

# Conflicts of Interest & Voting

**ALLYSON M. HICKS**  
Assistant Attorney General  
Office of Attorney General

# Disclaimer

- ▶ This presentation is not intended as legal advice.
- ▶ The information provided in this presentation and any comments or materials are for educational purposes only and should not be considered legal advice or legal opinion.
- ▶ Please consult with your board's general counsel for legal counsel as needed.

# Agenda

- ❖ Obligation to Vote
- ❖ Conflicts of Interest
- ❖ Procedure
- ❖ Improper Abstention
- ❖ Examples

# Obligation to vote

Board members have a duty to vote unless there is an applicable statute that would require or permit abstention.

*See N.D.A.G. 2002-L-54; Northwestern Bell Telephone Co. v. Bd. of Comm'rs of the City of Fargo, 211 N.W.2d 399, 403 (N.D. 1973).*

All votes on substantive matters must be open, public, roll call votes. *See N.D.C.C. § 44-04-21*

# N.D.C.C. § 44-04-22: Conflicts of Interest

When can (or must) a board member abstain due to conflict of interest?

If the person has a “direct and substantial personal or pecuniary interest in a matter before that board.”\*

## **N.D.C.C. § 44-04-22: Conflicts of Interest**

“A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.”

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## **N.D.C.C. § 44-04-22: Conflicts of Interest**

While § 44-04-22 technically only applies to legislative or quasi-legislative, judicial or quasi-judicial matters before the Board, the Attorney General's office has advised that where there is not a more specific conflicts of interest statute on point, this standard should apply to all matters.



# N.D.C.C. § 44-04-22

## ❖ Direct

- ❖ “operating by an immediate connection or relation, instead of operating through a medium.” Black’s Law Dictionary 459 (6th ed. 1990). “A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful.” *Id.* At 460.

## ❖ Substantial

- ❖ “[o]f real worth and importance; of considerable value; . . . something worthwhile as distinguished from something without value or merely nominal.” *Id.* at 1428, citing *Seglem v. Skelly Oil Co.*, 65 P.2d 553, 554 (Kan. 1937); see also *Miller v. Commissioner of Internal Revenue*, 84 F.2d 415, 418 (6th Cir. 1936) (“In the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest. . . .”); *Yetman v. Naumann*, 492 P.2d 1252, 1255 (Ariz. Ct. Ap. 1972) (“substantial interest” defined in statute as any interest other than a “remote interest”).

# Conflicts of Interest

- ❖ Personal

- ❖ “[a]ppertaining to the person; belonging to an individual; limited to the person.” Black’s Law Dictionary at 1143.

- ❖ Pecuniary Interest

- ❖ “[a] direct interest related to money in an action or case.” Id. at 1131.

The AG has opined that the terms “direct,” “substantial,” “personal,” and “pecuniary,” as used in N.D.C.C. § 44-04-22, have the meanings indicated above. See N.D.A.G. 2002-L-54.

# Conflicts of Interest

The mere appearance of impropriety or potential conflict of interest is not sufficient to abstain from voting.

# Procedure

I think I have a conflict—what do I do?

- ❖ As soon as you realize you think you have a conflict, call your general counsel and your board chair and notify them and disclose the facts.
  - ❖ Attorney may need to do more research so giving more time prior to the meeting is appreciated.
  - ❖ This may be dispositive of the issue- if it is clearly a conflict, you can unilaterally recuse yourself in the meeting (disclose the facts and the decision at the beginning of the agenda item)
- ❖ If it is not clear, disclose the facts to the board at the beginning of the agenda item, indicate that you may have a conflict
  - ❖ Disclosure and notation in the minutes of the basic facts disclosed to the board (doesn't have to be super detailed).
- ❖ Board decides (by roll-call vote) if you can participate in or vote on that particular matter. You recuse yourself from this discussion and decision.
  - ❖ Board has to do the analysis of whether the conflict is “direct and substantial personal or pecuniary” to require abstention.
  - ❖ Vote and discussion needs to be recorded in the minutes.
    - ❖ If Board votes to allow you to vote, you have a **duty** to vote.
    - ❖ If Board votes to allow you to abstain:
      - ❖ Do not participate in discussion (words, facial expressions, noises, ANYTHING) or influence vote in any manner.
      - ❖ Do not participate in vote
- ❖ How is the vote recorded?
  - ❖ Proper abstention (with board consent): member is noted as present, abstained (i.e., not an aye or a nay).
  - ❖ Improper abstention (without board consent): vote is recorded with majority.

# Specific statutes

School boards and members have some statutes that are specific to them for certain situations

▶ 15.1-07-17

- ▶ 1. A school board member or other school officer who has a conflict of interest in any contract requiring the expenditure of school funds shall disclose the conflict to the board and may not participate in any discussions or votes regarding that contract without the consent of all other board members.
- ▶ 2. For purposes of this section, a conflict of interest means **the personal, professional, or pecuniary interest of an individual, the individual's spouse or relative, or the individual's business or professional associate.**
- ▶ 3. Any person who violates this section is guilty of a class A misdemeanor.

# Take Away

- ▶ 1. DISCLOSE DISCLOSE DISCLOSE.
- ▶ 2. Contact your general counsel.