

## Chapter 30

### Conflicts of Interest

#### 30-100 Introduction

Our system of government is dependent in large part on its citizens maintaining the highest trust in their public officials. *2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519*. The conduct and character of public officials is of particular concern to state and local governments, because it is chiefly through that conduct and character that the government's reputation is derived. *2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519*. Like the Freedom of Information Act (*see chapter 29*), public officers and employees must be familiar with the State and Local Government Conflict of Interests Act (hereinafter, "COIA").

The purpose of COIA (*Virginia Code § 2.2-3100 et seq.*) is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised or affected by inappropriate conflicts. *Virginia Code § 2.2-3100*. The Attorney General has stated that COIA provides minimum rules of ethical conduct for state and local government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees; (2) it restricts the ability of such officers and employees to have personal interests in certain contracts with their own or other governmental agencies; and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest. *2014 Va. Op. Atty. Gen. WL 200906*. This chapter primarily focuses on the third type of conflict – those pertaining to personal interests in transactions.

#### Summary of the Key Elements of the State and Local Government Conflicts of Interest Act

- Applies to public officials having a *personal interest in a transaction* or a *personal interest in a contract*.
- A personal interest in a transaction arises from the public official's, or a member of the public official's immediate family's, ownership of property or interest in a business, income, or by representing or providing services to a client who has a pending transaction.
- A public official having a personal interest in a transaction must *disclose* that interest in the manner required by COIA; provided that a personal interest in a transaction that affects the public generally need not be disclosed.
- A public official having a personal interest in a transaction is *disqualified* from participating in the transaction if the transaction applies solely to property or a business in which the public official has a personal interest or if no express exception allowing participation applies.
- A public official having a personal interest in a transaction *may participate* in the transaction *after disclosing* his personal interest if one of the three common exceptions apply:
  - The public official is a member of a business, profession, occupation or *group of three or more* persons, the members of which are affected by the transaction.
  - The party to the transaction is a client of the public official's firm but the public official *does not personally represent or provide services* to the client.
  - The transaction *affects the public generally*, even though her personal interest, as a member of the public, may also be affected.
- A public official who believes she may have a conflict of interest should consult with the counsel for the public body and obtain a written opinion from the locality's attorney or from the Commonwealth's Attorney, after providing a full disclosure of the facts; if the public official is later charged with a knowing violation, the locality's attorney's opinion is evidence that the public official did not knowingly violate COIA, the Commonwealth's Attorney's opinion immunizes the public official from prosecution.
- The acceptance of money, gifts and honoraria is also prohibited under COIA.
- A knowing violation of COIA is either a class 1 or class 3 misdemeanor, depending on the violation, and constitutes malfeasance in office; penalties may include criminal fines and penalties, forfeiture of office, forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived.

COIA is a very technical act and the reader is advised to consult counsel (*see section 30-600*) for an in-depth review of the law and to receive guidance on how to proceed if and when a conflict of interest exists. A knowing violation of COIA has serious consequences. A knowing violation is a misdemeanor (*Virginia Code § 2.2-3120*) and constitutes malfeasance in office (*Virginia Code § 2.2-3122*). In addition to criminal fines and penalties, a knowing violation may result in forfeiture of the office or employment (*Virginia Code § 2.2-3122*), the forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived from the violation (*Virginia Code § 2.2-3124*).

COIA does not address all conflicts of interest and those situations are addressed in section 30-800.

### **30-200 Definitions of key terms**

A conflict of interest will be found to exist under COIA if the public official has a *personal interest in the transaction*. Except as expressly stated otherwise, the term *public official* includes members of the locality's public bodies, advisory agencies, committees (collectively referred to as a *public body*) and employees.

#### **30-210 Personal interest**

A *personal interest* is a *financial benefit or liability* accruing to a *public official* or to a *member of his or her immediate family*. *Virginia Code § 2.2-3101*. A member of the *immediate family* is a spouse and any child who resides in the same household as the officer or employee and who is a dependent of the officer or employee. *Virginia Code § 2.2-3101*. A *personal interest* exists in any of the following situations:

- *Ownership in a business*: Ownership in a business, if the ownership interest exceeds three percent of the total equity of the business.
- *Income from property or business*: Annual income that exceeds, or may reasonably be anticipated to exceed, \$5,000 from ownership in real or personal property or a business.
- *Salary, compensation, benefits paid or provided by business or governmental agency*: Salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually.
- *Ownership of property*: Ownership of real or personal property, if the interest exceeds \$5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property.
- *Personal liability on behalf of business*: Personal liability incurred or assumed on behalf of a business, if the liability exceeds three percent of the asset value of the business.
- *Option for ownership of business or real property*: An option for ownership of a business or real or personal property if the ownership interest will consist of ownership in a business or real or personal property.

A *business* is a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit. *Virginia Code § 2.2-3101*. A public official with a personal interest in a business also has a personal interest in any related business entity. A personal interest exists in a parent-subsidiary relationship when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation. A personal interest exists in an affiliated business if one business has a controlling ownership interest in the other, if a controlling owner in one business is also a controlling owner in the other, or if there is shared management or control between the two businesses.

COIA requires a public official to be keenly aware of the business interests of his partners and the ownership interests of any businesses in which he has a personal interest.

### 30-220 Transaction

A *transaction* is any matter considered by the governmental or advisory agency, whether in a committee, subcommittee, or other entity of the agency or before the agency itself, on which official action is taken or contemplated. *Virginia Code § 2.2-3101*. Thus, under COIA, a *transaction* is any matter before the locality for which official action will or may be taken (*e.g.*, review and approval of any type of land use-related application) by the governing body, planning commission, architectural review board, BZAs, a department, or any other public official.

In the realm of land use approvals, the types of matters that would be a *transaction* under COIA range from an applicant-initiated comprehensive plan amendment to a building permit, and everything in between, and would also include matters pertaining to zoning enforcement, official determinations by the zoning administrator, and appeals thereof to the BZA. In the situation where a public official has provided representation or services, the transaction need not necessarily be the matter for which the public official or member of his immediate family provided the representation or services to the client. *See section 30-400*.

COIA applies to a public official only to the extent that the transaction is or might be considered by the governmental agency or advisory agency for which the public official is a member. Thus, for example, COIA does not prohibit a BZA member (or require disclosure) from representing a client in a zoning map amendment before the planning commission or the governing body because the BZA would never take official action on the zoning map amendment. However, members of governing bodies must be much more cautious since they represent the locality as a whole, and almost *every matter* may at some point be considered by the governing body.

### 30-230 Personal interest in a transaction

A *personal interest in a transaction* is a personal interest of a public official in any matter considered by his or her agency. *Virginia Code § 2.2-3101*. A personal interest exists when a public official or a member of his immediate family has a personal interest in property or a business, or represents an individual or business and the property, business or represented individual or business: (1) is the subject of the transaction; or (2) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. *Virginia Code § 2.2-3101*.

### 30-300 Applicable rules when a personal interest in a transaction exists

If a personal interest in a transaction is determined to exist, a public official is not automatically prohibited from participating in the transaction. The table below provides a summary of a number of typical situations when a public official may need to determine whether a conflict of interest exists under COIA.

Situations When a Public Official Must Determine Whether a Conflict of Interest Exists		
Relationship	Personal Interest	Disclose and Disqualify or Merely Disclose
Official has an interest in a business	Personal interest if the official's interest is more than 3% of the total equity of the business	<ul style="list-style-type: none"> <li>Disqualified if the transaction applies solely to the business (<i>e.g.</i>, it is the applicant) or no other exception applies.</li> <li>Must only disclose if the transaction affects a group of 3 or more (<i>e.g.</i>, neighboring business is the applicant; official's business is in the neighborhood).</li> </ul>
Official receives annual income from ownership in real or personal property or a business	Personal interest if the official's annual income exceeds, or may be reasonably anticipated to exceed, \$5,000 ( <i>e.g.</i> , receives \$11,000 in stock dividends from business)	<ul style="list-style-type: none"> <li>Disqualified if the transaction applies solely to the property or business (<i>e.g.</i>, it is the applicant) or no other exception applies.</li> <li>Must only disclose if the transaction affects a group of 3 or more (<i>e.g.</i>, neighboring business is the applicant; official's property or business is in the neighborhood).</li> </ul>

Situations When a Public Official Must Determine Whether a Conflict of Interest Exists		
Relationship	Personal Interest	Disclose and Disqualify or Merely Disclose
Official receives salary, other compensation, fringe benefits, or benefits from the use of property paid by business or government	Personal interest if the official's salary, compensation or benefits exceeds, or may be reasonably anticipated to exceed, \$5,000 (e.g., receives \$9,000 in salary and \$2,000 in fringe benefits from business)	<ul style="list-style-type: none"> <li>Disqualified if the transaction applies solely to the business (e.g., it is the applicant) or no other exception applies.</li> <li>Must only disclose if the transaction affects a group of 3 or more (e.g., neighboring business is the applicant; official's business is in the neighborhood).</li> </ul>
Ownership of real property, not addressed above	Personal interest if the interest in the real property exceeds \$5,000 (e.g., official owns a house valued at \$400,000)	<ul style="list-style-type: none"> <li>Disqualified if the transaction applies solely to the real property (e.g., the official is the applicant) or no other exception applies.</li> <li>Must only disclose if the transaction affects a group of 3 or more (e.g., a neighboring landowner is the applicant; official's real property is in the neighborhood).</li> </ul>
Official represents or provides services to applicant	Personal interest by virtue of representation or providing services	<ul style="list-style-type: none"> <li>Disqualified, including where the public official previously represented or provided services to the applicant on the matter, or where the public official currently represents or provides services to the applicant on other matters.</li> </ul>
Official's firm represents or provides services to applicant	Personal interest by virtue of firm representation or providing services	<ul style="list-style-type: none"> <li>Disclosure (but not disqualification) required if the official never provided services to the applicant.</li> <li>Lawyers and other professionals must be aware of ethical restrictions that may still require higher conflict standards.</li> </ul>

The following rules determine whether the public official must disclose the interest and disqualify, or merely disclose the interest.

**30-310 Disclosure and disqualification is required if the transaction applies solely to the property or business in which the official has a personal interest or no exception allowing participation applies**

A public official must disqualify himself from participating in a transaction and publicly disclose that interest if the transaction applies solely to property or business in which he has a personal interest. *Virginia Code § 2.2-3112(A)*.

*Example 1:* A public official is a member of the planning commission whose ownership is 7% of the total equity of a business that has filed an application for a rezoning. The planning commissioner has a personal interest in the transaction, is disqualified from participating in the transaction, and must disclose his interest in writing.

Also, recall that a public official also has a conflict of interest if a member of his immediate family has a qualifying personal interest.

*Example 2:* The son of a county officer has recently moved back home to save money and has joined a small partnership engaged in land planning in which he owns 10% of the partnership's total equity. The son is assisting another planner in the firm on a proposed comprehensive plan amendment for a proposed project in the county. The son is a dependent of the county officer, who is a member of the planning commission. The county officer has a personal interest in the transaction because a dependent residing in her household has a personal interest in a transaction now pending before the county.

A public official also must disqualify himself if none of the exceptions set out in section 30-320 apply. *Virginia Code § 2.2-3112(A)*. For example, a public official must disqualify himself from participating in a transaction if he has

represented or provided services to a client on the matter that is the subject of the transaction. *See section 30-400 for a further discussion.*

*Disqualification* means that the public official may not participate in the discussion leading to a vote or decision. *Virginia Code § 2.2-3112(A); see section 29-623 for a discussion of the effects of disqualification on maintaining a quorum.* Disqualification also means that the public official may neither attend a closed meeting regarding the transaction nor discuss the matter with other governmental officers or employees at any time. *Virginia Code § 2.2-3112(A).* In other words, the disqualified public official should not have any contact with any other public officials, including staff, regarding the matter that creates the conflict.

The disclosure must be in writing and must: (1) identify the transaction involved; (2) state the existence of the interest; and (3) state the full name and address of the business and the address or parcel number for the real property if the interest involves a business or real property. *Virginia Code § 2.2-3115(F).* The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. *Virginia Code § 2.2-3115(F).*

**30-320 Disclosure is required if the transaction applies to not only the property or business in which the official has a personal interest but other properties or businesses, and an exception allowing participation applies**

There are a limited number of exceptions from the requirement that a public official having a personal interest in a transaction be disqualified from participating in the transaction. Because COIA is to be liberally construed to achieve its legislative purposes, the exceptions below should apply only when the circumstances squarely fall within their statutory parameters.

These exceptions allow participation in the transaction after proper disclosure of the interest. Proper disclosure includes being able to affirmatively state that even though the public official has a personal interest in the transaction, she is able to participate in the transaction fairly, objectively, and in the public interest. If the public official is unable to make that declaration, she should consider whether it is appropriate not to participate in the matter to avoid an appearance of impropriety, even though she does not have a conflict of interest requiring disqualification under COIA. *See section 30-800 regarding avoiding the appearance of impropriety.*

The three exceptions examined below are the most common under COIA. Although there are others, they have limited applicability. The reader should always bear in mind that no exception allowing participation applies when the transaction pertains solely to the public official’s property or business.

Disclosure Requirements for Three Common Exceptions			
Exception	Type of Disclosure	Contents of Disclosure	Timing of Disclosure
Public official is a member of a group of three or more members affected by the transaction	Oral or in writing	<ul style="list-style-type: none"> <li>Identify the transaction involved;</li> <li>Identify the nature of the personal interest affected by the transaction;</li> <li>State the fact that she is a member of a business, profession, occupation, or group the members of which are affected by the transaction; and</li> <li>State that she is able to participate in the transaction fairly, objectively, and in the public interest.</li> </ul> <i>Virginia Code § 2.2-3115(H)</i>	<ul style="list-style-type: none"> <li>If oral, prior to participation and at a time when it can be recorded in <i>written minutes</i> of the public body.</li> <li>If in writing, prior to participation, to be filed with the clerk or administrative head of his governmental or advisory agency; if reasonable time is not available to file the disclosure prior to participation, then by the end of the next business day.</li> <li>Thereafter, must orally disclose the existence of the interest during each meeting of the governmental or advisory agency at which the transaction is discussed.</li> </ul> <i>Virginia Code § 2.2-3115(H)</i>

Disclosure Requirements for Three Common Exceptions			
Exception	Type of Disclosure	Contents of Disclosure	Timing of Disclosure
Party to the transaction is a client of the public official's firm but the public official does not represent or provide services to the party/client	Oral or in writing	<ul style="list-style-type: none"> <li>Identify the transaction involved;</li> <li>State that a party to the transaction is a client of his firm;</li> <li>State that he does not personally represent or provide services to the client; and</li> <li>State that he is able to participate in the transaction fairly, objectively, and in the public interest.</li> </ul> <i>Virginia Code § 2.2-3115(I)</i>	<ul style="list-style-type: none"> <li>If oral, prior to participation and at a time when it can be recorded in the <i>written minutes</i> of the public body.</li> <li>If in writing, prior to participation, to be filed with the clerk or administrative head of his governmental or advisory agency; if reasonable time is not available to file the disclosure prior to participation, then by the end of the next business day.</li> </ul> <i>Virginia Code § 2.2-3115(I)</i>
The transaction affects the public generally	No disclosure required	Not applicable	Not applicable

### 30-321 Groups of three or more members

A public official may participate in a transaction 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, and the interest is disclosed. *Virginia Code § 2.2-3112(B)(1)*.

*Example 3:* A public official is a member of the BZA and the transaction is a variance to be considered by the BZA within the BZA member's neighborhood. The BZA member is a member of the group of three or more persons owning land in proximity to the parcel that is the subject of the transaction, and she may participate in the transaction if she makes the required disclosure.

The disclosure may be either oral or in writing and must: (1) identify the transaction involved; (2) identify the nature of the personal interest affected by the transaction; (3) state the fact that she is a member of a business, profession, occupation, or group the members of which are affected by the transaction; and (4) state that she is able to participate in the transaction fairly, objectively, and in the public interest. *Virginia Code § 2.2-3115(H)*. If the public official is unable to make the statements in the declaration of interest without reservation, she should not participate in the matter and disqualify herself from participating. The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. *Virginia Code § 2.2-3115(H)*.

### 30-322 No personal representation of a client

A public official may participate in a transaction when a party to the transaction is a client of his firm if he does not personally represent or provide services to the client, and the interest is disclosed. *Virginia Code § 2.2-3112(B)(2)*. See section 30-400 for a complete discussion of public officials representing or providing services to a party to a transaction. If the public official previously represented or provided services to the client regarding the matter, or currently represents the client on other matters, the exception does not apply and she is disqualified from participating in the transaction.

*Example 4:* A public official is a member of the board of supervisors and her law firm represents the applicant for a special use permit, though she does not and never has represented the client. The board member may participate in the transaction if she makes the required disclosure.

The disclosure may be either oral or in writing and must: (1) identify the transaction involved; (2) state that a party to the transaction is a client of her law firm; (3) state that she does not personally represent or provide services to the client and has never done so; and (4) state that he is able to participate in the transaction fairly, objectively, and in the public interest. *Virginia Code § 2.2-3115(I)*. If the public official is unable to make the statements in the declaration of interest without reservation, he should not participate in the matter and disqualify himself from

participating in the transaction. The disclosure form must be retained in the public records of the agency for five years in the office of the administrative head of the public body. *Virginia Code § 2.2-3115(I)*.

### **30-323 Application to the public generally**

A public official may participate in a transaction if it affects the public generally, even though her personal interest, as a member of the public, may also be affected by the transaction. *Virginia Code § 2.2-3112(B)(3)*.

*Example 5:* A public official is a member of the architectural review board and the board is considering architectural guidelines for structures along designated highways. The board member owns a parcel along one of the designated highways having a value of \$65,000 and his parcel would be subject to the guidelines. Because the architectural guidelines would apply to the public generally, the board member may participate in the transaction.

There are no disclosure requirements for this exception.

### **30-400 The representation or provision of services to a client who is a party to a transaction**

In the context of this section, a *personal interest in a transaction* exists when a public official or a member of his immediate family, or a member of his firm *represents* or *provides services* to any individual or business (“client”) and the property, business or individual: (1) is the subject of the transaction; or (2) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. *Virginia Code § 2.2-3101*. Under this situation, a personal interest in a transaction arises *regardless of whether the representation or the services pertain to the matter that will or may be considered by the locality*.

The terms *represent* and *provide services* are not defined in COIA, so they are given their commonly understood meanings. *Represent* means to “act the part of, in the place of, or for (another person) usu. by legal right,” *Webster’s Third New International Dictionary (2002)*, or to “function as the official and authorized delegate or agent” for someone else or to “act as a spokesperson for” someone else. *Webster’s II New Riverside University Dictionary (1994)*. Attorneys, engineers, civil engineers, surveyors, architects, landscape architects, planners and other professionals often *represent* clients on land use applications pending before a locality by, among other things, acting as the client’s spokesperson at meetings or in discussions with individual public officials. *Provide services* means to “provide information or other assistance” to another. *Webster’s Third New International Dictionary (2002) (definition of “service”)*. A wide range of professionals also may *provide services* to clients who have land use applications pending before a locality. Public officials must be aware that a conflict of interest arises by merely *providing services* to a client, regardless of whether they are also *representing* the client before the locality.

Because COIA fails to define *represent* or *provide services*, there may be some ambiguity as to when a public official is representing or providing services to a third party, and not merely assisting the third party in their official capacity. At the very least, some kind of working relationship is required between the public official and the client in order for COIA to apply. There may be occasions when the distinctions between providing services and providing information may blur, in which case counsel should be consulted (*see section 30-600*). The following examples illustrate situations when a public official is representing or providing services to a client.

*Example 6:* A county official who is an engineer is hired to represent an applicant for a subdivision and seeks to meet with county staff over the requirements of the subdivision ordinance and the possibility of obtaining exceptions to certain requirements. The county official has a personal interest in the transaction and is disqualified because he is representing the client on a matter pending before the county.

*Example 7:* A county official assists a friend in filling out the form for appealing a decision of the architectural review board to the board of supervisors. The county official assists the friend for no charge. The county official would likely not have a personal interest in the transaction and would

not be disqualified under COIA because the assistance was not provided in the context of a working relationship.

*Example 8:* A county official who is an architect is hired to design a house for a landowner in an abutting locality. The landowner is also an applicant for a special use permit for a commercial use on a separate, commercially zoned parcel in the county. The county official has a personal interest in the transaction and is disqualified because he is currently providing services to the applicant.

Common Situations Where a Public Official Represents or Provides Services to a Client			
Situation	Disqualification and Disclosure, or Only Disclosure	Key Factors	Other
The public official (or a member of his immediate family) represents or provides services to a client who is a party to the transaction	Disqualification and disclosure	Because the client, not the transaction, is the critical factor, disqualification is required even if: <ul style="list-style-type: none"> <li>The representation or services pertain to a matter outside of the public official's locality</li> <li>The representation or services were provided before any application was filed with the locality</li> <li>The public official is no longer representing or providing services to the client of the firm on the matter</li> </ul>	<ul style="list-style-type: none"> <li>In his or her <i>public capacity</i>, the public official is disqualified from participating in the transaction</li> <li>In his or her <i>private capacity</i> as a representative or service provider to a client, the public official is prohibited from discussing the matter with other public officials at any time</li> </ul>
The party to the transaction is a client of the public official's (or a member of her immediate family's) firm but the public official does not personally represent or provide services to the client	Disclosure	Because the client, not the transaction, is the critical factor: <ul style="list-style-type: none"> <li>The exception requiring disclosure but not disqualification of the public official does not apply if the public official previously represented or provided services to the client regarding the matter</li> <li>The exception requiring disclosure but not disqualification of the public official does not apply if the public official currently represents the client on other matters</li> </ul>	<ul style="list-style-type: none"> <li>The term <i>firm</i> is not defined in COIA; its common meaning is a "commercial partnership of two or more persons"</li> <li>Public officials who are attorneys, architects, engineers and other professionals should be aware that their profession's own ethical standards may require a higher standard of conduct</li> </ul>
Disqualified public employees may represent themselves or family members	Disclosure	Employee may not receive compensation for services	Does not apply to disqualified public officers

The following examples illustrate some situations when a public official has a conflict of interest because of the work of a member of his immediate family.

*Example 9:* A city employee's spouse is an attorney, and she provided legal services pertaining to a rezoning prior to the rezoning application being filed with the city. The city employee has a personal interest in the transaction and is disqualified because his spouse provided legal services to a client on a matter now pending before the city.

*Example 10:* The son of a county official, a recent college graduate who has moved back home after graduating, is working in a local planning firm as an intern. The son is assisting another planner in the firm on a proposed comprehensive plan amendment for a proposed project in the county. The son is a dependent of the county official, who is a member of the planning commission. The county official has a personal interest in the transaction because a dependent residing in her household has provided services to a client on a matter now pending before the county.

Note that the county official in Example 10 would also have a personal interest in a transaction on any project in the county proposed by the planning firm's client, even if her son assisted the planner only on a project for the planning firm's client that would be located in an abutting locality.

These rules require that public officials not only be cognizant of their own activities, but also those of their spouses and other members of the immediate family. Note also that when a personal interest arises from representing or providing services, a *personal interest in a transaction* exists regardless of the amount of income or other financial benefit received for the representation or services, *i.e.*, the \$5,000 income or ownership interest thresholds that apply to other personal interests under COIA do not apply where representation or the provision of services is the issue.

### **30-410 Disclosure and disqualification is required if the public official represents or provides services to a client who is a party to the transaction**

Subject to the two circumstances noted in sections 30-420 and 30-430 below, if a public official, or a member of his immediate family, represents or provides services to a client, the public official is disqualified from participating in any transaction pertaining to that client. The following examples illustrate some of the effects of disqualification.

*Example 11:* A city official who is an engineer is hired to represent an applicant for a subdivision and seeks to meet with city staff over the requirements of the subdivision ordinance and the possibility of obtaining exceptions to certain requirements. Because the city official has a personal interest in the transaction, he may not have any discussions with city officials or employees and may not meet with city staff to discuss the subdivision or send any writings discussing the subdivision.

*Example 12:* A county employee's spouse is an attorney, and she provided legal services to an applicant on a rezoning prior to the rezoning application being filed. Because the county employee has a personal interest in the transaction, he must not participate in any way in the review of the application or discuss the rezoning with any county officer or employee. In addition, the county employee has a personal interest in all other transactions pertaining to the applicant that are pending, or that may be pending, before the county.

In the scenarios presented in Examples 11 and 12, public officials must be certain that they not initiate discussions with other public officials they know to be representing or providing services to a client. In such a situation, the disqualified officials should be notified that they may not discuss the matter with any other public officials and that another person must represent the applicant on the matter in discussions with the locality's staff.

The consequences arising from a conflict apply whether the public official's role is characterized as being in a public capacity (*e.g.*, as a public official) or in a private capacity (*e.g.*, as a representative or service provider to a private client). In his or her *public capacity*, the public official is disqualified from participating in the transaction. *Virginia Code § 2.2-3112(A)*. In his or her *private capacity* as a representative or service provider to a client, the public official is prohibited from discussing the matter with other public officials at any time. *Virginia Code § 2.2-3112(A)*. Prohibited discussions include both oral and written communications, regardless of the formality of the communication, the setting of the discussion, or the substance of the communication itself, so long as it pertains to the matter.

*Example 13:* A county official is a member of the planning commission and an architect in a solo practice. A bank desires to locate a new branch in the county and hires the county official to perform architectural services. Before the site plan is filed, the bank hires an engineering firm to represent the bank, complete and submit the preliminary site plan, and act as the bank's contact person. The site plan will be reviewed and approved administratively by county staff. Because the county official is providing services to the bank, he may not meet with county staff to discuss the site plan or send any writings discussing the site plan. In addition, the county official has a personal

interest in all other transactions pertaining to the bank that are pending, or that may be pending, before the county.

In Example 13, if discussions with county staff are going to take place on the matter, the public official must have somebody else communicate with staff.

Because a *transaction* includes any matter on which official action is taken *or contemplated* (*Virginia Code* § 2.2-3101), the *transaction*, as well as the disqualification and resulting prohibition on participation, may begin long before a land use application is filed with the locality. Thus, a public official who is representing or providing services to a client is prohibited from contacting the locality's public officials to discuss a proposed application for ideas, solicit preliminary feedback or the locality's receptiveness to a proposal, or participate in a pre-application conference, even before an application is filed.

### **30-420 Disclosure required if the party to the transaction is a client of the public official's firm and the public official does not personally represent or provide services to the client**

A public official whose firm represents or provides services to a client has a personal interest in a transaction. *Virginia Code* § 2.2-3112(B)(2). However, if the public official does not personally represent or provide services to the client, disclosure, but not disqualification, is required. *Virginia Code* § 2.2-3112(B)(2). If the public official previously represented or provided services to the client regarding the matter, or currently represents the client on other matters, the exception allowing only disclosure does not apply and she is disqualified from participating in the transaction.

The term *firm* is not defined in COIA so it is given its commonly understood meaning. *Firm* in this context means a "commercial partnership of two or more persons," *Webster's II New Riverside University Dictionary* (1994), "a partnership of two or more persons not recognized as a legal person distinct from the members composing it," or "a business unit or enterprise." *Webster's Third New International Dictionary* (2002). Consistent with the liberal interpretation to be given COIA, the term *firm* covers an array of business entities involving two or more persons.

*Example 14:* A city official is a member of the planning commission and an attorney in a local three-member law firm. A developer is a client of the firm, but the city official does not personally represent the developer on its special use permit application, never provided services to the developer on the application, and does not represent the developer in any other matters. The city official must disclose the relationship, but is not disqualified from participating in the special use permit or any other matter of the developer when it comes to the planning commission, and may discuss the matter with other city officers or employees.

*Example 15:* A county official is a member of the architectural review board and an architect in a local four-member architectural firm. A local car dealership desires to update its buildings and the county official prepares some preliminary architectural drawings. The project is then assigned to another architect in the firm. Four months later, a site plan amendment is filed with the county. Because the county official previously provided services to his firm's client on the transaction, he is disqualified from participating in the site plan or any other matter of the car dealership pending before the county, regardless of whether the filed site plan does not rely on the preliminary architectural drawings prepared by the county official.

*Example 16:* A city official is a member of the board of supervisors and an engineer. She represents and provides services to a developer on a subdivision proposed in an abutting locality. She is disqualified from participating in any transaction pertaining to the developer in her locality.

Attorneys and other professionals should be aware that their own profession's ethical requirements may require a higher standard of conduct and that compliance with COIA may not satisfy those professional ethical requirements. See section 30-322 for the disclosure requirements.

### **30-430 Disqualified employees may represent themselves or a member of their immediate family in the transaction if they receive no compensation**

A *public employee* who has a personal interest in a transaction and is disqualified from participating in a transaction may represent himself or a member of his immediate family in a transaction, provided that the employee does not receive compensation for the representation and complies with the applicable disqualification and disclosure requirements of COIA. *Virginia Code* § 2.2-3112(C).

*Example 17:* A county employee and her husband own 35 acres that they wish to subdivide with a private street. Although the county employee may not participate in the transaction as a county employee, she may represent herself and her husband in discussions with public officials, as well as at the planning commission meeting where the private street request would be considered, provided that she receives no compensation and satisfies the disqualification and disclosure requirements of COIA.

This exception applies only to employees and does not apply to officers.

### **30-500 Other prohibited conduct**

In addition to those situations when a public official may have a personal interest in a transaction discussed above, COIA prohibits certain interests in contracts and other general conduct.

#### **30-510 Contracts**

Virginia Code § 2.2-3107 prohibits *members of governing bodies* from having a personal interest in any contract with the governing body, any governmental agency that is a component part of the locality and subject to the control of the locality's governing body, or any contract other than any governmental agency if the official's governing body appoints a majority of the members of the governing body of the second governmental agency. There are three exceptions pertaining to: (1) a contract of employment if the member was employed by the locality prior to July 1, 1983 in accordance with the former Conflict of Interests Act or the employment began before the member became a member of the governing body; (2) a contract for the sale of goods or services by a governmental agency at uniform prices available to the public; and (3) a contract awarded to a member of a governing body as a result of competitive sealed bidding, subject to certain restrictions and requirements.

Virginia Code § 2.2-3109 prohibits *all other public officials and employees* of a locality from having a personal interest in any contract with the agency of which he is an officer or employee other than his own contract of employment. In addition, Virginia Code § 2.2-3109 prohibits all other public officials and employees of a locality from having a personal interest in any contract with any other governmental agency that is a component of the locality's government unless the contract is awarded as a result of competitive sealed bidding or competitive negotiation under the Virginia Public Procurement Act, is awarded under a procedure embodying competitive principles as authorized under the Virginia Public Procurement Act, or is awarded after a finding by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public. There are numerous exceptions in Virginia Code §§ 2.2-3109, 2.2-3109.1 (contracts related to hospital authorities) and 2.2-3110 including those for: (1) certain personal interests of employees in contracts for goods or services or of employment contracts; (2) an officer's or employee's personal interest in a contract of employment with any other governmental agency that is a component part of his locality; (3) contracts for the sale of goods or services by a governmental agency at uniform prices available to the public; (4) contracts for the sale, lease, or exchange or real property between the locality and the public official or employee; and (5) contracts for goods and services when the contract does not exceed \$500.

#### **30-520 Personal benefits, money, gifts, and other things of value**

Virginia Code § 2.2-3103 *et seq.* prohibits a range of conduct in which the public officer or employee (collectively, "public official") obtains personal benefits, money, gifts, and other things of value, including:

- *Soliciting or accepting money or other thing of value for services:* Except for special benefits authorized by law, a public official may not solicit or accept money or other things of value for services performed within the scope of his official duties, except the compensation, expenses, or other remuneration paid by the locality.
- *Offering or accepting money or other thing of value for employment, appointment, or promotion:* A public official may not offer or accept money or any other thing of value in consideration of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency.
- *Offering or accepting money or other thing of value to use position for contract purposes:* A public official may not offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency.
- *Using confidential information for personal or another's gain:* A public official may not use for her own economic benefit, or that of another party, confidential information which she has acquired by reason of her public position and which is not available to the public.
- *Accepting money or other benefit that may influence performance:* A public official may not accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties. This rule does not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Virginia Code § 24.2-900 *et seq.*
- *Accepting an opportunity that may influence performance:* A public official may not accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties.
- *Accepting honoraria:* A public official may not accept any honoraria for any appearance, speech, or article in which the public official provides expertise or opinions related to the performance of her official duties. The term *honoraria* does not include any payment for or reimbursement to a person for her actual travel, lodging, or subsistence expenses incurred in connection with the appearance, speech, or article or, in the alternative, a payment of money or anything of value not in excess of the *per diem* deduction allowable under section 162 of the Internal Revenue Code.
- *Accepting a gift where its timing and nature question impartiality:* A public official may not accept a gift from a person who has interests that may be substantially affected by the performance of the public official's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the public official's impartiality in the matter affecting the donor.
- *Accepting gifts frequently so as to raise appearance of impropriety:* A public official may not accept gifts from sources on a basis so frequent as to raise an appearance of the use of her public office for private gain.
- *Retaliating against person for expressing views on matters of public concerns or for exercising protected rights:* A public official may not use his public position to retaliate or threaten to retaliate against any person for expressing views on matters of public concern or for exercising any right that is otherwise protected by law. However, this prohibition does not restrict the authority of any public employer to govern conduct of its employees, and to take disciplinary action, in accordance with applicable law, and does not limit the authority of a constitutional officer to discipline or discharge an employee with or without cause.

Each of these prohibitions will be liberally construed to apply as broadly as reasonable under the circumstances.

Virginia Code § 2.2-3103.1 prohibits public officials or a member of his immediate family from soliciting, accepting, or receiving any single gift with a value in excess of \$100 or any combination of gifts with an aggregate value in excess of \$100 within any calendar year for himself or a member of his immediate family from any person that he or a member of his immediate family knows or has reason to know is: (1) a registered lobbyist; (2) a lobbyist's principal; or (3) a person, organization, or business who is or is seeking to become a party to a contract

with the locality of which the public official is an officer or employee. *Virginia Code § 2.2-3103.1(B)*. Gifts with a value of less than \$20 are not subject to aggregation. *Virginia Code § 2.2-3103.1(B)*. Four key exceptions apply to local public officials:

- *Gifts composed of food, beverages, entertainment, cost of admission.* A public official or a member of his immediate family may accept or receive a gift of food and beverages, entertainment, or the cost of admission with a value in excess of \$100 when the gift is accepted or received while in attendance at a widely attended event and is associated with the event. *Virginia Code § 2.2-3103.1(D)*. A *widely attended event* is an “event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals who are: (i) members of a public, civic, charitable, or professional organization, (ii) who are from a particular industry or profession, or (iii) who represent persons interested in a particular issue.” *Virginia Code § 2.2-3103.1(A)*. These gifts must be reported on the disclosure form prescribed by Virginia Code § 2.2-3117. Note that offers of a ticket, coupon, or other admission or pass is not a gift unless it is used; note also that “attendance at a reception or similar function where food, such as hors d’oeuvres, and beverages that can be conveniently consumed by a person while standing or walking are offered,” is not a gift. *Virginia Code § 2.2-3101* (definition of “gift”).
- *Gifts from foreign dignitaries.* A public official or a member of his immediate family may accept or receive a gift from a foreign dignitary with a value exceeding \$100 for which the fair market value or a gift of greater or equal value has not been provided or exchanged. *Virginia Code § 2.2-3103.1(E)*. The gift shall be accepted on behalf of the locality and archived in accordance with guidelines established by the Library of Virginia. These gifts must be disclosed as having been accepted on behalf of the locality, but the value of the gift is not required to be disclosed. *Virginia Code § 2.2-3103.1(E)*.
- *Gifts from lobbyists, lobbyist’s principals, or persons seeking contracts who are also personal friends.* A public official or a member of his immediate family may accept or receive certain gifts with a value in excess of \$100 from a registered lobbyist, lobbyist’s principal, or person seeking a contract with the locality if the gift was made on the basis of a personal friendship. *Virginia Code § 2.2-3103.1(F)*. Whether the donor is a personal friend will be evaluated by these factors: (1) the circumstances under which the gift was offered; (2) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (3) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (4) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in Virginia Code § 2.2-3117. *Virginia Code § 2.2-3103.1(F)*.
- *Gifts of travel and related expenses from lobbyists, lobbyist’s principals, or persons seeking contracts.* A public official or a member of his immediate family may accept or receive gifts of travel, including travel-related transportation, lodging, hospitality, food or beverages, or other thing of value, with a value in excess of \$100 that is paid for or provided by a registered lobbyist, lobbyist’s principal, or person seeking a contract with the locality when the public official has submitted a request for approval of such travel to the Virginia Conflict of Interest and Ethics Advisory Council and has received the approval of the Council pursuant to Virginia Code § 30-356.1. *Virginia Code § 2.2-3103.1(G)*. These gifts must be reported on the disclosure form prescribed in Virginia Code 2.2-3117. *Virginia Code § 2.2-3103.1(G)*.

Virginia Code § 2.2-3103.2 provides that a person will not be in violation of any provision prohibiting the acceptance of gifts if: (1) “the gift is not used by such person and the gift or its equivalent in money is returned to the donor or delivered to a charitable organization within a reasonable period of time upon the discovery of the value of the gift and is not claimed as a charitable contribution for federal income tax purposes”; or (2) “consideration is given by the donee to the donor for the value of the gift within a reasonable period of time upon the discovery of the value of the gift provided that such consideration reduces the value of the gift to an amount not in excess of \$100 as provided in” Virginia Code § 2.2-3103.1(B) or (C).

### **30-600 Obtaining an opinion as to whether a conflict of interest exists**

A public official should review pending matters and agenda materials for possible conflicts of interest and then request an opinion as to whether a conflict exists. If the public official believes that a conflict of interest may exist, the official should contact the locality's attorney's office so that it is aware of the possible conflict, provide advice and, if necessary, prepare a required disclosure statement before the matter is considered.

#### **30-610 Request an advisory opinion from the locality's attorney's office, the Commonwealth's Attorney, or the Virginia Conflict of Interest and Ethics Advisory Council**

If a public official believes that a conflict of interest may exist, she may make a *written* request for an advisory opinion from the locality's attorney's office (*Virginia Code* § 2.2-3121(B)) or the Commonwealth's Attorney (*Virginia Code* § 2.2-3126(B)), or for a formal opinion or written informal advice from the Virginia Conflict of Interest and Ethics Advisory Council (*Virginia Code* § 30-356(5)).

If the public official relies in good faith on the written opinion of the Commonwealth's Attorney or the formal opinion or written informal advice of the Council, she is immune from prosecution for a knowing violation of COIA, regardless of whether the opinion is later withdrawn, provided the alleged violation occurred prior to the opinion being withdrawn. *Virginia Code* § 2.2-3121(B).

If the public official relies on the written opinion of the locality's attorney, and is prosecuted for a knowing violation of COIA, he may introduce a copy of the opinion at trial as evidence that he did not knowingly violate COIA. *Virginia Code* § 2.2-3121(C).

The public official should disclose all of the facts in writing to the locality's attorney, the Commonwealth's Attorney, or the Council. It also is important that the opinion request be made in sufficient advance of the public body's consideration of the matter to allow adequate time for the matter to be thoroughly reviewed and the advisory opinion to be written. Finally, if the public official will participate in the matter based on the advisory opinion, the official should have the written opinion prior to participation.

#### **30-620 Request Attorney General to review Commonwealth's Attorney opinion, and judicial review**

If the opinion given by the Commonwealth's Attorney indicates that the facts would constitute a violation of COIA, the public official affected by the opinion may request that the Attorney General review the opinion. *Virginia Code* § 2.2-3126(B). A conflicting opinion by the Attorney General acts to revoke the opinion of the Commonwealth's Attorney. *Virginia Code* § 2.2-3126(B).

Regardless of whether an opinion of the Commonwealth's Attorney or the Attorney General has been requested and rendered, any person has the right to seek a declaratory judgment or other judicial relief as provided by law. *Virginia Code* § 2.2-3126(B).

### **30-700 Penalties for a knowing violation of COIA**

A knowing violation of COIA has serious consequences. A knowing violation is either a class 1 or a class 3 misdemeanor, depending on the section of COIA violated, and constitutes malfeasance in office. *Virginia Code* §§ 2.2-3120, 2.2-3122. In addition to criminal fines and penalties, a knowing violation may result in forfeiture of the office or employment, the forfeiture of the value derived from the violation, and civil penalties in the amount of the value derived from the violation. *Virginia Code* §§ 2.2-3122, 2.2-3124(A). There also are civil penalties of \$250 for failing to timely file a disclosure form. *Virginia Code* § 2.2-3126(B).

### **30-800 Avoiding the appearance of impropriety even though a conflict of interest requiring disqualification does not exist under COIA**

COIA does not address all conflicts of interest. There may be circumstances when a public official's interest in a transaction may not be a conflict under COIA, but which may lend itself to an appearance of impropriety. These situations may arise, for example, when a party to a transaction is a personal friend, a family member who is not a member of the immediate family as defined under COIA, or is a club or other organization to which the public official is a member, but does not have the requisite ownership interest to trigger COIA. In those cases, it is incumbent upon the public official to determine whether participating in the transaction presents an appearance of impropriety. *2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519.*

In determining whether an appearance of impropriety exists, the public official should consider: (1) whether the appearance of a conflict is unacceptable; and (2) whether the appearance of a conflict will affect the confidence of the public in the public official's ability to perform his duties impartially. *2005 Va. Op. Atty. Gen. LEXIS 14, 2005 Va. Op. Atty. Gen. WL 1104519.* If either of these elements is present, the public official should seriously consider abstaining from participating in the matter. At the same time, however, a public official, particularly an elected public official, should not hastily abstain from a matter. *See section 29-623 for a discussion of the duties of elected public officials to not absent themselves from matters to which they are not disqualified.*