

Ethical Conduct and Avoiding the Appearance of Impropriety

Buddy Downs

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Disclaimer

These materials are intended for general information purposes only and do not constitute legal advice. The materials should not be used or relied upon as a substitute for a review of applicable statutes, regulations, rulings and court decisions.

The reader should consult legal counsel to determine how laws apply to specific situations. These materials were prepared in November, 2016, and, consequently, will not reflect changes in law subsequent to that date.

Key Terms and Definitions

- ➔ **Public servant** means a person who:
 - ➔ is authorized to perform an official function on behalf of, and is paid by, a governmental entity;
 - ➔ is elected or appointed to office to discharge a public duty for a governmental entity; or
 - ➔ with or without compensation, is appointed in writing by a public official to act in an advisory capacity to a governmental entity concerning a contract or purchase to be made by the entity.
- ➔ The term does not include a person appointed by the governor to an honorary advisory or honorary military position.

Key Terms and Definitions

- ➔ **Governmental entity** means:
 - ➔ the United States or any state, county, township, city, town, separate municipal corporation, special taxing district, or public school corporation;
 - ➔ any authority, board, bureau, commission, committee, department, division, hospital, military body, or other instrumentality of any of those entities; or
 - ➔ a state assisted college or state assisted university.
- ➔ **Governmental entity served by the public servant** means the immediate governmental entity being served by a public servant.

Key Terms and Definitions

- ➔ **Pecuniary interest** means an interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income or net worth of:
 - ➔ the public servant; or
 - ➔ a dependent of the public servant who:
 - ➔ is under the direct or indirect administrative control of the public servant; or
 - ➔ receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the public servant.

Key Terms and Definitions

- ➔ **Property** means anything of value. The term includes:
 - ➔ a gain or advantage or anything that might reasonably be regarded as such by the beneficiary;
 - ➔ real property, personal property, intangibles, money, labor, and services;
 - ➔ Written instruments otherwise of value to the owner ,including commercial instruments;
 - ➔ written instruments concerning labor, services, or property;
 - ➔ contract rights, choses-in-action, and other interests in or claims to wealth;
 - ➔ electricity, gas, oil, and water;
 - ➔ captured or domestic animals, birds, and fish;
 - ➔ food and drink;
 - ➔ Data.

Key Terms and Definitions

- ➔ **Dependent** means any of the following:
 - ➔ The spouse of a public servant.
 - ➔ A child, stepchild, or adoptee of a public servant who is:
 - ➔ unemancipated; and
 - ➔ Less than eighteen (18) years of age.
 - ➔ An individual more than one-half (1/2) of whose support is provided during a year by the public servant.

Official Misconduct (IC 35-44.1-1-1)

- ➔ A public servant who knowingly or intentionally:
 - ➔ commits a crime in the performance of the public servant's official duties;
 - ➔ solicits, accepts, or agrees to accept from an appointee or employee any property other than what the public servant is authorized by law to accept as a condition of continued employment;
 - ➔ acquires or divests himself or herself of a pecuniary interest in any property, transaction, or enterprise or aids another person to do so based on information obtained by virtue of the public servant's office that official action that has not been made public is contemplated; or
 - ➔ fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies;
- ➔ commits official misconduct, a Level 6 felony.

Example

- ➔ A county commissioner approaches a developer and agrees to secure favorable consideration on the developer's proposed waste-to-energy facility to be located in the county if the developer hires the commissioner's wife as a real estate broker with respect to the site of the facility.

Bribery (IC 35-44.1-1-2)

- ➔ Sec. 2. (a) A person who:
 - ➔ confers, offers, or agrees to confer on a public servant, either before or after the public servant becomes appointed, elected, or qualified, any property, except property the public servant is authorized by law to accept, with intent to control the performance of an act related to the employment or function of the public servant or because of any official act performed or to be performed by the public servant, former public servant, or person selected to be a public servant;
 - ➔ being a public servant, solicits, accepts, or agrees to accept, either before or after the person becomes appointed, elected, or qualified, any property, except property the person is authorized by law to accept, with intent to control the performance of an act related to the person's employment or function as a public servant;

Bribery (continued)

- ➔ A person who:
 - ➔ confers, offers, or agrees to confer on a person any property, except property the person is authorized by law to accept, with intent to cause that person to control the performance of an act related to the employment or function of a public servant;
 - ➔ solicits, accepts, or agrees to accept any property, except property the person is authorized by law to accept, with intent to control the performance of an act related to the employment or function of a public servant;
- ➔ commits bribery, a Level 5 felony.

Example

- ➔ Developer offers to pay each commissioner \$100,000 in exchange for the commissioner's vote in favor of a new combined agricultural feeding operation.
- ➔ Landfill operator pays health department inspector \$10,000 to falsify a groundwater contamination report.

Ghost Employment (IC 35-44.1-1-3)

- ➔ A public servant who knowingly or intentionally:
 - ➔ hires an employee for the governmental entity that the public servant serves; and
 - ➔ fails to assign to the employee any duties, or assigns to the employee any duties not related to the operation of the governmental entity;
- ➔ A public servant who knowingly or intentionally assigns to an employee under the public servant's supervision any duties not related to the operation of the governmental entity that the public servant serves;
- ➔ A person employed by a governmental entity who, knowing that the person has not been assigned any duties to perform for the entity, accepts property from the entity;

Ghost Employment (continued)

- ➔ A person employed by a governmental entity who knowingly or intentionally accepts property from the entity for the performance of duties not related to the operation of the entity;
- ➔ commits ghost employment, a Level 6 felony.
- ➔ Any person who accepts property from a governmental entity in violation of the statute and any public servant who permits the payment of property in violation of the statute are jointly and severally liable to the governmental entity for that property.

Ghost Employment (continued)

- ➔ The attorney general may bring a civil action to recover that property in the county where the governmental entity is located or the person or public servant resides.
- ➔ An employee who voluntarily performs services:
 - ➔ That do not promote religion, attempt to influence legislation or governmental policy, or attempt to influence elections to public office;
 - ➔ for the benefit of another governmental entity or an organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code;

Ghost Employment (continued)

- ➔ with the approval of the employee's supervisor; and
- ➔ in compliance with a written policy or regulation that
 - ➔ is issued by the executive officer of the governmental entity; and
 - ➔ contains a limitation on the total time during any calendar year that the employee may spend performing the services during normal hours of employment;
- ➔ is considered to be performing duties related to the operation of the governmental entity.

Example

- ➔ County sheriff puts deadbeat daughter on department payroll, but does not require her to perform any duties for the department.
- ➔ Commissioners direct county highway department to remove snow from commissioners' sidewalks and driveways.
- ➔ County commissioner assigns employee to work on county's United Way campaign.

Conflict of Interest (IC 35-44.1-1-4)

- ➔ A public servant who knowingly or intentionally:
 - ➔ has a pecuniary interest in; or
 - ➔ derives a profit from:
 - ➔ a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Level 6 felony.
- ➔ It is not an offense if the public servant or the public servant's dependent receives compensation through salary or an employment contract for:
 - ➔ services provided as a public servant; or
 - ➔ expenses incurred by the public servant as provided by law.

Conflict of Interest (continued)

- ➔ It is not an offense if:
 - ➔ The public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve months before the date of the contract or purchase was \$250 or less.
 - ➔ The contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government.
 - ➔ The public servant is a member of the governing board of, or is a physician employed or contracted by, a hospital organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1.

Conflict of Interest (continued)

- ➔ It is not an offense if a public servant makes a disclosure that meets the requirements of the statute and the person is:
 - ➔ not a member or on the staff of the governing body empowered to contract or purchase on behalf of the governmental entity, and functions and performs duties for the governmental entity unrelated to the contract or purchase;
 - ➔ appointed by an elected public servant;
 - ➔ employed by the governing body of a school corporation and the contract or purchase involves the employment of a dependent or the payment of fees to a dependent; or
 - ➔ an elected official.

Conflict of Interest (continued)

- ➔ The minimum disclosure must:
 - ➔ be in writing;
 - ➔ describe the contract or purchase to be made by the governmental entity;
 - ➔ describe the pecuniary interest that the public servant has in the contract or purchase;
 - ➔ be affirmed under penalty of perjury;
 - ➔ be submitted to the governmental entity and be accepted by the governmental entity in a public meeting of the governmental entity before final action on the contract or purchase;
 - ➔ be filed within fifteen days after final action on the contract or purchase with:
 - ➔ the state board of accounts; and
 - ➔ if the governmental entity is a governmental entity other than the state or a state supported college or university, the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase; and
 - ➔ contain, if the public servant is appointed, the written approval of the elected public servant that appointed the public servant.

Examples

- ➔ County auditor serves on the board of directors of the local REMC.
- ➔ County commissioner enters into contract to sell key piece of real estate developer and redevelopment commission need for new automotive plant.
- ➔ County surveyor's son works for a law firm that has a \$50,000 contract with the drainage board.
- ➔ County council member's husband owns a printing company that submits a bid for a contract with a cost of \$10,000 to print employee handbooks.

Profiteering from Public Service

- ➔ A person who knowingly or intentionally:
 - ➔ obtains a pecuniary interest in a contract or purchase with an agency within one year after separation from employment or other service with the agency; and
 - ➔ is not a public servant for the agency but who as a public servant approved, negotiated, or prepared on behalf of the agency the terms or specifications of:
 - ➔ the contract; or
 - ➔ the purchase;
 - ➔ commits profiteering from public service, a Level 6 felony.

Profiteering from Public Service (continued)

- ➔ Statute does not apply to negotiations or other activities related to an economic development grant, loan, or loan guarantee.
- ➔ Statute does not apply if the person receives less than \$250 of the profits from the contract or purchase.
- ➔ It is a defense to a prosecution under the statute that:
 - ➔ the person was screened from any participation in the contract or purchase;
 - ➔ the person has not received a part of the profits of the contract or purchase; and
 - ➔ notice was promptly given to the agency of the person's interest in the contract or purchase.

Example

- ➔ County coroner negotiates contract with local hospital for forensic services contract. One month later, coroner resigns and is hired by hospital to implement forensic services contract.
- ➔ County commissioner works closely on county bridge project with engineering firm. After commissioner loses election, he is hired by the engineering firm to do business development for the firm.

Other Statutes Applicable to the Conduct of County Officials

Contracting with the County (IC 36-1-21)

- ➔ The county legislative body must adopt a policy that includes, at a minimum, the requirements set forth in IC 36-1-21 for contracts with the county. The policy may:
 - ➔ include requirements that are more stringent or detailed than any provision in IC 36-1-21; and
 - ➔ apply to individuals who are exempted or excluded from the application of IC 36-1-21.
 - ➔ The county may prohibit or restrict an individual from entering into a contract with the county that is not otherwise prohibited or restricted by IC 36-1-21.

Contracting with the County (continued)

- ➔ Key Definitions

- ➔ **Elected official** means:

- ➔ the executive or a member of the executive body of the unit;
- ➔ a member of the legislative body of the unit; or
- ➔ a member of the fiscal body of the unit.

The term does not include other elected county (or municipal) officials.

Contracting with the County (continued)

- ➔ **Relative** means any of the following:
 - ➔ A spouse.
 - ➔ A parent or stepparent.
 - ➔ A child (including adoptee) or stepchild.
 - ➔ A brother or sister (including half brother or half sister), stepbrother, or stepsister.
 - ➔ A niece or nephew.
 - ➔ An aunt or uncle.
 - ➔ A daughter-in-law or son-in-law.

Contracting with the County (continued)

- ➔ Minimum Requirements of the Policy
- ➔ The county may enter into a contract or renew a contract for the procurement of goods and services or a contract for public works with:
 - ➔ an individual who is a relative of an elected official; or
 - ➔ a business entity that is wholly or partially owned by a relative of an elected official;
- ➔ only if the requirements of IC 36-1-21-5 are satisfied and the elected official does not violate IC 35-44.1-1-4.

Contracting with the County (continued)

- ➔ The county unit may enter into a contract or renew a contract with an individual or business entity if:
 - ➔ the elected official files with the unit a full disclosure, which must:
 - ➔ be in writing;
 - ➔ describe the contract or purchase to be made by the unit;
 - ➔ describe the relationship that the elected official has to the individual or business entity that contracts or purchases;
 - ➔ be affirmed under penalty of perjury;
 - ➔ be submitted to the legislative body of the unit and be accepted by the legislative body in a public meeting of the unit prior to final action on the contract or purchase; and
 - ➔ be filed, not later than 15 days after final action on the contract or purchase, with:
 - ➔ the state board of accounts; and
 - ➔ the clerk of the circuit court in the county where the unit takes final action on the contract or purchase;

Contracting with the County (continued)

➔ AND

- ➔ the appropriate agency of the county makes a certified statement:
 - ➔ That the contract amount or purchase price was the lowest amount or price bid or offered; or
 - ➔ of the reasons why the vendor or contractor was selected; and
- ➔ the county satisfies any other requirements under IC 5-22 (public purchasing) or IC 36-1-12 (public works construction).
- ➔ An elected official must also comply with the disclosure provisions of IC 35-44.1-1-4, if applicable.

Contracting with the County (continued)

- ➔ Not later than December 31 of each year, each county officer must certify, under penalties of perjury, to the county executive, that the officer is in compliance with the policy.
- ➔ The county's annual report filed with the state board of accounts must include a statement that the county has implemented a contracting policy.
- ➔ The state board of accounts must notify the department of local government finance if the county has not implemented a policy.

Contracting with the County (continued)

- ➔ If the county has not adopted a contracting policy, the department of local government finance may not approve:
 - ➔ the county's budget; or
 - ➔ any additional appropriations for the county;
- ➔ for the ensuing calendar year until the state board of accounts certifies to the department of local government finance that the county has adopted a contracting policy under IC 36-1-21.

Examples

- ➔ County awards contract with plumbing company owned by county council member for plumbing service for the courthouse. County council member complies with conflict of interest statute and purchasing statute, files appropriate disclosures.
- ➔ County auditor's husband bids on public works project to replace flooring in county office annex. Contract for \$150,000 is awarded to husband. Neither the county auditor or her husband file any disclosure forms.

Nepotism in Employment (IC 36-1-20.2)

- ➔ The county legislative body must adopt a nepotism policy that includes, at a minimum, the requirements set forth in IC 36-1-20.2. The policy may:
 - ➔ include requirements that are more stringent or detailed than any provision in IC 36-1-20.2; and
 - ➔ apply to individuals who are exempted or excluded from the application of IC 36-1-20.2.
 - ➔ The county may prohibit the employment of a relative that is not otherwise prohibited by IC 36-1-20.2.

Nepotism in Employment (continued)

- ➔ Key Definitions

- ➔ **Direct line of supervision**

- ➔ A person is in the "direct line of supervision" of an elected officer or employee if the elected officer or employee is in a position to affect the terms and conditions of the individual's employment, including making decisions about work assignments, compensation, grievances, advancement, or performance evaluation.
- ➔ The term does not include the responsibilities of the executive, legislative body, or fiscal body of a unit, as provided by law, to make decisions regarding salary ordinances, budgets, or personnel policies of the county

Nepotism in Employment (continued)

- ➔ **Employed** means an individual who is employed by a county on a full-time, part-time, temporary, intermittent, or hourly basis. The term does not include an individual who holds only an elected office. The term includes an individual who is a party to an employment contract with the county.
- ➔ Performance of the duties of:
 - ➔ a precinct election officer under IC 3; or
 - ➔ A volunteer firefighter;Is not considered employment by the county.

Nepotism in Employment (continued)

- ➔ **Relative** means any of the following:
 - ➔ A spouse.
 - ➔ A parent or stepparent.
 - ➔ A child (including adoptee) or stepchild.
 - ➔ A brother or sister (including half brother or half sister), stepbrother, or stepsister.
 - ➔ A niece or nephew.
 - ➔ An aunt or uncle.
 - ➔ A daughter-in-law or son-in-law.

Nepotism in Employment (continued)

- ➔ Minimum Requirements of the Policy
- ➔ Individuals who are relatives may not be employed by the county in a position that results in one relative being in the direct line of supervision of the other relative.
- ➔ Unless a nepotism policy provides otherwise, an individual may remain employed by the county and maintain the individual's position or rank if the individual is employed by the county on the date the employee's relative assumes elective office.
- ➔ Individual may not be promoted to a position if the new position would be within the direct line of supervision of the a relative who holds elective office.

Nepotism in Employment (continued)

- ➔ Unless the policy provides otherwise, a sheriff's spouse may be employed as prison matron for the county under IC 36-8-10-5 and the spouse may be in the sheriff's direct line of supervision.
- ➔ Unless the policy provides otherwise, an individual:
 - ➔ who served as coroner;
 - ➔ who is currently ineligible to serve as coroner under Article 6, Section 2(b) of the Constitution of the State of Indiana;
 - ➔ who, as coroner, received certification under IC 36-2-14-22.3; and
 - ➔ whose successor in the office of coroner is a relative of the individual;
- ➔ may be hired in the position of deputy coroner and be in the coroner's direct line of supervision.

Nepotism in Employment (continued)

- ➔ Not later than December 31 of each year, each county officer must certify, under penalties of perjury, to the county executive, that the officer has not violated the nepotism policy.
- ➔ The county's annual report filed with the state board of accounts must include a statement that the county has complied with the nepotism policy.
- ➔ The state board of accounts must notify the department of local government finance if the county has not implemented a nepotism policy.

Nepotism in Employment (continued)

- ➔ If the county has not adopted a nepotism policy, the department of local government finance may not approve:
 - ➔ the county's budget; or
 - ➔ any additional appropriations for the county;
- ➔ for the ensuing calendar year until the state board of accounts certifies to the department of local government finance that the county has adopted a nepotism policy under IC 36-1-20.2.

Example

- ➔ The deputy clerk's daughter is elected as county clerk. After being sworn in, the new county clerk names her mother as chief deputy.
- ➔ County highway superintendent's son is hired by county surveyor to survey rights-of-way for drainage improvements.
- ➔ County auditor's cousin serves on the county redevelopment commission.
- ➔ County highway engineer's sister-in-law is hired by the county park department as project manager.

Other Conflict of Interest Statutes

Redevelopment Commission

IC 36-7-14-10

- ➔ Neither a member of the redevelopment commission or a nonvoting adviser may have a pecuniary interest in any contract, employment, purchase, or sale made by the redevelopment commission.
- ➔ any property required for redevelopment purposes in which a member or nonvoting adviser has a pecuniary interest may be acquired, but only by gift or condemnation.
- ➔ A transaction that does not comply with these requirements is void.

Examples

- ➔ Redevelopment commission member is an officer of the local bank which is purchasing the county's bonds.
- ➔ Wife of school superintendent serving as nonvoting adviser on redevelopment commission serves a counsel to the redevelopment commission

Economic Development Commission

IC 36-7-12-16

- ➔ Members of an economic development commission must disclose any pecuniary interest in any employment, financing agreement, or other contract made under IC 36-7-12 before the commission takes action on the matter.
 - ➔ A member with a pecuniary interest shall not vote on any such matter.
- ➔ A county council member must disclose any pecuniary interest in any employment, financing agreement, or other contract made under IC 36-7-12 before the council takes action on the matter.
 - ➔ A council member with a pecuniary interest shall not vote on any such matter.

Economic Development Commission

IC 36-7-12-16

- ➔ If any property in which an economic development commissioner or a county council member has a pecuniary interest in property required for the purposes of IC 36-7-12, that property may be acquired, but only by gift or condemnation.

Examples

- ➔ Member of economic development commission is also president of the county's local economic development corporation, which is seeking a loan for a new manufacturing facility.
- ➔ County council member serves on board of local bank which will be guaranteeing the bonds.

Plan Commission

IC 36-7-4-223

- ➔ A member of either the plan commission or the legislative body is disqualified and may not participate as a member in a hearing or recommendation of the commission or legislative body concerning a zoning change in which the member has a direct or indirect financial interest.
- ➔ The facts concerning the member's disqualification must be entered in the records of the plan commission or fiscal body.

Examples

- ➔ Plan commission member owns property adjacent to site of proposed industrial plant which must be rezoned for industrial use.
- ➔ County commissioner is developing agricultural property for single family housing. Proposed development requires change to comprehensive plan.

Board of Zoning Appeals

IC 36-7-4-909

- ➔ A member of a board of zoning appeals is disqualified and may not participate in a hearing or decision of that board concerning a zoning matter if the member:
 - ➔ is biased or prejudiced or otherwise unable to be impartial; or
 - ➔ has a direct or indirect financial interest in the outcome of the hearing or the decision.
- ➔ The board shall enter the fact that a regular member has such a disqualification in the board's records.

Example

- ➔ Wind farm developer files for special exception. Member of plan commission has had discussions about siting a wind mill on his farm.

INDOT Conflict of Interest Policy

- ➔ Latest version – 6/17/2016
- ➔ The policy applies to all contracts for professional services related to INDOT projects including design-bid-build contracts and design-build contracts.
 - ➔ This appears to be broader than the requirements of 23 CFR 172, effective June 15, 2015, which applies to engineering and design related services funded by Federal Aid Highway Program funds.
- ➔ 23 CFR 172.7(b)(4) requires a contracting agency to maintain a written code of standards governing the performance of their employees engaged in the award and administration of engineering and design related services contracts and governing the conduct of consultants in the performance of services under such contracts to prevent, identify and mitigate conflicted of interest.

INDOT Conflicts of Interest Policy

- ➔ 23 CFR 1872.7(b)(4)(iii) provides that the contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements.
- ➔ **A contracting agency may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.**
- ➔ **INDOT policy provides that personnel shall accept nothing of monetary value (mementos or souvenirs of nominal value may be accepted)**

INDOT Conflicts of Interest Policy

- ➔ No employee, officer or agent of INDOT nor a federal fund recipient of INDOT shall participate in the selection, award or administration of a contract supported by federal funds if a conflict of interest, **real or apparent**, would be involved. Consultant personnel serviceing in management roles for INDOT or federal funds subrecipients and officials and employees of subrecipients participating in the selection, award or administration of a contract are required to comply with the INDOT Conflicts of Ethics prescribed for INDOT personnel.

INDOT Conflicts of Interest Policy

- ➔ *Contracting agencies* means a State transportation agency or a procuring agency of the State acting in conjunction with and at the direction of the State transportation agency, other recipients, and all subrecipients that are responsible for the procurement, management, and administration of engineering and design related services.
- ➔ Is a county, as a subrecipient, a contracting agency?