Thiele, David L.

From: Kathleen Tweeten <HKTweeten@outlook.com>
Sent: Wednesday, October 27, 2021 10:47 PM
To: -Info-ND Ethics Commission
Subject: Conflict of Interest

Please add that a conflict of interest also pertains to election contributions received from the person or entity that will financially or otherwise gain from the decision. This is the intent of Article 14 of the ND Constitution and what the people of North Dakota voted for. Delete 5a! We know that this is not easy and you are getting a great deal of push back from lobbyists telling you that this would be impossible, but they are only looking out for their interests and not the well being of North Dakotans whom you are supposed to represent. There is a way in law to have, I believe the administrative judge, to sit in when a vote must be taken and there is a tie.
Thank you,
Howard and Kathy Tweeten

Sent from Mail for Windows

North Dakotans
for Public Integrity, Inc.

TO: North Dakota Ethics Commission
ethicscommission@nd.gov

FROM: Dina Butcher, Chair, Board of Directors
North Dakotans for Public Integrity, Inc.[1]
NDpublicintegrity@gmail.com

DATE: November 22, 2021

RE: Comments on the Draft Conflict of Interest Rules 115-04-01

The North Dakotans for Public Integrity Board of Directors finds that the draft rules do not comply with the language and spirit of Article XIV. In addition to recommending needed revisions, we remind the Ethics Commission that:

1. *The Ethics Commission is a constitutional body, accountable to the people of North Dakota.*
2. *The Ethics Commission is not authorized to make exceptions unless Article XIV says so.*
3. *Public officials must disqualify themselves from decisions about their political campaign donors.*

INTRODUCTION

We appreciate the opportunity to comment on the Ethics Commission's draft conflict-of-interest rules. We believe significant changes are needed, and we ask the Ethics Commission to continue its efforts to develop the rules until they conform to the language and intent of Article XIV in the state Constitution.

Commissioners seem to have an incomplete picture of the Commission's authority and obligations.[i] It is a constitutional body, not a state agency. Its authority comes directly from the people of North Dakota through a citizen-initiated ballot measure approved in 2018. Its members, like all North Dakota public

[1] North Dakotans for Public Integrity, Inc. (NDPI) is a non-partisan grassroots organization that engages North Dakotans in advancing integrity and public accountability in government institutions. NDPI wrote and carried the successful 2018 ballot measure that established the Ethics Amendment to the North Dakota Constitution. The NDPI Board members are Dina Butcher, Ellen Chaffee, Kathy Tweeten, David Schwalbe, Sarah Vogel, and Darrell Dorgan. BadAss Grandmas for Democracy is a NDPI tradename.

officials, swear to support the state Constitution. Legislative majorities in 2019 and 2021 repeatedly violated their oath and Article XIV. The people are counting on the Ethics Commission to set a far higher standard by implementing Article XIV as it stands, judiciously exercising only the discretion Article XIV gives them. The draft conflict-of-interest rules do not meet that standard.

We believe that it is time for the Ethics Commission to come to grips in public session with the confounding fundamental principles and practical dynamics facing them. If the Ethics Commission is not transparent, if the Ethics Commission violates the Constitution, if the Ethics Commission falls short, it is failing the 54 percent of voters who enacted Article XIV as well as the 80+ percent of voters who favored requiring full online public disclosure of large political money in campaigns, reducing the influence on government of campaign contributions and money in politics, and strengthening conflict of interest rules.[ii]

Without strong rules, government cannot be independent and impartial. The public cannot have confidence in government integrity where there is private benefit from public service or favored parties have advantages. This state agency code of ethics makes clear that the Commission's conflict-of-interest rules are highly consequential:

> The proper operation of democratic government requires that a public official or employee be independent and impartial; that government policy and decisions be made through the established process of government; that a public official or employee not use public office to obtain private benefits; that a public official or employee avoid action which creates the appearance of using public office to obtain a benefit; that a public official or employee administer state programs and laws in a manner that does not give an advantage to a particular business or person; and that the public have confidence in the integrity of its government and public officials and employees.[2]

We submit that it is the Commission's duty to comply with Article XIV requirements including these on conflict of interest:

> ***Section 2.5: "Directors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person."***

CONCERNS AND RECOMMENDATIONS

Our specific concerns include:

1. Definition of "Quasi-Judicial."

   The draft rules offer an erroneous, highly restrictive definition of a central term in the Constitution, defining "quasi-judicial" to require the presence of five powers or acts:

[2] North Dakota Industrial Commission Code of Ethics, Preamble. 2/22/1995

> Quasi-judicial" act means an act in which the public official has the power and authority to exercise judgment and discretion, hear and determine or ascertain facts, make binding orders and judgments affecting personal or property rights, examine witnesses, and enforce decisions or impose penalties.

These requirements unduly narrow the intent of Section 2.5 and have no apparent legal justification in – and appear to contradict - the Commission's legal advisory memo.

The second sentence in the draft definition, "…when a public official is called upon to perform a judicial act when the public official is not a member of the North Dakota judiciary," is consistent with the Commission's legal adviser's recommendation to use Black's Law Dictionary definition of this term: "of, relating to, or involving an executive or administrative official's adjudicative acts; quasi-judicial act – A judicial act performed by an official who is not a judge."

Recommendation: Define "quasi-judicial" as in the second sentence of the Commission's draft: "…when a public official is called upon to perform a judicial act when the public official is not a member of the North Dakota judiciary,"

2. Unauthorized Exemptions

A. Campaign Contributions

The Constitution specifically identifies "monetary or in-kind support related to that person's election to any office" - i.e., campaign donations - as grounds for disqualification for conflict of interest, yet Section 5.a. of the draft rules exempts campaign donations from conflict-of-interest consideration, a clear violation of the Constitution that must change.[iii] Political campaign contributions are private benefits that create conflict of interest in quasi-judicial decisions relating to donor interests.

Recommendation: Delete Section 115-04-05a

B. Vague Language and Loopholes

Furthermore, Section 5.b. exempts what is found in statute but could be used as a very large loophole ("ownership interest in one of the parties to the proceeding which is shared by the general public") and provides an avenue for buying influence by contributing to a retirement account.

Recommendation: Delete Section 115-04-05b

C. Rule of Necessity

The Constitution requires public officials to disqualify themselves from a quasi-judicial decision when they have a conflict of interest. In section 115-04-01-03, the draft rules provide an exemption based on the duty to perform functions of office – "the rule of necessity." The rule of necessity is moot where provisions are made for substitute decision-makers, as is the case, for

example, with the Public Service Commission. Such provisions can and should be made elsewhere.

Recommendation: Delete all of 115-04-01-03 and replace it with a requirement that all relevant entities have a policy that designates a substitute decision-maker if the responsible individual has a conflict of interest.

D. Loophole for Evading Disqualification

The draft rules restrict disqualification to situations where the impact of the conflict is obvious to a reasonable person, where a governing body or agency head so rules, or where there is no option for a substitute decision-maker. No such exemptions are provided for in the Constitution. On the contrary, the Constitution requires avoiding even the appearance of bias.

Recommendation: Delete all of 115-04-01-03 and replace it with a requirement that all relevant entities have a policy that designates a substitute decision-maker if the responsible individual has a conflict of interest.

E. Definition of "Gift"

The draft rules rely on an incorrect definition of "gift," found in the Commission's rules on lobbying, that exempts campaign contributions. Article XIV does not allow that exemption for conflict of interest.

Recommendation: Revise the definition of "gift" as needed to comply with this context.

F. Definition of "Conflict of Interest"

Section 115-04-01-01 requires clarification, at minimum. Does the word "and" at the end of 115-04-01-01b mean that conflict of interest requires a, b, and c to be present? Why is "quasi-judicial decision" not included in part b?

Recommendation: Clarify the definition of "conflict of interest"

As you know, the Constitution and statute make public policy; rules are to implement policy, not change it. The intent of Article XIV is to change a culture of entitlement and exemption to one of integrity, transparency, and accountability. That cannot happen without leadership from the Ethics Commission.

We ask the Commission to take another look at its options without the baggage of traditional assumptions. For example, Article XIV provides for a three-year delay in its effective date. The intent of that three years was to allow individuals who run for offices that make quasi-judicial decisions to manage their campaign funds accordingly during that three-year period. If they had done so, the question of disqualification would seldom or never come up.

An attorney at the Campaign Legal Center offers their perspective on the Commission's constitutional concerns in the attached letter. Briefly stated, the Commission's concern is unwarranted. The CLC memorandum shows that acting in accordance with the conflict-of-interest provision in Article XIV is not only consistent with the U.S. Constitution but also, in some instances, required.

Finally, we strongly object to two Commission decisions related to these draft rules:

1. The Commission asked the Attorney General to determine the legal aspects of rules that clearly would have a very significant impact on him. Probably no one in state government makes more quasi-judicial decisions and thus has a greater conflict of interest in this topic than the Attorney General. We are even more concerned if the Attorney General fails to recuse himself.
2. The Commission scheduled a public hearing on November 30 that, apparently intending to be helpful, the Commission's executive director advised us in an email message not to attend. He implied that the hearing is strictly pro forma and not worth anyone's trouble to attend. This apparent disdain for genuine public input the Commission's disregard for the Administrative Agency Practices law are not in keeping with the Commission's mission.

We will greatly appreciate the Commission's wholesale revision of the rules as needed to fulfill the expectations of the voters who amended the North Dakota Constitution. Since we have raised a number of very substantive concerns, we plan to attend the November 30 hearing. We hope to see you there.

---

[i] For example, the Commission requested an Attorney General's opinion that focused only on a specific matter. His December 23, 2020 letter opinion supports the Commission's constitutional authority, but narrowly. The letter concludes that, ". . . the Ethics Commission is constitutionally authorized to promulgate a rule defining 'lobby' and 'lobbyist' as set forth in the proposed rule in a manner which expands the statutory definition of 'lobby' and 'lobbyist' in order to fulfill its constitutional mandate in N.D. Const. art. XIV." [emphasis added]

[ii] Poll of 600 likely November 2018 voters taken in November 2017 as a foundation for the final version of Measure 1 in 2018, now Article XIV, by EMC Market and Opinion Research Services, Washington, D.C.

[iii] "This order should in no manner be construed as an endorsement of the practice of PSC Commissioners accepting campaign contributions from individuals or political action committees closely associated with coal companies and coal mining activities. Although the acceptance of campaign contributions from such entities may be lawful and in compliance with SMCRA and North Dakota law, the decision to do so is ill-advised, devoid of common sense, and raises legitimate questions as to the appearance of impropriety." Dakota Chapter of Sierra Club and Dakota Resource Council vs. Secretary of the Interior Sally M.R. Jewell and North Dakota Public Service Commission. U.S. District Court for the District of North Dakota Southwestern Division. Case 1:12-cv-00065-DLH-CSM Document 52 Filed 10/22/13 Page 20

CLC
ADVANCING DEMOCRACY THROUGH LAW

To: North Dakotans for Public Integrity

From: Aaron McKean
Legal Counsel, State and Local Reform

Erin Chlopak
Senior Director, Campaign Finance
Campaign Legal Center

Re: Whether the conflict-of-interest disqualification requirements in Article XIV, § 2(5) of the North Dakota Constitution conflict with the First Amendment of the U.S. Constitution

Date: November 12, 2021

INTRODUCTION

Article XIV of the North Dakota Constitution requires certain officials to disqualify themselves from participating in quasi-judicial proceedings where a conflict of interest creates an appearance of bias to a reasonable person. This requirement in the North Dakota Constitution advances the due process guarantees of the Fourteenth Amendment of the U.S. Constitution, and it does not undermine any interest protected by the First Amendment.

The North Dakota Ethics Commission has proposed rules to implement the requirements in Article XIV, including rules that specify when recusal is required to address certain conflicts of interest. Among other things, the proposed rules define certain situations that present a "conflict of interest," and they exempt all lawful campaign donations, regardless of the amount, from qualifying as a "significant financial interest" that could be the basis of any conflict of interest.[1]

[1] Draft Conflict of Interest Rules, § 115-04-01-01.1 (defining "conflict of interest"); *id.* § 115-04-01-01.5 (excluding lawful campaign donations from the definition of "significant financial interest" and "significant business interest") (proposed Oct. 20, 2021), *available at* htt. s://www.ethicscommission.nd. ov/sites/www/files/documents/conflict%20of%20interest%20draft%20Oct%2018-2021. df.

We understand that a question has been directed to the Attorney General as to whether this proposed exemption is required by the First Amendment of the U.S. Constitution, even if a substantial campaign donation might otherwise create an appearance of bias to a reasonable person such that disqualification would be required under Article XIV of the North Dakota Constitution. We provide this memo to explain why the answer to that question is clearly *no*. Indeed, not only is recusal *not precluded* by the First Amendment; the U.S. Supreme Court has recognized that large amounts of campaign-related spending may create a conflict of interest in an adjudicatory proceeding for which recusal is *required* to protect due process guarantees under the Fourteenth Amendment.

This memo is limited to addressing these constitutional questions and does not address the distinct policy question of how best to implement Article XIV's conflict of interest and recusal requirements.

DISCUSSION

I. Article XIV of the North Dakota Constitution requires officials in quasi-judicial proceedings to disqualify themselves when a conflict of interest creates an appearance of bias to a reasonable person.

In 2018, North Dakota voters passed Measure 1, amending the state constitution by, among other things, establishing an ethics commission, requiring transparency in election-related spending, and requiring conflicts of interest rules for public officials.[2] Section 2(5) of Article XIV requires "[d]irectors, officers, commissioners, heads, or other executives of agencies" to "avoid the appearance of bias" in quasi-judicial proceedings.[3] These officials are required to "disqualify themselves in any quasi-judicial proceedings in which monetary or in-kind support related to that person's election to any office . . . creates an appearance of bias to a reasonable person."[4]

The Ethics Commission has proposed rules to implement the conflicts of interest and recusal provision of Article XIV.[5] In this context, we understand that a question has been directed to the North Dakota Attorney General as to whether the recusal required by Article XIV, § 2(5) conflicts with the First Amendment of the U.S. Constitution. Specifically, we understand the question to focus on whether the Supreme Court's decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), render unconstitutional any rule that would require recusal based solely on a campaign contribution to an official who participates in a quasi-judicial proceeding.

---

[2] ND Voices, Official 2018 General Election Results, htt s://tin url.com/wthcm4z (last visited Nov. 10, 2021).
[3] N.D. Const., art. XIV, § 2(5).
[4] *Id.*
[5] N.D. Ethics Comm'n, *Notice of Intent to Adopt Ethics Commission Rules*, available at htt s://tin url.com/mrahtd b (Oct. 20, 2021).

II. Requiring disqualification of an official due to a conflict of interest arising from campaign donations is permissible and, in some cases, required under the U.S. Constitution's guarantee of due process.

The guarantee of due process under the Fourteenth Amendment to the U.S. Constitution permits, and in some cases requires, officials to recuse themselves from an adjudicative proceeding due to a conflict of interest. The U.S. Supreme Court has specifically held that campaign donations may create a conflict of interest for which officials must disqualify themselves from particular proceedings.[6]

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court reaffirmed the principle that "[a] fair trial in a fair tribunal is a basic requirement of due process."[7] In *Caperton*, a state supreme court justice was required to recuse himself from a case in which one of the parties had made substantial contributions and expenditures in support of the justice's election campaign.[8] To determine whether constitutional due process requirements necessitated the justice's recusal, the Court considered whether the conflict of interest created by the litigant's financial support of the justice's election campaign "pose[d] such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[9] The Court noted that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," but it concluded that the litigant's "significant and disproportionate influence" over the outcome of the justice's election posed a "serious risk of bias," thus requiring that the justice recuse himself.[10]

In the aftermath of *Caperton*, judicial ethics codes provide an illustrative example of how states have implemented conflicts of interest rules requiring recusal due to the risk of actual or apparent bias from campaign contributions. Five states have adopted rules for judges that require recusal based on a specific amount or percentage of campaign contributions.[11] Another 11 states have incorporated the standards from *Caperton*, requiring recusal by a judge based on specific factors relating to campaign contributions by litigants.[12] As the Supreme Court has made clear, due process requirements apply equally "to administrative agencies that adjudicate as well as to courts."[13] The recusal requirement in Article XIV of the

---

[6] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
[7] *Id.* at 876 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).
[8] *Id.* at 886.
[9] *Id.* at 883-884 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).
[10] *Id.* at 884.
[11] Ala. Code 12–24–3; Ariz. Code of Judicial Conduct R 2.11(A)(4); Cal. Code of Judicial Ethics, Canon 3E(5)(j) and Cal. Civ. Proc. Code § 170.1(9)(A); Miss. Code of Judicial Conduct, Canon 3E(2); and Utah Code of Judicial Conduct R 2.11(A)(4).
[12] Ark. Code of Judicial Conduct R 2.11 cmt. 4; Ga. Code of Judicial Conduct R 2.11(A)(4); Iowa Ct. R. 51:2.11(A)(4); Mich. Ct. R. 2.003; Mo. R. Bar R 2-4.2; N.M. Code of Judicial Conduct R 21-211; N.D. Code of Judicial Conduct R 2.11 cmt. 4; Okla. Code of Judicial Conduct R 2.11(A)(4); Pa. Code of Judicial Conduct R 2.11(A)(4); Tenn. R. Sup. Ct. R 10, RJC 2.11; Wash. Code of Judicial Conduct R 2.
[13] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

North Dakota Constitution thus fits squarely within Supreme Court doctrine, and is consistent with the approaches of other states.

III. The U.S. Supreme Court's First Amendment jurisprudence does not call into question the constitutionality of Article XIV's recusal requirement.

While the Supreme Court has recognized a First Amendment right of individual citizens to make campaign contributions, subject to certain restrictions, and of individual citizens, and U.S. corporations and unions, to make unlimited independent expenditures, it has never held that such First Amendment rights supersede the due process protections guaranteed by the Fourteenth Amendment. We understand that the question posed to the Attorney General asked whether, in particular, *Citizens United v. FEC*, 558 U.S. 310 (2010), or *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), render unconstitutional any rule that would require recusal based solely on a campaign contribution, regardless of the amount, to an official who participates in a quasi-judicial proceeding. The answer to that question is: No. Neither of those cases has anything to do with conflicts of interest or recusal, nor do they otherwise call into question the recusal requirements in Article XIV.

Citizens United v. FEC. In *Citizens United*, the Supreme Court held that a longstanding federal law prohibiting corporate independent expenditures violated corporations' First Amendment right to free speech.[14] The decision was premised on the Court's distinction between *independent* spending in support of candidates, which it assumed to be generally non-corrupting, and direct campaign contributions, which the Court recognized *do* raise corruption concerns.[15] The decision left in place the federal ban on direct corporate contributions to candidates, and it explicitly recognized that the Court's earlier holding in *Caperton* was "not to the contrary."[16] *Caperton*, the Court explained, "was limited to the rule that the judge must be recused," and the Court recognized that such a requirement was *not* equivalent to a ban on political speech.[17]

Moreover, while a recusal requirement is materially distinguishable from a contribution restriction, it is important to note that federal law and many states prohibit campaign contributions from certain sources where the risk of actual or apparent corruption or "pay-to-play" arrangements is heightened, and those requirements have been upheld by courts as consistent with the First Amendment.[18]

---

[14] *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).
[15] *Id.* at 356-357.
[16] *Id.* at 360.
[17] *Id.*
[18] *See, e.g., Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (upholding federal law banning campaign contributions from federal contractors), *cert. denied, Miller v. FEC*, 136 S. Ct. 895 (2016); *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (upholding New York City law

Americans for Prosperity Foundation v. Bonta. In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court considered a challenge to a California law that required charities operating in the state to confidentially disclose to the state Attorney General a list of the charities' largest donors.[19] The Court found that the law swept too broadly and was not sufficiently tailored to address the government's anti-fraud interests, and thus concluded that it violated the charities' right to free association under the First Amendment.[20] This case clarified the standard by which courts evaluate government transparency regimes generally,[21] but it had nothing to do with campaign donations specifically, or election-related spending more broadly. Nor did the case involve any discussion related to conflicts of interest or recusal requirements for officials in adjudicatory proceedings. The *Bonta* case thus has no bearing or relevance to questions concerning the constitutionality of Article XIV's conflict of interest and recusal requirements.

CONCLUSION

The recusal required by Article XIV, § 2(5) of the North Dakota Constitution advances federal due process protections guaranteed by the Fourteenth Amendment of the U.S. Constitution and does not conflict with any rights protected by the First Amendment. We would be happy to answer any further questions you may have related to these issues.

---

banning contributions from corporations, LLCs, LLPs, and partnerships), *cert. denied*, 133 S. Ct. 28 (2012); *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015) (upholding Hawaii ban on contractor contributions), *cert. denied, Yamada v. Shoda*, 136 S. Ct. 569 (2015).

[19] *Americans for Prosperity Found. v. Bonta,* 141 S. Ct. 2373, 2380 (2021).

[20] *Id.* at 2385.

[21] *Id.*

Thiele, David L.

From: Eric Murphy <eric.murphy@krampade.com>
Sent: Monday, November 29, 2021 11:03 AM
To: -Info-ND Ethics Commission
Subject: Public Comments on Policy

Dear Commission Members:

One important point that needs to be made is that with a non-professional legislature, many individuals will have numerous conflicts of interest. The issue is not that there are many conflicts, the issue is with the ability of each individual in government to properly manage those conflicts. For the legislature to function and committee work to be effectively accomplished, eliminating individuals from performing their elected duty is not a step in the correct direction. Clearly every member of the legislature has multiple conflicts and it is not merely from accepting campaign contributions. These individuals sit in church services next to their constituents, they dine in the local restaurants with the constituents, and they attend local events, again right beside their constituents. They'll be lobbied by the individuals in their community for a vote in a desired direction or for introduction of legislation. This is all a normal part of the role of the legislator.

Whether a campaign donation comes from Sally at the diner or from Joe, a customer of the legislator, there is a conflict and expectation that the legislator will act in the collective best interests of their constituents. This includes Sally and Joe. Excluding this legislator from participating in all of the duties for which they have been elected absolutely is detrimental to the very idea of a representative form of government.

However, the other issue that seems to particularly plague some individuals of this Committee is the notion of outside influence. The ever present corporate donor who takes the form of the bogeyman for lack of a better term. Corporate America is in North Dakota, which may come as a surprise by individuals who proclaim that this State is an idyllic place where such entities do not have an active right to participate in our State government. It is not uncommon for these entities to make donations to campaigns, but even if they do, how is that any different from Sally or Joe? All of these contributions are an effort to gain some kind of recognition from the candidate if they become successful in winning the election.

That said, cannot these individuals manage that conflict? And if the conflict is not manageable, then recusing themselves is indeed appropriate. However, if a vote that aids a local manufacturer and other manufacturers throughout the State is appropriate, how is it wrong? If you examine the CoI policy of our institutions of higher education, you'll see a rather flexible system that is not intended to stymie function(s) of an individual, but rather to ensure that measures are in place to manage noted conflicts.

When I teach my students CoI, we talk about the simple fact that we all have conflicts, it is the ability to manage them that is important. However, if an organization takes an approach that conflicts are bad, then important conflicts may not be disclosed, which is not the proper course of action. In essence, having conflicts is not bad, but allowing those conflicts to create a bias that is not reflective of the best action to be taken is what is bad.

My best regards,

Eric

--
Eric J. Murphy, Ph.D.
CEO/CSO
Krampade, LLC

675 S. 48th St.
Grand Forks, ND 58201

513-237-7711 mobile
701-772-3430 office
1-833-KRAMPED (1-833-572-6733) TOLL FREE

Everything a Sports Drink Should Be.....Official Sports Drink Partner of the National Collegiate Hockey Conference (NCHC)

www.krampade.com

Memorandum

Date: **December 6, 2021**

To: **North Dakota Ethics Commission**

Re: **Draft Conflict of Interest Rules**

From: **Sarah Vogel, Esq. and Gregory Stites, Esq.**

We respectfully urge the Commission not to adopt in current form the Draft Conflict of Interest Rules. We believe the Draft Rules are not consistent with Article XIV to the North Dakota Constitution based upon a reasonable reading of the following case law.

The Campaign Legal Center memorandum dated November 12, 2021 addresses the *Citizens United v. FEC* and *Americans for Prosperity Foundation v. Bonta* Supreme Court cases. We agree that neither case has a bearing or relevance to questions concerning the constitutionality of Article XIV's conflict of interest and recusal requirements. Neither case in any way supports the exclusion of "campaign contributions" from the application of Section 2.5 of Article XIV requiring disqualification in quasi-judicial proceedings.

As to the *Nevada Commission on Ethics v. Carrigan* Supreme Court case, it unambiguously held that Nevada's recusal provision ***did not*** violate the member's First Amendment right to freedom of speech. The Court further held that the provisions of the Nevada Ethics in Government Law (prohibiting a member with a "conflict of interest" in regard to a proposed statute from advocating its passage or failure during the legislative debate) was a reasonable time, place, and manner limitation under the First Amendment. This *Nevada Commission on Ethics* Supreme Court case clearly holds that it is unethical for a legislator to either vote on or speak in favor of or against a bill or regulation in which that legislator has a conflict of interest. Recusal, or a sanction for failing to recuse, is manifestly appropriate in these circumstances. It is important to note that the *Nevada Commission on Ethics* Supreme Court case does not review or consider whether "campaign contributions" constitute a conflict of interest or not. But for purposes of Section 2.5 of Article XIV requiring disqualification in quasi-judicial proceedings, "campaign contributions" are "monetary or in-kind support related to that person's election to any office" and therefore must be grounds for disqualification if the amount of those campaign contributions create an "appearance of bias to a reasonable person." Because the Constitution does not define what the "appearance of bias to a reasonable person" means, it would seem prudent for the Ethics Commission to define by rule what a dollar equivalent for this would be. For example, setting total amounts of less than $200 would be reasonable since this would match the triggering reporting requirements under present law. Most voters either give nothing to a campaign or donate sums less than $200. It seems that a "reasonable person" might conclude that amounts over $200 do in fact give the appearance of bias, especially if those donations are being given by persons or entities seeking a favorable or unfavorable outcome from a quasi-judicial proceeding.

As a final thought generally, all Constitutional provisions are to be robustly defended by the Attorney General, especially against federal preemption. Section 2.5 of Article XIV is clear in its language that "monetary or in-kind support related to that person's election to any office" are grounds for disqualification. The Ethics Commission and the Attorney General should be working together to see that this Section is given its most expansive and intended meaning, especially in light of its direct

personal application to the Attorney General as a member of the Industrial Commission and other quasi-judicial proceedings. In fact, some legal theories might hold that the Attorney General's Office has a continuing ethical conflict in representing the Ethics Commission considering the Commission's role in regulating public officials and others.

See cited passages below for authority in the *Nevada Commission on Ethics v. Carrigan* U.S. Supreme Court case:

---

131 S.Ct. 2343
Decided June 13, 2011

Supreme Court of the United States

No. 10–568.

NEVADA COMMISSION ON ETHICS, Petitioner,
v.
Michael A. CARRIGAN.

---

*121

"The challenged law not only prohibits the legislator who has a conflict from voting on the proposal in question, but also forbids him to "advocate the passage or failure" of the proposal—evidently meaning advocating its passage or failure during the legislative debate. Neither Carrigan nor any of his amici contend that the prohibition on advocating can be unconstitutional if the prohibition on voting is not. And with good reason. Legislative sessions would become massive town-hall meetings if those who had a right to speak were not limited to those who had a right to vote. If Carrigan was constitutionally excluded from voting, his exclusion from *122 "advocat[ing]" at the legislative session was a reasonable time, place, and manner limitation. See Clark v. Community for Creative Non–Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)."

*122

"The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years."

*122

""[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning,' " Printz v. United States, 521 U.S. 898, 905, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (quoting Bowsher v. Synar, 478 U.S. 714, 723–724, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986)). That evidence is dispositive here. Within 15 years of the founding, both the House of Representatives and the Senate adopted recusal rules. The House rule—to which no one is recorded as having objected, on constitutional or other grounds, see D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, p. 10 (1997)—was adopted within a week of that chamber's first achieving a quorum.2 The rule read: "No member shall vote on any question, in the event of which he is immediately and particularly interested." 1 Annals of *123 Cong. 99 (1789). Members of the House would have been subject to this

recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none.

The first Senate rules did not include a recusal requirement, but Thomas Jefferson adopted one when he was President of the Senate. His rule provided as follows:

"Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to." A Manual of Parliamentary Practice for the Use of the Senate of the United States 31 (1801).""

*124

"The Nevada Supreme Court's belief that recusal rules violate legislators' First Amendment rights is also inconsistent with longstanding traditions in the States. A number of States, by common-law rule, have long required recusal of public officials with a conflict. ... Today, *125 virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest."

Thiele, David L.

From: North Dakotans for Public Integrity <ndpublicintegrity@gmail.com>
Sent: Tuesday, December 7, 2021 10:46 AM
To: -Info-ND Ethics Commission
Cc: Dina Butcher; Kathy Tweeten; Sarah Vogel; David Schwalbe; Darrell Dorgan; Greg Stites
Subject: Commission Authority
Attachments: Legal Analysis of AG Letter Opinion 2020-L-09 FINAL.pdf

Dear Commissioners,

While working on our rules comment letter, we came across the attached legal analysis done by Greg Stites for NDPI after the Attorney General issued Letter Opinion 2020-L-09. We shared it with Executive Director Thiele early this year and he may have passed it along to you.

This memo explains that the Ethics Commission can disregard any legislative statutes it believes are wrong or incorrect or unconstitutional. Its rules supersede any statutes passed by the legislature (except for where Article XIV says the legislature only is supposed to pass laws, like penalties.

The Commission for example need not try to exempt the Industrial Commission from the recusal requirements of Article XIV Section 2.5. It can by rule provide the mechanism for who is to replace one or all of the members of the Industrial Commission in a situation where they have a conflict of interest. It doesn't matter whether the legislature has done or is willing to do so or not.

If your understanding differs, it would be helpful to know that. Our goal is always to be supportive and respectful, and we would not want any fundamental misunderstandings to undermine that goal.

--
Common Sense Accountability

North Dakotans for Public Integrity
701-840-1780
ndpublicintegrity@gmail.com
1515 Burnt Boat Drive, Ste C-273, Bismarck, ND 58503

Attorney General Letter Opinion 2020-L-09 Dated December 23, 2020

by Attorney Greg Stites for North Dakotans for Public Integrity

1. Attorney General Opinions are controlling law in North Dakota until such time as a court decides differently. Legislators are bound by their oaths to uphold the law, including these Opinions.

2. In Letter Opinion 2020-L-09, Attorney General Stenehjem has held that, "if the rules passed by the [Ethics] Commission conflict with a statute, the Constitution mandates that the rule promulgated by the Commission prevails." Thus, this controlling AG legal opinion establishes in effect a priority by pointing out that the rules enacted by the Ethics Commission are superior to any conflicting statutes passed by the Legislature (meaning controlling over).

   Letter Opinion 2020-L-09 recognizes that for purposes of carrying out their authorized duties under the N.D. Constitution, the Ethics Commission, the Legislature, and the Supreme Court are on equal footing. And most importantly, in any conflict between the two bodies, the rules of the Ethics Commission in its domain prevail over the statutes enacted by the Legislature.

3. What this means for the question posed to the Attorney General by the Chairman of the Ethics Commission:

   Letter Opinion 2020-L-09 states that "the Ethics Commission has the constitutional authority to promulgate rules defining "lobby" and lobbyist" within the context of the lobbyist gifting restrictions [in Article XIV, N.D. Constitution] even if those definitions are broader than what has been passed by the Legislature". Thus, it was entirely permissible for the Ethics Commission to add to the Legislature's definition of "lobby" the 2 new subsections that include "attempt[ing] to secure passage, amendment, or defeat of any administrative rule or regulation by any department, agency, or body of the state's executive branch" or "attempt[ing] to otherwise influence public official action or decision".

   In summary, commencing on January 5, 2021, the Ethics Commission's lobbyist gifting rules defining "lobby" and "lobbyist" must prevail over any conflicting statutes. Article XIV clearly provides that a "public official" may not accept gifts from a lobbyist, and defines "public official" to include "any elected or appointed office or official of the state's executive or legislative branch, including members of the ethics commission, or members of the governor's cabinet, or employees of the legislative branch".

4. What this means overall for the Ethics Commission responsibilities and rules:

   Letter Opinion 2020-L-09 recognizes that the Ethics Commission is a constitutionally established body whose 5 members are charged with duties in five broad areas. The Ethics Commission is authorized to promulgate ethics rules related to "1) transparency,

2) corruption, 3) elections, and 4) lobbying" to which any lobbyist, public official, or candidate for public office shall be subject, and 5) may investigate alleged violations of such rules, Article XIV of the N.D. Constitution, and related state laws.

Letter Opinion 2020-L-09 recognizes that the Ethics Commission has constitutional standing, just as does the Legislative Assembly and the state Supreme Court. Thus, the Ethics Commission has a green light to use its best judgment in pursuing its constitutional responsibilities. This concurrent jurisdiction is analogous to the interplay between the Legislature and the state Supreme Court. The Court has explained in case law the interplay between legislative statutes and rules promulgated by the Court by stating that the Legislature cannot repeal - meaning hamper, restrict, or impair – rules made pursuant to the Court's powers provided for in the Constitution. The same is true for the interplay between the Legislature and the Ethics Commission.

5. What Letter Opinion 2020-L-09 means for future implementation of Article XIV provisions:

   It is important to note that Letter Opinion 2020-L-09 explicitly stated that "this opinion should not be construed as addressing the constitutionality of any portion of N.D.C.C. ch. 54-66" (the statutes passed by the Legislature in 2019).

   HB 1521, passed in 2019, did not fulfill all of the Legislature's responsibilities to implement Article XIV. In fact, several provisions of the bill are in direct contradiction with Article XIV. At least two bills being introduced into the 2021 session will provide the Legislature with an opportunity to fulfill its responsibilities consistent with Article XIV, including repeal and/or alteration of certain statutes passed in 2019.