



Everyday Ethics for Local Officials

Let's Not Make a Deal: Vote-Trading and Similar Practices Raise Legal and Ethical Issues

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QUESTION

I am a newly elected official. When I ran for office, I pledged to support a certain policy I'll call "X." After working with staff at our agency, a resolution to do X is now pending before our governing body.

One of my colleagues called me yesterday and said that he would vote for resolution "X" if I would vote for "Y," a cause he's championing. I confess I was taken aback and very uncomfortable. Am I right to be concerned?

ANSWER

Yes, you are right to be concerned. There are a number of issues to be aware of in such a situation.

First, when your constituents elected you, they elected you to use your best judgment on all issues that come before you. That means that you have a responsibility to vote only for proposals that you genuinely believe are in the public's interests.

Any time a public official considers something other than the public's best interests in making a decision, that official falls short of both legal and ethical obligations to his or her constituents. An easy example is when an official votes for something in exchange for money - everyone understands that such a practice is a bribe, which of course is a crime.

Vote-Trading is a Felony

Perhaps less well-known is the fact that vote-trading is also a crime for both state and local officials. Vote-trading for state officials has been a crime for some time, as have other improper influences on the legislative process.¹ Recent amendments to the Penal Code extended the prohibition to local officials.²

[A]ny member of the legislative body of a city, county, city and county, school district, or other special district, who ... gives, or offers or promises to give, any official vote in consideration that ... another member of the legislative body ... shall give this vote either upon the same or another question, is punishable by imprisonment in the state prison for two, three, or four years and ... by a restitution fine of not less than \$2,000 or not more than \$10,000.³

To underscore the seriousness of the offense, vote-trading (like other forms of bribery and crimes against the legislative power) also subjects an official to forfeiture of office and forever being disqualified from holding office.⁴

Like bribery, vote-trading is a form of quid pro quo (you do this for me, I'll do that for you). Quid pro quos are always legally risky and fall short of ethical standards for public officials.

Vote-Trading and Interagency Agreements

The Attorney General explored the boundaries of the prohibition against vote-trading in an opinion on interagency agreements. The issue was whether a memorandum of understanding (MOU) between a county and cities within the county in which the agencies all committed to take various actions would constitute an illegal exchange of votes.

The Attorney General said "no." He made a distinction between trade-offs *between jurisdictions* and trade-offs *between individual decision-makers*.

The hallmark of illegal vote-trading, according to the AG, is when one or more elected officials condition his or her vote on some other official voting one way or another on the "same or another question." The reason this is improper is that the officials are making their decision on the prospect of personal gain or advantage, rather than upon an objective and unbiased evaluation of the matter being voted upon.⁵

The Ethics of Vote-Trading and Similar Legislative Strategies

Why are quid pro quos a bad thing? Isn't cooperation and compromise with colleagues a good thing?

Let's look at the much maligned practice of "earmarking" in Congress. Earmarking is the process of designating funds for certain local projects in appropriations legislation. The system survives on a similar sort of "you-scratch-my-back, I'll-scratch-yours" mentality that results in the expenditure of billions of dollars of taxpayer resources. According to

the nonpartisan Congressional Research Service, the number of earmarks has grown from 4,155 valued at \$29 billion in 1994 to 14,211 worth \$53 billion a decade later.⁶

Some of the projects that get funded through this process are undoubtedly worthwhile. However, it is the decision-making process itself that is flawed, because legislators are not necessarily evaluating each project on its merits or whether each project funded is the most worthwhile use of taxpayer dollars. Nor is there necessarily an evaluation of whether the overall spending level through earmarking is the right amount of spending. And finally, the process by which such projects get added to the appropriations bills is less than transparent.⁷

This is the bottom line: Any time a public official stops making decisions based on what's best for the public, the policy-making process is compromised. The same dynamic can occur at any governmental level when officials who represent geographical districts take a hands-off attitude toward their colleagues' districts - on the theory that the deference will be reciprocal when it comes to issues arising in one's own district. Such "district deference" is another form of quid pro quo. Like earmarking, district deference involves one person voting for someone else's proposal so that the other person will return the favor.

The reason that such approaches are problematic is that the legislative process is, by design, a group decision-making process. When one defers to one's colleague, the voters lose the benefit of the group decision-making process; the process is undermined. Consider the consequences of unbridled vote-trading at the local level: Instead of several people (the council) deciding what's best for the jurisdiction, it would be possible for just one person (who had traded votes with the others) to make the call. Moreover, there are real risks that no one is looking at the big picture.

Your colleague might respond, "Well, I would never vote for anything that was truly bad or absolutely against my sense of the public's interest." Of course, it's good to have that minimum standard. But is that the standard that your colleague's constituents expect of him? Did he promise the voters, "I pledge not to vote for anything that's truly bad"? One suspects that your colleague instead ran on a platform that he would make the best decisions on every issue that comes before him, and those that voted for him did so on that basis.

The Slippery Slope of the Ends Justifying the Means

Your colleague might say, "My constituents elected me to be an effective advocate for their interests. By engaging in vote-trading, district deference and similar practices, I am getting valuable benefits for my constituents. Isn't that what my constituents elected me to do?"

This is a dangerous line of thinking for public officials. It's a variation of the notion that the ends justify the means. As both Gandhi and Martin Luther King Jr. observed, in a

democracy, the means are the ends. In a democracy, worthwhile ends rarely - if ever - justify dishonest or even questionable means.

Let's look at it this way: Legislative and other forms of decision-making in your agency are entrusted to a group of policy-makers. This collective decision-making process is designed to produce the wisest decision. If the process were set up such that each elected official from each district gets to have their way with respect to issues that arise in their district, then the system should be explicitly designed that way and explained to the voters as such.

What's the fundamental problem with a decision-making process that is predicated on vote-trading or even deference to a colleague's priorities for his or her district? The problem is that such practices are, in essence, dishonest because they deceive the public about how decisions are made. The public thinks it is getting a system of bona fide collective decision-making when in reality that's not how the system is working. Furthermore, the public believes that its representatives are each voting for a proposal because each representative thinks the proposal is best for the public. With vote-trading (or district deference), the public's representatives are instead motivated by quid pro quo considerations instead of public policy.

Other Rationalizations: "This Is How Politics Works" or "Everyone Does It" and "Who's Going To Know?"

Because you are newly elected, your colleague may try to tell you that vote-trading, district deference and other forms of quid pro quos are just the way business is done in politics. He may advise you to "go along to get along." Don't buy into this advice.

If this is commonly accepted practice in politics, is your colleague willing to publicly acknowledge the practice? In other words, if the newspaper asked why your colleague voted for your X policy, would your colleague feel comfortable saying that he did so because he exchanged his vote for yours on one of his proposals? If he's not willing to do so, this is a tacit admission that this approach is not consistent with the voters' standards and expectations (not to mention the law). This gets back to the fact that the public is being misled.

This is a variation of the so-called "newspaper test" for ethical decision-making. One way to know a given course of action is questionable is if one wouldn't want to be reported as engaging in that conduct in the newspaper. With recent reports that the public is very concerned about corruption and ethics in government,⁸ one can be fairly certain that your colleague's efforts to be "effective" would not be well-received by the public.

This is also the antidote to the "who's going to know?" question. You can never count on something being kept a secret - particularly in politics. Someone can accidentally let a comment slip in a moment of bravado or at a bar. Political alliances can change.

Prosecutors also have powerful incentives for getting people to tell the truth. It's simply unwise to count on a code of silence.

There's another test for ethical decision-making:

Is this a practice that would make the world better off if everyone engaged in it?

This is the "universal practice" test. If the answer is "no, the world would not be better off if this were a universal practice," then chances are very strong that the practice is not an ethical one.

Wholly apart from the legality of such practices, it is not at all clear that considerations of quid pro quos in the policy-making processes would produce better policy. The current firestorm related to earmarking illustrates this point.

Instead, it's more likely that the policy-making process would produce better policy if policy-makers each acted on their best judgments about what best serves the public's interest. Everyone may not agree on the latter, but having policy-makers focus on this as the ultimate question (as opposed to "how do I get my way on a given proposal?") seems more likely to achieve policy that serves the public's interests.

Conclusion

In short, your constituents elected you to make your best judgment on every issue that comes before you as a decision-maker - not just some issues. Tell your colleague that the kind of deal he proposes is not only illegal (indeed a felony that could cost him his freedom, his office and more), but unethical.

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 Note, too, that the voters have expressed the importance of avoiding improper influence in the state's legislative process by including similar prohibitions in California's constitution, such that:

A person who seeks to influence the vote or action of a member of the Legislature in the member's legislative capacity by bribery, promise of reward, intimidation, or other dishonest means, or a member of the Legislature so influenced, is guilty of a felony. (Cal. Const. art. 4, § 15)

² Cal. Penal Code § 86.

³ Cal. Penal Code § 88.

⁴ Cal. Penal Code § 86. Note that the state's criminal laws not only outlaw bribery and vote-trading, but "any attempt by menace, deceit, suppression of truth, or *any corrupt means*, to influence a member in giving or withholding his or her vote." [1] This is a pretty sweeping prohibition and is clearly designed to protect the integrity of the governmental decision-making process.

⁵ See 91 Cal. Op. Att'y Gen. 46 (2008).

⁶ Birnbaum, Jeffrey H. "Earmark - It's \$\$\$, Not Body Art" *Washington Post*, Feb. 3, 2006, at A17 (available online at www.washingtonpost.com).

⁷ According to a source quoted in the *Washington Post*, 98 percent of the 3,000-plus earmarks added to a single appropriations bill last year were added in conference committee, where they cannot be tampered with before final passage. *Id.*

⁸ CNN reported as follows: "Asked which issues were extremely important to their vote, 42 percent said corruption and ethics; 40 percent, terrorism; 39 percent, the economy; 37 percent, Iraq; 36 percent, values; and 29 percent, illegal immigration." "Corruption Named As Key Issue By Voters In Exit Polls" No v. 8, 2006 (available online at www.cnn.com/2006/POLITICS/11/07/election.exitpolls/index.html).