

VIRGINIA'S CONFLICT OF INTEREST AND ETHICS LAWS 2014 Reform and Beyond

VIRGINIA SHERIFF'S ASSOCIATION
CONFERENCE

SEPTEMBER 15, 2014

"The events of the past 18 months have been a painful ordeal for all who care about Virginia."

– William J. Howell and Thomas K. Norment, Jr., September 8, 2014 Op-Ed,
Richmond Times Dispatch

General Themes

- The Sheriff is a public official – always on duty.
- Any funds Sheriff handles carry the presumption they are public funds.
- Any money coming into Sheriff's custody, other than paycheck or personal funds = assumption Sheriff is fiduciary custodian and holding for someone else.

General Themes

- Ignorance of the law is no defense – especially for government officials.
- The cover-up is almost always worse than the original problem.
- If it doesn't seem right or feel right – don't do it!

Where do recent events leave us in the
Commonwealth?

ETHICS REFORM LEGISLATION

- Several national surveys prior to 2014 Session of the General Assembly gave Virginia an “F” rating on ethics.
- Historically relied on “transparency and disclosure.”
 - Each elected official is required to file an annual disclosure statement – accessible by public.

ETHICS REFORM LEGISLATION

- New world – post-McDonnell.
- Heightened scrutiny for all those subject to disclosure requirements under the Conflict of Interest Acts.
- Reform legislation passed this year made substantive changes.
- Passed 140-0
 - Generally deemed insufficient now – more change on the way.

ETHICS REFORM LEGISLATION

- Overview of 2014 Changes:
 - \$250 cap on “Tangible Gifts”
 - Prohibits tangible gifts with a value of more than \$250 or a combination of tangible gifts with a value of more than \$250
 - To certain officers and employees of state or local governmental or advisory agencies or to legislators (including Sheriffs)
 - From a lobbyist; a lobbyist's principal; or a person, business, or organization who is a party to or seeking to become a party to certain governmental contracts.

ETHICS REFORM LEGISLATION

- Overview of 2014 Changes:
 - Clarifies the distinction between gifts and other things of value received for travel.
 - Reduces a number of disclosure provision thresholds from \$10,000 to \$5,000.
 - Requires the disclosure of gifts to immediate family members.
 - Semi-annual disclosures effective July 1, 2015.

ETHICS REFORM LEGISLATION

- Changes (cont'd):
 - Gifts from a relative or personal friend are not subject to disclosure, but a lobbyist; a lobbyist's principal; or a person, business, or organization who is a party to or seeking to become a party to certain governmental contracts cannot be considered a personal friend.
 - Provides that the provisions of the conflict of interests acts do not preclude prosecution for any criminal law violation, including bribery.

HOW DOES THIS EFFECT SHERIFFS?

- State and Local Government Conflict of Interest Act:
 - Applies to all state and local government officers and employees except members of the General Assembly.
 - Constitutional Officers (Sheriffs) = Local Officers under the Act.
 - 2014 changes apply pursuant to *Va. Code § 2.2-3116*

CONFLICT OF INTERESTS

The Basics

- Act covers *actual* conflicts – not *appearances* of conflict.
- Puts the burden on official to analyze each contemplated action.
- Covers:
 - “generally prohibited and unlawful conduct”
 - “personal interests in a contract”
 - “personal interests in a transaction”

CONFLICT OF INTERESTS

- Prohibited and Unlawful Conduct includes:
 - Extortion
 - Bribery
 - Insider trading
 - Anti-honoraria
 - Anti-gift
 - Anti-revolving door

CONFLICT OF INTERESTS

- Personal Interest in a Contract:
 - Interest in a contract with a governmental agency
 - Whether party to the contract or
 - Due to a personal interest in a business that is a party to the contract.
 - Applies to official and immediate family.
 - Immediate family means a spouse and any child who lives at home and who is a dependent of the official.
 - Certain exceptions enumerated in Va. Code.

CONFLICT OF INTERESTS

- Personal Interest in a Transaction:
 - Generally, “personal interest in a transaction” applies to a personal interest of official or immediate family in any matter considered by his agency.
 - Applies to property or business which is the subject of a transaction before the agency, OR
 - Which may realize direct or indirect benefit or detriment as a result of agency action.
 - If so – disqualify, no closed meetings, no discussions.

STATEMENT OF ECONOMIC INTEREST

- Annual disclosure
 - Semi-annual eff. July 1, 2015
- “Best knowledge, information and belief” at time of filing.
- Has effect of law – codified in §2.2-3117.
- Certain categories impacted by 2014 changes.

STATEMENT OF ECONOMIC INTEREST

- Selected Categories:
- Personal Liabilities (Schedule B)
 - Report Debts in excess of \$5,000
 - 2014 Reform – threshold decreased from \$10,000
 - Remember to include debts of immediate family members as well.

STATEMENT OF ECONOMIC INTEREST

- Selected Categories:
- Securities (Schedule C)
 - Report securities in excess of \$5,000
 - 2014 Reform – threshold decreased from \$10,000
 - Looks at aggregate of officer and immediate family members.

STATEMENT OF ECONOMIC INTEREST

- Selected Categories:
- Payments for Talks, Meetings, Publications (Schedule D)
 - Officer only.
 - Lodging, transportation, money, or any other thing of value with combined value of \$200.
 - For single talk or presentation, or
 - Attendance at educational meeting
 - Official capacity

STATEMENT OF ECONOMIC INTEREST

- Selected Categories:
- Gifts (Schedule E)
 - Broad definition
 - Includes:
 - any item having monetary value, including any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, services or gifts of transportation, local travel, lodging and meals, whether provided in-kind, or by purchase of a ticket, payment in advance or reimbursement.

GIFTS

- Does NOT include:
 - (i) offer of ticket, admission, or pass if not used;
 - (ii) honorary degree; (iii) financial aid; (iv) properly reported campaign contribution; (v) gift related to private profession of officer or immediate family (business entertainment); or (vi) gift from relatives or personal friends.
 - “personal friend” cannot be a lobbyist, lobbyist principal, or person/entity seeking to contract w/ Commonwealth.

GIFTS

- Must list each source over past 12 months:
 - Any one gift w/ value exceeding \$50
 - Entertainment at single event where avg. value per person is \$50
 - Gifts, etc. w/ aggregate of more than \$100
 - Applies to immediate family members

GIFTS

- 2014 Reform –
 - § 2.2-3116. Disclosure by certain constitutional officers.
 - “These officers shall be subject to the prohibition on certain gifts set forth in subsection B of § 2.2-3103.1.
 - § 2.2-3103.1. Certain gifts prohibited.
 - Tangible vs. Intangible distinction
 - \$250 cap on tangible gifts

GIFTS

- A "tangible gift" means a physical item, object, currency, or other negotiable instrument of value that upon the happening of a certain event or expiration of a given date retains its form or value.
- An "intangible gift" means a physical item or object of value that upon the happening of a certain event or expiration of a given date loses its form or value.
 - include, but are not limited to, entertainment, food, and tickets or other access to social or recreational events.

GIFTS

- \$250 gift limit consists of single gift or annual aggregate – from single source.
- Applies to gifts from registered lobbyists and people seeking or doing business with Commonwealth.

GIFTS

- Intangible gifts still unlimited as a general rule:
 - No cap on gifts of travel, meals, entertainment or other events, which make up the majority of large gifts.
 - 2012 – *only 18 of 756 total disclosed gifts were tangible.*
 - Football tickets, baseball tickets, tickets to Busch Gardens, tickets to galas and balls, are all also permitted intangible gifts.
 - One legislator last year reported trip and tickets to Masters – all legal – under current law.

GIFTS

- The governing body of a locality “may adopt an ordinance setting a monetary limit on the acceptance of any gift by” its officials “and requiring the disclosure by such ... [officials] of the receipt of any gift.” § 2.2-3104.2.
- Such an ordinance supplements but does not supersede the provisions of the State and Local Government Conflict of Interests Act. § 2.2-3100.

STATEMENT OF ECONOMIC INTEREST

- Penalty for Non-Compliance:
 - Any person who does not file or who knowingly files the Statement of Economic Interests form inaccurately may be charged with a Class 1 Misdemeanor which is punishable by no more than 12 months in jail and a fine of no more than \$2,500.
 - Class 3 misdemeanor for violations of certain sections involving interest in certain transactions.
 - Any person who knowingly files the form inaccurately may also be dismissed from office or employment.

STATEMENT OF ECONOMIC INTEREST

- Penalty for Non-Compliance:
 - Negligent violations –
 - Recision of contract involved
 - Forfeiture of any gain realized by official

BRIBERY

- Violations of § 2.2-3100, *et seq.* do not preclude prosecution for violation of criminal laws, including bribery.
- Do not constitute defense to any such prosecution.

BRIBERY

- Va. Code § 18.2-447
- Generally, offering:
 - a benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant or party official.
- Bribery is commonly understood to be a quid pro quo for favorable treatment.
 - Gift / gratuity violation does not require a formal “this for that” understanding.

BRIBERY

- Criminal – Class 4 Felony
- Max. imprisonment 2-10 years; max. fine \$100,000

CAUTIONARY TALES

- The McDonnells' were charged with accepting \$177,000 in lavish gifts and loans from Jonnie Williams, the former chief executive of Star Scientific Inc, in exchange for promoting his company and its anti-inflammatory Anatabloc.
- Convicted under Federal corruption statutes – not Virginia law.

CAUTIONARY TALES

- Sheriff convicted of 2 felony counts of bribery:
 - Misappropriated more than \$20,000 in asset forfeiture funds.
 - Used funds to bribe police officers.
 - Voted out of office.

CAUTIONARY TALES

- Sheriff's Office Sergeant indicted on Federal conspiracy and bribery charges:
 - Accepted cash payments from bondsman on weekly basis.
 - Made false statements.
 - Accepted gift card in exchange for assisting on bond release.

MOVING FORWARD - MORE CHANGE ON THE HORIZON

- Fallout from McDonnell convictions resulted in greater public awareness of Virginia's elected officials – including Sheriffs.
- Given media opportunity to declare open season on elected officials:
 - Assumption that they can be influenced through a gift or trip to do something appropriate.

MOVING FORWARD - MORE CHANGE ON THE HORIZON

- CANNOT legislate honesty, integrity, and morality.
- Ultimately it comes down to the personal standards of the individual.
- Will always be abhorrent behavior that violates standards.

WHAT'S NEXT?

- Stronger ethics reforms to be introduced in General Assembly's 2015 Session.
- Led by Del. Todd Gilbert and Sen. Tommy Norment.
- Will re-examine every aspect of current ethics laws – seek to close loopholes.

WHAT'S NEXT?

- Further restrictions on gifts.
- Prohibition of any secured or unsecured loans from anyone having issues before the General Assembly or executive branch
 - Except for conventional and chartered lending institutions.
- Revised definitions of “personal friend” and “family member.”

WHAT'S NEXT?

- Ethics commission – subpoena power?
 - Originally in 2014 legislation but vetoed by Governor McAuliffe (budget shortage).
- Increasing sanctions for violations.

FINAL THOUGHTS

- Don't get too comfortable.
- Conduct detailed review of disclosure forms moving forward:
 - ensure compliance with new important definitions and thresholds for disclosure.
- Disclose, disclose, disclose and it will almost be a complete inoculation.

KAUFMAN & CANOLES