

A Legislator's Guide to Conflicts of Interests and Rules of Conduct

2009



DIVISION OF LEGISLATIVE SERVICES

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Published by the Division of Legislative Services

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Special acknowledgement is due Martha Brissette, former staff attorney at the Division of Legislative Services and now on the staff of the State Board of Elections, who developed much of the material used in this Guide.

February 2009

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Introduction

This guide has been prepared for the convenience of members of the Virginia General Assembly and other participants in the legislative process. It lays out the statutes and rules that govern members' conduct as public representatives.

One function of this guide is to highlight the variety of measures that define the rules of conduct for legislators. Moreover, these laws and rules change over time, and this guide is designed to offer all members a summary of the current laws and rules governing their conduct and conflicts of interest.

Chapter 1 provides background on relevant constitutional provisions and the interplay between the Senate and House Rules and the General Assembly Conflicts of Interests Act (GACOIA or Act).¹ The GACOIA is the primary source for the statutory rules that govern the interplay between a legislator's public role in the General Assembly and his private interests, and it is discussed in Chapter 2.

Other laws and rules apply to actions by legislators as candidates and as incumbents. Chapters 3 through 5 cover areas as diverse as incompatible offices, campaign finance, freedom of information rules, and criminal law provisions. Finally, Chapter 6 reviews the national picture on legislative ethics and conduct rules.

A second function of the guide is to help members become more aware of the legal and ethical considerations that apply while they serve as legislators and when they make decisions in the legislative arena. In writing about legislative ethics, Alan Rosenthal has emphasized this point:

¹ Code of Virginia §§ 30-100 through 30-129. Citations to the Code of Virginia in this guide will be to the section numbers only.

2 INTRODUCTION

I would like legislators to take ethical considerations into account, be conscious of ethical questions, reason with ethics in mind, and incorporate ethics into their judgments.²

A third function is to give examples of questions and answers about specific situations involving the application of these statutes and rules — what is the right or ethical response in various circumstances.

² Alan Rosenthal, *Drawing the Line -- Legislative Ethics in the States* (Lincoln, University of Nebraska Press, 1996), 20.

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Constitutional Provisions

The Virginia Constitution recognizes that matters of conduct and ethics may be addressed by statute and by legislative rule. It spells out the qualifications to hold elective office, provides that no further qualifications can be imposed by law, but explicitly gives the General Assembly power to enact laws

. . . to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision.³

³ Constitution of Virginia, Article II, Section 5, and Article IV, Section 4.

4 BACKGROUND

The Senate and House of Delegates are each authorized "to settle its rules of procedure." Each house "may punish [its members] for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member."⁴

Finally, the Constitution imposes three specific rules:

- No United States official or employee can be eligible to serve in the General Assembly;
- No member "shall be elected by the General Assembly to any civil office of profit in the Commonwealth" during the term for which he was elected; and
- There can be no increase in salary for a member "until the end of the term for which he was elected."⁵

The explicit recognition of the authority "to prevent conflict of interests" was new in the 1971 Constitution. The drafting of the new constitution occurred at the same time that a major study had been undertaken on conflicts of interests. That study⁶ produced the first comprehensive state statute governing conflict of interests, the 1970 Virginia Conflict of Interests Act.⁷

1970 Rules and Conflicts of Interests Acts

The Commission Studying Conflict of Interests recommended a state law applicable to General Assembly members and state and local officials and employees to govern conflict of interests, prohibit certain types of conduct, contracts, and votes, and require disclosure of personal financial interests. The statute replaced 38 separate state laws addressing various conflict of interest situations.

1970 Act

The 1970 Act provided that a government official shall "disqualify himself from voting or participating in any official action in which he may have a material financial interest." The Commission recommended that General Assembly members be exempted from this particular provision:

⁴ Constitution of Virginia, Article IV, Section 7.

⁵ Constitution of Virginia, Article IV, Sections 4 and 5.

⁶ Senate Document 11, 1970.

⁷ 1970 Acts of Assembly, Ch. 463.

The Commission has provided an exemption for members of the General Assembly . . . in the belief that the adoption of provisions on disqualification to vote is a decision which properly should be made by the Senate and House. The long-standing constitutional principle that each House should be the judge of the qualifications of its members and the particular complexities occasioned by members' representing heterogeneous constituencies led us to this conclusion. We therefore suggest that the two Houses examine their rules to see if any revision is appropriate.⁸

In the 1970s, both the Senate and House rules contained provisions allowing a member to abstain from voting on a matter that had a unique impact on his personal interest. The Senate rules provided that ". . . no Senator shall vote on a question in the event he is immediately or personally interested." The House rules contained a similar provision: ". . . no member who has an immediate and personal interest in the result of the question shall either vote or be counted upon it."⁹

1983 Comprehensive Act and 1987 Acts

The next major revisions of the conflict of interest statutes occurred in 1983 when the 1970 Act was repealed and replaced with the Comprehensive Conflict of Interest Act. In 1987, the General Assembly passed separate Acts to govern members of the General Assembly (the General Assembly Conflicts of Interests Act or GACOIA) and state and local officers and employees generally (the State and Local Government Conflict of Interests Act or SLGCOIA).¹⁰

These revisions and later amendments to the GACOIA reverse the position taken by the 1970 Commission and apply to General Assembly members the requirement that a member abstain from voting when the member "has a personal interest in the transaction."¹¹ This provision is discussed below in Chapter 2. This section of the GACOIA also provides that the disqualification from voting will be further defined in the rules of the Senate and House:

Unless otherwise prohibited by the rules of his house, the disqualification requirement of this section shall not prevent any legislator from participating in discussions and debates, provided (i) he verbally discloses the fact of his personal interest in the transaction at the outset of the discussion or debate or

⁸ Senate Document 11, 1970, 4.

⁹ Manual of the Senate and House of Delegates (Virginia 1968); Senate Rule 39 and House Rule 67.

¹⁰ The GACOIA is set out in §§ 30-100 through 30-129. The SLGCOIA is set out in §§ 2.2-3100 through 2.2-3131.

¹¹ § 30-108.

as soon as practicable thereafter and (ii) he does not vote on the transaction in which he has a personal interest.

The Senate and House have taken different approaches to the disqualification requirements.

Current Senate Rules and the GACOIA

The Senate Rules¹² have replaced an earlier provision that ". . . no Senator shall vote on a question in the event he is immediately or personally interested" with language to incorporate the GACOIA provision on disqualification due to personal interests. The Senate Rules provide further that a member who abstains because of a conflict must refrain from participating "directly or indirectly in the matter."

Senate Rule 20 (d) covers votes in committee and states:

A Senator who has a personal interest in the transaction, as defined in § 30-101 of the Code of Virginia, shall neither vote nor be counted upon it, and he shall withdraw, or invoke this Rule not to be counted, prior to the taking of any vote upon it, by stating the same before the Committee, and the fact shall be recorded by the Committee Clerk and reported along with the votes of the Committee members on the bill or resolution. If a Senator invokes this rule, the Senator shall not participate, directly or indirectly, in the matter wherein the rule is invoked.

Senate Rule 36 covers floor votes and states:

A Senator who has a personal interest in the transaction, as defined in § 30-101 of the Code of Virginia, shall neither vote nor be counted upon it, and he shall withdraw, or invoke this rule not to be counted, prior to the division, and the fact shall be recorded on the voting machine. If a Senator invokes this rule, the Senator shall not participate, directly or indirectly, in the matter wherein the rule is invoked."¹³

Other provisions in the Senate Rules affect conflict of interest and conduct matters:

¹² Citations to the Senate Rules are to the Rules of the Senate, adopted January 9, 2008.

<http://hodcap.state.va.us/publications/SenateRules.pdf>

¹³ Senate Rule 36 begins with the statement that every Senator who is present "shall vote or be counted as voting on one side or the other. . . ." Compare House Rule 69 discussed below.

- Rule 18 (h) provides that the Committee on Privileges and Elections will consider the following:
 - (i) Matters concerning conflict of interests (except matters concerning the judiciary or solely the legal profession);
 - (ii) The reprimand, censure, or expulsion of a member;
 - (iii) Matters related to financial disclosure statements; and
 - (iv) Reports from the Senate Ethics Advisory Panel concerning the GACOIA.
- Rule 19 (g) establishes a Subcommittee on Standards of Conduct of the Committee on Rules to prepare advisory opinions on potential violations of the Senate Rules or the GACOIA. The Committee on Rules must consider the Subcommittee's opinion and approve it.
- Rule 51 (b) provides for the Senate Ethics Advisory Panel and parallels § 30-112.¹⁴

Current House Rules and the GACOIA

The House Rules¹⁵ have retained the language that appeared in the 1970 rules. Rule 69 states in its entirety:

Upon a division of the House on any question, a member who is present and fails to vote shall on the demand of any member be counted on the negative of the question and when the yeas and nays are taken shall, in addition, be entered on the Journal as present and not voting. However, no member who has an immediate and personal interest in the result of the question shall either vote or be counted upon it.

There is no cross reference to the GACOIA or § 30-101.

The House Rules differ from the Senate Rules in that they do not prohibit a member from discussing a matter on which he abstains. Code § 30-108 addresses this issue:

¹⁴ § 30-101 provides for nominations to the Panel by the Senate Committee on Rules, which has been the practice since 2004. Senate Rule 51 (b) retains the earlier language for nominations by the Committee on Privileges and Elections.

¹⁵ Citations to the House Rules are to the 2008-2009 Rules of the House of Delegates, adopted January 9, 2008, and amended March 8, 2008. <http://hodcap.state.va.us/publications/20082009HouseRulesText.pdf>

Unless otherwise prohibited by the rules of his house, the disqualification requirement of this section shall not prevent any legislator from participating in discussions and debates, provided (i) he verbally discloses the fact of his personal interest in the transaction at the outset of the discussion or debate or as soon as practicable thereafter and (ii) he does not vote on the transaction in which he has a personal interest.

Other provisions in the House Rules affect conflict of interests and conduct matters:

- Rule 23 establishes a subcommittee on Standards of Conduct of the Rules Committee to prepare advisory opinions on the request of any member "with respect to the general propriety of any current or proposed conduct of such member." The subcommittee also reviews annually the members' statements of economic interests.
- Rule 24 gives the Privileges and Elections Committee jurisdiction to "receive and investigate any charges or complaints brought against any member . . . in the performance of his duties or the discharge of his responsibilities and recommend to the House such action as it may deem appropriate to establish and enforce standard of conduct for members."

Questions and Answers

Question: I plan to abstain from voting on a bill that will directly affect my manufacturing business. May I comment on the bill in committee or on the floor to explain the bill?

Answer: Senate Rules 20 (d) and 36 prohibit a Senator from participating "directly or indirectly" in the matter and from debating the measure. House Rules are silent on this question and, therefore, § 30-108 allows a House member to participate "in discussions and debates" on the measure when he discloses his personal interest and then abstains from voting because of conflict of interests concerns.

Question: If I have a question about my conduct, what resources may I consult for advice?

Answer: Senators can seek an advisory opinion from the Senate Committee on Rules on whether facts in a particular case violate the Senate Rules or GACOIA by communicating a request to the Subcommittee on Standards of Conduct through the Clerk of the Senate. House members can request an advisory opinion from the House Subcommittee on Standards of Conduct on the general propriety of any present or

proposed conduct by directing an inquiry to the Clerk of the House. In addition, § 30-122 provides that a legislator may request an advisory opinion from the Attorney General "as to whether the facts in a particular case would constitute a violation of the provisions of" the GACOIA.

Question: What duty do I have to vote on questions before the chamber?

Answer: Members have a duty to vote unless a conflict warrants an abstention. Senate Rule 36 states that "every Senator present in the Chamber . . . shall vote or be counted as voting on one side or the other . . ." when there is a vote. The Rule then continues to permit an abstention when a Senator has a "personal interest" in the vote as "personal interest" is defined in § 30-101. House Rule 69 provides that "a member who is present and fails to vote shall on the demand of any member be counted on the negative of the question." The Rule then continues to prohibit a member with "an immediate and personal interest in the result of the question" from voting or being counted on the vote.

2 *General Assembly Conflicts of Interests Act*

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History

As noted in Chapter 1, the first version of the present General Assembly Conflicts of Interests Act (GACOIA) was recommended by the Commission Studying Conflict of Interests and enacted in 1970. The Commission's goal was to provide a comprehensive state statute to guide the conduct of state and local officers and employees. The 1970 Act brought conflicts issues into focus and generated questions and discussions for the next four decades

A listing of the reports to the General Assembly that have proposed changes to the GACOIA or its predecessor acts illustrates the number of issues raised:

- 2006 House Doc. No. 23, *Report of the Joint Subcommittee Studying the Disclosure Filings Required by the State and Local Government Conflict of Interest Act, the General Assembly Conflict of Interest Act and the Lobbyist Disclosure and Regulation Act* (2004 HJR 186).
- 2004 House Doc. No. 43, *Report of the Joint Subcommittee Studying the Disclosure Filings Required by the State and Local Government Conflict of Interest Act, the General Assembly Conflict of Interest Act and the Lobbyist Disclosure and Regulation Act* (2004 HJR 186).
- 2003 House Doc. No. 31, *Report of the Joint Subcommittee Studying the State and Local Government Conflict of Interest Act* (2002 HJR 31).
- 1994 Senate Doc. No. 65, *Report of the Joint Subcommittee Studying the Report of the Governor's Commission on Campaign Finance Reform, Government Accountability and Ethics* (1993 SJR 217).
- 1992, *Public Service, Public Trust*, Report of the Governor's Commission on Campaign Finance Reform, Government Accountability, and Ethics (available at the Division of Legislative Services, Legislative Reference Center).
- 1987 Special Session, Ch. 1, repealing the Comprehensive Conflict of Interests Act and enacting the separate State and Local Government Conflict of Interests Act and the General Assembly Conflicts of Interests Act, following the work of an eight-member joint subcommittee (1986 SJR 68).
- 1980 Senate Document No. 00, *Report of the Joint Rules Committee on Conflict of Interest and Disclosure* (available at Division of Legislative Services, Legislative Reference Center).

- 1976 Senate Document 25, *Report of the Conflict of Interests Committee* (1975 SB 893).

The first wholesale revision to the 1970 Act was passed by the 1983 General Assembly when it repealed the 1970 Act and passed the Comprehensive Conflict of Interests Act, established separate ethics panels in the Senate and House of Delegates, and set out the form for an annual financial disclosure statement.

The second major revision took place in 1987 when the General Assembly enacted the separate GACOIA. The 1987 GACOIA retained most of the 1983 Act, but eliminated the 1983 provision that allowed a panel to refer a willful violation of the Act to the Attorney General for criminal law prosecution. The 1987 Act provided that matters of discipline would be determined by the member's house.

Purpose and Summary

§ 30-100. The General Assembly, recognizing that our system of representative government is dependent in part upon (i) citizen legislative members representing fully the public in the legislative process and (ii) its citizens maintaining the highest trust in their public officers, finds and declares that the citizens are entitled to be assured that the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts.

This first section of the GACOIA recognizes the importance of public confidence in the legislature and further states that the Act should be "liberally construed" to accomplish this purpose.

The Act seeks to prevent "inappropriate conflicts" faced by legislators who serve on a part-time basis. It does so in four ways:

- Prohibiting certain categories of conduct;
- Restricting contracts between legislators and governmental agencies;
- Disqualifying members from voting on transactions in which they have a personal interest; and
- Requiring legislators to disclose certain financial interests and relationships.

Each of these four topics is discussed below with examples of questions that have arisen with respect to the topic. A final section of this chapter outlines the provisions for the enforcement of the Act.

Prohibited Conduct

Section 30-103 sets out 11 categories of prohibited conduct for legislators:

1. Soliciting or accepting money or anything of value for performing his official duties other than the pay he receives as a member of the General Assembly.
2. Offering or accepting money or anything of value for getting any person a position or promotion with any governmental agency.
3. Offering or accepting money or anything of value for getting any person a contract with a governmental agency.
4. Using confidential information for his own or another's economic gain.
5. Accepting any money, gift, or opportunity that tends to influence his official actions (excluding properly reported and used political contributions).
6. Accepting any business or professional opportunity when he knows it is likely being offered to influence his performance of his official duties.
7. Lobbying the General Assembly or a legislative agency within one-year after leaving the legislature.
8. Accepting an honorarium for a speech or article relating to his official duties.
9. Accepting appointment to the managing body of a state-regulated business on which two other legislators already serve.
10. Accepting a gift from a person whose interests can be substantially affected by the legislator's performance of his duties so that a reasonable person would question the legislator's impartiality.
11. Accepting frequent gifts creating the appearance that he is using his public office for private gain.

The first four prohibitions involve a quid pro quo factor — the legislator solicits or accepts something of value in return for a misuse of his office. These prohibitions are closely related to criminal bribery and misuse of office statutes.¹⁶

¹⁶ These Code provisions are set out in Chapter 6.

The fifth and sixth prohibitions also involve the acceptance of money, anything of value, or an opportunity when it is reasonable to conclude that the money or opportunity will influence his official actions or is being offered for that purpose. These prohibitions are not dependent on a quid pro quo or any actual misuse of his office by the legislator. Prohibition 5 explicitly exempts campaign contributions received by a legislator that are properly reported under campaign finance disclosure laws and used for campaign purposes.

Prohibitions 7, 8, and 9 address specific conduct situations: a one-year "revolving door" prohibition on lobbying the legislative branch, with a special provision for obtaining an opinion from the Attorney General on contemplated conduct; a prohibition on the acceptance of honoraria; and a ban on serving as the third legislator on the board of a publicly regulated company.

The final two prohibitions concern the acceptance of gifts when the gifts raise either the issue that they are being given to influence the legislators' official actions or the suggestion that he is using his public office for personal gain. These two prohibitions are not subject to criminal law penalties.

The term "gift" is broadly defined in § 30-101 and includes "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." Prohibitions 10 and 11 involve the perception of impropriety — would a reasonable person question a legislator's impartiality or does the legislator appear to be using his office for his private gain. The definition of "gift" does not include presents from relatives, honorary degrees, or tickets or admissions to events that are not used by the legislator.

This definition is repeated in § 30-111 in the disclosure form or Statement of Economic Interests, and the disclosure of gifts received by legislators complements the prohibitions in § 30-104.

Questions and Answers

Question: A constituent of a member asks him to introduce and support legislation to benefit the constituent's business. Can the member introduce the legislation?

Answer: Yes, so long as the member does not solicit or accept any payment for performing his legislative duties. There is no quid pro quo in this situation. § 30-103, subdivision 1.

Question: A client of an attorney-member asks him to draft, introduce, and support legislation to benefit the client's business. Can the member introduce the legislation?

Answer: **No**, assuming that the member is being paid to represent the client's business interests. The member cannot accept a payment for performing his legislative duties. § 30-103, subdivision 1.

Question: A constituent of a member asks him to introduce and support legislation to benefit the constituent's business. The constituent makes a \$1,000 contribution to the member's campaign committee. Can the member introduce the legislation?

Answer: **Yes**, if there is a clear separation between the contribution and the performance of the member's legislative duties. For example, if the constituent's contribution was made before the legislative issue developed. This gray area requires good judgment on the part of the legislator.

Question: A representative of a corporation has called to invite the member to dinner, at which he will give the member a campaign contribution from the corporation's political action committee. He proposes to pay for the meal and treat the cost of the dinner as an in-kind contribution to the member's campaign. Can the member accept the contribution and the meal in these circumstances?

Answer: It depends on the timing and context of the contribution. **Yes**, if the dollar and meal contributions are made when the General Assembly is not in a regular session. Both monetary and in-kind campaign contributions must be reported on the member's campaign finance disclosure forms. **No**, if the contributions are made during a regular session. Subsection A of § 24.2-954 prohibits a member from accepting any political contribution during a regular session of the General Assembly. **Note:** If the meal is a gift rather than a campaign contribution, it may be reportable as a gift on the member's Statement of Economic Interests as discussed below under "Prohibited Conduct: Contracts."

Question: A representative of a trade association has called to invite the member to address the association's annual dinner to give his views on the work of the General Assembly at the just-concluded regular session. May the member accept an honorarium for his speech and expenses to attend the dinner?

Answer: **No** and **Yes**, respectively. Under subdivision 8 of § 30-103, a member cannot accept an honorarium for any publication, speech, or appearance where he provides information related his work as a legislator. He may accept payment of subsistence expenses such as meals.

Question: How can a member determine when the acceptance of a particular gift or series of gifts will violate subdivision 10 or 11 of § 30-103?

Answer: It takes good judgment to determine whether "the timing and nature of the gift would cause a reasonable person to question the legislator's impartiality" on a legislative matter under subdivision 10. Similarly, a judgment call is required to determine whether frequent gifts cause "an appearance of the use of [a member's] public office for private gain" under subdivision 11.

The GACOIA does not explicitly prohibit any specific gift by category or by value. But the Act does require that members disclose the gifts that they receive in their Statement of Economic Interests as discussed below in the Question and Answer section under "Disclosure Requirements." The Act relies on disclosure to reinforce good judgment in this area.

Prohibited Conduct: Contracts

Sections 30-104 through 30-106 set out the rules to guide legislators contracting with state and local governments. These provisions depend on the definitions of "contract," "personal interest," and "personal interest in a contract" set out in § 30-101.

"Contract" means any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the General Assembly or a political subdivision, whether or not such agreement is executed in the name of the Commonwealth of Virginia, or some political subdivision thereof. "Contract" includes a subcontract only when the contract of which it is a part is with the legislator's own governmental agency.

"Personal interest" means a financial benefit or liability accruing to a legislator or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a

business if the liability exceeds three percent of the asset value of the business.

"Personal interest in a contract" means a personal interest which a legislator has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract.

Under § 30-105 A, a legislator is prohibited from having "a personal interest in a contract with the legislative branch of state government." He is presumed to have more influence with the legislative branch and its employees than with other state or local agencies.

Under § 30-105 B, a member can compete for a contracts in which he has a personal interest with executive and judicial branch agencies of state government if the contract is awarded under competitive bidding or negotiation processes.¹⁷

Under § 30-105 C, a member can compete for a contract in which he has a personal interest with a local government agency if the contract is awarded under competitive bidding or negotiation processes, special local procurement procedures, or a local administrative finding that competitive processes are contrary to the public interest.¹⁸

Sections 30-105 and 30-106 contain a number of exceptions to the general prohibitions on contracts with government agencies:

- Regular employment contracts with executive or judicial state agencies or local government agencies. § 30-105 B and C.
- Contracts for services or goods sold by a government agency at uniform rates and available to the general public. § 30-105 D.
- Contracts between public institutions of higher education and publishers in which the member's personal interest results from his authorship of the textbook or material. § 30-105 E.
- Contracts for the sale, lease, or exchange of real property with a government agency so long as (i) the legislator does not participate as such and (ii) public disclosure requirements are met. § 30-106 A 1.
- Contracts to publish official notices. § 30-106 A 2.

¹⁷ See the Virginia Public Procurement Act, § 2.2-4300 et seq.

¹⁸ See the Virginia Public Procurement Act, § 2.2-4300 et seq. and particularly § 2.2-4343.

- Contracts with a legislative branch agency when the legislator's or his immediate family member's personal interest is the result of more than \$10,000 annual income from the agency or firm so long as the legislator or his immediate family member does not have any authority to participate in the contract negotiations. Public record disqualification is required if the legislator has authority to participate in the contract negotiations on behalf of an agency and no participation is allowed. § 30-106 A 3.
- Contracts between a legislator's government agency and certain public service or utility companies or financial institutions in which the legislator has a personal interest, provided that there is a public record of the legislator's disqualification and there is no participation by him in the contract process. § 30-106 A 4.
- Contracts to purchase goods or services for \$500 or less. § 30-106 A 5.
- Grants or payments under government programs with uniform rates or amounts applicable to all qualified applicants as established by the government agency. § 30-106 A 6.¹⁹

Questions and Answers

Question: I am a member of the Transportation Committee. I have been offered the opportunity to purchase a substantial ownership interest in a limited liability company (LLC) providing an annual income to me exceeding \$10,000. The LLC contracts with the Virginia Department of Transportation and other government agencies through competitive sealed bidding. Can I take advantage of this opportunity?

Answer: Yes, with qualifications. Under § 30-105 B, a legislator may have a personal interest in a contract with an executive branch agency if the contract is the result of competitive bidding or negotiation procedures. Under the Act's definitions, the legislator would have a "personal interest" in the LLC by having an annual income of more than \$10,000 and a "personal interest in [the] contract" because of his personal interest in the contracting LLC. The applicable exception in § 30-105 B is based on the protections offered by the competitive bid process.

When a business opportunity is offered, the legislator must also consider the § 30-103 prohibited conduct provisions. He should determine that the business opportunity is an arms-length offer and not an offer intended to influence his

¹⁹ Members should be aware of the Ethics in Public Contracting provisions (§§ 2.2-4367 through 2.2-4377) that are part of the Virginia Public Procurement Act. § 2.2-4300 et seq.

legislative actions. Further, he must comply with applicable disclosure provisions discussed below and report his holdings in the LLC.

Question : Can I be a principal of a development team seeking contracts with an executive branch agency to build student housing on state-supported college campuses? I expect to earn more than \$10,000 annually as a result of this work.

Answer: You will have a personal interest in the contract awarded to the developers. Therefore, your interest is permissible only if the contract fits the exception stated in § 30-105 B and is awarded by competitive sealed bidding or competitive negotiation as defined in § 2.2-4301.²⁰

Question: I own a corporation that sells, leases, and services telecommunications equipment. Can my corporation contract directly with the General Assembly? With the Department of General Services? With the Supreme Court? With a local governing body?

Answer: Contracts with the General Assembly: No, § 30-105 A prohibits a member from having a personal interest in a contract with the General Assembly, and there is no applicable exception. The exception in § 30-106 A 3 applies to a legislator whose sole interest in the contract results from his having an annual income in excess of \$10,000 annually, and the legislator cannot have authority to participate in the contracting process. As sole owner of the corporation, the legislator would have authority to participate.

Contracts with the Department of General Services or Supreme Court: Under § 30-105 B, a legislator may have "a personal interest in a contract" with an executive or judicial branch agency if the contract is awarded under competitive bidding or negotiation processes.²¹

Contracts with a local government agency: Under § 30-105 C, a legislator may have "a personal interest in a contract" with a local government agency so long as the contract is awarded under competitive bidding or negotiation processes, procedures based on competitive principles, or a written finding by the agency head that competitive processes are contrary to the public interest.

The rationale for §§ 30-105 and 30-106 is to prevent those situations where a legislator may be in a position to influence the letting of the publicly funded contract. Thus the legislator is prohibited from contracting with agencies in the legislative branch but may contract with other government agencies through publicly regulated

²⁰ See 2000 Op. Va. Att'y Gen. No. 99-095.

²¹ COI Adv. Op. No. 8 (1983). Senator with personal interest in timberlands company cannot contract with executive agency to procure restoration funds without required competitive process.

competitive processes. Or he may have a personal interest in contracts under other exceptions such as the § 30-106 A 5 exception for small contracts (\$500 or less) or the § 30-106 A 6 exception for grants available to the public under uniform guidelines and rates.

Prohibited Conduct: Transactions

GACOIA

Section 30-108 states the rule: "A legislator who has a personal interest in a transaction shall disqualify himself from participating in the transaction."

Before analyzing the Act's pertinent definitions, it is helpful to look at some traditional interpretations of legislative conflict of interest rules. For example:

It is a principle of "immemorial observance" that a Member should withdraw when a question concerning himself arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as one of a class. Dreschler, Notes to Jefferson's Manual and the Rules of the House of Representatives, House Doc. 402, 90th Congress, 2nd Session (1969), p.319. Citations omitted.

It is the general rule that no members can vote on a question in which they have a direct personal or pecuniary interest. *The right of members to represent their constituencies, however, is of such major importance that members should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal.* Mason's Manual of Legislative Procedure (1989), p. 354. (Emphasis added.)

As these statements illustrate, the member has a first responsibility to represent his constituents and should abstain on a vote only if his interest is personal and sets him apart from a class.

The determination under the GACOIA of whether a member must disqualify himself from voting on a bill or participating in a transaction depends primarily on two of the § 30-101 definitions:

"Personal interest" means a financial benefit or liability accruing to a legislator or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or

may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business.

"Personal interest in a transaction" means a personal interest of a legislator in any matter considered by the General Assembly. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business, or represents any individual or business and such property, business or represented individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. A "personal interest in a transaction" exists only if the legislator or member of his immediate family or an individual or business represented by the legislator is affected in a way that is substantially different from the general public or from persons comprising a profession, occupation, trade, business or other comparable and generally recognizable class or group of which he or the individual or business he represents is a member.

A "personal interest" is a financial interest — a significant financial interest.²² The member or a member of his immediate family²³ may have a financial interest as the result of any of the following:

- Ownership of more than three percent of a business;
- Annual income that exceeds, or is reasonably expected to exceed, \$10,000 from ownership in property or a business;
- Salary or other compensation or benefits paid by a business that exceeds, or is reasonably expected to exceed, \$10,000 annually;
- An ownership interest in property that exceeds \$10,000 in value (excluding the interests listed above); or

²² The 1970 first version of a statewide conflicts law used the term, "material financial interest," and defined it to include an ownership interest of five percent or more of a business or an annual income of \$5,000 or more.

²³ "Immediate family" means (i) a spouse and (ii) any other person residing in the same household as the legislator, who is a dependent of the legislator or of whom the legislator is a dependent. "Dependent" means a son, daughter, father, mother, brother, sister or other person, whether or not related by blood or marriage, if such person receives from the legislator, or provides to the legislator, more than one-half of his financial support.

- A personal liability assumed on behalf of a business if the liability exceeds three percent of the asset value of the business.

There are several elements to the definition of “a personal interest in a transaction” that must exist before a legislator is disqualified from voting on a matter:

First, the legislator or a member of his immediate family must have a “personal interest” in property or a business that may be affected by the transaction. This personal interest must be a financial interest as set out in the definition of “personal interest.” Alternatively, the legislator may represent an individual or business that may be affected by the transaction. The definition does not include any monetary threshold when representation is involved. Representation of an individual or business by a legislator is the equivalent of a personal interest for purposes of the definition of a “personal interest in a transaction.”

Second, the definition requires that the legislator's property or business or the individual or business that the legislator represents either (i) “is the subject of the transaction” or (ii) “may realize a reasonably foreseeable direct or indirect benefit or detriment as a result” of the transaction.

Third, a legislator still does not have a disqualifying personal interest in the transaction or vote on a measure unless the transaction affects him “in a way that is substantially different from the general public or from persons comprising a profession, occupation, trade, business or other comparable and generally recognizable class or group.” If the member owns timberland and the bill affects all timberland in the state, the member may vote on the bill. If the member is president of a bank and earns more than \$10,000 annually, he may vote on a bill that affects all banks in the state.

The determination of what constitutes a “generally recognizable class or group” is one of the most difficult issues raised by these provisions of the GACOIA. By its terms, § 30-101 provides slight guidance on what constitutes a “generally recognizable class or group.” First, it must mean more than one person or entity because the definition requires that the legislator or his business must be a “member of a class or group.” Second, it must mean a category smaller than the general public because it is an alternative exemption to that provided for legislation with like impact on “the general public.” The Attorney General's opinions on this issue have favored an interpretation of “recognizable class or group” so that the prohibition on voting on bills is applied only in exceptional cases.²⁴

²⁴ See, e.g. Opinions of the Attorney General, COI Adv. No. 90-A31, 90-A28 (1990), 9-A22 (1989), 8-A15 (client's membership in group of “several” developers or property owners affected did not require

SLGCOIA

The GACOIA differs from the SLGCOIA in this area. Under the SLGCOIA, an officer who has "a personal interest in a transaction" and who is disqualified or elects to disqualify himself must disclose the nature of his interest and his disclosure is made part of the public record. In addition, the act provides that the officer may participate or vote "if he is a member of a business, profession, occupation, or group **of three or more persons** the members of which are affected by the transaction,"²⁵ if he makes a public disclosure of his interest, identifies the group that is affected by the transaction, and declares that he can participate and vote objectively.²⁶ The SLGCOIA, in effect, defines a group as three or more persons and requires a publicly recorded disclosure of the official's interest. This definition of a group as three or more persons was added to the SLGCOIA in 2003 on the recommendation of a joint subcommittee. The subcommittee's report noted that the term "group" was not defined in the act and had been broadly interpreted in some cases to mean as few as two similarly situated persons. Therefore, it recommended a definition of "three or more persons."²⁷

The GACOIA does not have a similar mechanism for disclosure. When a member determines that he has a personal interest in a matter, he abstains and cites the applicable rule (Senate Rule 20 (d) or 36 or House Rule 69). Under § 30-108, a member may participate in discussions and debates even though he has a personal interest in the measure so long as he discloses his interest and does not vote. However, the rules of his house may prohibit his participation. Senate Rules 20 (d) and 36 prohibit such participation. The House Rules do not include that prohibition.

Questions and Answers

Question: Can I advocate for my spouse to be elected by the General Assembly to a judgeship? Can I advocate for my son to be elected to a judgeship?

Answer: Section 30-108 prohibits members from *voting* on any transaction in which they have a "personal interest" defined in § 30-101 to include financial benefits to *immediate family members* such as an annual salary exceeding \$10,000. Immediate family members are spouses and family members who reside in the member's home

disqualification) and 8-A07 (spouse's ownership of one of 220 parcels of real estate in affected subdivision did not require disqualification) (1988).

²⁵ § 2.2-3112 A 2 (emphasis added).

²⁶ See §§ 2.2-3114 F and 2.2-3115 G.

²⁷ House Doc. 31 (2003), p. 17. 2003 Acts of Assembly, Ch. 694.

and receive over one-half of their support from the legislator. If the nominee is the member's spouse, a House member is allowed to disclose his interest and participate in discussions and debates, but not vote (House Rule 69). However, Senate Rules 20(d) and 36 prohibit not only voting, but also all participation, direct or indirect, so a Senate member could not advocate for his spouse.

Assuming that the member's son does not live in the legislator's household, the legislator would not be precluded from participating and voting by the GACOIA.

Question: My spouse is a salaried member of an architectural firm and earns more than \$10,000 annually. His firm plans to bid on a proposed new state office building. May I vote on a bill to approve the acquisition of land for the proposed building?

Answer: You may vote on the bill. You have a personal interest in the architectural firm because of your spouse's income from the firm. The bill to provide for the purchase of the land may benefit your spouse's firm by opening up the prospect of a new project. However, the possibility that the firm may bid on a future project does not constitute "a reasonably foreseeable direct or indirect benefit or detriment as a result of" a vote on the bill. Moreover, your personal interest in the business of your spouse's architectural firm makes you one of a broad class of persons with interests in architectural firms, many of which may bid on the work involved.

Question: When I vote in my caucus on legislation, is that vote considered a transaction under the definition in § 30-101?

Answer: The definition states: "*Transaction*" means any matter considered by the General Assembly, whether in a committee, subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which official action is taken or contemplated." The question turns on the interpretation of the phrases "other entity of the General Assembly" and "official action." The Attorney General has issued his opinion that the legislative caucuses are not public bodies within the meaning of the Freedom of Information Act (FOIA) but are primarily politically based and not publicly funded.²⁸ Therefore, the caucuses are not bound by the public notice and public meeting requirements of FOIA. While you may participate in the caucus consideration of a bill, you would still be required to abstain from voting on the bill in committee or on the floor if you have a personal interest in that vote.

²⁸ 2003 Op. Va. Att'y Gen. No. 03-063.

Disclosure Requirements

Every member of the General Assembly discloses his financial interests annually. The public disclosure of financial interests has the most direct impact on members and generates the most public discussion of potential conflicts as the press and public interest groups review the annual statements of economic interests. The disclosure requirements are set out in §§ 30-109, 30-110, and 30-111 of the GACOIA.

Who must file and when?

Incumbent members and members-elect must file the statement as a condition for assuming office on or before January 8 and must file the statement annually thereafter on or before January 8. § 30-110 A.

New candidates for the General Assembly must file a statement with the appropriate house clerk. Candidates for a primary must file by the primary filing deadline, usually the 60th day before the primary. Candidates for the November election must file by the second Tuesday in June. This requirement for candidate filings does not apply to a General Assembly member running for reelection to the same office who has met the annual statement filing requirement. § 30-110 B and §§ 24.2-502 and 24.2-503.

What is the disclosure form and where does a member get it?

The form for disclosure is set out in § 30-111 and is entitled a "Statement of Economic Interests." The Senate and House Clerks send the forms to the members by November 30 of each year. Candidates may download the form from the State Board of Elections web site:

http://www.sbe.virginia.gov/cms/documents/GA_Economic_Interests.pdf

Where does a member file the statement?

Members and candidates file the statement with the clerk of their house. § 30-110 A.

Must the statement be sworn and notarized?

The member, member-elect, or candidate must sign the statement and swear or affirm that the information given is complete and accurate to the best of his knowledge. His signature must be notarized. § 30-111 A.

What are the penalties for a failure to file a statement or filing a false statement?

Every candidate must comply with the requirement to file a statement in order to qualify as a candidate and have his name printed on the ballot. §§ 24.2-502 and

24.2-504. Every member and member-elect must file a statement "as a condition to assuming office." § 30-110 A.

If a member makes a knowing misstatement of a material fact on his statement, he is subject to disciplinary action by his house. § 30-111 B.

How are statements reviewed for their content?

Statements are reviewed annually by the Standards of Conduct Subcommittee of the House Rules Committee or by a special subcommittee of the Senate Rules Committee. § 30-111 C; House Rule 23; Senate Rule 19(f). The member may be required to file an amended statement if deficiencies are found.

Ten percent of the membership of the Senate or House may request a special review of a member's statement, although this process has not been utilized. § 30-111 D, Senate Rule 19(f).

Statements are public record documents and may be reviewed by the press and public interest groups or individuals. The Senate and House Clerks maintain the statements for five years as public records. Arrangements to review the statements may be made through the Clerk of the Senate (804-698-7400) or the Clerk of the House (804-698-1619). There is no electronic database of statements accessible from the Internet.

What must be disclosed in the Statement of Economic Interests?

The statement covers the financial interests of the member and his immediate family (spouse and dependents in his household). There are a series of definitions and then items or questions and related schedules.

Item 1 and Schedule A — Paid offices. Does the member or any immediate family member have a paid office or directorship in any business? Business is broadly defined and covers profit and non-profit entities, corporations, partnerships, and any business entity or individual. If the answer is yes, Schedule A must be completed, listing each business, the name and address of each business, and the position held. The amount of pay received in Schedule A is not required. This question pertains to the date the statement is completed.

Item 2 and Schedule B — Liabilities. Does the member or any immediate family member owe more than \$10,000 to any one creditor? (Excluding government loans and loans secured by property equal in value to the loan.) If the answer is yes, Schedule B must be completed, indicating the business or individual owed and the amount of the liability — either \$10,001 to \$50,000, or more than \$50,000. This question pertains to the date the statement is completed.

Item 3 and Schedule C — Securities. Does the member or any immediate family member, separately or together, own securities valued at more than \$10,000 in any one business? (Including ownership derived through mutual funds, limited partnerships, and trusts.) If the answer is yes, Schedule C must be completed, naming the issuer, type of entity, type of security and value — either \$10,001 to \$50,000, or more than \$50,000. U.S. or other government securities other than Virginia state and local securities need not be listed. This question pertains to the date the statement is completed.

Item 4 and Schedule D-1 — Payments for talks, meetings, and publications. Has the member, in his capacity as a legislator, received more than \$200 in value for any one talk, meeting, or publication? This schedule covers transportation, lodging, money, and other things of value a legislator receives in connection with a talk or meeting. If the answer is yes, Schedule D-1 must be completed, showing the payer, approximate value, circumstances of the talk or meeting, and type of payment, such as travel reimbursement. This question pertains to the 12 months before the statement is completed. This question does not cover payments and reimbursements by the Commonwealth.

Item 11 and Schedule D-2 — Payments from the Commonwealth for meetings held outside the Commonwealth. Has the member, in his capacity as a legislator, received more than \$200 in value from the Commonwealth for any one meeting held outside the Commonwealth? This schedule covers transportation, lodging, money, and other things of value received in connection with a meeting. If the answer is yes, Schedule D-2 must be completed, showing the payer, approximate value, circumstances of the meeting, and type of payment, such as travel reimbursement. This question pertains to the 12 months before the statement is completed.

Item 5 and Schedule E — Gifts. Has the member received a single gift or entertainment with a value of more than \$50 or multiple gifts and entertainments with a collective value of more than \$100 from any one business, government entity, or individual during the past 12 months? If the answer is yes, Schedule E must be completed. Schedule E requires the listing of each donor, location of event or gift, description of the gift or event, and its approximate value.

The term "gift" is broadly defined, but the following gifts are not reported on Schedule E:

- Gifts from relatives or personal friends not related to the member's legislative position;
- Business entertainment related to the member's private profession or business;

- An entertainment event if the average cost per person attending the event is \$50 or less; or
- Campaign contributions publicly reported under the Campaign Finance Disclosure Act.

Even though a gift or dinner may have a value of \$50 or less, it is important to keep track of all gifts through the year in case multiple gifts from a single donor reach a value in excess of \$100. Examples of single and multiple gift situations are illustrated in the following box.

Reporting Gifts

Single Gifts

You must report each gift with a value over \$50.

Single Entertainment Event

You do not need to report an “entertainment event” unless the average value per person attending the event is over \$50. The term “entertainment event” is not defined, but would include events such as a trip, dinner, or reception for legislators. This term is also used in the lobbyists’ disclosure law.

Multiple Gifts and Entertainment Events

You must report any combination of gifts and entertainment events provided by a single donor with a cumulative value greater than \$100.

Examples

ABC Inc. sends you a clock worth \$40. You do not need to list the gift.

ABC Inc. sends you a clock worth \$40, a book worth \$45, and a ham worth \$30. You should list each of the three gifts (cumulative value more than \$100).

XYZ Inc. hosts a reception that you attend, and the average value per person attending is \$30. You do not need to list the event.

XYZ Inc. hosts a reception that you attend, and the average value per person attending is \$75. You should list the event.

XYZ Inc. sends you a clock worth \$40 and hosts two events that you attend, and the average value per person attending is \$40 for each event. You should list the combination of the gift and events because the cumulative value is more than \$100 from XYZ Inc.

Item 5 and Schedule E — Gifts — lobbyists' reports. As stated on Schedule E, gifts from businesses, governmental entities, and individuals must be reported. The schedule covers gifts from lobbyists as well as others. The lobbying disclosure law²⁹ requires the lobbyist to report his expenses and to name each legislator who attended an entertainment event with an average value of more than \$50 per attendee and who received any other gift worth more than \$50. The lobbyist is required to send each legislator named in its disclosure report a summary of the events and gifts provided by it to the legislator. Lobbyists provide these summary reports to legislators by December 15.³⁰ These summary reports cover the prior 12 months complete through November 30 of each year. Members will find it useful to review the lobbyists' summaries received prior to filing disclosure statements on or before January 8 of each year.

Item 6 — Salaries and wages. The statement requires members to list each employer who pays an annual salary or wage of more than \$10,000 to the member or an immediate family member. State or local government agency employers are not listed. Each employer must be identified. No further details on the amount of salary or wage are required.

Item 7A and Schedule F-1 — Business interests. This item asks if a member or an immediate family member has any interest in a self-owned or family-owned business with a value of more than \$10,000. Examples given are rental property, a farm, consulting business, partnership, or corporation. Schedule F-1 requires information as to the identity of the business; address of rental property, city or county and state; nature of the business; and gross income, categorized as \$50,000 or less, \$50,001 to \$250,000, or more than \$250,000.

Item 7B and Schedule F-2 — Lobbyist relationships. In 2003 the General Assembly added this item and schedule with a definition of "lobbyist relationship."³¹ On Schedule F-2, a member lists each registered lobbyist who may have worked for

²⁹ Article 3 of Chapter 4 of Title 2.2 (§ 2.2-418 et seq.).

³⁰ § 2.2-426 E.

³¹ 2003 Acts of Assembly, Ch. 610.

The definition states: "Lobbyist relationship" means (i) an engagement, agreement, or representation that relates to legal services, consulting services, or public relations services, whether gratuitous or for compensation, between a member or member-elect and any person who is, or has been within the prior calendar year, registered as a lobbyist with the Secretary of the Commonwealth, or (ii) a greater than three percent ownership interest by a member or member-elect in a business that employs, or engages as an independent contractor, any person who is, or has been within the prior calendar year, registered as a lobbyist with the Secretary of the Commonwealth. The disclosure of a lobbyist relationship shall not (i) constitute a waiver of any attorney-client or other privilege, (ii) require a waiver of any attorney-client or other privilege for a third party, or (iii) be required where a member or member-elect is employed or engaged by a person and such person also employs or engages a person in a lobbyist relationship so long as the member or member-elect has no financial interest in the lobbyist relationship.

him in the past year and each business in which he has a greater than three percent ownership interest that has employed a registered lobbyist in the past year. Schedule F-2 calls for listing each person or business with which the member had a lobbyist relationship, a description of the relationship, the dates involved, and the amount of payments to the lobbyist, categorized as \$10,000 or less or more than \$10,000. An example of a lobbyist relationship would be employment by a member of an attorney in a private business matter who was also registered as a lobbyist.

Item 8A and Schedule G-1 — Payments for representation by a member.

This item covers the member's representation of any business before a state agency for which the member received more than \$1,000 during the past 12 months. For example, if a member represents a business in a rate hearing before the State Corporation Commission or a restaurant in a licensing matter before the Alcoholic Beverage Control Board, he would report those activities in Schedule G-1. Item 8A does not cover appearances before courts and judges. Schedule G-1 asks for the name and type of business, purpose of representation, name of the agency, and amount received, categorized as \$1,001 to \$10,000, \$10,001 to \$50,000, \$50,001 to \$100,000, \$100,001 to \$250,000, or \$250,001 or more. Members are asked to identify any amount above \$250,000 rounded to the nearest \$10,000.

Item 8B and Schedule G-2 — Payments for representation by associates.

This item covers the representation of any business before a state agency for which the member's associates received more than \$1,000 during the past 12 months. For example, if a member's law partner represents a business in a rate hearing before the State Corporation Commission or a restaurant in a licensing matter before the Alcoholic Beverage Control Board, he would report those activities in Schedule G-2. Item 8B does not cover appearances before courts and judges. Schedule G-2 asks for the type of business and the name of the agency, but does not request information on the amount received.

Item 8C and Schedule G-3 — Payments for other services. Item 8C covers services to businesses not covered under Items 8A or 8B. This item covers services to any business for which the member and his associates received more than \$1,000 during the past 12 months. For example, a member's accounting firm provides audit services to automobile dealerships and receives compensation of more than \$1,000 during the past 12 months. Schedule G-3 requests the type of business, type of service rendered, and amount received, categorized as \$1,001 to \$10,000, \$10,001 to \$50,000, \$50,001 to \$100,000, \$100,001 to \$250,000, or \$250,001 or more.

Item 9 and Schedule H — Real estate. Item 9 covers real estate interests held by a member or his immediate family (including partnership interests) valued at \$10,000 or more. It does not include the member's principal residence, the address of which is listed at the beginning of the statement. It also does not include real estate if

the address is shown on Schedule F-1 under business interests and rental property. The information required on Schedule H includes the county or city and state where the property is located, the type of property (e.g., recreational or business), and the name of record of the property if not the member's name.

Item 10 and Schedule I — Real estate contracts with state agencies. This item covers real estate dealings with state government agencies; e.g., a member is a partner in a business that owns and leases a store to the Alcoholic Beverage Control Board. Item 10 calls for information on real estate contracts, pending or completed during the past 12 months, with state government agencies when the member or an immediate family member holds an interest in the real estate worth more than \$10,000. The question covers sales or exchanges of real estate and interests derived through a corporation, partnership, trust, option, easement, or land contract. Item 10 also covers real estate leases with state government agencies when the member or an immediate family member holds an interest in the real estate worth more than \$1,000. If the interest is derived through an ownership interest in the business, the disclosure requirement applies only if the interest is more than three percent of the total equity of the business.

Schedule I requires information on the member's real estate interest, the parties to the contract, the management role and percentage ownership interest of the member or family member, and the annual income from the contract derived by the member or family member.

Questions and Answers

Question: My spouse inherited stock with a value of \$25,000 in July of 2008. Do I need to amend my statement for 2007 to cover the stock that my spouse inherited?

Answer: Generally, **no**. The annual filing requirement covers yours and your spouse's stock holdings at the time of filing. There is no explicit requirement to file additional information until the filing of your 2008 statement by January 8, 2009. However, you may amend your statement to show the new stock holding or a significant change in value. You may also amend your statement at any time to correct an error or omission in the statement. See, 2006 House Doc. No. 23, *Report of the Joint Subcommittee Studying Conflict of Interest and Lobbyist Disclosure Filings* 24 (testimony of Bruce Jamerson, Clerk, House of Delegates).

Question: My spouse is a partner in a law firm whose clients include utility companies, banks, and manufacturing companies. Do I have to disclose payments her law firm receives for representing these companies?

Answer: Yes, if the payments exceeded \$1,000 in the last 12 months. Disclosure is required because you have a close financial relationship with the members of your spouse's law firm that has an agreement with the clients.³² In contrast to representation you provide directly before state agencies (Schedule G-1), Schedules G-2 and G-3 require only that the type of business be identified, not the name of the business.

Question: I am employed part-time as a bookkeeper for a nonprofit organization for an annual salary of \$15,000, and earn \$35,000 preparing taxes as an independent contractor for individuals and small businesses. How do I report my income?

Answer: You would report your part-time salary under Item 6 by listing your employer's name. You would report your tax preparation fees under Item 7A (self-owned business) and Schedule F-1 showing the name, location, and nature of your business and checking the appropriate category of income received. You would also respond "yes" to Item 8C if you received more than \$1,000 from any single business in the past 12 months and complete Schedule G-3. For example if you did all your tax work for retail establishments, you would check the retail company category, show tax preparation for the type of service, and check the \$10,001 to \$50,000 compensation category. You may note on your form that the same information is shown in Item 6 and 8C.

Question: I am employed by XYZ Corporation. I own stock in the corporation that is worth \$20,000 and equals less than a one percent ownership interest in XYZ. XYZ has 20 registered lobbyists. Do I have to disclose a lobbyist relationship with any lobbyist hired by XYZ?

Answer: No. You must report your salary (Item 6) and stock holding (Item 3 and Schedule C). On the facts stated, you do not have a "lobbyist relationship" as defined in § 30-111 unless you have employed the lobbyist personally or have a greater than three percent ownership interest in XYZ.

³² 1988 Op.Va. Att'y Gen. 23

Sources of Advice

The GACOIA provides two sources of advice to members with questions about the application of the Act's provisions.

- The Senate Committee on Rules and House Standards of Conduct Subcommittee can respond to requests for advice on the particular facts of a given situation. § 30-120. Senate Rule 19 (g). House Rule 23.
- The Attorney General will give an opinion on the application of the Act's provisions in response to a request for advice. § 30-122.

Good faith reliance by a member on an advisory opinion by a Standards of Conduct Subcommittee or the Attorney General shields a member from discipline or prosecution for a violation of the GACOIA when the opinion is based on a full disclosure of the facts involved. § 30-122.

Discipline and Penalties

The GACOIA establishes two separate panels to hear complaints that a member has violated the Act: the Senate Ethics Advisory Panel, with jurisdiction for Senate members, and the House Ethics Advisory Panel, with jurisdiction for House members. §§ 30-112 through 30-119. The key features of the panel provisions include:

- The panels do **not** give advisory opinions to members. They are "advisory" in the sense that they hear complaints concerning a member's alleged violation of the GACOIA and then advise the Senate or House on their findings.
- Each panel is composed of five members. The Senate panel is composed of three former Senators and two citizens who have not served in the Senate. Panel members are nominated by the Senate Rules Committee and confirmed by the Senate. The House panel is composed of two former House members, one former judge of a court of record, and two citizen members, one of whom has not served in either such office. House panel members are nominated by the Speaker of the House and confirmed by the House. Members serve for four-year terms and may serve no more than three terms in succession. Bipartisan representation is required.

- The panel receives and considers any signed and sworn complaint that a member of the Senate or House has violated the provisions of the GACOIA during his current or immediately preceding term.
- Within 120 days, the panel conducts a preliminary inquiry, determines whether to proceed with hearings, and disposes of the matter. The panel may (i) dismiss the complaint if it finds it is without merit, (ii) find that a member unknowingly violated the GACOIA and report its findings to the Senate or House, or (iii) find that a member knowingly violated the GACOIA and report its findings to the Attorney General, who may prosecute the violation or return the panel's report to the Senate or House. However, there can be no prosecution for a violation of the requirement to abstain when a member has a personal interest in a transaction unless his house has referred the matter to the Attorney General for prosecution following its action on a report from the Ethics Advisory Panel that the member has violated § 30-108 or § 30-110 C.
- A knowing violation of the GACOIA is a Class 1 misdemeanor. The punishment on conviction is either a term in jail of no more than 12 months or a fine of no more than \$2,500, or both.

The Virginia legislature has enjoyed a history relatively free of public corruption scandals. In recent history, only two reported cases have involved the censure of a member of the General Assembly on ethics grounds, and only one case has involved a report from one of the Ethics Advisory Panels.³³ No prosecutions for violations of the GACOIA have occurred.

³³ 1987 Acts of Assembly SR 37 (censuring Senator Peter Babalas for voting in violation of Rule 20 (c) prohibiting voting on matters in which member has personal interest), 1987 Virginia Senate Journal 45-49, 155-57 (same). 1982 Virginia Senate Journal 55 (disapproving of Senator Miller's failure to invoke Rule 36 prohibiting voting on matters in which member has personal interest).

3 *Incompatible Offices*

37 Constitutional and Statutory Provisions

39 The Hatch Act

39 Questions and Answers

Constitutional and Statutory Provisions

Prohibitions on dual office-holding and the concept of incompatible offices present issues separate from conflict of interests. Different constitutional and statutory provisions come into play.

The Virginia Constitution establishes several direct prohibitions on dual office-holding by members of the General Assembly:

- *Article II, Section 8, and § 24.2-119.* A member or any state elected officeholder or deputy cannot be appointed to an electoral board or as general registrar, assistant registrar, or officer of election.
- *Article III.* Under the "Division of Powers" Article, no person shall "exercise the power of more than one of" the three branches of government — the legislative, executive, and judicial branches. *See § 2.2-2101.*

- *Article IV, Section 4.* A member cannot hold a federal office or post of profit or emolument (compensation and benefits) or be an employee of the federal government. Section 2.2-2800 provides that acceptance of the federal office or post automatically vacates the state office. A member cannot hold a salaried state office or be a judge, Commonwealth's attorney, sheriff, treasurer, tax assessor, commissioner of revenue, tax collector, or clerk of court.
- *Article IV, Section 5.* A member cannot be elected by the General Assembly to any civil office of profit in the Commonwealth during the term for which he was elected.

The Article IV, Section 4, prohibition on federal service is broader than its prohibition on holding a "salaried state office." The federal office prohibition extends to all employment and posts of emolument. However, this prohibition is subject to statutory exceptions allowing, for example, uncompensated service on federal advisory boards or active military service. *See* subdivision A 19 of § 2.2-2801 and § 2.2-2802.

In addition to the Constitution's direct prohibitions, Article II, Section 5 (c) establishes the primacy of the General Assembly's power "to prevent conflict of interests, dual officeholding, or other incompatible activities" by elected and appointed officials.³⁴

Exercising its Article II, Section 5 (c) powers, the General Assembly has enacted a number of scattered statutory prohibitions on dual office-holding and incompatible activities located in different titles of the Code. Several examples of these prohibitions:

- **§ 2.2-2101** generally prohibits legislators from serving on executive branch boards, commissions, and councils that administer legislatively established programs. Exceptions include policy studies, commemorative activities, and 20 specifically listed exempt bodies such as the Board for Branch Pilots and Virginia Interagency Coordinating Council.
- **§ 2.2-2807** prohibits holding two elected offices at the same time.
- **§ 16.1-69.19** lists incompatible offices for district court judges.

³⁴ See Howard, *Commentaries on the Constitution of Virginia* 401 (1974). Howard argues that because the right to run is the rule, this power to disqualify should be construed strictly and not extended to state and local employees having no policymaking functions that might justify calling them "officials."

- §§ 24.2-106 and 24.2-110 prohibit local electoral board members and general registrars from either holding an elective office or engaging in described political activities.
- § 59.1-366 prohibits any member of the General Assembly from being appointed to the Virginia Racing Commission.

The Hatch Act

The Hatch Act restricts the political activity of executive branch employees of the federal government, District of Columbia government and some state and local employees who work in connection with federally funded programs (5 USC §§ 1501-1508, 7321-7326). The Hatch Act is administered by the United States Office of Special Counsel. This agency's website, <http://www.osc.gov/contacts.htm>, provides interpretative guidance, opinions and contact information. One advisory ruling concludes that the Hatch Act limitations apply only to state executive branch employees and not to legislative branch employees.³⁵

Questions and Answers

Question: Can I accept an appointment to the President's Commission on Physical Fitness?

Answer: **Yes**, but to continue in the General Assembly you must waive all federal compensation, including any per diem. Subdivision A 19 of § 2.2-2801 provides that state elected officials may serve on federal advisory boards without compensation but may accept reimbursement of actual expenses. Attorney General's opinions have interpreted the term "emolument" as pecuniary gain above and beyond the reimbursement of expenses.³⁶

Question: I have been a reservist for several years. If I am called to active duty, will that vacate my office in the General Assembly?

Answer: **No**. Subdivision B 2 of § 2.2-2801 and § 2.2-2802 provide a specific exception to the general rule of incompatibility based on federal employment for officers and soldiers receiving active duty pay. Virginia's specific statutes abrogate

³⁵ Advisories for State and Local Employees, Legislative branch employees (7/11/96) (Hatch Act does not prohibit legislative branch employee from running for or holding a partisan political office).

³⁶ 1993 Op. Va. Att'y Gen. 27 n.6; 1989 Op. Va. Att'y Gen. 53, 54; 1981-1982 Op. Va. Att'y Gen. 301, 302 n. 9.

the common law doctrine under which civil and military service have been held incompatible.³⁷

Question: Can I serve as a temporary assistant Commonwealth's attorney when the General Assembly is not in session?

Answer: Yes. Article IV, Section 4, of the Constitution prohibits an attorney for the Commonwealth from serving in the General Assembly but does not by its terms prohibit a member serving as an *assistant* Commonwealth's attorney on a temporary basis while the General Assembly is not in session. A 2002 Attorney General's opinion³⁸ expressly overruled prior opinions extending the dual office-holding prohibitions of Article IV, Section 4, and Article VII, Section 6, to deputies of the officers named. The 2002 opinion follows *Bray v. Brown*, 258 Va. 618, 521 S.E.2d 526 (1999). In *Bray*, the Supreme Court of Virginia held that Article VII, Section 6, and an implementing statute (§15.2-1534) did not prohibit circuit court judges from appointing a deputy sheriff to fill a town council vacancy.

Question: Can I serve on my county library board?

Answer: Yes, unless you live in Fairfax County. Article IV, Section 4, does not apply when a statute specifically removes any compensation as § 42.1-35 does for library board members except in Fairfax County.³⁹

Question: Can I accept a job with the United States Postal Service?

Answer: Under § 2.2-2800, acceptance of the federal employment would vacate your state office.

³⁷ § 1-200 (common law continues except as altered by General Assembly); 63C Am. Jur. 2d, *Public Officers* § 57 at 501 (1997).

³⁸ 2002 Op.Va. Att'y Gen. # 02-024.

³⁹ 1998 Op. Va. Att'y Gen. 102.

Campaign Finance — **4** *Prohibitions and Disclosure*

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Prohibitions

Virginia relies on disclosure to regulate campaign finance. Unlike federal law that limits the size of contributions and prohibits various types of contributions, the Commonwealth imposes almost no restrictions on who can contribute to candidates and committees or on the amount that can be contributed. Measures have been introduced to limit the size of contributions, but consistently have failed to pass.⁴⁰

However, there are several prohibitions to note. **First**, federal law prohibits state candidates from soliciting or accepting contributions from "foreign nationals" in

⁴⁰ See, for example, 2000 HB's 392, 928, 1073.

any election. "Foreign nationals" also cannot make contributions or independent expenditures. 2 USC § 441e (a). The term "foreign national" excludes citizens and United States nationals lawfully admitted for permanent residence owing permanent allegiance to the United States. 2 USC § 441e (b), 8 USC § 1101 (a) (22).

Second, § 24.2-954 prohibits campaign fundraising during regular sessions of the General Assembly. This section makes it unlawful for General Assembly members, the Governor, the Lieutenant Governor, and the Attorney General to solicit or accept campaign contributions for their campaigns or for any political committee during the session. It also prohibits any person from making or promising to make a contribution to the campaign of any member, the Governor, the Lieutenant Governor, and the Attorney General, during a General Assembly regular session. There are two exceptions to the prohibition:

- Members can contribute their personal funds, and
- Contributions may be made to the campaign committees of special election candidates.

The civil penalty for violating § 24.2-954 is the greater of \$500 or the amount of the prohibited contribution.

Third, a member or candidate cannot convert campaign funds to his personal use. Under § 24.2-948.4, surplus campaign funds may be used for current, past, or future campaigns, returned to the contributor, donated to charity, donated to other candidates or registered political committees, or used to defray nonreimbursed expenses of the member's elected office.

Fourth, § 59.1-368 prohibits any member of the Virginia Racing Commission or his immediate family member from making a contribution to any candidate for state or local political office.

Disclosure

Virginia's Campaign Finance Disclosure Act (Chapter 9.3 of Title 24.2, §§ 24.2-945 through 24.2-953.5) dates from 1970 and was reorganized and reenacted in 2006. Separate chapters were reorganized and reenacted in 2006 to govern campaign fundraising during sessions (Chapter 9.4, § 24.2-954) and political campaign advertisements (Chapter 9.5, §§ 24.2-955 through 24.2-959.1).

The Campaign Finance Disclosure Act establishes registration and reporting requirements for candidates and committees. The Act spells out the registration and reporting requirements for candidate campaign committees and a variety of other committees, including political party committees, political action committees (PACs), referendum committees, inaugural committees, out-of-state political committees, and federal political action committees.

The registration and reporting requirements are triggered by specified events depending on the nature of the individual or committee involved:

- Candidates and candidate campaign committees must register within 10 calendar days of accepting a contribution, making any expenditure, or other events specified in § 24.2-947.1, such as filing a statement of qualification or appointing a campaign treasurer.
- Political action committees (PACs) and political party committees with annual contributions or expenditures exceeding \$200 must register and report within 10 calendar days of organization (§§ 24.2-949.2 and 24.2-950.2).
- Inaugural committees must register within 10 days of organization (§ 24.2-952.1).
- Referendum committees spending \$1,000 on a local issue, \$5,000 on a regional issue, or \$10,000 on a statewide referendum must register and report (§§ 24.2-945.1, 24.2-951.1, and 24.2-951.2).⁴¹
- Out-of-state political committees must register on or before making contributions of \$10,000 or more to candidate campaign committees or political committees (§ 24.2-949.9:1). Out-of-state political committees are organizations formed under 26 USC § 527 — primarily "issue" committees not formed for the primary purpose of advocating the election or defeat of candidates in Virginia elections. Special reporting requirements apply to these committees and their contributions to Virginia candidates (§§ 24.2-949.9:1 — 24.2-949.9:4).

Except for the out-of-state political committees, these committees must report:

- The total number of contributors donating \$100 or less;
- For donors giving more than \$100, their name, address, occupation, name of employer or business, locality of work, dates, and total contributions;

⁴¹ This registration requirement was enacted after *Virginia Society for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998), held Virginia's registration and reporting requirements inapplicable to organizations engaging solely in issue advocacy without expressly advocating election or defeat of a particular candidate. The current requirements are based on the large dollar amounts involved.

- Itemized expenditures; and
- Loans.⁴²

Members of the General Assembly and candidates for the General Assembly will be most concerned with the provisions in Article 3 of the Campaign Finance Disclosure Act (§§ 24.2-947 through 24.2-948.4) that cover the disclosure requirements for candidate committees.

The disclosure requirements for a candidate for the General Assembly include:

- The filing of a statement of organization with the State Board of Elections and the electoral board of the candidate's residence;
- Designation of a treasurer and campaign depository (if no treasurer is designated, the candidate is deemed to be the treasurer);
- The filing of periodic disclosure reports showing contributions and expenditures; and
- The filing of a final report.

Extensive information is available at the State Board of Elections (SBE) website both on the steps a candidate must take to run for office and on the Campaign Finance Disclosure Act filing requirements.

For example, for information on the requirements to be a candidate for the House of Delegates, use:

http://www.sbe.virginia.gov/cms/documents/Cidates/Bulletins/09Nov_HOD.pdf

This site covers the qualifications to be a candidate, documents to be filed, where and when to file required documents, and frequently asked questions. This link to the requirements to be a candidate pertains to the November 2009 election.

For information on the Campaign Finance Disclosure Act and political advertisement requirements, use:

http://www.sbe.virginia.gov/cms/Campaign_Finance/Cidate_Summary.pdf

This site provides a 65-page "Summary of Laws and Policies for Candidate Campaign Committees" (July 1, 2008) designed to guide the candidate and his treasurer or

⁴² See §§ 24.2-947.4, 24.2-949.5, 24.2-950.4, 24.2-951.3, 24.2-952.3.

committee through the steps required to comply with campaign finance disclosure and political advertisement requirements.

Increased disclosure goes in lockstep with developments in technology, electronic filings, and the Internet. Almost all General Assembly members now file their disclosure statements electronically with the State Board of Elections. Information from the campaign disclosure reports is made available through the State Board and through the Virginia Public Access Project (VPAP). Useful links to the State Board and VPAP:

http://www.sbe.virginia.gov/cms/Campaign_Finance_Disclosure/Index.html

and

http://www.vpap.org/about_us/.

By using these links, it is possible to search the campaign finance disclosure reports and to find information on individual donors, committees, and types of donations.

Penalties and Enforcement

The Federal Election Commission (FEC) enforces federal campaign finance limitations, including the prohibitions on contributions from foreign nationals. Violations may result in civil penalties, and willful violations may also result in criminal prosecution with a fine and imprisonment. 2 USC § 437g (d).

In Virginia, the State Board of Elections enforces election laws and the Secretary of the State Board has authority to impose civil penalties and refer violations to the Commonwealth's Attorney and the Attorney General (§§ 24.2-104, 24.2-946.3, 24.2-953, and 24.2-1019). Intentional violations are Class 1 misdemeanors punishable by a fine up to \$2,500 and up to 12 months in jail (§§ 18.2-11 and 24.2-953). Violations are presumed willful if a State Board communication is not responded to within 60 days or within 120 days for incomplete reports (§§ 24.2-953 and 24.2-953.3); see also § 24.2-946.3 (F): Commonwealth's attorney must be notified of violation within 90 days of report deadline. Only five days are allowed for responding to a State Board communication about noncompliance with reporting requirements for federal PACs and out-of-state political committees (§ 24.2-953.5 (C)).

From a compliance standpoint, it is better to **file an incomplete report on time** than a complete report late.

Statewide candidates are subject to additional penalties for failing to file or filing delinquent or incomplete reports (§ 24.2-953.4).

The State Board has some authority to grant extensions: §§ 24.2-503 (statements of qualifications and economic interests), 24.2-946.4 (described special circumstances), and 24.2-948.3 (campaign finance reports required to qualify as candidate). The State Board's policy is to grant extensions of up to two weeks for reports involving election expenditures below \$10,000.

Prosecutions for violations of the Campaign Finance Disclosure Act must be brought within one year after discovery of the offense and no later than three years after the commission of the offense (§§ 19.2-8 and 24.2-953).

Stand By Your Ad

One aspect of disclosure is the identification of sponsors of political campaign advertisements (§§ 24.2-955 through 24.2-959.1). In 2002, the General Assembly passed a major revision and expansion of the prior law that required a disclaimer on political advertisements. The expanded law covers print, radio, and television advertisements. A comprehensive explanation of its provisions is available online in the State Board of Elections "Summary of Laws and Policies for Candidate Campaign Committees" (July 1, 2008), pages 59 through 65:

http://www.sbe.virginia.gov/cms/Campaign_Finance/Cidate_Summary.pdf

Questions and Answers

Question: What are permissible ways to raise campaign funds? What should be avoided?

Answer: Generally, methods that do not allow identifying donors such as "passing the hat" should be avoided; any proceeds collected in this way should be treated as anonymous contributions and donated to charity. Since the Campaign Finance Disclosure Act depends on disclosure to regulate campaign finance activities, candidates and committees are obligated to collect donor information.⁴³ Contributions of \$100 or less may be reported together without identifying donor

⁴³ State Board of Elections "Summary of Laws and Policies for Candidate Campaign Committees" (July 1, 2008), p. 23. http://www.sbe.virginia.gov/cms/Campaign_Finance/Cidate_Summary.pdf

information. However, identifying donor information should be maintained so that it is available when a donor makes multiple gifts that accumulate to more than \$100 and identifying donor information will be required.

Question: What steps must I take to obtain the required donor identifying information.

Answer: Your campaign committee should use its "best efforts." The State Board of Elections "considers a 'best effort' made by the committee to include sending a written request to the contributor asking for the required information."

"If the campaign finance report is due and, after sending a written request, any of the required information of the contributor is still unknown, it shall temporarily suffice to report 'Unable to Obtain' or 'Information Requested' in the field missing the required information." The committee is also required to submit, along with the committee's report, a copy of the written request to the contributor asking for the required missing information. SBE does not consider a report complete if in a committee's report more than 10 percent of the total number of contributors or other required itemized information is missing.⁴⁴

Question: Can I help raise money for a referendum committee or caucus during a regular session?

Answer: No. Section 24.2-954 prohibits a member from soliciting contributions for campaign committees or for "any political committee" during a regular session. The term "political committee" is defined in § 24.2-945.1 and includes "any political action committee, political party committee, referendum committee, or inaugural committee." The term "political party committee" includes caucus groups — i.e., an "organized political party group of elected officials."

Question: Do I have to report contributions made to defray the costs of an election recount challenging my election?

Answer: You may want to report the contributions to avoid any issues. However, the Supreme Court of Virginia has held that the statutory definition of contribution, currently in § 24.2-945.1, generally requires a purpose to influence an election which may be lacking in the context of a recount. *Waldrop v. Commonwealth*, 255 Va. 210, 495 S.E.2d 822 (1998).

⁴⁴ Ibid, p.26.

Question: I received a contribution January 5 before the session began but put the check away and located it in February. Can I deposit the check in my campaign account if the General Assembly is still in session?

Answer: Yes, the prohibition of § 24.2-954 applies to "solicit[ing] or accept[ing]" contributions "on and after the first day of a regular session of the General Assembly through adjournment sine die of that session." Op. Va. Att'y Gen. No. 01-012 (2/8/01). You accepted the check when you received it before the session and may deposit the check when it is convenient to do so.

If the check was lost before being seen by you or an agent of your committee, the date the check was discovered by you or an agent of your committee would be considered the date of receipt and acceptance for purposes of applying the § 24.2-954 prohibition.

Question: Can I sell property donated to my campaign?

Answer: Yes. The property can be sold at fair market value to any willing buyer. The proceeds of the sale must be reported on Schedule C (Miscellaneous Receipts) of the campaign finance disclosure form and used to pay campaign debts or treated as a surplus distribution (§ 24.2-950.9).⁴⁵ The property would have been reported as an in-kind contribution when it was first received at its fair market value.

Question: What do I report if friends offer to host a fundraiser at their home?

Answer: Any costs associated with the fundraiser are considered in-kind contributions. These costs could include, but are not limited to: catering, food, beverages, and entertainment.⁴⁶ For example, the cost of using a residence could be determined by reference to the fair market rental value of a home in the area and dividing that by amount of time the home was used: a home that rents for \$1,500 a month would have a daily fair market value of \$50.

⁴⁵ Ibid, p. 33.

⁴⁶ Ibid., pp. 30-32.

5 *Freedom of Information Act*

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Summary of FOIA

The Virginia Freedom of Information Act (FOIA)⁴⁷ guarantees citizens of the Commonwealth and representatives of the media access to meetings and public records held by public bodies, public officials, and public employees.

Virginia's FOIA starts from the presumption that all government records and meetings are open and available to the public. A record cannot be withheld and a meeting cannot be closed unless a specific exemption applies, or unless some other statute in Virginia law applies. Just because an exemption could apply, however, does not mean that it must. Exemptions are discretionary, and they must be interpreted narrowly to increase awareness of all citizens of government activities.

⁴⁷ §§ 2.2-3700 through 2.2-3714.

Section 2.2-2700 sets out this policy:

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. . . . Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

. . . . Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.

The General Assembly is a public body and its members are public officials subject to the general policy and provisions of FOIA. For background and resources, members may refer to the Virginia Freedom of Information Advisory Council website:

<http://dls.state.va.us/foiacouncil.htm>

and the Virginia Coalition for Open Government website:

<http://www.opengovva.org/>

This *Legislator's Guide* focuses on the FOIA provisions of particular applicability to the General Assembly.

Meetings

Under special provisions applicable to the General Assembly in § 2.2-3707.01, citizens have a right to attend and record or film floor sessions, standing and study committee and subcommittee meetings, including work sessions, joint committees of conference or quorums of General Assembly committees or subcommittees.

The meetings of the political party caucuses of either house are specifically exempt from the meeting provisions of FOIA under § 2.2-3707.01. This section also states that the FOIA provisions for electronically conducted meetings do not apply to any session of the General Assembly.

The section also refers to authority of the Joint Rules Committee to establish rules to govern public access to meetings, subject to approval by the General Assembly, but this provision has never been implemented.

To attend a meeting, a citizen has to know about it. FOIA requires state public bodies, including General Assembly committees and subcommittees, to post notice of upcoming meetings on the Internet, in a prominent public location, and in the office of the clerk where other public notices are kept (§ 2.2-3707). For example, the daily calendar available at the General Assembly lists meetings, and the Legislative Information System (LIS) website provides information about meetings. Notice must be given at least three working days before the meeting and must state the date, time, and location of the meeting. If there is an agenda, at least one copy of it must be made available to the public at the same time the members of the public body get it. Citizens can ask public bodies to notify them of every upcoming meeting.

Special or emergency meetings require notice "reasonable under the circumstance" and that the public be notified at the same time as members of the public body (§2.2-3707 D).

Citizens can record the meetings at their own expense, provided that they do not interfere with the proceedings. Minutes are required for most open meetings of public bodies, but minutes are not required for General Assembly committee meetings and study commissions (§ 2.2-3707 I).

All votes must be made in front of the public; no secret ballots are allowed, nor are binding votes taken in closed session (§ 2.2-3710). Votes may not be cast by telephone or electronically, but the House and Senate may adopt rules allowing such voting by standing committee members. House Rule 18(e) allows chairmen to authorize electronic meetings, but provides that members participating electronically may not be counted for quorum purposes. There is no comparable Senate rule.

Section 2.2-3708 B sets forth procedures General Assembly committees and subcommittees may use outside of session to conduct electronic meetings with a quorum assembled at one location.

There are 42 specific statutory exemptions to the open meeting requirement found in § 2.2-3711. Most apply to specific agencies and situations. The exemptions that may apply to General Assembly committee meetings include personnel matters involving specific individuals and consultation with legal counsel about probable or existing lawsuits.

Procedural requirements are important. Before a public body may go into a closed meeting, it must make a motion in open session identifying the subject matter, stating the purpose of the meeting, and identifying the specific exemption that covers the topic. A general reference to the subject is not sufficient. The members of the public body must vote on the motion. No official action may be taken in the closed session (§ 2.2-3712 G). When the public body comes out of the closed meeting, it must take another vote on a motion certifying that the topics identified in the motion to go into closed session were the only issues discussed. If a member of the public body disagrees with the motion, and believes that other topics were discussed, that member should say why, and this reason must be recorded in the minutes (§ 2.2-3712 D).

Records

A public record is any writing or recording — regardless of whether it is a paper record, an email, electronic file, an audio or video recording, or any other format — that is prepared by, owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business (§ 2.2-3701).

All public records are presumed to be open and may be withheld only if a specific statutory exemption applies.

Important statutory exemptions exist to protect public safety; administrative investigations; education, health, and social services records; confidential and proprietary trade secret information; and working papers of members of the General Assembly, the Division of Legislative Services, and other enumerated government officials. Sections 2.2-3705.1 through 2.2-3705.7 specify detailed requirements for application of each exemption.

Under FOIA, a General Assembly member **does not** have to release:

- Correspondence or working papers. “Working papers” are those records prepared by or for a member for his personal or deliberative use. However, no record, which is otherwise open to inspection under FOIA, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.
- Records and writings furnished by a member of the General Assembly to a meeting of a standing committee, special committee, or subcommittee of his house established solely for the purpose of reviewing members' annual

disclosure statements and supporting materials filed under § 30-110 or of formulating advisory opinions to members on standards of conduct, or both.

Enforcement

Disputes over records or access to meetings often can be resolved by working out a mutually satisfactory agreement between the citizen or media representative and the public body directly. Agreements can be facilitated by obtaining, without charge, an oral or written opinion from the Freedom of Information Advisory Council. The Council's opinions are persuasive and its answers are generally respected by citizens and government alike.

Aggrieved citizens can also file lawsuits in general district or circuit court asking for an injunction or for a writ of mandamus, which is basically an order directing the government to do something. If a citizen wins against the government, he may be able to recoup his attorney fees and costs, and the members of the public body may be required to pay a civil penalty under the provisions of §§ 2.2-3713 and 2.2-3714.

Questions and Answers

Question: What is considered a "meeting" under FOIA for General Assembly members?

Answer: Under § 2.2-3707.01, **only** the following types of gatherings of General Assembly members must be open and are subject to FOIA:

- Floor sessions of either house of the General Assembly;
- Meetings, including work sessions, of any standing or interim study committee of the General Assembly;
- Meetings, including work sessions, of any subcommittee of such standing or interim study committee;
- Joint committees of conference of the General Assembly; or
- A quorum of any such committees or subcommittees.

Question: Are political party caucuses considered meetings subject to FOIA?

Answer: **No.** Political party caucuses are not "meetings" subject to FOIA (§ 2.2-3707.01).

Question: Must a standing committee or a study committee have minutes of its meetings?

Answer: **No.** Minutes are not required for meetings of standing and other committees of the General Assembly (§ 2.2-3707).

Question: May I poll the members of my committee?

Answer: **Yes,** you may contact members separately to ascertain their positions by phone, letter or email. This exemption cannot be used in lieu of a meeting — only for its stated purpose.

Question: If I bump into members of my committee, is it a meeting?

Answer: Under § 2.2-3707, FOIA should not be construed "to prohibit the gathering or attendance of two or more members of a public body

- (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body or
- (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to discuss or transact public business. . . ."

Question: Can a joint committee of conference hold a closed meeting in order to discuss matters concerning budget bills?

Answer: **No.** Under § 2.2-3707.01, joint committees of conference are explicitly covered by FOIA. The committee's meetings are presumptively open to the public and may be closed only for the limited purposes specified in § 2.2-3711, none of which apply to budget matters generally (2006 FOIA Advisory Op. No. 04).

Question: What if three members of a five-member subcommittee of a standing committee gather at a reception hosted by a trade association and informally discuss the order of considering matters on the agenda for an upcoming meeting?

Answer: Section 2.2-3707 G exempts informal gatherings of members of the General Assembly from notice requirements. However, this informal meeting involving a quorum of the subcommittee could become a covered meeting under § 2.2-3707.01 if decisions affecting legislation pending before the subcommittee were made. In some

cases, order can be determinative. The fact that the gathering was initiated by a trade association weighs against finding the gathering to be a meeting, but the activities can override this factor. *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004) (citizen-organized "informational forum" was not a meeting).

Question: What if those three members of the five-member subcommittee exchanged e-mails to arrive at consensus on the order of considering matters on the agenda for the next meeting, supplemented by instant messages?

Answer: The Supreme Court of Virginia has held that emails do not involve the element of simultaneity necessary to constitute a meeting. *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004). The Court noted that an Attorney General's opinion treating emails as letters (1999 Op. Va. Att'y Gen. 12) did not consider the dynamics of chat rooms and instant messaging. Here, the order of consideration could be determinative and the instant messaging could provide the element of simultaneity necessary for a meeting. The Freedom of Information Advisory Council has ruled that the use of a listserv by members of a public body can constitute a meeting if used to discuss or transact public business.

6 *Other State and Federal Laws*

57 Virginia Law

57 Other State and Federal Activities

Virginia Law

The bribery of a public servant or the acceptance of a bribe by a public servant constitutes a Class 4 felony under § 18.2-447 and is punishable by imprisonment for two to 10 years and fine of not more than \$100,000. Members of the General Assembly are included explicitly in the definition of "public servant" in § 18.2-446. If a public servant or member is convicted of bribery, he forfeits his office and "shall be forever incapable of holding any public office in this Commonwealth" (§ 18.2-449).

Other State and Federal Activities

The National Conference of State Legislatures (NCSL) has a Center for Ethics in Government that can be found on the Internet at

<http://www.ncsl.org/ethics/>.

NCSL reports that 33 states have ethics commissions with jurisdiction over legislators and staff.

http://www.ncsl.org/programs/ethics/whats_the_difference.htm.

These commissions review disclosure statements, investigate complaints, and issue advisory opinions. They generally cannot remove legislators but can recommend sanctions including removal, impose civil penalties, and refer possible criminal violations to law-enforcement agencies. See, e.g., Alabama Code § 36-25-4 (g). Most states provide criminal penalties for official corruption. See the NCSL Chart summarizing state criminal penalties (as of 12/31/06) at

http://www.ncsl.org/programs/ethics/public_corruption.htm.

In May 2006, the FBI announced a website for reporting public corruption at all levels of government:

<http://www.fbi.gov/hq/cid/pubcorrupt/pubcorrupt.htm>.

The FBI identified public corruption as fourth in its list of top 10 priorities. In a May 2, 2008, news release, the FBI announced the conclusion of the Tennessee Waltz undercover sting and described current corruption investigations:

Tennessee Waltz was a landmark investigation: it not only led to the convictions or guilty pleas of a dozen state and local public officials—including several state senators, a state representative, two county commissioners, and two school board members—but also to new state ethics laws and the creation of an independent ethics commission in Tennessee. . . .

For the FBI, public corruption continues to be our top criminal priority. Right now, we have more than 2,500 pending cases—an increase of 50 percent from 2003. And during the past two years alone, our work with our partners has led to the conviction of more than 1,800 government officials.

During 2005, 15 states⁴⁸ experienced investigations into political corruption and ethics violations. *Rundown of Statehouse Ethics Scandals* (1/23/06), available at **<http://www.stateline.org>**. These scandals included both federal and state investigations.

In addition to bribery and corrupt practices laws, federal prosecutors have been relying on 18 USC § 1346 to obtain convictions for schemes that "deprive another of the intangible right of honest services." For example, the United States Attorney's Office on September 8, 2008, announced the indictment of Kevin A Ring, a former lobbyist working with Jack A. Abramoff, with corruption charges and "several counts of engaging in a scheme to deprive U.S. citizens of their right to the honest services of certain public officials."⁴⁹

⁴⁸ Ohio, Kentucky, Tennessee, Illinois, Alabama, North Carolina, Nevada, New Mexico, Wisconsin, Michigan, Maryland, Rhode Island, Arizona, Idaho, and West Virginia.

⁴⁹ <http://washingtondc.fbi.gov/dojpressrel/pressrel08/wfo090808.htm>

Conclusion

At the beginning of this *Guide*, a quote from Alan Rosenthal suggested that legislators should "be conscious of ethical questions . . . and incorporate ethics into their judgments." One way to bring ethics issues to the surface when making political or legislative decisions is to ask such questions as the following:

- How would your remarks sound if you were being wiretapped?
- Would your contemplated action survive public scrutiny?
- Would you be embarrassed to read about it in the newspaper?
- Could you comfortably defend it?
- Does it help the reputation of your office?

Legislators rely primarily on their own good judgment, but they are entitled to advice. On ethics matters covered by the General Assembly Conflicts of Interests Act, a member may request an advisory opinion by the appropriate Committee on Standards of Conduct (§ 30-120), or the Attorney General (§§ 30-122 and 30-124). On Freedom of Information Act matters, an advisory opinion can be requested from the Freedom of Information Advisory Council or the Attorney General (§§ 2.2-505 and 30-179). On other matters, an official opinion of the Attorney General can be requested (§ 2.2-505).

In the final analysis, Virginia relies on the good judgment of its legislators to maintain high ethical standards:

The law cannot, however, protect against all appearances of conflict. It is incumbent, therefore, on members of the General Assembly and other state

and local government officials to examine their conduct to determine if it involves an appearance of impropriety that they find unacceptable and that could affect the confidence of the public in their ability to perform their duties impartially.⁵⁰

⁵⁰ 2005 Op. Va. Att'y Gen. No. 05-030.