

**What recourse is available if the request is denied?**

A party denied the right to inspect a document may seek injunctive or declaratory relief in the circuit court of the county in which the document is held.

W. Va. Code §§ 29B-1-1 *et seq.*

(Updated October 2019.)

## FREEDOM OF INFORMATION ACT (UNITED STATES)

The United States Freedom of Information Act was enacted to ensure that the public would have access to information concerning their government's activities. All persons are entitled to public records concerning the activities of government agencies and officials. However, there are categories of records not available for public inspection. These exemptions are specified within the Act.

### Which records are not available to the public?

- (1) Information specifically authorized by an Executive Order to be kept secret in the interest of national defense or foreign policy.
- (2) Internal personnel rules and practices of an agency.
- (3) Information specifically exempted from disclosure by statute.
- (4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
- (5) Inter-agency or intra-agency memoranda that would not be available by law to a party other than an agency in litigation with that agency provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.
- (6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.
- (7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings, would deprive a person of a right to a fair trial or an impartial adjudication, could reasonably be expected to constitute an unwarranted invasion of personal privacy, could reasonably be expected to disclose the identity of a confidential source, would disclose techniques and procedures for law enforcement investigations or prosecutions, or could reasonably be

expected to endanger the life or physical safety of any individual.

- (8) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervisions of financial institutions
- (9) Geological or geophysical information and data concerning wells.

#### **How does one request a public record?**

A request must be made to the agency that produced the document. All requests must reasonably specify the documents sought. After the request is made, the agency has twenty days, not including weekends and holidays, to comply with or deny the request. The agency must state in writing the reasons for compliance or denial. In usual circumstances, the time limit for determination may be extended for up to ten additional days.

Through FOIA online, a tracking and processing tool for various agencies and offices, guest users may search for previously released records and receive records electronically by providing an email address.

#### **Is there a charge for obtaining a public record?**

The agency may charge a reasonable fee for document search, duplication and review.

#### **What recourse is available if the request is denied?**

A party denied the right to inspect a document may appeal to the head of the agency denying the document. If on appeal the denial is upheld, the party may seek injunctive relief in a district court of the United States that has jurisdiction.

**5 U.S.C. § 552.**

**(Updated October 2019.)**

## **WEST VIRGINIA'S OPEN MEETING LAW: THE GOVERNMENT IN THE SUNSHINE ACT**

The Sunshine Act was created to ensure that public agency meetings are held open to the public. Under the Act, the date, time, place and purpose of all public agency meetings open to the public are published in the State Register at least five days prior to the date of the meeting. However, not all meetings are open to the public. The Sunshine Act specifies that some meetings, referred to as executive sessions, are to be closed to the public. In addition, the Sunshine Act provides rules for anyone wishing to broadcast meetings open to the public.

### **What is a public agency?**

A public agency is any administrative or legislative unit of a state, county or municipal government. This includes any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee, or any other agency or subunit of such groups, authorized by law to exercise some portion of executive or legislative power. However, the courts of West Virginia are not considered public agencies for the purposes of the Act.

### **What is a meeting?**

A meeting is any gathering of public agency members with the authority to make decisions for or recommendations to a public agency on policy or administration with the intent to make a decision or deliberate toward a decision. However, the following are not considered meetings and, therefore, are not to be held open to the public:

- (1) Any deliberation for the purpose of making a final decision in a hearing or court of claims proceedings;
- (2) Any on-site inspection of any project or program;
- (3) Any political party caucus;

- (4) General discussions on issues of interest to the public when held in a planned or unplanned social setting, without intent to conduct public business and with no intent for the discussion to lead to an official action; and
- (5) Discussions on logistical and procedural methods to schedule and regulate a meeting.

**Which meetings must be held open to the public?**

The general rule is that all public agency meetings must be held open to the public, with a few exceptions. For example, certain meetings, called executive sessions, may be closed to the public. An executive session may be closed to the public only when the session is necessary to:

- (1) Consider acts of war, threatened attack from a foreign power, civil insurrection or riot;
- (2) Consider actions concerning the employment of a public officer or employee, unless the officer or employee requests a meeting open to the public;
- (3) Conduct a hearing on a complaint, charge, or grievance against a public officer or employee, unless the public officer or employee requests an open meeting; however, any final actions taken must be taken in an open meeting;
- (4) Decide upon actions against any student in any public school or public college or university, unless the student requests an open meeting;
- (5) Issue, effect, deny, suspend or revoke a license, certificate, or registration, unless the person requests an open meeting;
- (6) Consider the physical or mental health of any person, unless the person requests an open meeting;
- (7) Discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy, such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation,

insurance, and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

- (8) Plan or consider an official investigation or matter relating to crime prevention or law enforcement;
- (9) Develop security personnel or devices;
- (10) Consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which, if made public, may adversely affect the financial or other interests of the State or political subdivision; however, after such actions are finalized and completed, the information must be disclosed to the public;
- (11) Avoid the early disclosure of an honorary degree, scholarship, prize or similar award;
- (12) Discuss any matter which, by express provision of federal law or state statute or rule of court, is rendered confidential, or which is not considered a public record under the Freedom of Information Act; and
- (13) Discuss any settlement offers which, by their terms, do not allow disclosure.

### **Who may attend the meetings?**

Any member of the public may attend an agency meeting which is open to the public. However, anyone planning to attend an agency meeting should consult that agency's rules concerning attendance and presentation. Anyone who is disrupting the meeting in a way which interferes with the orderly conduct of the meeting may be removed from the meeting. In addition, any person present at the meeting may address the public agency but may be required to register before the meeting.

### **What are the procedures for broadcasting or recording meetings?**

The Sunshine Act allows any radio or television station to

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broadcast all or any part of a meeting that is open to the public. However, the use of equipment necessary for broadcasting, photographing, filming or recording a meeting may be regulated to prevent undue interference with the meeting. The public agency must allow the equipment to be placed within the meeting room in such a way as to permit its intended use. Yet, if the public agency determines that the size of the meeting room is not such to accommodate everyone present and the equipment and personnel necessary for broadcasting, photographing, filming and recording the meeting without interfering with the meeting, the public agency may require the pooling of the equipment and the personnel operating it.

W. Va. Code §§ 6-9A-1 *et seq.*

*Peters v. County Commission*, 205 W. Va. 481, 519 S.E.2d 1979 (1999).

*McComas v. Board of Educ.*, 197 W. Va. 188, 475 S.E.2d 280 (1996).

(Updated October 2019.)

## INTERCEPTING CELLULAR COMMUNICATION

### Is the interception of cellular communications illegal?

Yes. The United States Code (18 U.S.C. § 2511(1)(a)) makes it a crime to intentionally intercept, endeavor to intercept or procure any other person to intercept or endeavor to intercept any wire, oral or electronic communication. As a result, the mere possession of a receiver (police scanner), which intercepts cellular telephone calls, violates federal law. It would also appear that this same statute outlaws the interception of e-mail, voicemail or hidden microphones where the intercepted parties are unaware of the interception by a third party. For example, it may be appropriate to use a hidden microphone when a reporter interviews an individual for an investigative report. However, it would not be appropriate under this statute to intercept a conversation between third parties of which the reporter was not a party, while those parties were unaware that the conversation was being intercepted.

### Is it illegal to broadcast intercepted cellular communications?

As is often the case with difficult legal questions, the answer is: yes and no, depending on the circumstances. Recently, the United States Supreme Court explored the relevant issues in the case known as *Bartnicki v. Vopper*. In this case, two labor organizers discussed possible violence over a cellular telephone and their conversation was intercepted and taped by an unknown third party. The labor organizers sued a radio station talk show host who played back this tape for his listeners. The talk show host obtained the tape from an intermediate party, did not know it had been intercepted and had played no part in the interception. The United States Supreme Court indicated that the application of the Federal Wiretap Act, as well as its Pennsylvania counterpart, violated the free speech rights of the radio station since the tape concerned matter of public importance and the radio station played no part in the illegal interception. However, in the concurring

opinions, it was made clear that this decision allowing the First Amendment to trump these wiretap statutes only applies under these very limited facts where the media defendant played no part in the interception and the content of the intercepted conversation reflected a matter of public importance. Specifically, the concurring opinion suggested that cases of truly private matters (Justice Bryer cited the video tape of Pamela Anderson Lee and her former husband, Tommy Lee, as an example of a truly private matter) are not immune from these wiretap provisions. It has further been made clear by other members of the Court that trade secrets and other non-public information would not be appropriate for a media defendant to disseminate. While the *Bartnicki* case is favorable from a media's standpoint, it does not eliminate three hard and fast rules regarding wiretap laws of which every station should be aware:

- (1) A station should not have, in their newsrooms or elsewhere, police scanners which intercept cellular communications.
- (2) Reporters and editors should exercise extreme caution in receiving from third parties copies of tapes or other recordings regarding matters which are not of substantial public interest and that may have been improperly intercepted.
- (3) A station should strictly avoid using hidden microphones and parabolic microphones, playing back third-party voicemail and answering machines, and intercepting e-mail.

18 U.S.C. § 2511(1)(a).

*Bartnicki v. Vopper*, 121 S.Ct. 1753 (2001).

(Updated October 2019.)

## EQUAL EMPLOYMENT

### May we consider an applicant's criminal history?

Yes. Employers' selection criteria regarding criminal history must consider the following factors from the Equal Employment Opportunity Commission ("EEOC"): (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction, (3) the nature of the job held or sought as related to the conviction. However, a blanket exclusion of individuals with arrest records would almost never withstand scrutiny and bright line rules relating to arrests or convictions will likely be deemed to have a disparate impact on certain minority groups.

### May we utilize unpaid interns?

In 2010 the Department of Labor (DOL) provided a six-part test for employers to utilize when determining whether an intern should be treated as a regular employee. If all six elements of the test are not met, then the intern must be compensated for his or her work at the station. The six part test is: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit Federal Court of Appeals determined that the DOL's six-part test was "too rigid," reasoning that all relevant evidence should be considered in this "highly individualized inquiry," not just those elements that

the DOL has deemed pertinent. Because of this decision the court created its own multi-factor inquiry, providing a set of non-exhaustive factors that one could consider when determining if a specific intern should or should not be compensated. Those factors are: (1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation- any promise of compensation, express or implied, suggests that the intern is an employee, and vice-versa; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment, including clinical and other hands-on training provided by educational institutions; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

While many of the DOL's elements and the Second Circuit's factors are similar, the main difference between the two is that the Second Circuit's inquiry is one that "requires weighing and balancing of all the circumstances," as no one factor is dispositive. Further, the court made it clear that any and all relevant evidence specific to an individual intern should be taken into account during the inquiry.

Although the Second Circuit's decision is only binding upon those businesses operating in New York, Vermont, and Connecticut, the decision is considered persuasive law to other federal courts in different jurisdictions. Therefore, cautious employers should look to both the DOL's six-part test as well as the considerations laid out by the Second Circuit when determining if an intern should be paid for his or her work

at the station.

**What are the major changes with the Americans with Disabilities Act?**

The discrimination rules use the previous definition for “disability,” but its application is different. For instance, the EEOC now construes the definition of “disability” broadly—“to the maximum extent allowable under the law.” Under the Americans with Disabilities Act, the term “disability” means a “physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having a disability.” The new regulations clarify that “major life activities” include “major bodily functions” and “interacting with others.”

However, “major bodily functions” includes functions of the immune, digestive, cardiovascular, respiratory, endocrine, and lymphatic systems, to name a few. However, “substantially limit” means the impairment need not prevent or severely restrict performance of a major life activity.

Broadcasters should consider taking steps to educate managers and personnel to ensure compliance with these regulations.

42 U.S.C. §§ 12111, *et seq.*

*Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528n(2nd Cir. 2016).  
(Updated October 2019.)

## OVERTIME EXEMPTION FOR EMPLOYEES WHO GATHER NEWS

### Is there an exemption from overtime for certain radio and television employees?

Yes, there is an exemption from overtime pay requirements under Section 13(b)(9) of the Fair Labor Standards Act for certain radio and television employees. For the exemption to apply, the following criteria must be met: (1) the employee must be employed as an announcer, news editor, or chief engineer; (2) the employee must be employed by a radio or television station; and (3) the "major studio" of the station must be located in a city or town with a population of less than 100,000 (the exemption applies if the city or town is within a "standard metropolitan statistical area" which has more than a population of 100,000), or is in a city or town of 25,000 population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area. The regulations define a "news editor" as an employee who gathers, edits, and rewrites the news. The term includes an employee who selects and prepares news items for broadcast, presents the news on the air, and performs duties which are an integral part of these activities.

29 C.F.R. § 793.3.

29 C.F.R. § 793.8.

(Updated October 2019.)

## EMPLOYMENT REQUIREMENTS WITH REGARD TO MILITARY LEAVE

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq.* Generally, the statute provides job protection for veterans returning to their jobs without any concomitant loss of seniority, status or pay. Veterans may not be denied initial employment, reemployment, retention in employment, promotion or any benefit of employment on the basis of membership in uniformed services.

### **What notice of military leave must employees give?**

Although USERRA requires that employees provide their employers with written or verbal notice of pending military duty, this requirement is waived if notice is precluded by military necessity or is otherwise unreasonable or impossible. Although there is no strict requirement, the applicable federal regulations on this matter suggest a preference for written notice and strongly recommend at least a 30-day notice. Therefore, the best course of action for employers is to know which employees have military affiliations, then proactively work with them to get as much notice as possible in order to work out potential conflicts before they become problematic.

### **When must employees return to work after military leave?**

The USERRA provisions applicable to returning to work vary depending on the length of the absence as a result of military duty. For service of one to thirty days, the service member must report to work at the beginning of the next regularly-scheduled work period on the first full day following the completion of service. However, the timing of this return must accommodate at least an eight-hour rest period following a safe return home by the service member. For example, if service members returned home at 11 p.m., they cannot be required to report to work at 1 a.m. the next morning, but they can be required to return to work at 7 a.m. the next morning, unless it is impossible or

unreasonable for the service member to do so. For military service members taking leave for a fitness-for-service exam, the same rules apply, regardless of the length of absence.

For service members absent from work for thirty-one to 180 days, an application for reemployment must be submitted within fourteen days after the completion of service. However, as with the above requirements, an exception to this rule exists where it is impossible or unreasonable, through no fault of the service member, to apply within the fourteen-day limit. In such case, the application must be submitted as soon as possible. For example, if the fourteenth day falls on a day when the employer's offices are closed, then the time period extends to the next business day.

For service of more than 180 days, the service member must file an application for reemployment within ninety days after the completion of service. There appears to be no exception to this timely filing requirement following this length of service.

An employee's failure to timely file an application for reemployment does not automatically forfeit his rights under USERRA, but such a failure does subject the employee to the employer's policies and procedures regarding unexcused absences. Further, if an employee is hospitalized for or convalescing from an injury or illness either incurred or aggravated during military service, that employee may follow the reapplication procedures above upon his recovery. The time limit on this reapplication is two years, with extensions to accommodate circumstances beyond the hospitalized/convalescing employee's control.

#### **What is the maximum limit on military leave?**

An employee may not exceed a cumulative total of five years of military leave, counting most types of military service already listed. However, there are several exceptions to this limit, all of which allow an employee to exceed five years of military leave without forfeiting USERRA rights. Those exceptions are: (1) service required beyond five years to complete an initial period of obligated service; (2) service

from which employees, through no fault of their own, are unable to obtain release within the five-year limit (i.e., service time ends while employees are still at sea with Navy); (3) training required of reservists and National Guard members (i.e., monthly drills and annual two-week training by reservists); (4) service pursuant to an involuntary order to active duty or to remain on active duty during domestic emergency - or national security-related circumstances; (5) service pursuant to an order to active duty (other than for training) or to remain on active duty due to a war or national emergency declared by the President/Congress; (6) active duty (other than for training) by volunteers supporting designated "operational missions"; (7) service by volunteers ordered to active duty in support of a designated "critical mission or requirement"; and (8) federal service by National Guard members ordered by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

**When are rights under USERRA forfeited?**

There are four categories of circumstances where an employee's separation from the military will cause a loss of USERRA protection. They are: (1) dishonorable or bad conduct discharge; (2) separation from service under "other than honorable conditions", as defined by each military branch; (3) dismissal of a commissioned officer in situations involving a court martial or by order of the President in time of war; and (4) dropping service members from the rolls when they have been absent without authority for more than three months or are imprisoned by a civilian court.

**What are employees' rights to return to work, and employers' duties, after military leave?**

Except for those situations in which a service member has a disability incurred during or aggravated by military service, the method for reinstating a returning service member is based on length of service.

First, employees absent for one to ninety days must be promptly reinstated in the following order of priority: (1) in the position the employee would have occupied had the employee remained continuously

employed, so long as the employee is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the employee (i.e., refresher training, etc.) or (2) if the employee cannot become qualified for the position in option 1, in the employee's pre-service position, so long as the employee is qualified for the job or could become qualified after reasonable efforts by the employer; or (3) if the employee cannot become qualified for the positions in either option 1 or option 2, then in any other position which is the nearest approximation of option 1 for which the employee is qualified, with full seniority.

Second, employees absent for more than ninety days must be promptly reinstated in the following order of priority: (1) in the position the employee would have occupied had the employee remained continuously employed, or a position of equal seniority, status, and pay so long as the employee is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the employee; or (2) if the employee cannot become qualified for the position in option 1, in the employee's pre-service position, or a position of equal seniority, status, and pay, so long as the employee is qualified for the job or could become qualified after reasonable efforts by the employer; or (3) if the employee cannot become qualified for the positions in either option 1 or option 2, then in any other position which is the nearest approximation of option 1 for which the employee is qualified, with full seniority.

The main difference between these two sets of prioritized options is that with the latter group, employees absent for more than ninety days, the employer may offer a position of equal seniority, status, and pay to employees falling into either option 1 or 2. Additionally, the reemployment position with the highest priority in both schemes reflects the "escalator" principle, which requires that each returning service member steps back onto the seniority "escalator" at the point the employee would have occupied had the employee remained continuously employed. The "promptness" requirement depends upon the circumstances

of each case; for instance, “prompt” reinstatement after weekend National Guard duty would probably be the next scheduled work day, while “prompt” reinstatement after several years’ active duty may require providing notice to the employee who occupied the position left by the employee on military leave. As to employees who incurred or aggravated an injury or illness during military service, a special set of rules apply. Specifically, employers are to follow a three-part reemployment plan for such employees: (1) the employer must make reasonable efforts to accommodate an employee’s disability so that the employee can perform the job the employee would have held had the employee remained continuously employed; (2) if, despite such reasonable accommodation efforts, the employee is not qualified to do the job due to a disability, the employee must be given a position of equal seniority, status, and pay, so long as the employee is qualified for the job or could become qualified after reasonable efforts by the employer; and (3) if the employee does not become qualified under part 1 or 2, then the employee must be employed in a position that, consistent with the circumstances of that person’s situation, most nearly approximates the job in part 2 in terms of seniority, status, and pay.

If two or more employees are entitled to reemployment in the same position, the employee who left the position first has the superior right to it. The other employee(s) are entitled to employment with full seniority in any other position(s) that provide similar status and pay in the order of priority under the reemployment plan from above which is otherwise applicable to such person(s)

### **What are the limits of the employers’ obligations?**

The employer’s obligations to reemploy returning service members are discharged where the employer’s circumstances have changed so much that reemployment of the persons is impossible or unreasonable, such as a reduction in force that would have included the service members had they been at their jobs instead of on military leave. Also, an employer is excused from making efforts to qualify returning service members or from accommodating those with service-related disabilities when doing

so would cause undue hardship. Both of these situations, like the rest of USERRA, are to be liberally construed in favor of the returning service members.

**What are employees' rights with regard to pensions and benefits?**

Service members who return to employment are entitled to seniority and all rights and benefits based on seniority which they would have attained with reasonable certainty had they remained continuously employed rather than taking military leave. A right based on seniority is one based on length of service with the employer. Further, since employees on military leave are considered to be on a leave of absence from the employer, they must be granted all the rights and benefits not based on seniority that are available to employees who take non-military leaves of absence, whether paid or unpaid. Should there be a variation among types of non-military leave of absence, the service members must be granted the most favorable treatment. Employers may require the service members to pay the cost of any funded benefit to the extent that other employees on leave of absence would be required to pay. Finally, if service members knowingly provide clear written notice of intent not to return to work following military service, the employees waive entitlement to leave-of-absence benefits not based on seniority. Such a waiver, however, does not surrender other rights and benefits under USERRA, particularly reemployment rights.

For pension plans which are tied to seniority, USERRA provides: (1) reemployed service members must be treated as not having incurred a break in work with the employer who maintains a pension plan; (2) military service must be considered work with the employer for purposes vesting and benefit accrual; (3) the employer is liable for funding any resulting obligation; and (4) the reemployed persons are entitled to any accrual of benefits from employee contributions only to the extent that they repay the employee contributions.

Service members, rather than take military leave without pay, must be permitted to use any vacation time that had accrued before the beginning of their military service. This is done at the service

members' request, but employers cannot force service members to use vacation time for military service.

USERRA provides for health benefit continuation for employees on military leave, even when their employers are not covered by COBRA (i.e., fewer than twenty employees). If an employee's health plan coverage would end due to military leave, the employee may elect to continue coverage for (1) up to eighteen months after the absence begins or (2) for the period of service plus time to apply for reemployment, whichever period is shorter. The employee cannot be required to pay more than 102 percent of the full premium for coverage, and if the military service is thirty or fewer days, the employee cannot be required to pay more than the normal employee share of any premium.

**What protections against discrimination are provided under USERRA?**

Under USERRA, a reemployed service member may not be discharged without cause: (1) for one year after the date of reemployment if the employee's military service was for more than six months (181 days or more); or (2) for six months after the date of reemployment if the service member's military service was for thirty-one to 180 days. Employees who use thirty or fewer days of military leave before reemployment are not protected from discharge without cause, but all service members are protected from discrimination because of military service or obligation.

Employment discrimination because of past, current or future military obligations is prohibited; this broad prohibition includes the following areas of employment; hiring; promotion; reemployment; termination; and benefits. USERRA protects past service members, current service members, and those who apply to be a member of any of the branches of the uniformed services.

Essentially, if an individual's past, present, or future connection with military service is a motivating factor in an employer's adverse employment action against that individual, the employer has presumptively violated the law. The employer's burden is then to prove that it would have taken the same action regardless of the individual's

military connection. Further, an employer can be liable for unlawful discrimination when an individual's military connection is merely one of the reasons a particular adverse action was taken. To avoid liability, an employer must prove that a reason other than an individual's military connection would have been sufficient to justify its action.

Finally, employers are forbidden to retaliate against anyone, whether or not that person has a military connection who (1) files a complaint under USERRA; (2) testifies, assists, or otherwise participates in an investigation or proceeding under USERRA; or (3) who exercises any right under USERRA.

**Is West Virginia law consistent with USERRA?**

West Virginia law provides similar protections to those provided by USERRA. Under W. Va. Code § 15-1F-8, "[m]embers of the organized militia in the active service of the state or another state shall be entitled to the same reemployment rights granted to members of the reserve components of the Armed Forces of the United State by applicable federal law, including rights protected by" USERRA.

38 U.S.C. §§ 4301 *et seq.*

W. Va. Code § 15-1F-8.

(Updated October 2019.)

## **USING COVENANTS NOT TO COMPETE AND NON-PIRACY PROVISIONS IN EMPLOYMENT CONTRACTS**

Covenants not to compete in broadcast industry employment contracts are commonplace. But, to ensure these functional provisions are enforceable, they need to be reasonable and used for a proper purpose. The Supreme Court of Appeals of West Virginia has offered some guidance as to what types of covenants not to compete are likely to be enforced in a case involving a doctor's employment contract. Although this case did not involve a contract within the broadcast industry, the same law is generally applicable. In addition, the Supreme Court of Appeals of West Virginia recently approved the use of non-piracy provisions in an employee contract.

### **What guidelines apply to covenants in employment contracts?**

First, restrictive covenants are not appropriate for every employee at the station. They may be only used to prevent an employee from competing unfairly against his or her former employer by using resources provided to the employee by the former employer. West Virginia has recognized three resources that an employer may protect: (1) information disclosed to the employee; (2) customers with which an employee has worked; and (3) skills the employee acquired on the job. Translated to the broadcast industry, this means that the time and money spent on promoting and training an on-air personality is a resource that likely could be protected through a covenant not to compete. Also, covenants in employment contracts for key managers with central knowledge of the company's business strategies and sales persons with direct contact with advertising clients likely would be enforced.

Second, the covenants not to compete must be reasonably limited in both time and geographic area and be no more restrictive than necessary to protect the interests of the employer. For radio and television

stations, this means that the restrictive covenant should not extend beyond the stations' broadcast area and the time should be limited to no more than one year. Although three-year restrictive covenants have been enforced in West Virginia outside the broadcast industry context, this pushes the outer limits of what is reasonable. To hedge against a possible court ruling that a covenant not to compete is unreasonable, the contract's provisions should include language allowing a court to modify the terms of the covenants to the extent required to render them valid and enforceable under the law.

Third, the promise not to compete should be extracted from the employee as a condition to employment or it must be accompanied by payment of additional consideration in exchange for obtaining the covenant. This means that prospective employees should be notified of the required covenant in their offer of employment. If the employer seeks to obtain the restrictive covenant after employment has begun, the employer must provide the employee some new consideration such as a better position, higher salary, or job security in return for the covenant.

**What are non-piracy provisions and when are they enforceable?**

According to the West Virginia Supreme Court, a non-piracy provision in an employee contract restricts the former employee from soliciting the employer's customers or making use of the employer's confidential information. A covenant not to compete, on the other hand, restricts the employee from engaging in a similar business to that of the employer within a specific time and geographical area. Non-piracy provisions are also called non-solicitation or hands-off provisions.

Although both provisions are utilized to safeguard an employer's business interests, non-piracy provisions typically are less restrictive on the economic forces of the marketplace because they do not include geographical limits. Therefore, an employee, whose contract only has a non-piracy provision, can still practice a similar business in the same area as the employer, but cannot use any of the former employer's confidential information or solicit any of the former employer's

customers. In the broadcast industry, a non-piracy provision may be helpful in the employee contracts of the sales department employees. The provision could potentially restrict former sales employees from contacting the customers of their former employer to encourage them to place advertisements on the new station where the employee works.

The validity of a non-piracy provision is dependent upon: (1) whether the employer has a protectable business interest (i.e. confidential information and information on customer accounts); (2) the extent to which the non-piracy provision reasonably protects that interest; and (3) whether the provision unjustly restricts the employee from engaging in a business activity they wish to pursue.

**Can format non-compete agreements lead to FCC fines?**

Yes, the FCC forbids provisions in non-compete agreements that prevent stations from making format choices, e.g., using a news-talk or other format, because format restrictions deprive the licensee of control over station programming, restrict its ability to adjust its operations to account for changing market conditions, and are against public interest.

The FCC explained in its May 8, 2008 decision *In re: Mid Atlantic Network, Inc. and Centennial Licensing II, LLC*, that because the FCC's longstanding policy that a licensee must "retain control over programming at all times," any contract "barring the use of such formats, even for a limited period, is impermissible."

*Reddy v. Community Health Found. of Man*, 171 W. Va. 368, 298 S.E.2d 906 (1982).  
*Wood v. Acordia of West Virginia, Inc.*, 217 W. Va. 406, 618 S.E.2d 415 (W. Va. 2005).

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## MISUSE OF COMPUTERS AND THE INTERNET

Because computers have become the basis for storing and transmitting most information, the federal government has enacted several statutes dealing with the use of software, computers, and the Internet. Although not an exhaustive list, this brief overview explains some pertinent statutes and how reporters or station managers might avoid violating them.

### **What constitutes illegal accessing of computer information?**

The *Computer Fraud and Abuse Act of 1986* was the first federal computer crime statutes to deal almost exclusively with computer crime affecting federal interests. An offender, under this statute, is one who knowingly and without authority or beyond the scope of his authority intentionally accesses a protected computer and commits certain prohibited acts. These acts include: (i) obtaining restricted government information; (ii) obtaining financial records or credit records maintained by a federally regulated or insured financial institution; (iii) trafficking in passwords in interstate or foreign commerce; and (iv) using, modifying, destroying or disclosing information in or preventing the use of a computer operated for or on behalf of the federal government. Under this statute, a protected computer is any computer which is used to transverse interstate lines for communication or commerce in addition to computers used by financial institutions or the federal government.

As a result, reporters should be careful when accessing federal information or information from federally-insured financial institutions, as doing so without appropriate authorization or through the use of another user's password is a criminal violation.

### **What are the limitations involving copyright issues and revealing trade secrets?**

The *Economic Espionage Act* addresses the theft or misappropriation

of trade secrets. While the primary thrust of the Act is to prevent the transfer of trade secret information to foreign entities or powers, the second section of the Act makes it a crime to attempt, conspire or engage in economic espionage and to steal trade secrets even though the crime may be solely a domestic one. The statute makes it unlawful to attempt to conspire or engage in the theft to knowingly receive, buy or possess a stolen trade secret. Therefore, reporters should be aware that under certain circumstances obtaining drug formularies, ingredients in foods or tobacco products, or other information could subject them to civil and/or criminal liability.

Along with protecting trade secrets, the federal government enacted the *No Electronic Theft Act of 1997* in response to the failure of the copyright and trademark laws to address wide scale infringement by users of the Internet who were misusing copyrighted works or trademarks but not for profit (a requirement of the prior law). This statute amends criminal provisions of the copyright and trademark laws to include provisions that:

- A. Eliminate the profit motive requirement for infringers who willfully reproduce or distribute copyrighted works on a large scale;
- B. Define financial gain to encompass bartering, as well as the exchange of money;
- C. Include electronic distribution in the definition of reproduction or distribution;
- D. Change the statute of limitations from three years to five years; and
- E. Increase the penalties for repeat offenders.

The law reaches individuals who copy and distribute films, software and music and makes them available to the general public over the Internet. Penalties include sanctions of up to \$250,000 for the distribution of ten or more copies of one or more copyrighted works that have a total retail value of at least \$2,500. Criminal penalties also accompany these fines. Reporters and webmasters for radio and television

stations should be careful not to disseminate music, films or other copyrighted material to avoid violating the *No Electronic Theft Act of 1997*.

Finally, relating to copyright issues, Congress enacted the *Digital Millennium Copyright Act of 1998* to provide the protection necessary to encourage copyright owners to make their works available over the Internet and in other digital formats. The Act is designed to punish those individuals who attempt to circumvent a technological measure used to protect digital copyrighted works. The Act also prohibits the manufacture or sale of devices primarily designed to circumvent control access technology. Station managers and reporters should be careful not to obtain or utilize so-called cracker tools to bypass software protection measures.

**What are the federal laws regarding identity theft and fraud?**

The *Identity Theft and Assumption Deterrence Act of 1998* prohibits the unauthorized, knowing transfer or use of another means of identification with the intent to commit or to aide or abet any unlawful activity that constitutes a violation of federal law or that constitutes a felony under any applicable state or local law. Violations of this provision carry up to a 15-year prison term, fines and forfeiture of property used in conjunction with the theft. Reporters should be careful in utilizing any other person's identity in such a manner as to violate either state or federal law.

Along with identity theft, a reporter needs to be aware of federal prosecutors' use of wire fraud. Any scheme that is conducted on the Internet falls under the federal wire fraud statutes. For the government to convict a defendant of wire fraud, it must show:

- A. A scheme to defraud by means of the use of false pretenses;
- B. Defendants' knowing and willful participation in that scheme; and
- C. The use of interstate wire communications.

Such a plan does not have to be successful to warrant criminal

liability. General managers and reporters should be aware that any attempt to defraud through the use of false pretenses can result in criminal liability.

**Does the First Amendment shield reporters from criminal sanctions involving the transportation of stolen property or child pornography when used to gather news?**

The *National Stolen Property Act* provides criminal penalties for the transport between states of any stolen property. In a well-known case styled *United States v. Riggs*, the defendants were charged with transporting stolen property by publishing in a computer newsletter a 911 test file illegally obtained from Bell South through wire fraud. The First Amendment did not shield the defendants even though the criminal conduct involved speech. Therefore, reporters and general managers should be careful in obtaining or receiving what could constitute stolen property.

The strict enforcement of *Protection of Children Against Sexual Exploitation Act* illustrates the degree to which criminal penalties can be imposed upon reporters. In the case of *United States v. Matthews*, an award-winning journalist claimed that he had traded in child pornography over the Internet as research for a news story. Although this activity violated the *Protection of Children Against Sexual Exploitation Act*, he claimed that the First Amendment provided a defense under these circumstances. The federal district court rejected this argument and found that Congress had intended for enforcement of the statute regardless of absence of bad motive or evil intent.

**Can an employer monitor an employee's e-mail?**

Although legislative history indicates that Congress did not actually contemplate electronic mail in its passage of the Electronic Communication Privacy Act, which prohibits the interception, use, or disclosure of any electronic communication, the Act nevertheless may limit the interception and disclosure of electronic mail by employers. However, an employer who provides intra- and inter-officer e-mail for its employees may lawfully intercept and disclose the contents of the e-mail with the consent of the employee. Therefore, an employer can

effectively avoid liability under the Act by creating a policy that allows them to review, use and/or disclose the contents of e-mail sent on its system. To effectively establish this policy and system, an employer would send each employee a copy of the policy and, if possible, have the employee sign a document acknowledging that they have received and reviewed the policy.

Although there are no West Virginia cases that address exactly when and how an employer can monitor and use its employees e-mail, other states' courts have determined that employees have no reasonable expectation of privacy in their e-mail communication done through their employer's system. Based on the rulings of these states, the West Virginia Supreme Court of Appeals may join the other jurisdictions in recognizing that employees do not have a reasonable expectation of privacy in the workplace if presented with a case where the employer (1) put its employees on notice of monitoring or potential monitoring in the workplace; (2) obtained employees' consent for such monitoring; and (3) ensured that the monitoring did not violate state or federal wiretap statutes.

**Can an employer access an employee's social media account?**

No. As of June 10, 2016, West Virginia Code Section 21-5H-1 protects an employee's "personal account," defined as an account, service or profile on a social networking website that is used by an employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer. The law says that an employer may not request, require or coerce an employee or potential employee to disclose a username and password or other authentication information that allows access to the employee's or potential employee's personal account. An employer also cannot compel an employee or potential employee to add the employer to his or her list of contacts that enables the contacts to access a personal account, and cannot request or require an employee or potential employee to access his or her personal account in the presence of the employer.

The law permits employers to access publicly available information

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about employees or potential employees. Employer-provided devices, accounts, and services are also exempt. In addition, employers are authorized to ban employees from using their personal accounts during business hours or for business purposes.

This law does nothing to diminish the authority and obligation of an employer to investigate complaints, allegations or the occurrence of sexual, racial, or other harassment.

Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030.

Economic Espionage Act, 18 U.S.C. §§ 1831 and 1832.

No Electronic Theft Act of 1997, 17 U.S.C. §§ 101, 506 and 507; 18 U.S.C. §§ 2319 and 2320.

Digital Millennium Copyright Act of 1998, 17 U.S.C. 1201, et seq.

Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028.

White-Collar Crime Penalty Enhancement Act of 2002, 18 U.S.C. § 1343.

National Stolen Property Act, 18 U.S.C. § 2314.

Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252.

Electronic Communication Privacy Act, 18 U.S.C. § 2511(3)(b)(ii).

W.Va. Code § 21-5H-1.

(Updated October 2019.)

## NEW FEDERAL REGULATIONS PERTAINING TO MEDIA

### **Are media representatives required to wear safety vests on highways?**

Yes. Regulations issued by the U.S. Department of Transportation Federal Highway Administration (FHWA) require media representatives to wear high-visibility safety apparel when covering incidents on public highways. West Virginia broadcast personnel, who are responding to accidents or incidents on public roads, should wear compliant, ANSI/ISEA 107 Class 2 or 3 high visibility vests.

### **Will broadcasters be penalized for unauthorized broadcasts of telephone conversations?**

Yes, the FCC has expanded its penalties for the unauthorized broadcast of telephone conversations, including incoming and outgoing personal answering machine messages. The general rule is that the FCC does not permit telephone conversations to be broadcast without the knowledge and consent of all parties. An exception arises, as during a call-in discussion program, when the caller is presumed from the circumstances to be aware that the conversation is likely to be aired.

Enforcing this rule, the FCC fined a North Dakota AM station that broadcast a voicemail left on the private cell phone of the host of an on-air discussion show. The FCC concluded that the caller would have no expectation that his message was apt to be broadcast, and therefore, his expectations of privacy should be protected.

### **Will broadcasters be penalized for prerecorded telephone calls that promote free broadcasts?**

No. In response to a letter request from the U.S. Court of Appeals for the Second Circuit, the FCC clarified that prerecorded telephone calls that promote a broadcaster's sweepstakes offer and encourage consumers to tune in to a free broadcast are not prohibited by the Telephone Consumer Protection Act (TCPA) of 1991, 47 U.S.C. § 227, which regulates the use of the telephone system for marketing goods and services. The FCC distinguished such calls from calls that promote pay

programming services, like cable or satellite television services, and stated that the latter calls would be prohibited by the TCPA in the absence of the recipient's consent or an established business relationship.

See 47 U.S.C. § 227 (1991).

**Does the FCC penalize unattributed video news releases (VNRs)?**

Yes, the FCC issued notices of apparent liability for forfeiture to Comcast in two recent cases where Comcast broadcast VNRs provided to it by product manufacturers as part of a daily segment within the Art Fennell Reports program. Each VNR focused on a particular product and touted the product's benefits for consumers. Because the VNRs were produced by the product manufacturers, and they contained more than fleeting or transient references to the products, the FCC fined Comcast for violation of the sponsorship identification rules even though Comcast was not paid to carry the programming.

**Are the FCC's closed captioning requirements altered by the transition to digital television?**

No, the FCC's recent declaratory ruling clarifies that the standard exemptions from closed captioning do not suddenly apply as a result of the termination of analog programming. In addition, the FCC emphasized that no digital or HD channel is automatically exempt from closed captioning merely because it is being broadcast in digital. As a review, the exemptions from the closed captioning rules are the following:

- (1) programs airing between the hours of 2 a.m. and 6 a.m. local time;
- (2) commercials that are no more than five minutes long;
- (3) locally-produced and distributed non-news programming with no repeat value;
- (4) public service announcements (unless federally funded and produced), interstitials, and promotional announcements of 10 minutes or less;
- (5) instructional programming that is locally-produced by public television stations for use in grades K-12 and secondary

- schools;
- (6) programs in languages other than English and Spanish;
  - (7) programs shown on new networks for the first four years of the network's operations;
  - (8) primarily textual programming (e.g., program schedule channels and community bulletin boards;
  - (9) primarily non-vocal musical programming (e.g., televised symphony or ballet performances); and
  - (10) programs on channels producing annual gross revenues of under \$3,000,000 in the previous calendar year.

**Are broadcasters required to make emergency information accessible to individuals with hearing disabilities?**

Yes. Section 79.2 of the FCC's Rules requires stations to include emergency information being aired in the audio portion of their programming in a format subject to interpretation by those with hearing disabilities. This rule does not require the use of closed captioning, crawls, or signs, so long as the critical details of the emergency information are conveyed. In October 2003, the FCC enforced this rule and fined a San Diego television station for failing to make information about rapidly spreading wildfires accessible to persons with hearing disabilities.

**What should a broadcaster do if the Federal Emergency Management Agency asks to broadcast public service announcements regarding the Wireless Emergency Alert system ?**

Broadcasters may be asked to air public service announcements relating to the new Wireless Emergency Alert system, which use the Emergency Alert System tone. It is well established that broadcasters airing any ad or programs that includes EAS tones put themselves at risk of adverse action by the FCC. However, in an effort to assist FEMA in educating the public about the WEA, the FCC granted a limited waiver of Section 11.45. From May 31, 2013 until May 30, 2014, a station may broadcast the WEA attention signal in PSAs, so long as FEMA's PSAs do not predictably lead the public into concluding that an actual alert is being transmitted. This timeline was later extended to November 21, 2015.

On August 15, 2019 the FCC issued its “Public Notice: FCC Enforcement Advisory” stating that, for broadcast licensees, false or fraudulent EAS signals may violate the Commission’s prohibition against broadcast hoaxes. Section 73.1217 of the Rules prohibits broadcast licensees or permittees from broadcasting false information concerning a crime or catastrophe if (1) the licensee knows this information is false; (2) it is foreseeable that broadcast of the information will cause substantial public harm; and (3) broadcast of the information does in fact directly cause substantial public harm.

Accordingly, we recommend reviewing each ad before it airs for potential violations of the law.

**What is the FCC’s fleeting images policy?**

Prior to the 2004 Super Bowl halftime show featuring Janet Jackson and Justine Timberlake, the FCC generally excepted fleeting broadcast material from the scope of actionable indecency. Thus, the United States Court of Appeals for the Third Circuit unanimously rejected the \$550,000 forfeiture penalty and finding of indecency violation that the FCC imposed on CBS for the 2004 Super Bowl halftime show. The Court held that the FCC arbitrarily and capriciously departed from its prior policy of excepting fleeting broadcast material, but noted that the FCC can announce a change in its fleeting images policy in future declaratory rulings.

(Updated October 2019.)

## THE USE OF HIDDEN MICROPHONES AND VIDEO CAMERAS IN WEST VIRGINIA

States are generally divided into those states that require one-party consent to surreptitious sound recording and states that require two-party consent. West Virginia has always been a one-party state, meaning that only one party needs to consent to the sound recording of a conversation between those two parties. However, a recent case of the West Virginia Supreme Court of Appeals entitled *Bowyer v. Hi-Lad, Inc.* raises new and troubling issues regarding the use of concealed microphones.

### What happened in *Bowyer v. Hi-Lad, Inc.*?

In *Bowyer*, the plaintiff filed a lawsuit under the West Virginia Wiretapping and Electronics Surveillance Act (W.Va. Code § 61-1D-3 et seq.), which makes it unlawful for a person to intentionally intercept or to attempt to intercept any wire, oral or electronic communication. This statute also provides that a person who is injured may bring a lawsuit for compensatory and punitive damages. In *Bowyer*, a hotel utilized a surveillance monitoring system, which took both video and audio recordings of hotel employees and members of the public speaking in the vicinity of the hotel's front desk and hotel bar. Testimony at the time of trial reflected that the audio recordings of the hotel employees and members of the general public were the result of electronic interceptions without the consent of these individuals. It was also agreed to by the parties that the employee plaintiff worked in a public area and that he did not have access to any private space. In the *Bowyer* case, the jury awarded \$100,000 in compensatory damages and \$400,000 in punitive damages.

### What are the potential effects of *Bowyer*?

A provision of the Wire Tapping Electronics Surveillance Act provides that where one of the parties to the recorded communication has

given prior consent no violation is committed unless the interception is for the purpose of committing a criminal or tortious act in violation of the United States Constitution, the laws of the United States, the West Virginia Constitution or the laws of West Virginia. The concern raised by *Bowyer* is that if a recording by a radio or television station using a concealed microphone is used for purposes which might be described as a tort, for example, to defame a person or to invade their privacy, then the one-party consent rule may not apply.

The second concern raised by *Bowyer* is that where recording systems or video cameras are used, even in a public space, the claim may be made that since the holder of the recording device or the television cameramen are not a party to the conversation, that they are in fact violating the terms of this West Virginia statute. While this statute was passed in 1987, we have always felt that broadcasters were protected under the traditional one-party consent rule. *Bowyer* calls that into doubt. It raises new and troubling questions as to whether or not stations can safely record, even in public places, using concealed microphones.

**May stations broadcast the audio or video contents of police-worn body cameras?**

At this time it is unclear whether stations may broadcast the footage from police-worn body cameras. Under current West Virginia law, body-worn camera recordings are public records. The West Virginia Code (W. Va. Code § 29B-1-2(5)) states that "Public record includes any writing containing information prepared or received by a public body, the content of which, judged either by content or context, relates to the conduct of the public's business." Further, the Code (W. Va. Code § 29B-1-2(6)) states that a "writing" includes any "tapes, recordings, or other documentary materials."

For the purposes of broadcasting the video or audio contents of police-worn body cameras, the question is whether these public records can be accessed by the media to be delivered to the public at large. The Code (W. Va. Code § 29B-1-4(a)) seems to answer this question in the affirmative by providing that "there is a presumption of public

accessibility to all public records . . .,” but goes on to list a number of exceptions. Section 29B-1-4(a)(4) provides an exception that causes public access to body-camera footage to be contentious. The exception includes any “[r]ecords of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement.” This exception provides a defense to the argument that the footage from body-worn cameras is public record.

In March 2019, Berkeley County Prosecutor Catie Wilkes Delligatti released a video to The Associated Press showing a West Virginia officer kicking and punching a handcuffed teenage boy on the ground during a November traffic stop. Authorities originally denied media requests for the video, citing the investigation.

Unfortunately, however, West Virginia has yet to propose any legislation that would provide a clear-cut answer to whether the contents from body-worn cameras can, or should be, accessible to the public through the media, or otherwise.

*Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895 (2004).

W. Va. Code § 61-1D-1 (2005).

W. Va. Code § 29B-1-2(4).

W. Va. Code § 29B-1-2(5).

W. Va. Code § 29B-1-4(a)(4)(A).

(Updated October 2019.)

## JAILHOUSE INTERVIEWS

### What is the rule on jailhouse interviews?

Generally, interviews of inmates are permitted up until the inmate's conviction.

After conviction, however, interviewers are generally not permitted access unless the warden approves. We would recommend getting permission from the warden to conduct the interview prior to arriving at the jail.

## A BROADCAST STATION'S WEBSITE

### Are web publishers liable for content created by third parties?

Until recently, Section 230(c) of the 1996 Communications Decency Act was interpreted broadly to shield Internet service providers from liability for the communications of others.<sup>1</sup> Online libel suits and negligence claims based on third-party content or postings were typically dismissed pursuant to the nearly absolute immunity afforded by Section 230(c).

Recent judicial decisions, however, indicate that blanket immunity will no longer be afforded. In *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist*, the 7<sup>th</sup> U.S. Circuit Court of Appeals held that Section 230(c) "as a whole cannot be understood as a general prohibition of civil liability for website operators and other online content hosts." Likewise, in *Fair Housing Counsel of San Fernando Valley v. Roommates.com*, the 9<sup>th</sup> U.S. Circuit Court of Appeals ruled that section 230(c) does not provide immunity to a site that helps create discriminatory material.

Although the law remains unsettled, it is nevertheless clear that a website should not actively solicit, enable, or encourage its users to provide content that is defamatory or invasive of privacy. To avoid liability, it is also recommended that a website should promptly remove any content that it knows is defamatory or invasive of privacy.

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<sup>1</sup> Section 230(c) provides, in part, that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." The statute was included partly as a response to a New York case that imposed tort liability on an ISP as a result of third-party postings. Section 230(c) was thus intended to protect freedom of speech and "was designed so that those who edited and screened content would not be penalized." See David L. Hudson, Jr., Taming the Gossipmongers, ABA Journal at 19-20 (July 2008).

### **What is the Children's Online Privacy Protection Act (COPPA)?**

COPPA is federal law that applies to the online collection of personal information from children under 13. The FTC may bring enforcement actions and impose civil penalties for violations of the COPPA Rule. In September 2006, for instance, the FTC fined the website Xanga \$1 million for COPPA violations, for repeatedly allowing children under 13 to sign up for the service without getting parental consent.

### **Who must comply with COPPA?**

Any commercial website or online service directed to children under 13 that collects personal information from children – such as full name, home address, email address, telephone number or any other information that would allow someone to identify or contact the child – must comply with COPPA. COPPA also applies to any general audience website, or general website with a separate children's area, that collects personal information from children under 13.

### **What must a website do to comply with COPPA?**

COPPA requires operators to (i) post a privacy policy on the homepage and a link on every page where information is collected; (ii) provide notice about the site's information collection practices to parents and obtain consent; (iii) give parents a choice as to whether their child's personal information will be disclosed to third parties; (iv) provide parents access to their child's personal information and the opportunity to delete and opt-out; (v) maintain the confidentiality, security, and integrity of personal information collected from children; and (vi) disclosure of personal information may not be a condition for participation in any game, contest, or other activity.

### **Is screening for age to avoid collecting personal information from children under 13 sufficient to comply with COPPA?**

No. The Children's Advertising Review Unit (CARU) recently held that screening for age to avoid collecting personal information from children under 13 was not enough. In addition to requiring the user to

input his or her date of birth, interactive sites must have some reasonably effective means of tracking so children cannot get around the screening process.

**What are the limitations on utilizing information, photos, and other digital media on a station's social media or company website?**

Generally, federal copyright law governs what one can and cannot utilize on a station's social media or company website. Pursuant to the United States Code, (17 U.S.C. § 106), the owner of copyrighted material has the exclusive rights to do, or to authorize, the (1) reproduction of the copyrighted material; (2) preparation of derivative works based upon the copyrighted material; (3) distribution of the copyrighted work to the public; (4) performance of the copyrighted work publically; (5) display of the copyrighted material; and (6) performance of the copyrighted material by means of digital audio transmissions. These rights are subject to the "fair use" exception, which allows another to use the copyrighted work in question without permission if it is being used to criticize the original work, make a comment on the original work, or if it is being utilized for "news, reporting, teaching, scholarship, or research" purposes. In determining whether the use falls under this exception, courts are to consider four factors: (1) the purposes and character of the use, which includes whether such use is of a commercial nature; (2) the nature of the copyrighted work itself; (3) the amount and substantiality of the copyrighted work that is being used; and (4) the effect of the use upon the potential market for the copyrighted work. None of these factors, alone, are determinative, and can be decisive in a particular case. However, it is clear that using copyrighted material in a commercial context is more likely to cause problems, especially when the content is being used in a commercial advertisement.

As a general rule, not everything that is posted on the Internet is free for anyone to use. Whoever created the work and is the owner of a copyright on the material retains the rights to that material, no matter if he or she posted it to the Internet. Some websites will allow sharing within the site (such as Facebook, Instagram, and Twitter). However, the sharing of materials is only allowed within the confines

of the website itself, and such actions are normally governed by the website's terms of use.

Practically, a station should be extremely cautious when utilizing photos, videos, audio, and any other content taken from other Internet sources on the station's own website, or social media account, for commercial use. It may not be obvious if something on the Internet is protected by copyright. Therefore, the best practice is to never use any material found on the Internet for commercial use without express permission from the owner of the content.

15 U.S.C. §§ 6501-6506 (Pub.L. 105-277, 112 Stat. 2581-728, enacted October 21, 1998).

17 U.S.C. § 106.

17 U.S.C. § 107.

*See Murphy v. Millenium Radio Grp. LLC*, 650 F.3d 295 (3rd Cir. 2011) (finding copyright infringement occurred from the use of a copyrighted photograph on two websites without the photographer's consent; radio station and two radio personalities were not entitled to fair use defense based on purpose and character of the use because the unaltered use of the photograph was not transformative, since there was no meaningful distinction between the original photograph and the use the radio station made of the photograph, but rather was commercial).

(Updated July 2019.)

# FORMS

## SAMPLE FOIA REQUEST LETTER (WEST VIRGINIA)

Your Name  
Your Address  
Your Phone Number  
Date

Name, Title  
Agency  
Department  
Address

Re: Freedom of Information Act Request

Dear Mr./Mrs./Ms. \_\_\_\_\_:

This is a request under the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.*, as amended.

I write to request a copy of . . .

I am prepared to pay reasonable costs for locating the requested file and reproducing it. Please contact me at the above telephone number if the costs will exceed \$\_\_\_\_\_

As provided for in W. Va. Code § 29-B-1-3(d), I will expect to receive a reply within five (5) working days.

Thank you for your cooperation. Please feel free to call me at the above number if you have any questions regarding this request.

Sincerely,

Your Name

## **SAMPLE FOIA REQUEST LETTER (UNITED STATES)**

Your Name  
Your Address  
Your Phone Number  
Date

Name, Title  
Agency  
Department  
Address

Re: Freedom of Information Act Request

Dear Mr./Mrs./Ms. \_\_\_\_\_:

This is a request under with the Freedom of Information Act, 5 U.S.C. § 552, as amended.

I write to request a copy of . . .

As you know, the amended Act provides that if some parts of a file are exempt from release, then "reasonable segregable" portions shall be provided. Therefore, I request that if you determine that some portions of the requested report are exempt, then you provide me immediately with a copy of the remainder of the report. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the report is exempt from release, I would appreciate your advising me as to which exemption(s) you believe cover(s) the material which you are not releasing.

I am prepared to pay reasonable costs for reproducing the requested file. Please contact me at the above telephone number if the costs will exceed \$\_\_\_\_.

As you know, the amended Act permits you to reduce or waive the fees if the request "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I

believe that this request plainly fits that category and ask you to waive any fees.

Thank you for your cooperation. Please feel free to call me at the above number if you have any questions regarding this request.

Sincerely,

Your Name

# We're Here For You

You can depend on the attorneys at Jackson Kelly to handle your media and general business law needs, including defamation, advertising, FCC compliance, employment issues, sales and acquisitions.



**CHELSEA A. CRETA**  
[chelsea.creta@jacksonkelly.com](mailto:chelsea.creta@jacksonkelly.com)

**DAVID A. BARNETTE**  
[dbarnette@jacksonkelly.com](mailto:dbarnette@jacksonkelly.com)

**VIVIAN H. BASDEKIS**  
[vhbasdekis@jacksonkelly.com](mailto:vhbasdekis@jacksonkelly.com)



**Michele Crist**  
**304.744.2143**  
[mcrist@wvba.com](mailto:mcrist@wvba.com)



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