

When Innocent Behavior has Criminal Consequences

AVOIDING THE “PERP WALK”

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WHAT HAPPENED IN NEW JERSEY?

- × Indictments for what?
 - + Bribery
- × Who was indicted?
 - + Local city officials
 - + Developers
 - + Public and Private Attorneys
- × What was the common theme?
 - + Regulatory/development deals...

WHAT HAPPENED IN JERSEY?

- ✘ Ridgefield
 - + Mayor accepted cash in exchange for “helping with development approvals.
- ✘ Jersey City
 - + Consulted conspired with Housing Director to ease development approvals (18 months to serve!)
- ✘ Parsippany – Troy Hills
 - + Planning Board Attorney took cash for influencing action of Planning Board
- ✘ Yonkers
 - + Councilmember dropped opposition to project after developer got her cousin a job with his real estate firm

IN OTHER NEWS...

× Chicago

- + Alderman indicted for taking money in exchange for rezoning one of the City's largest undeveloped tracts of land.

× Dallas

- + Councilman and real estate developers convicted of bribery for involvement in land use approvals

GOALS FOR TODAY...

- ✘ Raise awareness of criminal laws that may be triggered by seemingly harmless behavior
- ✘ Discuss scenarios that could be potentially problematic for contractors, developers, and their respective lawyers
- ✘ Urge practitioners to exercise caution in the regulatory process

ETHICAL CONSIDERATIONS FOR LAWYERS...

- ✘ Disciplinary Rules of Professional Conduct:
- ✘ Rule 1.02(c)
- ✘ A lawyer shall not assist or counsel a client to engage in conduct the lawyer knows is criminal or fraudulent.
 - + Comment 7: There is a critical distinction between presenting an analysis of questionable conduct and recommending means by which to commit crime.

ETHICAL CONSIDERATIONS FOR LAWYERS

- × Rule 1.02(d)
- × When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client...

ETHICAL CONSIDERATIONS FOR LAWYERS

- ✘ A lawyer shall not commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects... *TDRPC Rule 8.04(a)(2)*
- ✘ "Serious crime" includes commission, conspiracy, or solicitation of:
 - + Felony of moral turpitude, or
 - + Misdemeanor involving financial misappropriation *TRDP 1.06(Z)*

THE IMAGE OF PUBLIC CORRUPTION



FEDERAL BRIBERY, 18 U.S.C. 201

- × An offense if:
- × “public official...directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for...being influenced in the performance of any official act.”

FEDERAL BRIBERY

- × “Official Act” defined very broadly
- × “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit”

FEDERAL BRIBERY

- ✘ Prohibits acceptance of unlawful gratuities
- ✘ Does not require proof of *quid pro quo*
- ✘ Only requires proof that something of value was given in exchange for an official act
- ✘ Bribe may be given either before (as inducement) or after (as appreciation) the official act

TEN COMMON OFFENSES...

- × Failure to report financial dealings
- × Misuse of political funds
- × “Ghost” employees
- × Licenses, Inspections, & Zoning changes
- × Bribery in establishment of tax increment financing (TIF) districts
- × Conflicts of Interests
- × Management override; awarding bonuses to oneself
- × “Pay to play”
- × Contract corruption – lowest bidders & change orders
- × Travel paid by vendors

PENAL CODE, 1.07

- × “Public servant” is broadly defined:
 - + Elected, selected, appointed, employed or otherwise designated as:
 - × Officer, employee or agent of government
 - × Juror or grand juror
 - × Arbitrator or referee authorized to determine a cause
 - × Attorney performing governmental function
 - × Candidate for public office
 - × Person performing a governmental function under claim of right
 - + Even if hasn't assumed duties or qualified for office

PENAL CODE, 1.07

- × “Benefit” is also broadly defined...
- × “*Benefit*” means ***anything*** reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest



PENAL CODE, 36.02

× Bribery

- + *Intentionally or knowingly*
- + Offers, confers, or agrees to confer, OR
- + Solicits, accepts, or agrees to accept
- + Any benefit as consideration
- + Decision, opinion, recommendation, vote or other exercise of official discretion
- + As a public servant or in an official proceeding

BRIBERY, CONTINUED...

- ✘ A campaign contribution or lobby expenditure, if offered or solicited in exchange for an exercise of official discretion, is still bribery
- ✘ Applies even if official has not yet taken office
 - + *Kaisner v. State*, 772 S.W.2d 528
- ✘ No defense that benefit is offered, accepted, or conferred *after* the exercise of discretion

BRIBERY, CASELAW

- ✘ When it is alleged that a benefit has been conferred, evidence must prove a bilateral agreement.
 - + *McCallum v. State*, 686 S.W.2d 132
- ✘ If only an offer or solicitation is alleged, no proof of bilateral agreement needed.
 - + *Martinez v. State*, 696 S.W.2d 930

PENAL CODE, 36.08

GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO...

- ✘ (a) Public servant cannot solicit or accept any benefit from a person subject to his regulation, inspection, or investigation by public servant or his agency
- ✘ (c) Public servant involved in criminal or civil litigation may not solicit or accept any benefit from a person against whom the litigation is pending or contemplated

PENAL CODE, 36.08

GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO...

- ✘ (d) Public servant who exercises discretion in connection with contracts, purchases, payments, or claims cannot solicit or accept benefit from person with – or likely to develop – an interest in such transaction...
- ✘ Travel, meals & lodging = pecuniary benefit
 - + *Smith v. State*, 959 S.W.2d 1
 - + Don't ask vendor for Broadway tix for your wife

PENAL CODE, 36.09

- ✘ Offering Gift to Public Servant
- ✘ Offense to offer, confer, or agree to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.
- ✘ Class A misdemeanor

PENAL CODE, 36.10

- ✘ Exceptions to 36.08 & 36.09 only
- ✘ Does NOT create exception to Bribery!
 - + Legitimate fee for service
 - + Prior relationship
 - + Campaign contributions
 - + Item valued less than \$50 (excluding CA\$H)
 - + Food, lodging, transportation or entertainment ***accepted as a guest***, and, properly reported if required by law to do so

PENAL CODE, 36.10

- ✘ What other reporting requirements exist?
 - + Lobby Law (GC 305)
 - + Personal Financial Statement (GC 572)
 - + PFS in counties +100,000 (LGC 159)
 - + PFS in cities +100,000 (LGC 145)
 - + CIQ/CIS (LGC 176)
 - + Any local ethics ordinance or policy (Austin)
 - + IRS?

PENAL CODE, 36.03 & 36.04

- × **Coercion of Public Servant**
 - + Offense to attempt to influence public servant in a specific exercise of official power or to violate his known legal duty (Class A misdemeanor)
 - + Exception: Authorized public official may coerce
- × **Improper Influence**
 - + Offense to privately entreat public servant in an effort to influence outcome of official proceeding on basis not authorized by law (?)
 - + Class A misdemeanor

PENAL CODE 36.07, ACCEPTANCE OF HONORARIUM

- ✘ Offense for public servant to solicit, accept, or agree to accept an honorarium in consideration for services that the public servant would not have been requested to provide *but for* the public servant's official position or duties.
- ✘ “Honorarium” not defined...
- ✘ Has been construed to include “compensation”
- ✘ Requires no “official act”

BE AWARE OF THE LAW...

- ✘ Lawyers, whether advising public entities or developers
- ✘ Contractors, developers, or anyone else seeking some regulatory action
- ✘ Public servants
 - + Elected & appointed officials
 - + Staff

BEWARE “INNOCENT” BEHAVIOR...

- × Entreaties
- × Meals
- × Entertainment
- × Gifts
- × Expressions of gratitude
- × Other, indirect favors
 - + Special treatment for third parties, etc.

SCENARIO – “CARDED”

- ✘ Vendor seeking contract to expand treatment plant gives each director a \$50 gift card to the Outback Steakhouse...
 - + Is it cash (and therefore prohibited)?
 - + Is it a gift of *less than* \$50?
 - + Is it food, and does the contractor have to be with you when you use it?
 - + What if your meal is only \$49?

SCENARIO – “GAME DAY”

- ✘ Builder, with permit application pending, flies city council member Dallas to address local association, pays for lunch, and then to a Cowboys game...
- ✘ Areas of concern?
 - + Gift to public servant by someone subject to his jurisdiction?
 - + Honoraria?
 - + Travel, entertainment & lodging?
 - + Bribery?



...AND AVOID THE “PERP WALK”