

# 2010 AASBO SUMMER PRE-CONFERENCE

# Ethics/Conflicts of Interest/Gratuities and Other Related Legal Issues

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# DENISE BAINTON

# INTRODUCTION

Inappropriate relationships or contacts between school officials and vendors may fall into any one or more of the following categories:

- Unlawful (i.e., violating one or more statutes), with potential criminal consequences
- Unlawful (i.e., violating one or more statutes), with potential civil consequences
- Unlawful (i.e., violating one or more administrative regulations)

- Not unlawful, but violating district policies
- Not unlawful, but not best practice

# The Statutes

## A.R.S. § 38-503

A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

# A.R.S. § 38-503

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

# Definitions

“Employee” means all persons who are not public officers and who are employed on a full-time, part time or contract basis by [Arizona public entities] for remuneration. § 38-502(2)

# Definitions

“Relative” means the spouse, child, child’s child, parent, grandparent, brother or sister of the whole or half blood and their spouses and the parent, brother, sister or child of a spouse. § 38-502(9)

# Definitions

“Substantial interest” means any pecuniary or proprietary interest, either direct or indirect, other than a remote interest.

§ 38-502(11)

# Definitions

“Remote interest” means: [selected definitions]

(e) the ownership of less than 3% of the shares of a corporation—with restrictions on percentage of income from the corporation;

(f) reimbursement of actual or necessary expenses incurred in performance of official duty;

(g) that of a recipient of public services provided on same terms and conditions as other recipients not employed by the employee’s public entity employer

# Definitions—“Remote interest”

- (h) that of a public school board member when the relative involved is not a dependent as defined in § 43-1001, or a spouse
- (j) that of a member of a trade, business, profession or class of persons consisting of at least 10 members which is no greater than the other members

# Framework for Analysis

## § 38-503

Does a District employee or Board member who is participating in a decision, contract, sale, service or purchase have a pecuniary or proprietary interest in that decision, contract, sale or purchase? Does a relative have such an interest?

# A.R.S. § 38-504: Prohibited Acts

C. A public officer or employee shall not use or attempt to use the officer's or employee's official position to secure any valuable thing or valuable benefit for the officer or employee that would not ordinarily accrue to the officer or employee in the performance of the officer's or employee's official duties *if the thing or benefit is of such character as to manifest a substantial and improper influence on the officer or employee with respect to the officer's or employee's duties.*

# Framework for Analysis

## § 38-504

- Because of his/her position with the District, has a Board member or employee received a valuable thing or benefit that does not ordinarily accrue to the Board member or employee?
- Is the valuable thing or benefit such that it could substantially and improperly influence the Board member or employee with respect to his/her duties?

## A.R.S. § 38-505: Additional income prohibited for services

A. No public officer or employee may receive or agree to receive directly or indirectly *compensation* other than as provided by law *for any service* rendered or to be rendered by him personally *in any case*, proceeding, application, or other *matter which is pending* before the public agency of which he is a public officer or employee.

# Definitions

"Compensation" means money, a tangible thing of value or a financial benefit. § 38-502(1)

# Framework for Analysis

## § 38-505

Has the Board member or employee received or agreed to receive any compensation (other than as provided by law) for a service in any case, proceeding, application or other matter pending before the District?

# TODD JAEGER

# What is a “conflict”?

- May depend upon the origins of one’s definition –
  - Legal (e.g., 38-501, et. seq.)
  - Ethical (“smell tests”)
  - Political
- Arizona’s legal definition of conflict is more narrow than many might perceive on an ethical or political basis.



# The purpose of the laws.

- Purpose is to remove or limit possibility of personal influence upon an official's decision.
  - Yetman v. Naumann, 16 Ariz.App. 314, 492 P.2d 1252 (Az.App. 1972).
- Law was passed to protect public from self-dealing by public employees.
  - Maucher v. City of Eloy, 145 Ariz. 335, 701 P.2d 593 (Az.App. 1985).



# The meaning of the laws.

- Do not prohibit the *mere potential* or *appearance* of conflict, as defined.
- Mandate the *disclosure* of any potential conflict, as defined.
- Do prohibit acting in a manner that makes the *potential* conflict *real* – participating in the purchasing decision in any manner
- Set requirements to avoid *real* conflicts



# Avoiding *Real* Conflict

- Make both *potential* and *real* conflicts known.
- “Make known” means the filing of a paper which is signed by a public officer or employee and which fully discloses a substantial interest or the filing of a copy of the official minutes of a public agency which fully discloses a substantial interest. The filing shall be in the special file established pursuant to [§ 38-509](#).

-- A.R.S. § 38-502



# Avoiding *Real* Conflict

- Laws relating to conflicts of interests of public officers and employees do not allow the school district to do business with a board member or employee (with substantial interest) through any means other than public competitive bidding.  
Op. Atty. Gen. No. 179-133.



# Examples – Potential v. Real

- Principal of Namesake High School is married to salesperson for largest school textbook manufacturer in America. Real?
- Factors –
  - Does the textbook company do business with Namesake?
  - Does the principal play any role in textbook decisions?
  - Does the spouse receive any compensation?



# Examples – Potential v. Real

- How does Namesake Principal avoid the conflict from becoming real?
  - Disclose, disclose, disclose – just in case.
  - Confirm the spouse's interests in business with the District.
  - Ensure principal plays no role in decision to buy textbooks if spouse has substantial interest.
  - All procurements of texts are bid if spouse has substantial interest.



# Examples – Potential v. Real

- Director of Facilities for Anytown School District has lots of friends in the equipment business from his days in the trades.
- Anytown needs to buy some equipment. Director of Facilities will decide where to buy.
- Potential or real conflict?



# Examples – Potential v. Real

- Real conflict does not exist unless there is a pecuniary or proprietary interest, by which a person will gain or lose something, as contrasted to general sympathy, feeling, or bias.
  - Yetman v. Naumann, 16 Ariz.App. 314, 492 P.2d 1252 (Az.App. 1972).



# Examples – Potential v. Real

- But, what if...
  - The vendor that Facilities Director chooses to buy from sends him a power tool of some type every year for Christmas. (They are good, old friends after all).
    - Potential or real?
  - Does it make a difference if there is an explicit *quid pro quo* arrangement?
    - Potential or real?



# SUSAN MYERS

# Attorney General Investigation

Allegations that a school district employee accepted gifts from a vendor may lead to an Attorney General procurement and/or antitrust investigation.

## Sources of complaints:

- Competing vendors
- District employees
- District self-reporting (A.A.C. R7-2-1084)
- Arizona Department of Education/School Fraud Hotline (1-877-737-4752)
- Arizona Auditor General
- U.S. Department of Education/Office of the Inspector General

# Investigation:

- Public Records Requests to school district
- Civil Investigative Demands (CID) (subpoenas) to vendors
- Examinations Under Oath (EUOs) (depositions)

Both the School Procurement Code and the Uniform Antitrust Act aim to protect and promote competition and ensure that vendors are competing on a fair and level playing field.

- The School Procurement Code (A.A.C. R7-2-1001 *et seq.*) maximizes competition, provides increased public confidence, and ensures the fair and equitable treatment of all persons who deal with public procurement entities.
- The Uniform Antitrust Act (A.R.S. § 44-1401 *et seq.*) protects competition by prohibiting contracts, combinations or conspiracies used to restrain trade or establish monopolies.

# Civil Liability

If a school district's relationship with a vendor has resulted in procurement or antitrust violations, the school district could be subject to monetary penalties and injunctions.

A.R.S. § 15-213(G); A.R.S. § 44-1407

- Injunctions could include requiring additional training and monitoring, special audits, and additional compliance reports to the Attorney General's Office and the Auditor General.

# Civil Liability

A school district employee who accepts gifts from a vendor may also violate procurement or antitrust regulations and could be personally subject to monetary penalties and injunctions, in addition to whatever penalties his/her employer imposes.

A.R.S. § 41-2616(A); A.R.S. § 44-1407

# Civil Liability

A school district employee who violates the School Procurement Code could be personally liable for the full amount of public monies paid and more.

- Any person who contracts for or purchases goods, materials and services in violation of the School Procurement Code is personally liable for recovery of all public monies paid, plus 20%, legal interest and costs. A.R.S. § 41-2616(A).

# Civil Liability

A school district employee who violates antitrust laws by participating in a contract, combination or conspiracy to restrain trade could be personally liable for up to \$150,000 per violation, plus costs and attorneys' fees, and injunctive relief.

A.R.S. § 44-1407.

# Criminal Liability

School district employees who conspire with vendors to violate procurement and antitrust laws or who accept gifts from vendors are also subject to criminal penalties.

A.R.S. § 41-2616(B); A.R.S. § 44-1416(C);  
A.R.S. § 38-510

# Criminal Liability

It is a class 4 felony to intentionally or knowingly contract for or purchase materials, services or construction pursuant to a scheme or artifice to avoid the requirements of the School Procurement Code.

A.R.S. § 41-2616(B)

# Criminal Liability

A person who enters into a contract, combination or conspiracy to restrain trade involving a government contract is guilty of a class 4 felony.

A.R.S. § 44-1416(C).

## Criminal Liability

Violating the conflict of interest laws – by, for example, accepting gifts from vendors – is a crime. A.R.S. § 38-510.

- Knowingly or intentionally violating A.R.S. § 38-503 to -505 is a class 6 felony.
- Recklessly or negligently violating these statutes is a class 1 misdemeanor.

Also, a person found guilty of violating A.R.S. § 38-503 to -505 shall forfeit his or her public employment. A.R.S. § 38-510(B).

# CHUCK ESSIGS

# Questions to be Addressed

- Legal or Not?
- Ethical or Not?

Ethical



Gray



Unethical



Highly Unethical

- Earning Trust
- Earning Respect

# AZ Republic Front Page

## June 20, 2010

- “Gifts to Stapley raise ethical flags”
- “Stapley says he committed no crime” and “no rules requiring disclosure or restrictions on how the money could be spent”

- “But ethics experts disagree”
- “Stapley’s actions were innappropriate”

# Tom Freestone longtime Stapley Friend

- “It’s an ethical issue”
- “It used to be people would run with honor”
- “Should not have to be laws to tell us what is right and what is decent”

- Maricopa County’s ethics policy calls for elected officials to maintain “unquestionable standards of high personal integrity”
- County Manager David Smith said supervisors must only “aspire” to follow the policy

# You Want to be an Example

- Example in the newspaper
- Example for your employees

# JANIS MERRILL

# Impacting the Integrity of the Procurement Process

One goal of public competitive procurement laws and regulations is to ensure that all prospective vendors compete on a level playing field. School districts should strive to eliminate bad practices that could tilt that level playing field.

When one prospective vendor is provided with an advantage that other prospective vendors are not provided, i.e. greater access to information and/or to public officials, that vendor may gain an advantage that other bidders do not have.

Therefore, public officials should avoid contacts with prospective vendors outside of the normal procurement/contract process unless all prospective vendors have the same access, i.e. booths at local, state or national conferences, or placing name on bidders list, or specific hours that are open to all.

# DAVID CANTELME

# The Flip Side of the Debate

**Can a District provide food and beverages to:**

- Employees or administrators called on to work overtime into an evening?
- Employees or volunteers coming in on a week day or holiday to do volunteer work for the District?



# The Flip Side of the Debate

## Issues to Consider

1. Legal authority to do so. Governing Boards have only the authority the Legislature expressly or impliedly has conferred on them.
2. Source of funds and limitations on the use of such funds.
3. Procurement rules for the purchase of food and beverages.
4. The gift-of-public funds clause.



# The Flip Side of the Debate

Attorney General Opinion I90-077

Question Presented

Can a District provide food and beverages to attendees of an insurance group trust meeting?



# The Flip Side of the Debate

## AG's Answer Via the Opinion

Yes, a District can provide food and beverages to attendees of an insurance group trust meeting.

The analysis depends on the post of duty.

- District can provide subsistence, including food and beverages, for assignments away from the post of duty.
- For Governing Board members it is the member's residence.
- Same for an advisory committee, such as the insurance trust group.



# The Flip Side of the Debate

## Implications

1. No food for employees working late at their posts of duty.
2. No food for administrators working late at their post of duty.



# The Flip Side of the Debate

## Employee/Administrator: Satisfying the Gift of Public Fund Clause

1. If it's provided in the employment contract when the employment contract is signed.
2. If it's provided in a stipend when the stipend is signed.
3. If it's paid for by a federal grant and food and beverages fall within the terms of the grant.
4. If it's paid for by private donation and falls within the terms of the donation.



# The Flip Side of the Debate

## Volunteers

1. Representatives of the Superintendent or principal.
2. School purpose.
3. Direct Benefit back to the District.
4. Gift, Grant or Donation exceptions



# The Flip Side of the Debate

## Special Considerations

On donations: Mind possible conflicts of interest stemming from donations.

On procurement: Always follow procurement rules.

On Funding Sources: Always observe and special limitations.



# BILL MUNCH

# Potential Traps

Schemes and Traps

“The Wolf in Sheep’s Clothing”

Includes “Educational Conferences  
Sponsored by Selected Entities”

There is no such thing as a “Free” Lunch

# Potential Traps

## “THE BUSINESS PARTNERSHIP”

- Have written application process that all potential business partners use-sets parameters
- Process should not be administered by business or purchasing departments
- Partnership should never “touch” procurement process—complete segregation of the two
- Any “donations” of cash or goods by business partner must be approved by Governing Board

# Potential Traps

- Factory Visits
- “View the product in action” Visits
- Spending the Evening at the Ball Park
- Hitting the Golf Links with the “Crowd”

- You are the Business Manager of Big Cactus School District. The District is considering purchasing a new, state-of-the-art, computer system, but hasn't yet written the specs. The procurement could run in the millions of dollars. Mega-Vendor offers to pay your way to visit some out-of-state companies that have just installed its system. Mega-Vendor's rep, of course, would accompany you on the tour, and pay for your meals and other expenses.

# Potential Traps

- “Free Educational Opportunities”

A district employee of Big Cactus attends an education conference, walks through the vendor's exhibition room, and takes a free tote bag, mug and pen offered at three different vendor's booths.

Big Cactus has already purchased Mega-Vendor's computer system. (The procurement was completely on the "up and up.") Mega-Vendor now invites you to its Chicago home office for training (at no cost to the District). There might even be a round or two of golf thrown in.

# Potential Traps

- Vendor “face time”
- Drop-in visits by vendors or potential vendors
- Why are they giving you what they are giving you?

You are on the Board of Big Cactus School District. You are at a national conference. Mega-Vendor, from whom Big Cactus already has purchased computers, has a hospitality suite at the hotel. Anyone at the conference may go to the hospitality suite for a drink and munchies (not my Bill Munch's kids).

Would the answer be different if Big Cactus had not yet purchased Mega-Vendor's product, but was currently in the procurement process?

You are the Business Manager of Big Cactus School District. You are at a national conference. Mega-Vendor (a company that has a product that Big Cactus may need in the future) invites you and several select others from other school districts nationally to a big-ticket meal, including drinks, at an exclusive restaurant.

You are the Business Manager of Big Cactus School District. The District has an ongoing relationship with Mega-Vendor. Mega-Vendor's rep meets you at Denny's restaurant one day for lunch. She picks up the tab. Your part of the tab comes to about \$15.00.

A law firm hosts the meeting of an association of school district lawyers. The law firm provides free lunch to all association members who attend. Some of the members are in-house counsel of school districts that are represented by the law firm providing the free lunch. Is there really no such thing as a free lunch?

An electric company offers to provide new energy saving light ballasts at no cost to a district that it serves.

A school district plans a lovely breakfast and social hour at a high school site for all of its new teachers. The goal is to create goodwill and networking opportunities for its new staff. The District asks a current vendor under contract to pay for the cost of the breakfast.

A school board member regularly meets representatives of the school district's affiliate of the state's teacher association for breakfast. The local education association foots the bill.

A rural school district routinely buys small quantity of items from its local hardware store. Can the hardware store graciously donate items or cash to the school?

A school district is supported by a non-profit corporation governed by local boosters of the District. The nonprofit regularly solicits donations. It requests a list of vendors from the District's Director of Procurement for the purpose of soliciting donations from vendors.

A school district awards a contract to a construction firm to do work at several sites. The construction firm in turn donates learning materials to each site that it has been contracted work to perform. The firm further donates “prizes” for fundraisers sponsored by a nonprofit corporation governed by local boosters of the District.

# Potential Traps

- The “Ego Trip”

# The Ego Trip

An out of state organization with a fancy name that includes “leadership” and “research” sends the superintendent a letter saying she has been “nominated” to attend the organization’s next meeting at a resort near a beach. As a prospective “member,” the superintendent’s expenses will be paid for coming to the meeting.

# One out-of-state school district fell for it and issued a press release:

## “*Superintendent* nominated for *Organization* Membership”

Executive Director of the *Organization* Dr. *Blank*, wrote the following in issuing *Superintendent* the invitation:

“Your unique experience and level of accomplishment in your career has prompted this invitation. Only the brightest and best are given the opportunity. Our focus is on student success and your leadership development. We are seeking individuals of high potential who are willing to answer the call for leadership excellence.”

*Organization* pays for all expenses for those who attend this special by invitation only conference. There is no cost to the school district or taxpayer for Dr. *Superintendent*'s participation.

The out-of-state school district's press release went on to say:

“It is an honor to be selected, but I know that the reason such an organization seeks my participation is because of the outstanding educators in our district's classrooms whose daily work on the district's instructional model is increasing student learning and school improvement throughout *Name of the Public Schools*.”

A look at the organization's website reveals that its  
“purpose is to establish networks among top  
performing superintendents and  
educational solutions providers for the  
discovery and promulgation of world class  
educational practices.”

# Who really is paying for the superintendent's expenses?

Hint: Could it be those “educational solutions providers,” and are they trying to sell something?

# Conclusion

- Avoid the traps
- Know the law
- Follow the law
- Stay out of jail
- Keep your job
- Stay out of the newspaper
- Avoid bid protests