AG Op. ADMINISTRATION OF GOVERNMENT GENERALLY, 87-88 Va. AG 23

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT.

PARTNERSHIPS: GENERAL PARTNERSHIPS — VIRGINIA REVISED UNIFORM LIMITED PARTNERSHIP ACT.

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS.

Interpretation of various provisions of § 2.1-639.15 Statement of Economic Interests required to be filed by certain state and local officers and employees pursuant to §§ 2.1-639.13 and 2.1-639.14.

Mr. David T. Stitt
County Attorney for Fairfax County

August 31, 1988

You ask certain questions requiring the interpretation of various questions and schedules in the Statement of Economic Interests which certain state and local officers and employees are required to file pursuant to §§ 2.1-639.13 and 2.1-639.14 of the Code of Virginia, a portion of the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24.

I. Applicable Statutes

The complete text of the Statement of Economic Interests is contained in § 2.1-639.15. The intent of these reporting requirements is to further the general purposes of the Act, as detailed in § 2.1-639.1, by establishing a written record of economic interests which may affect the judgment of governmental officers and employees in the performance of their official duties. References in this Opinion to questions and schedules will be to those set forth in the Statement of Economic Interests.

II. Schedule C — Reporting of Securities

A. Participation in Deferred Compensation Plan Not a "Security"

You first ask whether an officer's or employee's participation in a deferred compensation plan valued in excess of $10,000 must be disclosed as a security in Question 3 and Schedule C.

Schedule C requires the disclosure of the ownership interest of a declarant or a member of the declarant’s immediate family in securities of each business or Virginia governmental entity valued in excess of $10,000. The term "securities" is defined to include "stocks, bonds, mutual funds, money market funds, limited partnerships, and commodity futures contracts." Section 2.1-639.15, Sched. C. The term is defined to exclude "certificates of deposit, annuity contracts, and insurance policies." Id. The term "business" is defined in § 2.1-639.2.

A deferred compensation plan generally does not give participants the power to direct the specific investments of their deferred compensation plan nor is ownership in such investments generally attributed to a plan's participants. Rather, a participant generally has a contractual right to a certain amount of money and may also be entitled to a portion of any investment income generated by virtue of his participation in the plan. It is my opinion, therefore, that participation in a deferred compensation plan does not establish an ownership interest in a business. It is further my opinion that a declarant's participation in a deferred compensation plan valued in excess of $10,000 is not a "security" within the meaning of Schedule C and, therefore, does not need to be reported.

B. "Indirect" Ownership of Securities Must Be Disclosed

Question 3 also requires the disclosure of a declarant's indirect ownership interests in securities valued in excess of $10,000. You ask what the term "indirectly" means within the context of Question 3 and Schedule C. It is my opinion that the requirement that indirect ownership of securities be reported extends the disclosure requirement to situations where the declarant may not hold the securities in his own name but effectively owns and controls the securities. Indirect ownership triggering the reporting requirement would include instances where the securities are held in the name of a third party or other business or legal entity but significant attributes of ownership, such as a right of control or the right to receive income derived from the securities, are vested in the declarant.

C. Need to Report Investment of Retirement
Funds Depends on Ownership of Securities in Fund

You next ask what are the disclosure requirements for the investment of retirement funds.

Schedule C requires the disclosure of securities owned by a declarant valued in excess of $10,000. The characterization of a fund as a "retirement fund" does not, in my opinion, affect the reporting requirement. If a declarant effectively owns securities that are part of a retirement fund, it is my opinion that such securities must be reported if valued in excess of $10,000. If, on the other hand, the retirement fund is managed by a third party and investment control is not vested in the declarant, such as is the case with the Virginia Supplemental Retirement System, it is my opinion that the declarant need not report his interest in such a retirement fund in Schedule C.

D. Commodity Futures Contracts to Be Reported at Fair Market Value on Last Date of Reporting Period

You also ask how a commodity futures contract should be valued for purposes of disclosure under Schedule C.

It is my opinion that a commodity futures contract held by a declarant should be reported on Schedule C at its fair market value on the last date of the reporting period.

E. General Partnerships Not "Securities"

You next ask whether a declarant's interest in a general partnership should be disclosed in Schedule C. You note that the definition of "securities" specifically includes limited partnerships. [Page 25]

The Code of Virginia distinguishes the legal effect, rights and obligations incident to general partnership interests from those incident to limited partnership interests. See Ch. 1 of Tit. 50 ("General Partnerships") and Ch. 2.1 of Tit. 50 ("Virginia Revised Uniform Limited Partnership Act"). Based on the specific language of Schedule C and the significant legal distinctions between a general partnership interest and a limited partnership interest, it is my opinion that a declarant's general partnership interests do not constitute "securities" within the meaning of Schedule C and, therefore, do not need to be reported in Schedule C.

F. Second Deed of Trust on Real Property Not a "Security"

You ask whether a declarant must disclose on Schedule C a second deed of trust on property when this deed of trust has a value in excess of $10,000.

The form and effect of deeds of trust are the subject of Art. 2, Ch. 4 of Tit. 55, §§ 55-58 through 55-66.7. Section 55-59 specifically provides for the duties, rights and obligations of the parties to a deed of trust to the extent the instrument itself does not alter the general statutory provisions. It is my opinion, based on the language of Schedule C and the legal effect of a deed of trust, that a deed of trust is not a "security" within the meaning of Schedule C and, therefore, does not need to be reported in that schedule.

G. Stock Options Are "Securities"

You next ask whether stock options should be disclosed on Schedule C. It is my opinion that a stock option is a "security" within the meaning of Schedule C and, therefore, should be reported if the value of the stock option exceeds $10,000. It is further my opinion that a stock option should be valued at its fair market value on the last day of the reporting period.

H. Spendthrift Trust Is "Trust"

Your final question concerning Schedule C is whether the definition of the term "trust" applies if the trust is a "spendthrift" trust.

Section 2.1-639.15 defines the term "trust" in a manner which requires that the ownership of trust assets be imputed to a declarant when the declarant is the beneficiary of a trust. If the declarant has a proportional interest in a trust, the ownership of that same proportion of the trust's assets is imputed to the declarant.

A spendthrift trust is authorized by § 55-19. A spendthrift trust generally provides for the beneficiary's support and maintenance, but the beneficiary's ability to voluntarily or involuntarily alienate the trust's assets is restricted and the trust's income and corpus are protected from the beneficiary's creditors.
The definition of the term "trust" in § 2.1-639.15 imputes the ownership of trust assets to a declarant-beneficiary. This definition does not limit the imputed ownership based on restrictions placed on the beneficiary's ability to alienate the trust's assets. It is my opinion, therefore, that the definition of the term "trust" applies to a spendthrift trust.

III. Schedule D — Reporting of Payments for Talks, Meetings, and Publications

Schedule D requires the disclosure of each source from which a declarant received during the past 12 months lodging, transportation, money or thing of value (excluding meals or drinks coincident with a meeting) with a combined value exceeding $200 for the declarant's presentation of a single talk, participation in one meeting, or publication of a single work in the declarant's capacity as an officer or employee of a governmental agency. Pursuant to a 1988 amendment to § 2.1-639.15, a declarant must report payments or reimbursements by an agency only for meetings or travel outside the Commonwealth. See Ch. 849, 1988 Va. Acts 1704, 1706. Payments by a governmental agency to a declarant, therefore, are not required to be reported if the meeting attended was held in Virginia.

A. Two Hundred Dollar Limit Is Limit "Per Meeting"

You first ask whether the $200 limit is an aggregate limit for each source or a "per meeting" limit.

Schedule D expressly provides that the $200 limit refers to the declarant's presentation of a "single talk" or participation in "one meeting." It is my opinion, therefore, that the $200 limit is a per meeting limit and not an aggregate limit for each source of payment. For example, if a county employee is reimbursed separately for two meetings attended outside the Commonwealth and both reimbursements are in an amount less than $200, neither reimbursement is subject to reporting in Schedule D.

B. Direct Lodging Payments Must Be Reported

You next ask whether a declarant must report a payment in excess of $200 which is made by the county directly to a hotel for the declarant's lodging.

Schedule D requires the reporting of lodging and transportation costs received by a declarant during the reporting period. It is my opinion, therefore, that the direct payment of lodging costs by the county still would be subject to disclosure by the declarant if such costs exceed $200 for a single meeting held outside Virginia.

C. Declarant May Deduct Estimated Meals Cost from Lodging Payments for Combined Lodging and Meals

You also ask whether a declarant should deduct the cost of meals from lodging payments to be disclosed on Schedule D when a rate offered by a hotel is a daily or multiday rate, which includes both room and meals.

The cost of meals and drinks coincident with a meeting are not reportable in Schedule D. It is my opinion, therefore, that a declarant may deduct the estimated cost of meals included in a daily or multiday lodging rate from lodging payments to be reported on Schedule D.

D. Not All Publication Royalties Must Be Reported

You ask whether a declarant is required to disclose royalties received from the publication of a book prior to his employment with the county.

Schedule D requires the disclosure of payments received by a declarant for the publication of a work in the declarant's capacity as an officer or employee of a governmental agency. In the facts you present, the publication occurred prior to the declarant's employment with the county. The book's publication, therefore, would not be in the declarant's capacity as a county employee. It is my opinion, therefore, that a declarant is not required to disclose royalties received from the publication of a book prior to his employment with the county, even though these royalties are received during the declarant's employment with the county.

You next ask whether a declarant must disclose royalties received from the publication of a book which is published while he is employed by the county and which is related to the subject matter of his employment. [Page 27]

As noted above, the disclosure requirement for publications applies when the publication of the work is in the declarant's capacity as an officer or employee of a governmental agency. In this instance, although the publication of the book takes place
while the declarant is employed by the county and the subject matter is related to the declarant's employment, the publication would be in the declarant's official capacity only when the publication of the book was part of the declarant's official duties or the book was prepared using county resources or during the work hours of the declarant with the county. It is my opinion, therefore, that the declarant is not required to disclose royalty payments he receives in the circumstances you present, unless the publication of the book is a part of his employment with the county or the book is prepared using county resources or on county time.

E. Certain Payments and Reimbursements for "Participation in Meetings" Must Be Reported

You ask whether "participation in a meeting," as used in Schedule D, includes attendance at training conferences, continuing professional education conferences, or conferences sponsored by organizations such as the Virginia Municipal League and the Virginia Association of Counties.

It is my opinion that all of the conferences you describe involve "participation in a meeting" within the meaning of Schedule D. Payments and reimbursements by a declarant's own agency related to a declarant's participation in these conferences, therefore, are reportable in Schedule D, if such payments or reimbursements exceed $200 and the conference is held outside Virginia.

You next ask whether legislative activities performed by local government officers and employees which involve full-time, or nearly full-time, attendance at the General Assembly are included in the category of activities for which travel reimbursement is reportable on Schedule D.

It is my opinion that the legislative activities which you specify do not constitute participation in meetings which will trigger the travel reimbursement disclosure requirement. The travel reimbursement disclosure requirement, in my opinion, does not extend to all travel an officer or employee may undertake on behalf of his governmental agency. Rather, the disclosure requirement is directed at instances where some sort of formal gathering, meeting or conference is held. For example, if a county employee travels to another state to meet with officials from that state to discuss the appropriateness of a computer software program for the employee's office, that meeting would not trigger the disclosure requirement. On the other hand, if a county employee attends a professional conference in another state, the disclosure requirement applies. Travel reimbursements by an officer's or employee's own agency for activities related to a session of the General Assembly generally would not require travel outside the Commonwealth of Virginia and, therefore, would not be subject to disclosure in any event.

IV. Schedule E — Reporting of Gifts, Travel, and Business Entertainment

Schedule E requires the disclosure of each business, governmental entity, or individual which furnished a declarant with money, gifts, or other things of value, whose total value exceeded $200 during the past 12 months and for which the declarant neither paid nor rendered services in exchange. Schedule E excludes from the reporting requirement business entertainment related to a declarant's private profession or occupation. Gifts and other things of value received by a declarant also are excluded when given by a relative or personal friend for reasons clearly unrelated to the declarant's public position.

A. Presentation of Speech May Constitute Rendering of Services

You first ask, if a declarant is asked to speak at a dinner or a conference and receives either a free meal or reimbursement for his travel expenses, whether the declarant, by virtue of his speech, is considered to have "rendered services in exchange" for the meal or travel expenses.

In my opinion, a free meal or travel reimbursement paid to a declarant for the presentation of a speech would not be subject to disclosure under Schedule E when the declarant attended the meeting or dinner for the purpose of presenting the speech. In such circumstances, it is my opinion that the declarant has rendered services, i.e., presented the speech, in exchange for the meal or travel reimbursement exceeding $200 in value.

B. Gifts from Personal Friends Must Be Reported

You next ask what test should be used to determine whether a gift from a personal friend is "clearly unrelated to [the declarant's] public position" within the meaning of Schedule E.

Whether a gift received by a declarant is a personal gift not subject to disclosure in Schedule E, in my opinion, should be determined based on the circumstances of the gift — specifically, the identity of the donor, the relationship between the donor and the declarant, the timing of the gift, and whether there is any relationship between the business activities of the donor and the
declarant's public duties. It is my opinion that a gift is not required to be reported when the facts demonstrate that the declarant would have received the gift regardless of his public position. When the circumstances suggest a relationship between the gift and the declarant's public position, even when the relationship is relatively distant, it is my opinion that the gift is required to be disclosed in Schedule E.

V. Schedule F — Reporting of Business Interests

Schedule F requires the disclosure for each declarant owned or family owned business (including rental property, a farm, or consulting work), partnership or corporation in which the declarant or a member of his immediate family, separately or together, own an interest having a value in excess of $10,000. Business interests held in trust also must be reported.

You ask whether the disclosure requirement of Schedule F is triggered by the value of the declarant's business interests or the gross income received from the business. The 1988 amendments to Schedule F clearly demonstrate that the disclosure requirement of Schedule F is triggered by a declarant's business interests exceeding $10,000 in value, rather than the gross income generated by the business interests. 1988 Va. Acts, supra, at 1710. It is my opinion, therefore, that the disclosure requirement in Schedule F is triggered by the value of the declarant's business interests.

VI. Schedule G-3 — Reporting of Payments for Representation

Schedule G-3 requires the disclosure of the types of businesses that operate in Virginia to which services were furnished by the declarant or persons who have a close financial association with the declarant and for which total compensation in excess of $1,000 was received during the past 12 months. Schedule G-3 must be completed by officers and employees of both state and local governmental agencies. Schedules G-1 and G-2 impose additional reporting requirements applicable only to officers and employees of state governmental agencies. It is my opinion, therefore, that officers and employees of local governmental agencies should complete Schedule G-3 without reference to the reporting requirements of Schedules G-1 and G-2.

You ask what relationship is required to come within the meaning of a "close" financial association referred to in Schedule G-3.

It is my opinion that the disclosure requirement concerning a close financial association refers only to those individuals with whom the declarant shares significant financial involvement in situations where the declarant would reasonably be expected to be aware of the individual's business activities and the declarant would have access to the necessary records either directly or through the close financial associate. For example, it is my opinion that co-ownership of rental property, standing alone, would not establish a close financial association which requires a declarant to disclose the representation activities of his co-owners when such representation is unrelated to the limited financial relationship between the declarant and the coowners. On the other hand, it is my opinion that a declarant would have a close financial association with members of a law firm if the declarant's spouse was a partner in the law firm. In the law firm example, it is my opinion that the declarant is required to disclose the types of businesses to which legal services were rendered by the law firm according to the provisions of Schedule G-3.

VII. Schedule H-2 — Reporting of Real Estate for Local Officers and Employees

Schedule H-2 requires officers and employees of local governmental agencies to disclose real estate located in their county, city, or town, and any contiguous county, city, or town, other than the declarant's personal residence, in which the declarant or a member of the declarant's immediate family holds an interest, including a partnership interest, option, easement or land contract valued at $10,000 or more. Schedule H-1 imposes a parallel reporting requirement on officers and employees of state governmental agencies for real estate owned or interests in real estate located in Virginia.

You ask whether a declarant must list real estate located in a contiguous county that is valued at $10,000 or more if the contiguous county is in another state or whether Schedule H-2 applies only to property interests within Virginia. You note that the reporting requirement in Schedule H-1 is limited expressly to property interests in Virginia while no such limitation appears in Schedule H-2. It is my opinion that, in the absence of a similar limitation in Schedule H-2, a declarant is required to disclose property interests in contiguous jurisdictions under Schedule H-2, even when such property is located outside Virginia.

FOOTNOTES

1 Section 2.1-639.15 sets forth the "long" financial disclosure form to be used for filings required by §§ 2.1-639.13(A) and (D) and 2.1-639.14(A) and (D). Section 2.1-639.15:1 was added by the 1988 Session of the General Assembly and sets forth the "short" financial disclosure form which is to be filed by certain state and local officers and employees rather than the "long" form required by § 2.1-639.15.

Pursuant to §§ 2.1-639.13(A) and 2.1-639.14(A), the "long" financial disclosure form must be filed by statewide elected officials, all judges, members of the State Corporation Commission, Industrial Commission, Commonwealth Transportation
Board, and State Lottery Board, persons in offices or positions of trust or employment in state government so designated by the Governor, persons in positions of trust or employment in the legislative branch of state government so designated by the joint rules committees of the General Assembly, members of local governing bodies in localities with populations in excess of 3,500, and persons designated to file by ordinance of a local governing body who occupy positions of trust appointed by such body or positions of employment with the locality.

Pursuant to § 2.1-639.13(B), nonsalaried citizen members of state policy and supervisory boards, commissions and councils, as designated in Ch. 1.4 of Tit. 9, other than the Commonwealth Transportation Board and the State Lottery Board, are required [Page 30] to file the "short" disclosure form, as are nonsalaried members of other state boards, commissions and councils who are designated by the Governor to file an annual financial disclosure form. Pursuant to § 2.1-639.14(B), local governing bodies may designate which, if any, nonsalaried citizen members of local boards, commissions and councils must file a financial disclosure form. If such members are required to so file, they must file the "short" form set forth in § 2.1-639.15:1.

2 Question 7 of the Statement of Economic Interests in § 2.1-639.15 requires the disclosure of a family owned business regardless of the value of the business, while Schedule F requires completion for family owned businesses only when the ownership interest of the declarant or member of the declarant's immediate family exceeds $10,000.