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September 30, 2016

By Hand

Virginia Conflict of Interest and Ethics Advisory Council
Attention: The Honorable Patricia Lee West, Chair
Virginia Conflict of Interest and Ethics Advisory Council
201 N. 9th St., 2nd Floor
Richmond, VA 23219

Dear Council Members:

During the 2016 General Assembly Session, two identical bills, House Bill 1362 and Senate Bill 692, were passed amending portions of the State and Local Government Conflict of Interests Act (the Act). The legislation includes Enactment Clause 5, which required the Supreme Court of Virginia to report on the applicability of the Act to the judiciary:

5. That the Supreme Court of Virginia shall report to the Virginia Conflict of Interest and Ethics Advisory Council on the application of the State and Local Government Conflict of Interests Act to members of the judiciary. Such report shall be made no later than October 1, 2016, and shall include an evaluation of the feasibility of creating separate statutory provisions applicable to members of the judiciary. In making its report, the Supreme Court of Virginia shall consult with staff of the Virginia Conflict of Interest and Ethics Advisory Council, statewide bar associations, and others as the Court deems necessary.

In accordance with the above provision, the Supreme Court convened an Advisory Committee comprised of judges, representatives of bar associations, the State Corporation Commission (SCC), and the Virginia Workers Compensation Commission (VWCC), and staff of the Virginia Conflict of Interest and Ethics Advisory Council. A complete membership list is enclosed.

The need for this review of the Act's applicability to the judiciary was recognized as staff of the Virginia Conflict of Interest and Ethics Advisory Council and members of the judiciary began attempting to interpret and apply the recent changes to the Act to specific circumstances faced by judges. The Act currently prohibits officials, including judges, from accepting gifts of more than \$100 from lobbyists, lobbyist principals, or those seeking a contract with their agency.

For years, many bar associations have provided judges with complimentary memberships and waived conference registration fees for judges. Many of these same bar associations, however, are also registered lobbyists. Under the Act, judges are no longer permitted to accept these "gifts" if the value exceeds \$100. These new provisions of the Act are having a chilling effect on interactions between judges and the bar, and have raised concerns about judges' participation in events intended to promote the law and/or the administration of justice, as well as judges' routine interactions with their localities.

Many localities have traditionally provided legal periodical subscriptions and materials for judges, paid for their judges to attend a training or conference, or provided other services to their judges; however, these things may now be considered to be prohibited "gifts" under the Act because many of these same localities are registered lobbyists or lobbyist principals.

Judges are not the target of lobbying efforts; those are directed to the executive and legislative branches. Judges generally have no reason to know or even be affected by whether someone is a lobbyist or lobbyist principal.

Further concerns have been raised about the Act's requirement that judges disclose the reason for disqualification from cases to the extent they fall within the broad definition of "transactions." Disclosure of the reason for recusal from a case is not required under the Canons of Judicial Conduct. Moreover, such disclosure may itself result in bias or prejudice and further harm a party if such disclosure would cast either a negative or a positive light on one of the parties. Judges are bound by the Canons of Judicial Conduct for the State of Virginia, and the standards therein are sufficient to guard against actual or perceived malfeasance.

The Advisory Committee met on July 18, 2016, and was presented with two draft proposals to address these concerns. The first option created a new chapter within Title 2.2 of the Code of Virginia. This new chapter, which would have consisted of 21 separate statutes, largely mirrored Chapter 31, but would have been specifically tailored to address the unique circumstances faced by judges. The second option presented to the Advisory Committee simply amended two statutes within the Act, adding further exceptions to the definition of "Gift" within Va. Code § 2.2-3101 and exempting judges from being considered an "officer and employee" in Va. Code § 2.2-3112 as it relates to disqualification in transactions.

The Advisory Committee members were provided a two week period to review the options and provide feedback as to necessary edits and their optimal choice for moving forward. At the conclusion of the feedback period, most supported creating a separate Chapter, as set out in the first option.

Letter to the Virginia Conflict of Interest and Ethics Advisory Council
Attn. Honorable Patricia Lee West
September 30, 2016
Page 3 of 4

In addition to the two options presented to the Advisory Committee, staff from the Virginia Conflict of Interest and Ethics Advisory Council provided a third option. This third option clarifies that for judges, Justices, SCC and VWCC Commissioners, public disclosure of the reason(s) for disqualification from a pending case is not required by COIA. It also excludes Justices of the Supreme Court of Virginia, judges of the Court of Appeals of Virginia, judges of any circuit court, and judges and substitute judges of any district court from the prohibited gift provisions contained in the Act. This proposal would not change current reporting requirements.

Although the third option does not create a separate statute for judges, it has the effect of removing judges and Justices entirely from the COIA statute that has been most problematic, Va. Code § 2.2-3103.1 (certain gifts prohibited). These recommended changes essentially put judges and Justices in the position they were in as of July 1, 2014, when the prohibited gift statute was first enacted. At that time “intangible gifts” were allowed so that invitations to conferences and bar memberships with a value over \$100 were not prohibited.

Although this option addresses the concerns of the majority of those governed by the Canons of Judicial Conduct, it is important to note that it does not exempt the SCC and VWCC Commissioners from Va. Code § 2.2-3103.1. The challenge is that unlike judges and Justices who are not subject to being “lobbied”, the SCC and the VWCC are executive agencies as that term is defined for purposes of the lobbyist registration statutes in Article 3 of Chapter 4 of Title 2.2 and are subject to being lobbied.

"Executive agency" means an agency, board, commission, or other body in the executive branch of state government. "Executive agency" includes the State Corporation Commission, the Virginia Workers' Compensation Commission, and the Virginia Lottery.

Va. Code § 2.2-419. Crafting an amendment that would exempt the SCC and VWCC Commissioners would require amendment of additional statutes, including the lobbyist registration statutes and would raise issues beyond the scope of this review.

This third option was circulated to members of the Advisory Committee for their comment, with a majority of the Advisory Committee supporting this approach. The Committee recognized the benefits of a solution that was not only effective in substantially addressing the identified concerns, but also one that was uncomplicated in its approach.

We believe this third option (copy enclosed) takes into consideration the Advisory Committee's comments and addresses the judiciary's concerns with the existing language of the Act. Accordingly, we respectfully request that Council consider recommending the enclosed legislative proposal to the General Assembly.

We appreciate the opportunity to review these issues and provide our recommendations to the Council, and are grateful to the members of the Advisory Committee who have provided their input and suggestions during our review. We also very

Letter to the Virginia Conflict of Interest and Ethics Advisory Council
Attn. Honorable Patricia Lee West
September 30, 2016
Page 4 of 4

much appreciate the advice and assistance provided by the staff of the Virginia Conflict of Interest and Ethics Advisory Council, and by staff of the Division of Legislative Services.

Sincerely,



Donald W. Lemons

Enclosures

Advisory Committee Members

The Honorable Donald W. Lemons, Chair
Chief Justice, Supreme Court of Virginia

The Honorable Glen A. Huff
Chief Judge, Court of Appeals of Virginia

The Honorable Patricia Kelly
Fifteenth Judicial Circuit of Virginia

The Honorable Steven C. McCallum
Twelfth Judicial Circuit of Virginia

The Honorable Uley Norris Damiani
Eighteenth Judicial District of Virginia

The Honorable Colleen K. Killilea
Ninth Judicial District of Virginia

The Honorable A. Ellen White
Twenty-fourth Judicial District of Virginia

The Honorable Judith Williams Jagdmann
State Corporation Commission

The Honorable Wesley G. Marshall
Chairman, Virginia Workers' Compensation
Commission

Katherine B. Burnett, Esquire
Counsel, Judicial Inquiry and Review Commission

Karen A. Gould, Esquire
Executive Director, Virginia State Bar

Stephanie E. Grana, Esquire
President, Virginia Trial Lawyers Association

James P. Guy , II, Esquire
President, Virginia Bar Association

Mr. Karl R. Hade
Executive Secretary
Supreme Court of Virginia

G. Stewart Petoe, Esquire
Executive Director, Virginia Conflict of Interest and
Ethics Advisory Council

Michael W. Robinson, Esquire
President, Virginia State Bar

Rebekah Stefanski, Esquire
Virginia Conflict of Interest and Ethics Advisory
Council

Carlyle R. Wimbish, III, Esquire
President, Virginia Association of Defense
Attorneys

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact §§ 2.2-3103.1 and 2.2-3112 of the Code of Virginia, relating to the State
2 and Local Government Conflict of Interests Act; members of the judiciary.

3 **Be it enacted by the General Assembly of Virginia:**

4 **1. That § 2.2-3103.1 and 2.2-3112 of the Code of Virginia are amended and reenacted as follows:**

5 **§ 2.2-3103.1. Certain gifts prohibited.**

6 A. For purposes of this section:

7 "Person, organization, or business" includes individuals who are officers, directors, or owners of
8 or who have a controlling ownership interest in such organization or business.

9 "Widely attended event" means an event at which at least 25 persons have been invited to attend
10 or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to
11 individuals (i) who share a common interest, (ii) who are members of a public, civic, charitable, or
12 professional organization, (iii) who are from a particular industry or profession, or (iv) who represent
13 persons interested in a particular issue.

14 B. No officer or employee of a local governmental or advisory agency or candidate required to
15 file the disclosure form prescribed in § 2.2-3117 or a member of his immediate family shall solicit,
16 accept, or receive any single gift with a value in excess of \$100 or any combination of gifts with an
17 aggregate value in excess of \$100 within any calendar year for himself or a member of his immediate
18 family from any person that he or a member of his immediate family knows or has reason to know is (i)
19 a lobbyist registered pursuant to Article 3 (§ 2.2-418 et seq.) of Chapter 4; (ii) a lobbyist's principal as
20 defined in § 2.2-419; or (iii) a person, organization, or business who is or is seeking to become a party to
21 a contract with the local agency of which he is an officer or an employee. Gifts with a value of less than
22 \$20 are not subject to aggregation for purposes of this prohibition.

23 C. No officer or employee of a state governmental or advisory agency or candidate required to
24 file the disclosure form prescribed in § 2.2-3117 or a member of his immediate family shall solicit,
25 accept, or receive any single gift with a value in excess of \$100 or any combination of gifts with an

26 aggregate value in excess of \$100 within any calendar year for himself or a member of his immediate
27 family from any person that he or a member of his immediate family knows or has reason to know is (i)
28 a lobbyist registered pursuant to Article 3 (§ 2.2-418 et seq.) of Chapter 4; (ii) a lobbyist's principal as
29 defined in § 2.2-419; or (iii) a person, organization, or business who is or is seeking to become a party to
30 a contract with the state governmental or advisory agency of which he is an officer or an employee or
31 over which he has the authority to direct such agency's activities. Gifts with a value of less than \$20 are
32 not subject to aggregation for purposes of this prohibition.

33 D. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate
34 or a member of his immediate family may accept or receive a gift of food and beverages, entertainment,
35 or the cost of admission with a value in excess of \$100 when such gift is accepted or received while in
36 attendance at a widely attended event and is associated with the event. Such gifts shall be reported on
37 the disclosure form prescribed in § 2.2-3117.

38 E. Notwithstanding the provisions of subsections B and C, such officer or employee or a member
39 of his immediate family may accept or receive a gift from a foreign dignitary with a value exceeding
40 \$100 for which the fair market value or a gift of greater or equal value has not been provided or
41 exchanged. Such gift shall be accepted on behalf of the Commonwealth or a locality and archived in
42 accordance with guidelines established by the Library of Virginia. Such gift shall be disclosed as having
43 been accepted on behalf of the Commonwealth or a locality, but the value of such gift shall not be
44 required to be disclosed.

45 F. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate
46 or a member of his immediate family may accept or receive certain gifts with a value in excess of \$100
47 from a person listed in subsection B or C if such gift was provided to such officer, employee, or
48 candidate or a member of his immediate family on the basis of a personal friendship. Notwithstanding
49 any other provision of law, a person listed in subsection B or C may be a personal friend of such officer,
50 employee, or candidate or his immediate family for purposes of this subsection. In determining whether
51 a person listed in subsection B or C is a personal friend, the following factors shall be considered: (i) the
52 circumstances under which the gift was offered; (ii) the history of the relationship between the person

53 and the donor, including the nature and length of the friendship and any previous exchange of gifts
54 between them; (iii) to the extent known to the person, whether the donor personally paid for the gift or
55 sought a tax deduction or business reimbursement for the gift; and (iv) whether the donor has given the
56 same or similar gifts to other persons required to file the disclosure form prescribed in § 2.2-3117 or 30-
57 111.

58 G. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate
59 or a member of his immediate family may accept or receive gifts of travel, including travel-related
60 transportation, lodging, hospitality, food or beverages, or other thing of value, with a value in excess of
61 \$100 that is paid for or provided by a person listed in subsection B or C when the officer, employee, or
62 candidate has submitted a request for approval of such travel to the Council and has received the
63 approval of the Council pursuant to § 30-356.1. Such gifts shall be reported on the disclosure form
64 prescribed in § 2.2-3117.

65 H. During the pendency of a civil action in any state or federal court to which the
66 Commonwealth is a party, the Governor or the Attorney General or any employee of the Governor or the
67 Attorney General who is subject to the provisions of this chapter shall not solicit, accept, or receive any
68 gift from any person that he knows or has reason to know is a person, organization, or business that is a
69 party to such civil action. A person, organization, or business that is a party to such civil action shall not
70 knowingly give any gift to the Governor or the Attorney General or any of their employees who are
71 subject to the provisions of this chapter.

72 I. The \$100 limitation imposed in accordance with this section shall be adjusted by the Council
73 every five years, as of January 1 of that year, in an amount equal to the annual increases for that five-
74 year period in the United States Average Consumer Price Index for all items, all urban consumers (CPI-
75 U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, rounded to the
76 nearest whole dollar.

77 J. The provisions of this section shall not apply to any justice of the Supreme Court of Virginia,
78 judge of the Court of Appeals of Virginia, judge of any circuit court, or judge or substitute judge of any
79 district court.

80 **§ 2.2-3112. Prohibited conduct concerning personal interest in a transaction; exceptions.**

81 A. Each officer and employee of any state or local governmental or advisory agency who has a
82 personal interest in a transaction:

83 1. Shall disqualify himself from participating in the transaction if (i) the transaction has
84 application solely to property or a business or governmental agency in which he has a personal interest
85 or a business that has a parent-subsidary or affiliated business entity relationship with the business in
86 which he has a personal interest or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4. Any
87 disqualification under the provisions of this subdivision shall be recorded in the public records of the
88 officer's or employee's governmental or advisory agency. The officer or employee shall disclose his
89 personal interest as required by subsection E of § 2.2-3114 or subsection F of § 2.2-3115 and shall not
90 vote or in any manner act on behalf of his agency in the transaction. The officer or employee shall be
91 prohibited from (i) attending any portion of a closed meeting authorized by the Virginia Freedom of
92 Information Act (§ 2.2-3700 et seq.) when the matter in which he has a personal interest is discussed and
93 (ii) discussing the matter in which he has a personal interest with other governmental officers or
94 employees at any time;

95 2. May participate in the transaction if he is a member of a business, profession, occupation, or
96 group of three or more persons the members of which are affected by the transaction, and he complies
97 with the declaration requirements of subsection F of § 2.2-3114 or subsection H of § 2.2-3115;

98 3. May participate in the transaction when a party to the transaction is a client of his firm if he
99 does not personally represent or provide services to such client and he complies with the declaration
100 requirements of subsection G of § 2.2-3114 or subsection I of § 2.2-3115; or

101 4. May participate in the transaction if it affects the public generally, even though his personal
102 interest, as a member of the public, may also be affected by that transaction.

103 B. Disqualification under the provisions of this section shall not prevent any employee having a
104 personal interest in a transaction in which his agency is involved from representing himself or a member
105 of his immediate family in such transaction provided he does not receive compensation for such

106 representation and provided he complies with the disqualification and relevant disclosure requirements
107 of this chapter.

108 C. Notwithstanding any other provision of law, if disqualifications of officers or employees in
109 accordance with this section leave less than the number required by law to act, the remaining member or
110 members shall constitute a quorum for the conduct of business and have authority to act for the agency
111 by majority vote, unless a unanimous vote of all members is required by law, in which case authority to
112 act shall require a unanimous vote of remaining members. Notwithstanding any provisions of this
113 chapter to the contrary, members of a local governing body whose sole interest in any proposed sale,
114 contract of sale, exchange, lease or conveyance is by virtue of their employment by a business involved
115 in a proposed sale, contract of sale, exchange, lease or conveyance, and where such member's or
116 members' vote is essential to a constitutional majority required pursuant to Article VII, Section 9 of the
117 Constitution of Virginia and § 15.2-2100, such member or members of the local governing body may
118 vote and participate in the deliberations of the governing body concerning whether to approve, enter into
119 or execute such sale, contract of sale, exchange, lease or conveyance. Official action taken under
120 circumstances that violate this section may be rescinded by the agency on such terms as the interests of
121 the agency and innocent third parties require.

122 D. The provisions of subsection A shall not prevent an officer or employee from participating in
123 a transaction merely because such officer or employee is a party in a legal proceeding of a civil nature
124 concerning such transaction.

125 E. The provisions of subsection A shall not prevent an employee from participating in a
126 transaction regarding textbooks or other educational material for students at state institutions of higher
127 education, when those textbooks or materials have been authored or otherwise created by the employee.

128 F. The provisions of this section shall not prevent any justice of the Supreme Court of Virginia,
129 judge of the Court of Appeals of Virginia, judge of any circuit court, judge or substitute judge of any
130 district court, member of the State Corporation Commission, or member of the Virginia Workers'
131 Compensation Commission from participating in a transaction where such individual's participation
132 involves the performance of his adjudicative responsibilities as set forth in Canon 3 of the Canons of

133 Judicial Conduct for the State of Virginia. However, nothing in this subsection shall be construed to
134 authorize such individual's participation in a transaction if such participation would constitute a violation
135 of the Canons of Judicial Conduct for the State of Virginia.

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