



Everyday Ethics for Local Officials

Deciding When Not to Participate in an Agency Decision: Abstentions and Disqualifications

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QUESTION

Our governing body is struggling with the issue of abstentions. Here's the situation. We are a small jurisdiction – everyone knows everybody, is related to everyone and has business relationships with everyone. What's more, our elected officials have high ethical standards and want to avoid even the appearance of impropriety, so we abstain often. As a result, sometimes only a few individuals must make important decisions affecting our community – which makes them feel uncomfortable. Can you provide some insight on the law and ethics related to the abstention issue?

ANSWER

The issue of when to refrain from participating in an agency decision is indeed a vexing one. As with many ethical issues, it is an area in which the law provides some – but not all – of the answers. What you are struggling with is a tension between your responsibility to participate in your agency's decisions and your desire to promote the public's trust in the integrity of those decisions. Related to the public trust issue may be a concern that you cannot be fair in a given situation. Let's analyze the situation and see what some of your options might be.

Abstention or Disqualification?

A definition of relevant terms is a useful starting point. When an official abstains from participating in a decision, he or she does so voluntarily. Abstention involves the exercise of some degree of judgment or choice.

In the case of disqualification, the law makes the judgment that an official must not participate in a particular decision. Thus, when an official is disqualified from participating in a decision, there is less element of choice than when abstaining.

It is important to keep in mind that being disqualified from participating in a particular matter does not imply any wrongdoing. It simply means that an official has financial or

other relationships that preclude him or her from participating in the decision. (Of course, having a disqualifying conflict of interest and insisting on participating in the decision is another matter. Such participation is a violation of the law and could subject a decision-maker to civil and criminal penalties. It also could invalidate the action taken.)

Examples of Disqualification

The most common form of disqualification occurs under the state Political Reform Act. Under that law, a public official may not make, participate in or influence a governmental decision that will have a foreseeable and material financial effect on the official's (or his or her immediate family's) economic interests.¹ The Fair Political Practices Commission (FPPC) has adopted a process for determining when an official must disqualify him or herself from participating in a decision.

The last two steps of the process recognize some of the practical considerations referred to in your question: Step seven analyzes whether the decision's effect on the public official is the same for a significant segment of the public (this is known as the "public generally" exception to the disqualification requirement).

Step eight analyzes whether the otherwise disqualified- official's participation in the decision is legally required.

The latter exception applies if an official's disqualification would prevent the agency from acting in a situation in which it legally must act. When analyzing this issue, local agency counsel may ask such questions as: 1) Is the agency unable to convene a quorum? and 2) Are there no alternative means of making the decision?

Other reasons for being disqualified from participating in a decision include receipt of campaign contributions (under very limited circumstances), certain forms of bias based on a personal interest in the outcome of a decision, or strong feelings (positive or negative) about the parties whose interests will be affected by the decision. There also can be issues of common law bias to consider (personal interest in the outcome, party or factual bias); see next section for more on this issue.

By becoming familiar with these rules, public officials will know when to contact their local agency's attorney for help in determining whether there is a legal basis for disqualification. It may also be necessary to consult the FPPC. Remember, only written FPPC advice can immunize local officials from prosecution if you unlawfully participate in a decision.

See "Resources for Further Reading" box below for more information.

Abstentions

What if your agency attorney or the FPPC says that there is no legal basis for disqualifying yourself from a particular matter, but you continue to have concerns about your ability to make a fair decision? If you're not confident that you can separate your personal loyalties from the interests of the community as a whole, it's best to abstain.

What if you are confident in your ability to make a fair and public-minded decision, but others are questioning your ability to do so? As with many ethical dilemmas, this is an example of conflicting and important values.

One value is fulfilling your responsibility as an officeholder to make decisions – which, of course, is what your constituents elected you to do. Related to this value is the benefit of having as many decision-makers as possible participate in decisions to reflect the full range of community perspectives.

The other value is preserving the public's trust that the agency's actions are based on principles of fairness and what best promotes the public's interests – as opposed to decision-makers' self interests or those of their friends and family.

In these instances, put yourself in the public's shoes. Make an honest assessment of what you would think if you were a member of the public analyzing the situation. If you would question your ability to put personal interests and loyalties aside, you may want to abstain.

This kind of assessment causes some officials to adopt the practice you describe of avoiding even the appearance of impropriety with respect to their conduct as public officials. Such a practice places a high value on maintaining and improving the public's perception of government and those who govern. This value reflects a concern that the loss of public trust in government diminishes the community support necessary to address pressing community challenges.

Adopting this approach may mean not participating in an important decision. Perhaps even more difficult is the fact that those who do participate may make what you consider to be the “wrong” decision, in terms of the long-term interests of the community, and one with which your constituents disagree. Some of your constituents may feel disappointed and angry if you step aside and let others make a decision with which they disagree. They may even tell you they didn't elect you to be ethical or concerned about the public's trust in government: “As long as the law says you don't have to disqualify yourself, don't worry about it.”

Ultimately, the issue rests in the value you place on ethics in your service as a public official. Again, it appears that you and your colleagues have already placed a high value on such ethical considerations by deciding to avoid even the appearance of impropriety.

Some agencies have formalized such values in a code of ethics. Such codes can be a useful source of guidance in sticky situations.

If your agency does not have a code, ask yourself how you want to be remembered by the community and your family. If integrity is part of the picture, then braving criticism for voluntarily refraining from participating in an important decision may be worth it to you. Moreover, having such a reputation may help in the future when you believe you can ethically participate in a decision, even when others are questioning your ability to do so. And, if you establish such a reputation, the public will be more likely to be receptive when you indicate that you can ethically participate in a decision, even when others question your ability to do so.

The Eight Steps of a Disqualification Analysis

The process of determining when an official is disqualified from participating in a decision is a very complex one. There are statutes, regulations and interpretive opinions that flesh out each aspect of the basic prohibition. To organize the analysis, the Fair Political Practices Commission has adopted an eight-step procedure for identifying when one must disqualify oneself from participating in a matter. Although it is useful to be aware of the general outlines of the process, the analysis with all its twists and turns is best undertaken by agency attorneys and the Fair Political Practices Commission staff-particularly since the rules are not necessarily logical or intuitive.

- Are you a public official within the meaning of the rules?
- Are you making, participating in making, or influencing a governmental decision?
- Do you have an economic interest in the decision?
- Is your economic interest directly or indirectly involved in the decision?
- Are the financial impacts on your economic interests considered important (material) enough to trigger a conflict of interest?
- Is it reasonably foreseeable (substantially likely) the governmental decision will result in one or more of the materiality standards being met for one or more of your economic interests?
- Is the decision's effect on your economic interest different from the effect on the public generally?
- Even if you have a disqualifying conflict of interest, is your participation legally required?

Disqualifications, Abstentions and The Ability To Take Action

What about those feelings of discomfort you describe when your agency takes action with relatively few elected officials participating in the decision? It may be helpful for you to be aware of some minimum thresholds established by law.

The general rule is that a majority of a body must be present for it to conduct business – a concept known as a quorum.² Having a quorum ensures that a legally specified minimum number of decision-makers participate in a decision.

Usually, a majority of the quorum is necessary for an item to pass, although there are special rules that apply to certain kinds of actions. For example, resolutions, orders to pay money, and all ordinances require three votes to pass.³ Laws also require more than a majority of the body in order to take certain actions.⁴

These special rules reflect a judgment that some agency actions are sufficiently important that the body may not act with just a small number of its members participating in the vote.

How do abstentions and disqualifications affect the existence of a quorum? The general rule is that elected officials who abstain are counted for purposes of determining a quorum, but their abstentions are not counted when tallying the votes.

For example, if your agency has a five-member governing board and three members attend a meeting but one abstains, the board can still take action because the two voting members and the abstaining one constitute the requisite quorum of three. However, the two voting members must each vote in support of the matter for it to pass, assuming that the matter is not one that requires three affirmative votes or another special vote threshold.

It's important to note that those who abstain from voting because of a pending question concerning a conflict of interest (for example, a council member who is waiting to receive an advice letter from the FPPC) may be counted toward the quorum. This is because they have not yet been disqualified (typically their agency attorneys recommend that they abstain pending resolution of the conflict issue).⁵

Conversely, those who are disqualified from participating in the decision are not counted toward the quorum.⁶ Thus (again assuming a five-member governing board), if three members attend a meeting and one is disqualified, the body lacks a quorum. If four members on a five member board attend, and one abstains and one is disqualified, there is a quorum of three and the matter will pass with two affirmative votes. This scenario again assumes that the matter is not one that requires three affirmative votes or another special vote threshold.

What to Do If You Abstain or Disqualify Yourself

A consensus exists that, when you disqualify yourself or abstain, you should not participate in any aspect of the decision-making process. The basis for this rationale is as follows: If it's inappropriate for you to vote on a matter, it's also inappropriate for you to participate in the discussion or in any other activity that could influence a colleague's vote. This includes being present for the discussion.

The law codifies this concept regarding disqualifications.⁷ Typically one with a disqualifying financial interest in a decision must take the following series of actions:

- Publicly identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public;
- Recuse themselves from discussing or voting on the matter; and
- For certain officials, leave the room until after the discussion, vote and any other disposition of the matter, unless the matter is on the consent calendar.

Use Special Caution When a Public Official Has an Interest in an Agency Contract

Another disqualification and abstention issue arises when a public official has a financial interest in a contract that comes before the agency for approval.

State law prohibits public officials from having a financial interest in any contract made by their agencies.⁸ This is a prohibition against self-dealing. The prohibition is absolute and it applies even if the official abstains from voting on the contract and does not participate in any of the preliminary discussions, negotiations, planning or solicitation of bids.

The penalties for violating the contracting conflict-of-interest rules are severe. Violations are a felony, punishable by fines, imprisonment and disqualification from ever holding office again.⁹ The contract is also "void," meaning the agency does not have to pay for goods or services received under the contract and may seek repayment of amounts already paid.¹⁰

There are limited exceptions to the rule, including when the interest is so small that it amounts to "noninterest" or a "remote interest."¹¹ There is also a limited rule of necessity.¹² Consult your agency attorney the minute you believe you may have an interest in a contract being contemplated by your agency.

The law does allow a public official to speak on the issue at the same time as the public speaks on the issue if the subject of the decision is the official's business or property.¹³

Local elected officials may wish to consider whether, as an ethical matter, they want to also follow these practices when they voluntarily abstain from participating in the decision.

Resources for Further Reading

The Institute's *A Local Official's Reference on Ethics Laws* explains the disqualification rules in more detail. The guide is available without charge in electronic form from the Institute's website: www.ca-ilg.org/ethicslaws. Hardcopies are available for purchase at www.ca-ilg.org/ilgpubs).

The Fair Political Practices Commission also publishes a handy guide to the state rules in this area. The guide is called "Can I Vote? An Overview of the Conflicts Laws," and is available in electronic form without charge from the FPPC's website: www.fppc.ca.gov (click on Publications tab).

The Duty To Decide, Not Duck

As you point out, in an ideal world, all members of a governing body would be able to participate in any given decision. This underscores how important it is for all members of a governing body to attend every meeting, so decisions can reflect the views of every voting elected official who can participate in the decision.

Responsibility is a key component of ethical behavior. Attending and being prepared for meetings is a major element of an elected official's responsibilities and, hence, ethical behavior. So is voting in general. It may be tempting to abstain because of concerns about making an unpopular decision or simply not knowing which decision is best. As hard as some decisions are, making decisions is what you were elected to do.

It is manifestly unfair – and unethical – to abstain or otherwise put your colleagues in the position of taking the heat for a necessary but unpopular decision.

Pointing Fingers at Others

What if you have reason to believe that a colleague is disqualified or ought to abstain? The best approach is to discuss your concerns privately with the colleague. If you are still concerned that the colleague is legally disqualified from participating, the next step is to discuss the issue with the agency attorney and relevant law enforcement authorities.

It is not typically ethical to use a public meeting or other public forum to make political hay out of the situation. Such an approach embarrasses your colleagues and generally diminishes the public's view of your decision making process. One seasoned mayor explains that she discourages such conduct by stopping the discussion. She also admonishes the accuser that the issue of whether to disqualify oneself or abstain is one that the accused council member needs to decide, in consultation with the city attorney and relevant law enforcement authorities.

What's more, if you are mistaken about the underlying facts of the accusation, you could also end up embarrassing yourself. Following the Golden Rule is a good rule of thumb: Treat everyone the way you would like to be treated.

No Easy Answers

Regrettably, engaging in the legal and ethical analyses described here does not ensure that you can avoid uncomfortable situations. As Rushworth Kidder observes in his book, *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living*, "Those who live in close proximity to their basic values are apt to agonize over choices that other people, drifting over the surface of their lives, might never see as problems. Sound values raise tough choices; and tough choices are never easy." Kidder is encouraging us to become more accustomed to the inherent discomfort that comes with striving to be ethical.

This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.

Endnotes:

¹ See Cal. Gov't Code §§ 87100 and following.

² See Cal. Gov't Code § 36810 (for general law cities). See also Cal. Civ. Proc. Code §§ 12 and 15. Note, however, the rule is different for county boards of supervisors, which require a majority vote of the entire membership of the board to act. See Cal. Gov't Code § 25005.

³ See Cal. Gov't Code § 36936.

⁴ For example, urgency ordinances (for the immediate preservation of the public peace, health or safety) require a four-fifths vote. See Cal. Gov't Code § 36937(b). Urgency interim zoning ordinances (moratoria) also require a four-fifths vote. See Cal. Gov't Code § 65858. Resolutions initiating eminent domain proceedings require a two-thirds vote (four votes in a general law city). See Cal. Civ. Proc. Code §§ 1245.220, 1245.240.

⁵ *Farwell v. Town of Los Gatos*, 222 Cal. App. 3d 711, 271 Cal. Rptr. 828 (6th Dist. 1990) (subsequently ordered not published). See also 62 Cal. Op. Att’y Gen. 698, 700 (1979).

⁶ *Id.*

⁷ See Cal. Gov’t Code § 87105.

⁸ Cal. Gov’t Code § 1090.

⁹ See Cal. Gov’t Code § 1097.

¹⁰ *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985); See Cal. Gov’t Code § 1092.

¹¹ See Cal. Gov’t Code §§ 1091(a) and 1091.5.

¹² See 70 Cal. Op. Att’y Gen. 45 (1987).

¹³ See Cal. Gov’t Code § 87105(a); Cal. Code Regs. § 18702.4.