



A PROACTIVE APPROACH ON ETHICS

DAVE PFEIFLE

SD ASSOCIATION OF COUNTY COMMISSIONERS WORKSHOP

MARCH 18, 2021



SD Public Assurance Alliance

434 Members. 55 counties in SD.

SDPAA handles over 700 claims state-wide per year:

- Slip and Falls on public property
 - Auto accidents, including high speed pursuits
 - Water-related claims
 - Civil rights claims
 - Employment claims (terminations, harassment, etc.)
- 

Representative Democracy in SD

South Dakota most likely has the highest percentage of local elected officials of any state in the U.S.

Local governments in SD elect their leadership.

Counties elect all their department heads, i.e. Auditor, Treasurer, Register of Deeds, Sheriff, as well as Commissioners.

Those elected are well-known from being very active in their communities.

A Perspective on Public Service

Cynics portray the ethics issues for public servants in South Dakota as being so numerous and so pervasive that the entire system must be corrupt.

South Dakota will always have these issues arise due to our state having the highest percentage of elected officials per capita. It does not mean these issues show a system-wide problem. Wall-flowers do not get elected.

We are in a fishbowl, must remind ourselves that our conduct reflects on our public entity and our community.

President Lincoln on Public Office:

President Abraham Lincoln believed once he was elected to a public office, he and his immediate family became “public property.”

In other words, even their personal actions were subject to public scrutiny.

Public scrutiny was a necessary ingredient of public life.



Your Private life becomes Public

When you engage in public service, aspects of your private life may become public:

Appearance of Impropriety: Public officials should avoid or disclose any potential conflicts of interest.

Personal conduct: public scrutiny of your personal habits like drinking may impact your ability to function in your public capacity. Absences from official duties may lead to questions about your health or habits.

Personal Finances: Public officials are stewards of the public's finances. Their stewardship of their personal finances may negatively impact their ability to be stewards of the public's finances.

Ethics defined:

“Ethics” has been defined differently by many philosophers and many cultures.

Overall, “ethics” are a set of moral principles that go beyond legal requirements on what is considered right and wrong.

Something may be unethical but it can still be legal.

Many Local government charters contain the ethical principle to “avoid the appearance of impropriety.”

SD State Statutes on Ethics

SD Ethics Commission statutes repealed by 1979 SD Legislative Session.

Avoidance of impropriety does not appear in state statute.

However, Conflicts of Interest, Criminal conduct, and grounds for removal from public office are contained in state statutes.



Conflicts of Interest—legal summary:

State Statute prohibits any County officer from having a financial interest in a contract entered into by the County.

Includes certain family members.

Some exceptions apply, but ask your State's Attorney rather than interpreting it yourself.

Source: SDCL ch. 6-1



Statutes on Conflicts of Interest:

SDCL 6-1-1. Local officer's interest in public purchase or contract unlawful--Contract void.

It shall be **unlawful for any officer of a county**, municipality, township, or school district, **who has been elected or appointed, to be interested, either by himself or agent, in any contract entered into by said county**, municipality, township, or school district, either for labor or services to be rendered, or for the purchase of commodities, materials, supplies, or equipment of any kind, the expense, price, or consideration of which is paid from public funds or from any assessment levied by said county, municipality, township, or school district, or in the purchase of any real or personal property belonging to the county, municipality, township, or school district or which shall be sold for taxes or assessments or by virtue of legal process at the suit of such county, municipality, township, or school district. **Such contract shall be null and void from the beginning.**

More SDCL on Conflicts of Interest:

6-1-2. Conditions under which contract with local officer permitted--Contract voidable if conditions not fully met.

The provisions of § 6-1-1 are not applicable if the contract is made pursuant to any one of the conditions set forth in the following subdivisions, without fraud or deceit. However, the contract is voidable if the provisions of the applicable subdivision are not fully satisfied or present at the time the contract was entered into:

- (1) **Any contract involving five thousand dollars or less** regardless of whether other sources of supply or services are available within the county, municipality, township, or school district, if the consideration for such supplies or services is reasonable and just;
- (2) Any contract involving more than five thousand dollars but less than the amount for which competitive bidding is required, **and there is no other source of supply or services available** within the county, municipality, township, or school district if the consideration for such supplies or services is reasonable and just and if the accumulated total of such contracts paid during any given fiscal year does not exceed the amount specified in § 5-18A-14;
- (3) Any contract with any firm, association, corporation, or cooperative association **for which competitive bidding is not required** and where other sources of supply and services are available within the county, municipality, township or school district, and the **consideration for such supplies or services is reasonable and just**, unless the majority of the governing body are members or stockholders who collectively have controlling interest, or any one of them is an officer or manager of any such firm, association, corporation, or cooperative association, in which case any such contract is null and void;

SDCL Conflicts of Interest continued:

- (4) Any contract for which **competitive bidding procedures are followed** pursuant to chapter 5-18A or 5-18B, **and where more than one such competitive bid is submitted**;
- (5) Any contract for professional services with any individual, firm, association, corporation, or cooperative, if the individual or any member of the firm, association, corporation, or cooperative is an elected or appointed officer of a county, municipality, township, or school district, whether or not other sources of such services are available within the county, municipality, township, or school district, **if the consideration for such services is reasonable and just**;
- (6) Any contract for commodities, materials, supplies, or equipment **found in the state contract list established pursuant to § 5-18D-6, at the price there established or below**;
- (7) Any contract or agreement between a governmental entity specified in § 6-1-1 and a public postsecondary educational institution if an employee of the Board of Regents serves as an elected or appointed officer for the governmental entity, and if the employee does not receive direct compensation or payment as a result of the contract or agreement; and
- (8) Any contract with any firm, association, corporation, individual, or cooperative association for which competitive bidding procedures are followed pursuant to chapter 5-18A, and where only one such competitive bid is submitted, provided the procedures established in § 6-1-2.1 are followed.
- 

Two Simple Questions for COI:

Proceed with extreme caution if you can affirmatively answer either of these questions:

1. “Is there something in it for me?”
2. “Would I want it published on the front page of the local newspaper, or would it be difficult to explain in a simple manner?”

Timing and Perception are everything:

Attending public events: considerations.

President Lincoln recognized that the public expects their officials to be accessible, hence he joked about taking his daily “public opinion baths.”

Walk the fine-line between social butterfly and hermit.

“Don’t misinform your Doctor nor your Lawyer.”

- Consult with your State’s Attorney on any ethics issues **beforehand!**
 - Be proactive. Look before you leap!
 - Be candid with counsel. Your attorney needs all the pertinent information to be able to advise you properly.
 - Source: Benjamin Franklin.
- 

Criminal Statutes:

3-16-1. Willful failure to perform official duty as misdemeanor.

Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every intentional omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is a Class 2 misdemeanor.

3-16-2. Keeping office or property at unauthorized place as misdemeanor.

No state, **county**, township, or precinct officer in this state shall keep his office, or keep any books, papers, records, or other property belonging thereto, at any place other than that prescribed by law. Any state, county, township, or precinct officer violating this section is guilty of a Class 2 misdemeanor.

3-16-7. Officer's interest in public contract as misdemeanor.

No public officer who is authorized to sell or lease any property, or make any contract in the officer's official capacity may become voluntarily interested individually in any sale, lease, or contract, directly or indirectly with such entity. A violation of this section is a Class 2 misdemeanor unless the act is exempted by law.

Criminal statutes continued:

3-16-8. Self-dealing in award or terms of agency contract prohibited.

A **state officer or employee** may not solicit nor accept any gift, favor, reward, service, or promise of reward, including a promise of future employment, in exchange for recommending, influencing, or attempting to influence the award of or the terms of a contract by the state agency the officer or employee serves.

3-16-9. Retaliation prohibited for reporting violations, abuse, or danger to public.

No department, bureau, board, or commission of the state or **any of its political subdivisions** may dismiss, suspend from employment, demote, decrease the compensation of, or take any other retaliatory action against an employee because the employee reports in good faith to an appropriate authority a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to public health or safety, unless the report is specifically prohibited by law. The provisions of this section do not apply to any employee who knows the report is false or was made in a reckless disregard for the truth. A state employee who is the subject of retaliation under this section may file a grievance with the Civil Service Commission pursuant to § 3-6D-22. For purposes of an employee of a political subdivision, an appropriate authority includes any human resources department of that political subdivision, if any, any state's attorney, or the attorney general.

3-16-10. Retaliation prohibited for reporting public official's misuse of public funds.

An employee may file a grievance with the appropriate governmental entity if the employee believes that there has been retaliation, because of reporting a violation of § 22-30A-46 (using public funds or property in violation of public trust) through the chain of command of the employee's department, to the Office of the Attorney General, or to the Department of Legislative Audit. If no grievance process exists, a civil action may be filed in circuit court.

Public Official dishonesty

Sadly it can and does happen here.

Last three years, SDPAA has experienced claims for public official dishonesty—theft of public funds. Made the news.

Difficult to see people that you have trusted for years revealed to be engaged in that activity.

Removal of Officials

Governor removes certain law enforcement officers after notice and a hearing on the merits.

State's Attorney can commence a removal action in circuit court for all other public officials.

Local Law Enforcement Officer Removal:

SDCL 3-17-3. Removal of local law enforcement officers by Governor--Grounds.

The Governor shall have power, after notice and hearing, **to remove from office any state's attorney, sheriff, or police officer, or any deputy or assistant state's attorney, or deputy sheriff** who shall willfully fail, neglect, or refuse to perform any of the duties imposed upon him by, or to enforce any of the provisions of law relating to intoxicating liquors, or who shall willfully fail, neglect, or refuse to perform any duties imposed upon them by law, or who shall be guilty of intoxication or drunkenness, or who shall be guilty of the violation of any law, or who shall assist or connive in the violation of any law, or who shall be grossly incompetent to perform the duties of his office.

More on Removal of L.Enf. Officers:

3-17-5. Law enforcement officer removed from office not eligible for new appointment during term--Salary payment for office as misdemeanor.

Any person removed under the provisions of §§ 3-17-3 and 3-17-4 shall be ineligible to hold any public appointive or elective office or position of the state or any political subdivision thereof, during the unexpired part of the term of office to which such person was elected or appointed, and from which he has been removed.

It is a Class 2 misdemeanor for any officer or board to allow or pay any person so removed, any salary for any public appointive or elective office or position during the period for which he shall be disqualified to hold such office or position, and any person or board who shall allow or pay any such salary contrary to the provisions of this section shall be liable to the state or political subdivision as the case may be, for the salary so paid or allowed.

Grounds for Removal of Local Officers:

SDCL 3-17-6. Grounds for removal of local officers from office.

Any officer of any local unit of government may be charged, tried, and removed from office for **misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality.**

State ex rel. Steffen v. Peterson

Peterson was Gregory County Register of Deeds.

SD Legislative Audit conducted audits of RoD office's remittance of fees.

Irregularities noted. Peterson asked to resign, but refused.

State's Attorney commenced removal action.

Circuit court did not remove Peterson from office, but noted errors in following statutes.

Trial court awarded Peterson \$25,000 in attorneys' fees (\$37,000 in 2020 dollars).

On appeal, SD Supreme Court affirmed the trial court's decision not to remove him from office, but reversed on the award of attorney fees.

Court ordered Peterson was responsible for one-half those fees himself.

State ex rel. Steffen v. Peterson

Court looks to the official's intent.

SD Supreme Court noted:

“There is no [one] in official position so letter perfect in the law that he does not at some point by act or omission or misconstruction of the law, though with perfect integrity of motive, fall short of the strict statutory measure of his official duty.”

607 N.W.2d 262, at ¶ 23 (SD 2000)(quotations omitted).

Lessons on Removal Actions

If you are not removed from office, you can still be required to rectify various issues. If so, then you are not the “prevailing” party.

Only if public official is “prevailing party” can they get attorneys fees.

Strive for strict compliance with any statutes or rules regarding the handling of public money.

Maintain all formalities in running a public office. Don't get too informal.

Financial Best Practices in a nutshell

Follow all recommendations from annual financial audits whenever possible.

Explore adding forensic audits as part of those auditing services. Forensic audits are very in-depth, very expensive. Random samples of certain departments may be economical.

Develop every protocol possible based on the size of your organization and the independent auditor's recommendations.

SDPAA example:

Independent Financial Audits every year include some forensic audit aspects.

Files annual independent financial audit every year with SD Department of Legislative Audit and gives each Member a copy. Audits posted on our website: sdpaaonline.org

SDPAA also audits all its policies every three years to ensure we have adopted all the best practices. Then, each of the SDPAA's functions is independently audited every three years to ensure compliance with our policies.

Statements of Financial Interest:

SDCL 3-1A-4. Additions and corrections filed on assumption of elective local office.

Any person who assumes the office of a **county commissioner**, school board member of a school district with a total enrollment of more than two thousand students, or commissioner, councilman, or mayor in municipalities of the first class, shall, **within fifteen days after the person assumes office, file a statement of financial interest** setting forth any additions or corrections to any previous statement of financial interest filed pursuant to § 12-25-30 (statements by candidates for local office).

Disclosures of COI in Practice:

State Agency boards have board members disclose any conflicts with any agenda item(s) at start of any meeting. Avoids participating in discussion or vote if a conflict exists.

SDPAA follows that protocol.

Some public entities' governing bodies and boards wait for disclosure and require recusal for an agenda item before it is read.

If COI, refrain from discussing that item with your fellow elected or appointed officials and cannot vote/decide the issue.

See SDCL 6-1-17: “**No county, municipal or school official may participate in discussing or vote** on any issue in which the official has a conflict of interest.”

SDCL 6-1-17:

No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:

- (1) The official has a direct pecuniary interest in the matter before the governing body; or
- (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.

If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

GOVERNMENT PRACTICES HOTLINE

888.313.0839



SDPAA coverage can waive Bond requirements:

3-5-2. Bonds of county officers--Approval and filing.

The bonds of all county officers shall be approved by the board of county commissioners, except bonds of the county commissioners, which shall be approved by the auditor, and shall, together with the oaths of office be filed in the office of the county auditor.

3-5-14. Local government purchase of bonds or insurance coverage for faithful performance of officials and employees.

The governing board of any political subdivision of this state, may purchase a blanket bond, **blanket crime coverage**, an insurance policy, or an individual bond, issued to the political subdivision as the insured, covering the faithful performance of each officer, member, and employee. If the governing board purchases a blanket bond, blanket crime coverage, or an insurance policy that is equal to or exceeds the individual bond requirements established in law, no officer, member, and employee of the political subdivision is required to furnish an individual bond to qualify for office. Blanket coverage may not be less than the total coverage of all individual bonds purchased for the year prior to January 1, 2015.

QUESTIONS?

Thank you!

Disclaimer: while the presenter is an attorney, this presentation is for general information purposes only and should not be construed as providing legal advice or opinions for a specific situation. The audience is encouraged to contact the attorney of their choice for any specific legal discussion and legal advice.

