

# Ethics for County Officials

Buddy Downs

Karen Arland

Bob Clutter

November 27, 2018

# 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, 2018, and, consequently, will not reflect changes in law subsequent to that date.

# Public Servant

- ➔ An individual who is elected or appointed to office to discharge a public duty for a governmental entity; or
- ➔ A person who is authorized to perform an official function on behalf of, and is paid by, a governmental entity.

# Public Servant

- ➔ An individual who 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. This is regardless of whether the individual receives compensation.

# Public Servant

- ➔ A county commissioner is a public servant.
- ➔ Employees of the board of commissioners are public servants.
- ➔ An individual or a firm that is appointed in writing to the commissioners in a purchase or with a contract is a public servant.

# Governmental Entity

- ➔ The county
- ➔ The board of commissioners
- ➔ The county council
  - ➔ any authority, board, bureau, commission, committee, department, division, hospital, or other instrumentality of the county.

# Governmental Entity Served by the Public Servant

- ➔ This is the immediate governmental entity being served by a public servant.
- ➔ For commissioners, this is probably the county.
  - ➔ No case law

# Pecuniary Interest

- ➔ A public servant has a pecuniary 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 certain dependents of the public servant.
- ➔ (No case law)



# Property

- ➔ Property is anything of value. It includes, among other things:
  - ➔ real property, personal property, intangibles, money, labor and services; and
  - ➔ food and drink.
- ➔ Data is a form of property.

# Dependent

- ➔ The public servant's spouse.
- ➔ A public servant's minor child, stepchild or adoptee.
- ➔ An individual for whom more than one-half (1/2) of whose support is provided during a year by the public servant.

# Criminal 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.

# Class 6 Felony

- ➔ A person who commits a Level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years, with the advisory sentence being one (1) year. In addition, the person may be fined not more \$10,000.
- ➔ If a person has committed a Level 6 felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly.
- ➔ **Class A misdemeanor shall be imprisoned for a fixed term of not more than one year. In addition, the person may be fined not more than \$5,000.**

## Conflict of Interest (exception)

- ➔ 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.

# Conflict of Interest (continued)

- ➔ It is not an offense if the public servant:
  - ➔ is not a member of, 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; and
  - ➔ makes the disclosure required by the statute.

## Conflict of Interest (continued)

- ➔ It is not an offense if the public servant:
  - ➔ Is either:
    - ➔ an elected official; or
    - ➔ appointed by an elected public servant; and
  - ➔ makes the disclosure required by the statute.



# Conflict of Interest Disclosure

- ➔ Written;
- ➔ 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./

# Conflict of Interest Disclosure

- ➔ If the public servant is an appointed official, the disclosure must contain the approval of the elected official who appointed the public servant.
- ➔ The State Board of Accounts has prescribed a form for conflict of interest disclosure which can be completed electronically and printed.
- ➔ [http://www.in.gov/isda/files/Uniform\\_Conflict\\_of\\_Interest\\_Disclosure\\_Statement.pdf](http://www.in.gov/isda/files/Uniform_Conflict_of_Interest_Disclosure_Statement.pdf)

# Pop Quiz

- ➔ Engineering firm takes county commissioners to Super Bowl game. County contracts with engineering firm to design new county highway bridge.
  - ➔ Conflict?
  - ➔ Disclosure?
- ➔ County surveyor's son works for a law firm seeking a \$50,000 contract with the redevelopment commission.
  - ➔ Conflict?
  - ➔ Disclosable?

# Pop Quiz

- ➔ County council member's husband owns a printing company that submits the winning bid for a contract with a cost of \$10,000 to print employee handbooks.
  - ➔ Conflict?
  - ➔ Disclosable?
- ➔ County auditor serves on the board of directors of the local REMC.
  - ➔ Conflict?
  - ➔ Disclosable?

# Profiteering from Public Service

## IC 35-44.1-1-5

- ➔ 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 with the agency and while working for the agency approved, negotiated or prepared the terms or specifications of that purchase or contract commits profiteering from public service, a Level 6 felony.

# Profiteering from Public Service

- ➔ Negotiations or other activities related to an economic development grant, loan or loan guarantee are exempted. No definition of “economic development”.
- ➔ Contracts or purchases for which the person will receive less than \$250 are exempted.
- ➔ It is a defense if the person was screened from any participation in the contract or purchase; the person received no profits from the contract or purchase; and notice of the person’s interest was promptly given to the agency.

# Pop Quiz

- ➔ 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.
  - ➔ Profiteering from public service?
- ➔ County council member is on negotiating team to attract a major new business to the county. Six months after facility opens, council member is named head of public affairs for new business.
  - ➔ Profiteering?

# 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.



# Pop Quiz

- ➔ County auditor:
  - ➔ Failed to reconcile county's books for 36 consecutive months;
  - ➔ Ignored State Board of Accounts directives; and
  - ➔ Committed errors resulting in the loss of \$30 million in county funds.
- ➔ Official misconduct?
- ➔ *State v. Neff*

# 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)

- ➔ 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;
  - ➔ with the approval of the employee's supervisor;
  - ➔ in compliance with a written policy or regulation that is issued by the executive officer of the governmental entity; and

# Ghost Employment (continued)

- ➔ 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.
- ➔ 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.

# Pop Quiz

- ➔ County commissioner assigns employee to work on county's United Way campaign.
  - ➔ Ghost employment?
- ➔ Highway superintendent directs county snow removal crew to plow roads in superintendent's community before plowing main roads.
  - ➔ Ghost employment?

# 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

# Contracting with the County

- ➔ 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.



# 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.

# Pop Quiz

- ➔ Redevelopment commission member is an officer of the local bank which is purchasing the county's bonds.
  - ➔ Pecuniary interest?
- ➔ County commissioner owns key piece of real estate needed by redevelopment commission for new automotive plant.
  - ➔ Conflict?

# Economic Development Commission

## IC 36-7-12-16; IC 36-7-12-27.5

- ➔ 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.

# 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.

# Pop Quiz

- ➔ Petitioner for zoning ordinance is represented by the son of a council member. Is the council member conflicted from participation in considering the ordinance?

# 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.

# Pop Quiz

- ➔ Wind farm developer files for special exception. Member of plan commission has had discussions about siting a wind mill on his farm. Does the plan commission member have a conflict?
- ➔ County commissioner's wife has a one-fifth interest in property adjacent to the property for which the rezoning is sought. Does the Commissioner have a conflict?



# Design-Build – Technical Review Committee (IC 5-30)

- ➔ A member of the technical review committee may not submit a proposal for the design-build contract.
- ➔ A member of the technical review committee may not furnish design services or construction services under the design-build contract.
  - ➔ The design-builder may not delegate or subcontract professional services or construction services under the design-build contract to a member of the technical review committee.
- ➔ Each member of the technical review committee must certify for each request for proposals that there is not a conflict of interest between the member and the design-builder responding to the request for proposals. If a conflict of interest exists, the member must be replaced before the review of any proposal.

# Design-Build – Design Criteria Developer IC 5-30-6-2

- ➔ The design criteria developer may not submit a proposal for a design-build contract.
- ➔ The design criteria developer may not furnish design or construction services under a design-build contract.
- ➔ The design-builder may not delegate or subcontract design services or construction services to the design criteria developer.

# Consultant Disclosure of Conflicts of Interest

## IC 5-16-11

- ➔ A person who, as a consultant, pursuant to a contract, either evaluates bids or awards contracts for a county who has a conflict of interest, must file a disclosure with the county clerk, within ten days of the receipt of bids or the award of the contract, whichever is earlier
- ➔ A consultant has a conflict of interest if a bidder on the contract, including the successful bidder, has given a gift to the consultant or the consultant's spouse or minor children with a value of more than \$100 in the previous year.