

The Virgin Islands Consortium

Financial Disclosure: An Independent Attorney General Is Essential

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By way of introduction and background I was a prosecutor for 36 years retiring in 2011 with 32 of those years as a federal prosecutor. From 2005 through 2009 I served as the First Assistant and the acting and interim U.S. Attorney in the United States Virgin Islands. I teach Criminal Procedure at the University of St. Thomas Law School in Minneapolis, Minn. Obviously, I write only as a private citizen and in no official capacity to express an opinion on the financial disclosure statutes of the Virgin Islands and the absolute need for an independent Virgin Islands Attorney General.

There are two types of financial disclosure laws in the Virgin Islands: A campaign financial disclosure law and a government official annual financial disclosure law. The

Virgin Islands Attorney General (VIAG) is ultimately responsible for enforcing both. Without enforcement by an independent VIAG both laws are meaningless. As boring as these laws are to read, they are essential to honest government because money corrupts elections and government. Voters everywhere need to know the law and use it to protect their rights to free and fair elections and to honest government. Enforcement of the law is everyone's responsibility. To enforce it you must first read what the law provides.

Enforcement of these laws is simple. Candidates, contributors, and public officials are required by certain dates to file complete financial disclosure and/or campaign disclosure reports. Either they file complete reports or they do not. File on time or you commit a crime. There are many excellent deputy attorney generals who could easily investigate and prosecute these types of cases. They need an independent AG who directs and supports that these cases be investigated and prosecuted.

Campaign Financial Disclosure Before Elections

The purpose of the financial disclosure statutes found at 18 VIC 901 et. seq. is that *prior* to the election voters will know the source of the candidate's contributions and how the money was spent. Section 905 requires the filing of reports by candidates and political committees. Section 906 requires a report by any individual who, independent of a political committee, makes or receives contributions or expenditures in an aggregate amount over \$500 during a calendar year, which is for the purpose of advocating the election or defeat of a candidate. Qualifying contributions and expenditures within the last 30 days before the election must be reported to the supervisor of elections within 48 hours of making the contribution or expenditure.

Contributions Are Limited to \$1,000 Per Election-Per Candidate

Section 907 provides that no person shall make contributions to any candidate or his authorized political committee with respect to any election which, in the aggregate, exceed \$ 1,000 per election. Any person who gives more than \$1,000 per election, per candidate is committing a criminal offense.

Administration of the Election Disclosure Law

Section 909 sets out the administration of the disclosure requirements and gives the supervisor of elections broad, but limited, powers to administer the requirements of the statute. Nothing in the statute gives the supervisor, the board of elections, or the VIAG the power to grant extensions of time that override the Legislative directives concerning when reports must be filed. The board of elections, on its web site, has specifically stated that no extensions of filing dates are allowed.

Citizen Complaints

Section 910 (a) provides that any person who believes a violation of this statute has occurred may file a complaint with the supervisor. Section 910 (b) establishes non-discretionary duties upon the supervisor. Section 910 (c) provides that upon the filing of a complaint, if the supervisor "has **reason to believe** a violation of this chapter has occurred...the supervisor **shall** conduct an investigation." (Emphasis added). This is an important provision, as the Legislature has mandated that the Supervisor must conduct an investigation when the very-low standard of "reason to believe" is met. "Reason to

believe” is less than probable cause and the U.S. Supreme Court has interpreted it as less than “reasonable suspicion.” The test is an objective test, not a subjective one. Do the facts objectively support a “reason to believe?” If they do, under this objective test, an investigation must be conducted and the subject of the investigation may provide innocent explanations if there be any. The supervisor of elections, after investigation, needs only probable cause to take enforcement action. This is important to the administration of the statute because disclosure before the election is the Legislature’s primary objective, and enforcement must move forward swiftly and not await a higher level of proof.

Section 910 (g) provides that the Attorney General of the Virgin Islands **shall** assist the supervisor in enforcing the disclosure laws. The AG’s duty is mandatory, not discretionary.

Private Cause of Action: The Most Important Provision for Enforcement and Accountability

Section 910 (d) provides: “Nothing in this section shall be construed to prevent any person aggrieved by another’s violation of this chapter from instituting civil proceedings in any court of competent jurisdiction.”

This 910 (d) provision is the most important provision in VI election disclosure statutes. However, it does not appear to have been utilized by Virgin Islanders. The VI Legislature has expressly provided that “any person aggrieved by another’s violation of the chapter” may bring a private suit. This is not a situation where the standing to sue (the right to sue) is dependent on an “implied right” to bring a civil action, as is often the case with such statutes. The VI Legislature has expressed the specific legislative intent that a civil action by “any person aggrieved by another’s violation of this chapter” is recognized. If officials do not enforce the law, citizen’s may do so by private lawsuit.

The statute does not define who is within the phrase: “any person aggrieved by another’s violation.” It may include the public for whose benefit the statute is intended, or a candidate who complies with the law against a candidate who does not comply, or those who file a complaint under Section 910(a).

Failure to comply with the campaign disclosure statute or 3 V.I.C. 1105(d) may raise an issue whether a person running for office is a qualified “candidate.” What happens if they did not comply and get elected? Could their election be challenged because of a failure to file which is probable cause for a criminal offense? Is failure to file a disclosure a fraud on the public and a crime of moral turpitude?

Who Will Go to Jail: No One, It Seems

Who will go to jail for failing to comply with the Virgin Islands election financial disclosure statutes? The realistic answer appears to be: no one. If anyone has ever been prosecuted by local authorities, let alone convicted, for violating the campaign disclosure statutes in the 25 years since they were passed in 1990, this writer will gladly stand corrected. VI public officials appear to have granted themselves amnesty from audit, investigation and prosecution for failure to comply.

Public officials, the supervisor of elections and VIAGs, who are charged with enforcing the election disclosure law, should consider that the criminal penalty provisions in Section 911 appear to apply to them if they fail to perform the duties with which they are charged. It provides:

“Notwithstanding any other penalty limits of this chapter, any person who knowingly and willfully violates any of the provisions of this chapter shall be fined an amount not more than \$5,000 or three times the amount of any contribution or expenditure involved in such violation, whichever is greater, or imprisoned for not more than one year, or both.”

“Any person” is a very broad term. The term includes the obvious persons, candidates, donors, and officials of political committees. The term “any person” also includes those public officials charged with the duty of administering and enforcing the requirements of the statute.

Section 909 imposes duties for the administration of the disclosure law on the office of the supervisor of elections. In particular, Section 909 (c) imposes very specific duties that the supervisor shall perform. The legislature has mandated that the supervisor perform these duties and there is no discretion granted to the supervisor, the board of elections, or the Attorney General to waive the duties, or extend the times within which those duties must be performed. The legislative imperative is simple, do as we direct, when we direct, or you violate the statute and commit a crime.

What is the historical record of how supervisors of elections and VIAGs have performed their duties?

Here are the duties imposed on the supervisor of elections with [parenthetical comment]:

1. Have the supervisors of elections, in each district, maintained a conspicuous place for the filing of reports? [“Conspicuous” means standing out so as to be clearly visible. Not some locked file cabinet in the backroom of the board's offices. These reports are public and not secret.]
1. Have the supervisors of elections established a filing, coding, and cross-indexing system and indices on a candidate-by-candidate basis, of all expenditures and contributions for each candidate and does the supervisor periodically issue the indices on a timely, pre-election basis? [“Issue” means publication.]
1. Have the supervisors made the reports filed available to the public for inspection not later than the end of the second day following the day during which a report was received? [A long dilatory public records request process is not approved by this statute. Immediate, pre-election disclosure is required.]
1. Have the supervisors permitted the copying of any report by hand or by duplicating machine?
1. Have the supervisors preserved the reports filed for not less than six years from the date of receipt? [If so, where are those records now?]

1. Have the supervisors prepared and published from time to time in the newspaper of general circulation in the United States Virgin Islands the names of candidates not in compliance with this chapter? [If so, in which newspaper and on which dates were they published?]
1. Have the supervisors made audits, conducted field investigations, and held hearings to determine compliance with the law? [The supervisor has an affirmative duty to do each of these actions to ensure compliance, not sit back and wait for a complaint. Audits and investigations induce compliance.]
1. Have the supervisors complied with the duty to report apparent violations to the Attorney General? [If a candidate ran for office and required reports were not filed, that is the definition of "apparent."]

The VI campaign financial disclosure statute is fairly comprehensive. Some improvements could include: mandating publication on the web upon filing; increasing the penalty to a felony; requiring a mandatory minimum sentence; prohibiting the court from suspending the sentence or giving probation; and providing that any citizen who prevails in a private suit for enforcement is entitled to have the costs of their litigation paid for personally by the individual, candidate or public official. Finally, it should be provided that any candidate who does not timely comply with 18 V.I.C. 901 et. seq. and 3 V.I.C. 1105 (d) prior to the date of the election shall be removed from the ballot and is not a qualified candidate and votes for such a person shall not be counted. Money corrupts elections and it must be prevented.

Conflicts of Interests and Candidate Disclosure

Candidates for VI public office have another pre-election duty of financial disclosure and failure to timely comply with this duty is a felony. Title 3 V.I.C. 1105 (d) provides:

"Each candidate for public office shall file with the supervisor of elections within 10 days after filing his nomination petition or papers as a public record, a statement identical to the statement required by subsection (a) of this section."

Subsection (a) of Section 1105 requires the filing of a financial disclosure statement. Thus, every candidate for elective office in November 2014 has either filed such reports 10 days after filing their nomination petitions or they have not. It is a very simple question: who filed and who did not? The supervisor of elections is responsible for receiving these reports, knows who was required to file, who filed and who did not. The law is clear. The disclosure is a public record, not a secret.

Are there any candidates in the November 2014 election who did not comply with this provision of the law? If so, has the supervisor of elections reported them to the AG as is their duty? No public official has the authority to extend the filing date under 1105(d). There are no "do-overs." No mulligans. Integrity of elections is paramount in a free society. Either candidates complied with this law as required, when required, or they did not. Voters have a right to know who did not comply. Prosecutions by an independent VIAG ensures compliance for the 2016 election cycle.

VI Officials Financial Disclosure Law-File by April 30th or Commit a Felony

Title 3 VIC 1100 et. seq. establishes that in order to ensure the highest standards of ethical behavior of public officials, the VI Legislature mandates that certain public officials file financial disclosures with the VIAG every year by April 30. These reports are required for: (1) every statutory officer; (2) every judge of the Superior Court; and (3) every salaried appointed officer of a public agency exempt from the Personnel Merit System. New courts and officers should be added to this statute as created. All VI officials should ensure they comply as failure to file is a felony offense and no extensions are allowed.

The report is divided into two parts. Part I is a public report. The statute provides for the public to have access to Part I. Nothing in the statute authorizes this portion of the report to be kept secret from the public nor to be subject to a protracted and intentionally difficult public records disclosure request.

Part II provides that the person filing it shall seal Part II of the report and it is to remain sealed and secret unless the VIAG pursuant to his investigative authority determines that the examination of such information is essential in an official investigation. Exactly how the VIAG, who has never seen the information in Part II, can determine it is "essential" without any knowledge of what is in the report is not clear. It may be possible, but given the public interest in honest government, why should the information be secret and not reviewed by anyone? The current statute provides that when the person filing the report is no longer required to file such reports, the AG is required to return to the filer all sealed Part II reports. This of course defeats any possibility that the AG could prosecute a false filing during the statute of limitations period, which would extend beyond the termination of the reporting requirement. This provision is nonsensical, given the important public interest in avoiding conflicts of interests by public officials. There is no provision for Part I, which is a public record, to be returned to the filer. These should still be on file and available to the public. Someone should look.

The VI Legislature Should Enact A New Public Financial Disclosure Law

The information which must be provided pursuant to Section 1105, by today's standards of public financial disclosure statutes, is inadequate and the VI Legislature should consider modernizing the requirements. A new law should require complete public financial disclosure and no secrets. The Legislature should require that the reports be posted on a web page immediately upon filing to prevent bureaucratic roadblocks that interfere with public access. Those who choose to enter public life owe the public a guarantee that they do not have the slightest conflict of interest in the performance of their duties. A new law should increase the penalties imposed on public officials charged with enforcing these statutes who fail to do their duty. A private cause of action to enforce the law should be created.

The VI Inspector General Should Audit Compliance Immediately

The VI/IG and DOI/OIG should immediately audit compliance with these statutes by the candidates and the public officials, and those charged with enforcement.

Citizen Enforcement by Private Lawsuit-VIAG's Conflict of Interest

If the VI public officials fail to enforce the law then with proper legal counsel private citizens should consider, pursuant to 18 V.I.C. 910(d), filing a private suit seeking

enforcement. The VIAG's duty is to the public, not to individual public officials. The VIAG must serve only the public and cannot serve two masters. The VIAG must stand apart from all other VI government officials, especially a governor, as it is the VIAG's sworn duty to prosecute any government official who violates the law. In the real world, prosecuting someone who can fire you on the spot is impossible. That must change.

The VI Executive Branch structure was established in 1954 when the VIAG had minimal authority in criminal cases. Under the current ROA, no one has the authority to prosecute a VIAG if there is an alleged violation of "local" law by the person occupying that office. Would a VI deputy AG who works for the AG vigorously investigate and prosecute their boss? A similar problem arises if a VIAG has a personal conflict of interest, especially a sever conflict that requires the entire VIAG office be recused. Who impartially handles the case? Procedures for resolutions of conflicts of interests are non-existent.

It is clear from this review of the VI disclosure statutes that the integrity of the election system and government depends on the independence of the VIAG. In the end, it is the VIAG who either forces everyone to obey VI laws or does not. An independent VIAG is essential to the integrity of the election process and the operation of the VI government. The fact that the Revised Organic Act gives a VI governor absolute power over the VIAG guarantees that the VIAG cannot be an independent enforcer of the law. The ROA must be changed. The VIAG must be independent to enforce the law impartially.