

CHAPTER 8

CONFLICT OF INTEREST

Conflicts of interest require public officers and employees to make fact specific assessments of the interests involved based on statutorily established standards and exceptions. This Chapter provides general guidelines that public officers and employees should evaluate before conflicts arise. The Handbook does not address every situation that may qualify as a conflict of interest and does not assess all specialized conflict of interest prohibitions that may apply to particular state entities. Therefore, public officers and employees should review conflicts of interest not specifically addressed in this Chapter with legal counsel.

8.1 Scope of this Chapter. This Chapter addresses the statutory conflict of interest laws contained in A.R.S. §§ 38-501 to -511, as well as the incompatibility doctrine. These statutes set the minimum standards expected of public officers and employees who, in their official capacities, are faced with a decision or contract that might affect their pecuniary or proprietary interests or those of a relative.

8.2 The Arizona Conflict of Interest Laws. Section 38-503, A.R.S., provides in pertinent part:

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.

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.

Under this law, a public officer or employee who has a conflict of interest must disclose the interest and refrain from participating in the matter.

8.2.1. Purpose of the Conflict of Interest Laws. "The object of conflict of interest statutes is to remove or limit the possibility of personal influence which might bear upon an official's decision." *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972). Arizona's conflict of interest laws serve to prevent self dealing by public officials.

Maucher v. City of Eloy, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985). The financial interests of public officers or employees must not conflict with the unbiased performance of their public duties because "one cannot serve two masters with conflicting interests." *Id.* Public officials should avoid situations where their professional or financial concerns might conflict with the unbiased performance of their duties. *Id.* See also *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961) ("The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.").

8.2.2 Scope of Application. The conflict of interest prohibitions "apply to all public officers and employees of incorporated cities or towns, of political subdivisions, and of the State and any of its departments, commissions, agencies, bodies, or boards." A.R.S. § 38-501(A). Essentially, A.R.S. §§ 38-502 through -511 supercede any local charter or local ordinance and are in addition to any other State statutes on specific conflicts of interest. A.R.S. § 38-501(B), (C).

8.2.3 Public Officers. The term "public officer" includes "all elected and appointed officers of a public agency established by charter, ordinance, resolution, state constitution or statute," regardless of whether they are paid for their services. A.R.S. § 38-502(8). Members of advisory commissions, boards, councils, and committees such as the Health Advisory Council are public officers as that term is used in the conflict of interest laws. Ariz. Att'y Gen. Op. 175-211. See also Ariz. Att'y Gen. Op. 182-105, 188-014, and 189-067. All elected officials at the state or local level are public officers for the purposes of the conflict of interest laws as are directors of state agencies. For example, the Director of the Department of Health Services is appointed by the Governor; as such, the Director is an appointed officer of a public agency established by state statute and is covered by the conflict of interest laws. A.R.S. § 36-102. Although the members of the Legislature are subject to the requirements of A.R.S. §§ 38-501 through -511, they are also governed by a separate code of ethics adopted by the ethics committees in the Senate and the House of Representatives. See A.R.S. § 38-519.

The members of Arizona's many regulatory boards are also public officers covered by the conflict of interest laws, whether they are paid for or volunteer their services. A.R.S. § 38-502(6), (8). Because of their familiarity with the special areas that they regulate or advise, board members often have professional or social ties with the persons they license, regulate, or discipline. Board members should therefore be sensitive to potential conflicts of interest and appearances of impropriety. Conflict of interest rules may have a constitutional, as well as statutory, basis because due process requires that members of a regulatory board not have a direct interest in their decisions affecting licensees or other regulated entities. See *Tumey v. Ohio*, 273 U.S. 510 (1927).

8.2.4 Public Employees. Anyone employed "by an incorporated city or town, a political subdivision or the state or any of its departments, commissions, agencies, bodies or boards for remuneration," whether on a full-time, part-time, or contract basis, is considered an employee for the purposes of the conflict of interest laws. A.R.S. § 38-502(2). For example, a consultant hired by the Department of Transportation to make recommendations regarding the route of an interstate highway would be covered by the conflict of interest laws. The consultant would be prohibited from making recommendations if he or she owned or had an interest in a parcel of land that might be affected by the Department's decision concerning the route of the interstate highway. See also Ariz. Att'y Gen. Op. 189-067.

8.2.5 Relatives. The conflict of interest laws require an examination of proprietary and pecuniary interests of the public officer or employee and certain relatives of the officer or employee. A.R.S. § 38-503(B). "Relative" is expansively defined and includes: "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." A.R.S. § 38-502(9).

Public officers and employees must recognize that while they may not have a substantial interest in a decision or a contract, if one of the relatives described in A.R.S. § 38-502(9) has a substantial interest, the public officer or employee must disclose the interest and refrain from participating in the matter. A public officer or employee may not justify failure to comply with the conflict of interest laws by alleging ignorance of the relative's interest. See, e.g., A.R.S. § 38-510(A)(2). A public officer or employee has an affirmative obligation to become aware of the interests of relatives in matters in which the officer or employee may become involved. *Id.*

8.3 Substantial Interest. When assessing whether a public officer or employee has a conflict of interest, the starting point is to evaluate whether the official or the official's relative has a "substantial interest" in the matter under consideration. An interest is "substantial" if it is not defined by statute as "remote" and if it is "any pecuniary or proprietary interest, either direct or indirect," of public officers or employees or of their relatives. A.R.S. § 38-502(11). The term "interest" does not mean a mere abstract interest in the general subject or a contingent interest but is a pecuniary or proprietary interest, by which a person will gain or lose something, as contrasted with a general sympathy, feeling, or bias. *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972).

The Legislature has determined that certain economic interests are so remote that they do not impermissibly influence a person's decisions or actions. These "remote interests" are listed in A.R.S. § 38-502(10). Unless the interest at issue falls within one of the statutorily specified situations declared by the Legislature to be remote, the interest is substantial and creates a conflict of interest. *Yetman v. Naumann*, 16 Ariz. App. at 317, 492 P.2d at 1255.

To determine whether a substantial interest exists, the public officer should ask the following questions:

1. Will the decision affect, either positively or negatively, an interest of the officer or employee or the officer's or employee's relative?
2. Is the interest a pecuniary or proprietary interest?
3. Is the interest other than one statutorily designated as a remote interest?

If the answer to each of these questions is yes, then a substantial interest exists which requires disclosure and disqualification by the public officer or employee.

8.4 Remote Interests.

8.4.1 Generally. Section 38-502 (11), A.R.S., excludes from the definition of a substantial interest the ten enumerated remote interests in A.R.S. § 38-502(10). If an interest is classified as "remote," the officer or employee need not disclose it and may participate in the agency's action or decision. See A.R.S. § 38-503. A public officer or employee who has any pecuniary or proprietary interest in a decision or contract not covered by one of the statutorily authorized remote interests would have a substantial interest that requires disclosure of the interest and refraining from all participation in the decision or contract. A.R.S. § 38-502(11). Because a thorough understanding of the remote interests is essential in determining whether the conflict of interest laws apply in a given situation, the remote interests are discussed separately in Sections 8.4.2 to 8.4.11.

8.4.2 Nonprofit Corporations. If the public officer or employee or a relative is a non-salaried officer of a nonprofit corporation, he or she has a remote interest in any decision affecting that corporation. A.R.S. § 38-502(10)(a).

8.4.3 Landlord/Tenant of a Contracting Party. If the public officer or employee or a relative is a landlord or tenant of a party contracting with an agency, the officer or employee has a remote interest in a decision regarding the contract. A.R.S. § 38-502(10)(b).

8.4.4 Attorney of a Contracting Party. If the public officer's or employee's relative represents a client contracting with the officer's or employee's agency, he or she has a remote interest in any agency decision affecting the client's contract. A.R.S. § 38-502(10)(c). For example, if the Department of Economic Security is considering awarding a contract to a day care center, and that day care center is represented by an attorney who is related to the Director, the Director's interest in the awarding of the contract is remote. *Id.*

8.4.5 Nonprofit Cooperative Marketing Associations. If the public officer or employee or a relative is a member of a nonprofit cooperative marketing association, he or she has a remote interest in any decision affecting that association. A.R.S. § 38-502(10)(d).

8.4.6 Insignificant Stock Ownership. If the public officer or employee or a relative owns less than three percent of the shares of a corporation for profit, and if the income from those shares does not exceed five percent of the person's total annual income, he or she has a remote interest in any decision affecting that corporation. A.R.S. § 38-502(10)(e).

8.4.7 Reimbursement of Expenses. If the public officer or employee or a relative is being reimbursed for actual and necessary expenses incurred in the performance of official duties, he or she has a remote interest in any decision affecting that reimbursement. A.R.S. § 38-502(10)(f).

8.4.8 Recipient of Public Services Generally Available. If the public officer or employee or a relative is a recipient of public services provided by the governmental agency of which he or she is employed, and if those services are available to the general public, the public officer or employee has a remote interest in any decision affecting those services. A.R.S. § 38-502(10)(g). For example, employees of the Department of Transportation may participate in decisions regarding the building of highways because the use of the highways is a service provided on the same terms and conditions to persons not officers or employees of the Department of Transportation. However, if the decision concerns the building of a highway adjacent to property owned by an employee, the employee could be said to have a substantial interest and may not participate in it. See A.R.S. § 38-502(11).

8.4.9 Relatives of School Board Members. If a school board member has a relative, other than a spouse or dependent as defined in A.R.S. § 43-1001, who has a substantial interest in a decision made by the school board, then the interest is remote, and the school board member is not barred from participating in the decision. A.R.S. § 38-502(10)(h). See Ariz. Att'y Gen. Op. 100-013. For example, if a school board member votes on teachers' contracts for the district and has a relative, other than a spouse or dependent, who is a teacher in the district, the board member's interest is remote, and he or she may participate in the decision. However, if the school board member's dependent is a teacher covered by the contract, the board member must then disclose his or her dependent's interest and refrain from participating in the decision, because the interest is no longer remote. A.R.S. § 38-502(11). Section 38-503(D), A.R.S., prohibits the governing board of a school district or community college district from employing a person who is a member of a governing board or who is the spouse of a member of the governing board. See also A.R.S. §§ 15-421(D), 15-1441(H).

8.4.10 Interests of Other Agencies. A public officer or employee may participate in a decision that indirectly affects a relative who is an officer or employee of another public agency. A.R.S. § 38-502(10)(i). For example, the head of the state agency responsible for allocating funds to local governments could participate in such decisions even though his or her spouse was an officer or employee of the local government. If, however, the decision confers a direct economic benefit or detriment to the spouse, such as a decision to terminate funding for a program which would result in the termination of a spouse's

employment by the local government, a conflict of interest is present. Ariz. Att'y Gen. Op. 187-051.

8.4.11 Class Interests. If the public officer or employee or a relative is a member of a trade, business, profession, or other class of persons, and his or her interest is no greater than the interest of the other members of the class, the public officer or employee has a remote interest in any decision affecting the class. A.R.S. § 38-502(10)(j). For example, if members of the State Board of Dental Examiners were considering approving a rule prohibiting certain types of advertising, the interest of the dentists on the Board in the decision would be no greater than that of other licensed dentists and, therefore, they would not have to disclose the interest and would be allowed to participate in the decision regarding that rule. See, e.g., Ariz. Att'y Gen. Op. 179-142.

However, if a board member's judgment on a board matter is affected by the special interest of the professional association, a conflict of interest could arise. For example, in *Gibson v. Berryhill*, 411 U.S. 564, 567-68 (1973), the United States Supreme Court held that the Alabama Board of Optometry, which was comprised solely of independent practitioners, was disqualified from deciding whether optometrists employed by corporations engaged in "unprofessional conduct" because they were "aiding and abetting . . . the illegal practice of optometry." The district court determined that the corporation, Lee Optical, "did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business." See *id.* at 571.

8.5 Contracts for Supplies or Services. Should a public officer or employee wish to supply goods or services to his or her agency, the contract must be awarded pursuant to public competitive bidding. A.R.S. § 38-503(C)(2). This requirement of public competitive bidding is in addition to the disclosure and non-participation requirements discussed in Section 8.6. The public competitive bidding requirement does not apply to school district governing boards in limited situations specified in A.R.S. § 38-503(C)(1).

Although the competitive bidding requirements of A.R.S. § 38-503(C) do not generally apply to corporations, a public officer or an employee who sells supplies or services to the agency may not evade the bidding requirements of A.R.S. § 38-503(C) by forming a corporation that is the alter ego of the officer or the employee to avoid public competitive bidding. Ariz. Att'y Gen. Op. 186-036.

8.5.1. Contracts Made by Spouses of Public Officers or Employees. Although A.R.S. § 38-503(C) prohibits public officers and employees from supplying equipment, materials, supplies, or services to the public agency except pursuant to an award or contract let after public competitive bidding, such restrictions do not apply to the spouse of the officer or employee. Ariz. Att'y Gen. Op. 199-020. However, the public officer or employee must disclose the interest and refrain from any involvement in the matter. *Id.*

8.6 Strict Compliance. Once a public officer or employee determines that a substantial interest may be affected, the officer or employee must disclose the interest and withdraw from all participation in the decision or contract. A.R.S. § 38-503(A), (B). Even though public officers or employees may believe that they can be objective in making a decision and that the public interest would not be harmed by their participation, they do not have discretion to ignore the statutory mandate. *Id.*

Arizona's conflict of interest statutes are broadly construed in favor of the public, and the Legislature has provided substantial civil and criminal penalties for failure to comply with the statutory mandates. See Sections 8.16.1 - 8.16.4.

8.7 Disclosure of the Interest. Every political subdivision and public agency subject to A.R.S. §§ 38-501 to -511 must "maintain for public inspection in a special file all documents necessary to memorialize all disclosures of substantial interest made known pursuant to this article [A.R.S. §§ 38-501 to - 511]." A.R.S. § 38-509. Any public officer or employee who has a conflict of interest in any agency decision or in the award of a contract *must* provide written disclosure of that interest in the agency's special conflict of interest file. A.R.S. § 38-503(A), (B). The officer or employee may either file a signed written disclosure statement fully disclosing the interest or file a copy of the official minutes of the agency which fully discloses the interest. A.R.S. §§ 38-502(3), -509. See, e.g., Appendix 8.1 (Sample Disclosure Memorandum).

Having disclosed the conflict of interest and withdrawn from participation in the matter, the employee or officer must not communicate about the matter with anyone involved in the decisionmaking process in order to avoid a violation of A.R.S. § 38-503(A) or (B) and the appearance of impropriety.

8.8 Rule of Impossibility. In the unlikely situation that a public agency cannot act because most of its members have a conflict of interest, members may participate in the agency's decision after making known their conflicts of interest in the agency's official records. A.R.S. § 38-508(B). This is referred to as "the rule of impossibility." It is important to note that before the rule of impossibility will apply to a multi-member board or commission, the majority of the entire membership of the board or commission must be unable to participate because of conflicts of interest. The rule of impossibility may not be invoked if merely a quorum of the public body is present and unable to act because of conflicts. In those cases, the public agency must reconvene to take up the matter when all the members are present.

8.9 Other Conflict of Interest Laws. In addition to the general conflicts statutes found at A.R.S. §§ 38-501 to -511, other state statutes impose specific conflict of interest prohibitions on public officers and employees. Examples of these restrictions include: A.R.S. § 4-114(A) (prohibiting members of the Liquor Board, the Liquor Superintendent, or employees of the Department of Liquor Licenses and Control from having a financial interest in businesses licensed to deal in spiritous liquors); A.R.S. §§ 5-103(C) - (E),

-103.01, -115(E) (prohibiting members, employees, or appointees of the Racing Commission or department from holding certain interests in the racing industry or engaging in certain activities); A.R.S. § 6-113 (prohibiting the Banking Superintendent and personnel of the Banking Department from engaging in certain business dealings or being employed by financial institutions under the jurisdiction of the Banking Department); A.R.S. § 16-531(D) (prohibiting election and tally board members from being a federal, state, county, or precinct officer or a candidate for office at the election); A.R.S. § 20-149 (prohibiting the Director of the Department of Insurance and other Department of Insurance personnel from having a financial interest, except as a policyholder or a claimant under a policy, in an entity regulated by Department of Insurance); A.R.S. § 35-705 (prohibiting board members of a municipal or county industrial development authority from being an officer or employee of the authorizing county or municipality); A.R.S. § 37-132(C) (prohibiting the Commissioner, any deputy or employee of the Land Department from owning or acquiring any interest in state lands); A.R.S. § 38-481 (prohibiting public officials from appointing relatives to salaried public service positions).

Public officers or employees should refer to the statutes governing their particular agency for specific provisions regarding standards of conduct for that agency and its officers and employees.

8.10 Incompatibility of Public Offices. The common-law doctrine of incompatibility of public offices provides that a conflict of interest exists when a person who occupies a public position accepts an additional public position and that second position has duties that either conflict with the first position or render it physically impossible for the individual to perform the duties of both positions. *Coleman v. Lee*, 58 Ariz. 506, 121 P.2d 433 (1942). Under this doctrine, the person in question is deemed to have automatically vacated the first position upon accepting the second, incompatible position.

8.11 Representation of Others After Leaving Public Service. Section 38-504(A), A.R.S., provides:

A public officer or employee shall not represent another person for compensation before a public agency by which the officer or employee is or was employed within the preceding twelve months or on which the officer or employee serves or served within the preceding twelve months concerning any matter with which such officer or employee was directly concerned and in which the officer or employee personally participated during the officer's or employee's employment or service by a substantial and material exercise of administrative discretion.

For example, a Corporation Commission employee who was materially involved in a utility rate hearing involving a public service corporation may not represent that corporation before the Commission for one year after the employee has resigned from state service.

8.12 Disclosure or Use of Information Declared Confidential by Law. During the course of employment and for two years thereafter, public officers and employees are prohibited from disclosing or using, without appropriate authorization, any information acquired in the course of their official duties designated as confidential or information made confidential by statute or rule. A.R.S. § 38-504(B). An example of such information is confidential tax information provided to an Assistant Attorney General for the limited uses specified in A.R.S. § 42-2003. For a list of other information that is confidential as a matter of law, see Chapter 6, Appendix 6.1.

8.13 Disclosure or Use of Information Made Confidential By Agency Action. Public officers and employees are prohibited from disclosing or using for profit information that is designated confidential, other than by statute or rule, and which they obtained from their agency as a result of their employment or service with the agency. A.R.S. § 38-504(B). The prohibition exists during the course of employment and for two years after employment has terminated, unless authorization from the agency has been obtained. *Id.* For example, if during the course of employment, a former employee of the Department of Health Services acquired information the Department had designated as confidential, the employee may not disclose the information or use it for personal profit for two years after termination of employment or service with the Department.

The prohibition includes either disclosing or using confidential information. *Id.* Thus, even though a public officer or employee does not benefit or profit from the disclosure, A.R.S. § 38-504(B) prohibits them from disclosing the confidential information for the statutory period. *Id.*

8.14 Improper Use of Office for Personal Gain. Public officers and employees are prohibited from using or attempting to use their official position to secure valuable things or benefits for themselves, unless those benefits are part of their normal compensation for performing their duties. A.R.S. § 38-504(C). It is a class 4 felony for a public servant to solicit, accept, or agree to accept any benefit upon an understanding that his or her vote, opinion, judgment, or other official action may thereby be influenced. A.R.S. § 13-2602. It is a class 6 felony for a public officer to ask for, or to receive, any unauthorized gratuity or reward or promise of a gratuity or reward for doing an official act. A.R.S. § 38-444. For example, if a member of the Racing Commission offered to support an application for a permit to conduct horse racing in return for a gift of a thoroughbred horse, the commission member would violate the above-referenced criminal laws as well as the conflict of interest laws.

8.15 Receiving Additional Income for Services. Public officers and employees are prohibited from agreeing to receive or receiving, either directly or indirectly, compensation other than as provided by law for services they rendered in any case, proceeding, application, or other matter pending before an agency. A.R.S. § 38-505(A).

8.16 Sanctions for Violations.

8.16.1 Criminal Penalties. Knowingly or intentionally violating any provision of the conflict of interest laws is a class 6 felony. A.R.S. § 38-510(A)(1).

Negligent or reckless violation of the law is a class 1 misdemeanor. This means that public officers or employees may be prosecuted if they fail to disclose a conflict of interest even those of which they only should have known. A.R.S. § 38-510(A)(2).

Knowingly falsifying, concealing, or covering up a material fact as part of a scheme to defraud in any matter related to the business conducted by a state agency or any political subdivision of the state is a class 5 felony. A.R.S. § 13-2311.

8.16.2 Forfeiture of Public Office. Upon conviction of a violation of the conflict of interest laws, a public officer or employee forfeits the public office or employment. A.R.S. § 38-510(B).

8.16.3 Contract Cancellation. Any contract made by the state or any of its departments or agencies is subject to cancellation by the Governor if anyone significantly involved in the contract process on behalf of the state was or is also employed by or acted as consultant to any other party to the contract while the contract or contract extension is in effect. A.R.S. § 38-511(A).

In addition, any contract entered into by a public agency in violation of the conflict of interest laws is voidable at the option of the agency. A.R.S. § 38-506(A). In *Maucher v. City of Eloy*, 145 Ariz. 335, 701 P.2d 593 (App. 1985), the Arizona Court of Appeals held that the City of Eloy was entitled to void a contract with an engineer and the City because the contract was let without public competitive bidding and was entered into in violation of Arizona's conflict of interest laws. The court ruled that the engineer could not recover his losses under the cancelled contract by any legal theory, including restitution or quantum meruit. 145 Ariz. at 338, 701 P.2d at 596.

Once the impermissible interest of a public officer or employee is shown, the contract will not be sustained even if the contract is fair, just, and beneficial to the public agency. *Stigall v. City of Taft*, 375 P.2d 289 (Cal. 1962). A public agency may also recover any consideration or payments that it has paid to the public officer or employee under the contract, without restoring the benefits received by the agency under the contract. See, e.g., A.R.S. § 38-511(E). This is true even though no actual fraud or dishonesty was involved on the part of the public officer or employee. *Thomson v. Call*, 699 P.2d 316 (Cal. 1985).

8.16.4 Private Citizen Suits. Any person who is affected by a public agency's decision made in violation of the conflict of interest laws may sue to have the contract or decision declared null and void. A.R.S. § 38-506(B). The court may award costs and attorney's fees to the prevailing party. A.R.S. § 38-506(C). Persons claiming that a public officer, employee, or board member had a pecuniary interest in making a decision against

them may also file suit in state or federal court alleging a violation of their civil rights pursuant to 42 U.S.C. § 1983.

APPENDIX 8.1

CONFLICT OF INTEREST DISCLOSURE MEMORANDUM

Sections 8.8.1, 8.8.2

TO: (Name and position of Public Agency Supervisor)
FROM: (Name and position of employee or officer)
RE: CONFLICT OF INTEREST DISCLOSURE PURSUANT TO
A.R.S. §§ 38-501 to -511

1. Identify the decision, case investigation, or other matter in which you or your relative may have a "substantial interest" under A.R.S. §§ 38-501 to -511.

(use as much space as necessary)

2. Describe the "substantial interest" referred to above.

(use as much space as necessary)

Statement of Disqualification

To avoid any possible conflict of interest under A.R.S. §§ 38-501 to -511, I will refrain from participating in any manner in the matter identified above.

Date

Signature

cc: (supervisors)

#69874

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