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May 31, 2013

***VIA EMAIL AND U.S. MAIL***

Andra Donovan, Deputy General Counsel
San Diego Unified School District
4100 Normal Street, Room 2148
San Diego, CA 92103

**Re: Conflict of Interest -- Board Member Employment**

Dear Andra:

You have asked us to research and render an opinion regarding whether District Trustee Richard Barrera has a prohibited conflict of interest based on his appointment to the position of Secretary-Treasurer/CEO of the San Diego and Imperial Counties Labor Council ("Labor Council" or "Council"). You have specifically requested our opinion regarding whether Mr. Barrera may (1) continue to serve as a Trustee for the District; (2) participate in decisions related to and/or affecting SDEA and CSEA; and (3) participate in decisions involving the Project Stabilization Agreement ("PSA").

As is explained below, through a comprehensive review of all potentially-applicable conflict of interest laws, it is our opinion that:

1. Mr. Barrera may serve on the Board of Education and as Secretary-Treasurer/CEO of the Labor Council, as serving in these two positions does not violate the laws against incompatible offices.

2. At present, there is no information indicating that Mr. Barrera's service in both positions violates Government Code section 1090 et seq. or the common law prohibitions on conflicts of interest.

3. Although the analysis under the PRA is more intricate, Mr. Barrera may participate in decisions involving only SDEA and/or CSEA; howeverhe should refrain from participating in decisions on which the Labor Council has advocated a specific position, or in which the Labor Council is a party or is a subject of the proceeding.

4. The governmental decisions posing the greatest risk for Mr. Barrera are those which may involve a substantial portion or majority of membership of the Executive Board of the

Labor Council (e.g., trades union parties to the PSA). While there does not seem to be any evidence that a decision affecting these unions would have a "reasonably foreseeable" effect on Mr. Barrera's interest, there is a risk that a court may find these member unions are alter-egos of the Labor Council and that, therefore, the Labor Council itself is a party. However, as stated below, this is only a *risk* as we find no specific legal authority addressing this unique situation.

## FACTUAL BACKGROUND

Our understanding of the facts is as follows: Mr. Barrera has served as a District Trustee since 2008, and was recently appointed as the Secretary-Treasurer/CEO of the Labor Council. Mr. Barrera was selected as the Secretary-Treasurer/CEO of the Labor Council by a process that started with a vote by the Council's Executive Board, recommending that he be appointed to the position. This action sent the recommendation to a body of delegates, a group of approximately 100 people who represent, on a proportional representation basis, all of the Council's member organizations. There was a motion and a second, and the body of delegates voted to appoint Mr. Barrera to fulfill the remainder of Lorena Gonzalez's four-year term, which will expire in April, 2016.

Mr. Barrera will be employed by the Labor Council. His employment contract, which is being finalized, will be for a set salary and will have no incentive structure related to particular actions, goals or outcomes. Removal of Mr. Barrera from his position with the Council would require a vote of the body of delegates.

SDEA and CSEA are members of the Council, with each currently having a seat on the Council's Executive Board, but collectively comprise less than five percent (5%) of the Council and body of delegates. Several signatory locals to the PSA, as well as the San Diego Building & Construction Trades Council, currently have seats on the Executive Board as well. However, nothing in Mr. Barrera's compensation is impacted by the continued membership of SDEA, CSEA, or any other current member of the Labor Council.

## LEGAL ANALYSIS

### I. INCOMPATIBILITY OF POSITIONS

#### A. Government Code section 1099

Government Code section 1099 provides that a public officer "shall not simultaneously hold *two public offices that are incompatible*." (Emphasis added.) This section codifies a well-established common law rule prohibiting the holding of incompatible offices in California. However, the relevant case law and California Attorney General opinions on this point indicate that this proscription on holding incompatible positions relates only to *public* offices. (*See People* ex rel. *Chapman v. Rapsey* (1940) 16 Cal.2d 636, 641–642; *People v. Garrett* (1925) 72

Cal.App. 452; 65 Ops.Cal.Atty.Gen. 606 (1982).) The preeminent concern behind this outright proscription is the potentially overlapping jurisdiction that may potentially compromise the official loyalties for an individual holding two different public offices. For the prohibition to apply, both positions must be *public* offices, and not merely "a position of employment[.]" (Gov. Code § 1099, subd. (c); see also 58 Ops.Cal.Atty.Gen. 109, 111 (1975).)

Because employment with the Labor Council is not a "public office" within the meaning of the statute, Mr. Barrera's employment with the Labor Council does not run afoul of Section 1099.

**B. Incompatible Activities—Government Code section 1125 et seq.**

Under the provision prohibiting incompatible activities, a local agency[1] officer or employee must not, except as provided in specified statutes, engage in any employment, activity, or enterprise for compensation that is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointment power or agency by which he or she is employed. The officer or employee must not perform any work, service, or counsel for compensation outside of his or her local agency employment where any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing body, unless otherwise approved in the manner prescribed. (Gov. Code § 1126; see also *People v. Darby* (1952) 114 Cal.App.2d 412 [member of LAUSD Board of Education leased a vacant facility he owned to an ice cream company with which LAUSD subsequently contracted].)

According to the California Attorney General's Conflicts of Interest Guide (2010), the prohibition against inconsistent, incompatible, or inimical activities is "not self-executing." (Page 88.) Generally, the local agency determines which outside activities fall within the prohibition in an "incompatible activities statement." (Gov. Code § 1126, subd. (b).) However, the section is self-executing as applied to school board members; school board members are subject to the prohibitions in Government Code section 1126 as set forth in Education Code section 35233. Nevertheless, District Policy I-1210 does not encompass any of the activities Mr. Barrera is expected to carry out on the Labor Council.

The California Attorney General has opined that a public school board member violated Government Code section 1126 by operating a for-profit private preschool and K-3 school within the public school district's boundaries. (70 Ops.Cal.Atty.Gen. 157 (1987).) In that opinion, the Attorney General noted that the board member's activities *need not* fall within the prohibitions of the entity's incompatible activities statement to be prohibited. However, the Attorney General held that even where positions were incompatible, automatic disqualification was not generally required. The Attorney General stated:

[1] A school district is a local agency subject to the prohibition. (Gov. Code § 1125; 56 OpsCalAttyGen. 556 (1973); 58 Ops.Cal.Atty.Gen. 110, 112–114 (1975).)

> It is therefore concluded that section 1125 et seq. do not require a resignation of one office or employment if an incompatibility is found within the meaning of section 1126, but that abstention will be permitted on a transactional basis. The more specific provisions of the PRA and section 1090 et seq. should control over the more general provisions of 1125 insofar as they are covered by the former sections. We do not mean to hold, however, that if the incompatibility is of such a continuing and pervasive nature that a public officer or employee may constantly abstain from performing his duties because of personal conflict. (*Id.*)

Nevertheless, the Attorney General found a broad and pervasive conflict between the board member's duties and interests in his private schools:

> In our opinion, any matter which might come before the school board which would improve the school system generally, or the elementary school system particularly, if adopted and implemented, could be deleterious to the board member's private schools and their success. We can virtually take official notice of the fact that the better a public school system is, the less likely parents are to send their children to private schools. The matters which could influence such a decision could reach not only the educational attributes of the schools, but also other activities and amenities such as sports or even the provision of day care at the school for working parents.

The Attorney General held the proper remedial action in that case was to cure the incompatibility "by the cessation of either the public office or public employment or the outside incompatible activity…Absent voluntary action by a board member who is in violation of section 1126, the sanctions available would be removal from office pursuant to section 3060 et seq. of the Government Code, or recall by the electorate." (*Id.*)

In contrast with the Attorney General's private school decision, however, it appears no interest of the Labor Council would be so continually or pervasively incompatible with the decisions the District's Trustees must make so as to completely disqualify Mr. Barrera from the Board. The majority of District business relates to educational programs for its students, in which the Labor Council would take little interest. Therefore, we conclude that nothing in California law precludes Mr. Barrera from retaining his seat on the Board while being simultaneously employed by the Labor Council, and actual or potential conflicts of interest must therefore be addressed on a transactional or case-by-case basis under the specific provisions of the Political Reform Act or Government Code section 1090. Only if Mr. Barrera must continually recuse himself from Board decisions would there be a "continuing and pervasive" incompatibility so as to disqualify him completely pursuant to Government Code section 1125 et seq.

## II. CONFLICT OF INTEREST IN SPECIFIC DECISIONS

There are three different sets of laws which must be analyzed when determining whether an

official has a prohibited conflict of interest in a given decision. These are Government Code section 1090 et seq., the Political Reform Act, and the common law.

### A. Government Code section 1090 et seq.

Government Code section 1090 provides that public officials shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. The term "financially interested," as used in Section 1090, is interpreted liberally. "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." (*People v. Deysher* (1934) 2 Cal.2d 141, 146.) If one member is disqualified to act under Section 1090, the *entire board* is disqualified to act. Even measures designed to isolate or remove the conflicted board member from a contracting decision will be insufficient to avoid a Section 1090 conflict. There are some exceptions to Section 1090 for "remote"[2] interests, "noninterests,"[3] and "necessity."[4] Penalties for a violation of Section 1090 can be serious. The penalties include declaring the contract void and unenforceable, disgorging the contract benefits, barring recovery for contract services rendered to the public agency, and fines or imprisonment for the public official.

We are not aware of any situation in which the Labor Council itself will be a party to a contract with the District, and we could locate no authority providing that constituents of the Labor Council, such as SDEA, CSEA, or the trades union participants in the PSA would be deemed organizations in which Mr. Barrera would be found to have a financial interest by virtue of his position with the Labor Council. Therefore, it is our opinion that Mr. Barrera's service as Secretary-Treasurer/CEO of the Labor Council would not render void and unenforceable any future contracts with SDEA, CSEA, or the trades union participants in the PSA.

### B. The Political Reform Act ("PRA")—Government Code section 87100 et seq.

Government Code section 87100 states that "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." While section 1090 is confined to the making of contracts, the PRA applies more broadly to cover participation in any "governmental decision" in which one has a financial

[2] Remote interests are set forth in Gov. Code § 1091. If an official has a "remote" interest, the contract may be entered if there is disclosure on the record, and the official disqualifies himself and refrains from any participation in the matter. Mr. Barrera would not have a "remote" interest in any Labor Council matter because he is an officer of the Council and has not been employed with the Council for at least three years prior to taking office at SDUSD. (See Gov. Code § 1091(b)(2).)

[3] Noninterests are set forth in Gov. Code § 1091.5. In such cases, the official may not even be required to disclose the interest.

[4] Whether necessity is found is a fact-specific inquiry. It is suggested the District consult legal counsel and disclose all specific, relevant facts in order to determine whether an exception for necessity applies.

interest. (*See* Gov. Code § 87100.)[5]

In analyzing whether a conflict of interest exists under the PRA, the FPPC asks a series of eight questions:

**1. Is the individual a public official?**

Governing board members of a school district are public officials under the PRA. (Gov. Code § 82048.)[6] Therefore, Mr. Barrera is a public official.

**2. Is the public official making, participating in making, or influencing a governmental decision?**

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (2 C.C.R. § 18702.1.) Here, Mr. Barrera would make, participate in making, or influence a governmental decision when voting or taking part in discussion regarding matters involving SDEA, CSEA, or trade union constituents of the PSA.

**3. Does the public official have a qualifying type of economic interest?**

The PRA specifies several different kinds of "economic interests" which may result in a disqualifying interest in a decision. Clearly applicable here are two types of economic interests: sources of income, and the personal finances of the official.

Source of Income

Government Code section 87103 provides that a public official has a disqualifying conflict of interest in any source of income totaling $500 or more in the 12-month period prior to the decision in question.[7] A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or

[5] Whenever an officer or employee is unsure of his or her duties under the Conflict of Interest Code, he or she may request assistance from the Fair Political Practices Commission ("FPPC") pursuant to Gov. Code section 83114 and 2 C.C.R. §§ 18329 and 18329.5. If there is full and honest disclosure, *formal* written advice given by the FPPC (unlike letters from counsel, such as this one) will operate as a defense to prosecution or sanction under the PRA. (See Gov. Code § 83114(b).) FPPC advice letters only address whether the conduct violates the PRA; they do not address whether the conduct at issue may violate Section 1090 or the common law rules regarding conflicts of interest. The telephone number for the FPPC advice line is (866) ASK-FPPC [275-3772].

[6] The PRA does not apply only to elected and appointed officials. The term "public officials," means any "member, officer, employee, or consultant of a state or local government agency," including "other public officials who manage public investments." (Gov. Code §§ 87100, 82048; 2 C.C.R. § 18701.)

[7] Income includes earned income such as salary or wages. (Gov. Code § 82030(a).)

her immediate family, or on any source of the public official's income.

As stated above, Mr. Barrera's employment contract with the Labor Council, which is being finalized, will provide him a set salary but will have no incentive structure related to particular actions, goals or outcomes. Presumably, Mr. Barrera will make more than the requisite $500 per year to find a disqualifying conflict of interest in any decision involving the Labor Council itself.

What is less clear is whether Mr. Barrera's financial interest in the Labor Council would be deemed to make him financially interested in decisions involving SDEA, CSEA, or trade union constituents of the PSA. SDEA, CSEA, and the trade union constituents of the PSA are all associations which are represented on the Executive Board of the Labor Council. As is stated above, it is our understanding the Mr. Barrera's employment was pursuant to a process in which the Council's Executive Board voted to recommend his appointment to the position, the recommendation was forwarded to a body of delegates (a group of approximately 100 people who represent, on a proportional representation basis, all of the Council's member organizations), and the delegates adopted the recommendation by majority vote. It is also our understanding that Mr. Barrera's *removal* from his position would only occur by a majority vote of the body of delegates. On the surface, this appears to be an attenuated connection as it relates to votes impacting individual Labor Council member organizations.

However, in *Witt v. Morrow* (1977) 70 Cal.App.3d 817, the California court of appeal held a city councilmember was disqualified from voting on redevelopment of shopping center located near property owned by his corporate employer, despite the fact the decision would have no effect on councilmember's actual salary or finances. The appellate court in *Witt* further explained the official's "concept of what constitutes a conflict of interest is too narrow. It is not just actual improprieties which the law seeks to forestall but also the appearance of possible improprieties." (*Id.* at 823.) While the law is not clear on this issue, based on the *Witt* case we believe there is a substantial likelihood that Mr. Barrera would be found to have a financial interest in any decision involving the PSA, given the very large number of local trade unions that are signatories to the PSA. However, because SDEA and CSEA represent less than 5% of the Council and body of delegates, and therefore do not individually wield substantial voting power to take action against Mr. Barrera in his employment in response to any decision he makes as a trustee of the District, we are of the opinion that he does not have a financial interest in decisions related to SDEA and CSEA.[8]

[8] Although related to "business entities" rather than "sources of income," the FPPC has found parent and subsidiary corporations are related when one business entity is a controlling owner of the other business entity. (See 2 C.C.R. § 18703.1(d)(1)–(2).) A parent is one that has a 50% or greater ownership interest. While not on point, we suspect a court may analogize this situation to the relationship between the constituent unions and the Labor Council to find there are some interrelated interests, and therefore find Mr. Barrera has a "source of income" in the related entities when they exercise such substantial influence or control over Council decisions.

Personal Finances

An official has a disqualifying economic interest in his own finances when it is reasonably foreseeable that a decision will have a material financial effect on the official or a member of his immediate family distinguishable from the decision's effect on the public generally. (Gov. Code § 87103; 2 C.C.R. § 18703.5.) The effect is deemed material if it will increase or decrease the official's personal finances by $250 or more in a 12-month period. (2 C.C.R. § 18703.5.)

For the reasons stated above, related to sources of income, we advise extreme caution related to decisions that come before the Board regarding the PSA, and that in general Mr. Barrera does not have a disqualifying financial interest in typical decisions related to SDEA and CSEA. As is the case with all matters related to the PRA, each issue before the Board should be examined on a case-by-case basis, applying these principles, to determine whether there is a disqualifying interest on that particular matter.

**4. Is the economic interest directly or indirectly involved in the governmental decision?**

The economic interest is deemed to be directly involved in a decision before the governmental entity if the person or entity is named as a party, initiates a proceeding by filing an application, claim, appeal or similar request, or is otherwise the subject of a proceeding. (2 C.C.R. § 18704.1(a).) The regulations find there is direct involvement when there is a "nexus" between the purpose for which the official receives income and the governmental decision. (2 C.C.R. § 18705.3(c).) The Attorney General provides, as an example of "nexus," an executive director of an organization whose duties include advocating a position endorsed by his organization. In such an instance, the official would be disqualified from participating in any decisions that would advance or inhibit the stated position or goals of the organization. (See *Best Advice Letter*, No. A-81-032; Attorney General Conflict of Interest Guide at p. 16.) Regarding personal finances, 2 C.C.R. section 18704.5 broadly provides that "[a] public official or his or her immediate family are deemed to be directly involved in a governmental decision which has *any financial effect* on his or her personal finances or those of his or her immediate family." (Emphasis added.)

Applying these principles, a "directly involved" economic interest would be found in any decision before the Board about which the Labor Council has formally advocated a position, and we would advise Mr. Barrera to recuse himself from participation in those circumstances. In addition, as stated above, we believe there is a significant risk that the Labor Council may be considered a "party to a proceeding or a subject of a proceeding" when a substantial portion of its Executive Board membership (and definitely if it is a majority of its Board) may be affected by a District Board decision. In those circumstances we recommend that Mr. Barrera refrain from participating in any such decision.

**5. Will the governmental decision have a material financial effect on the public official's economic interests?**

This question essentially addresses whether, *assuming* there is a financial effect arising from the official's decision, the effect will be material. "Materiality" is presumed unless the official can demonstrate the decision will have *no* financial effect on his economic interests. (2 C.C.R. § 18705(a).) Regarding personal finances, according to 2 C.C.R. section 18705.5, "[a] reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least $250 in any 12-month period.

Although attenuated, there is a possibility that governmental decisions involving a significant portion of the Labor Council's Executive Board membership (i.e. the PSA or other decision impacting more than just SDEA and/or CSEA) will affect the personal finances of Mr. Barrera, based on the risk that his action on the item may result in a vote to remove him from his position. Should Mr. Barrera wish to participate in such a decision (and one assumes it is reasonably foreseeable the decision will affect an economic interest—see #6, below), he would bear the burden of proving that he could not be financially affected by the decision. Given the various interests and processes at play, this could be a significant task.

**6. Is it reasonably foreseeable that the economic interest will be materially affected?**

A conclusion that an economic interest could be materially affected does not end the inquiry, however—the next question is whether that effect is reasonably foreseeable. Thus, if there is found to be a material effect on the business entity or personal finances of the official, the FPPC or a court would ask whether the material effect is reasonably foreseeable.

A material financial effect on an economic interest need not be certain to be "reasonably foreseeable," but it must be more than a mere possibility. *Smith v. Superior Court of Contra Costa County* (1994) 31 Cal.App.4th 205, is the seminal case discussing this factor. The *Smith* case involved a county supervisor (Smith) who was also employed as a physician at a local hospital.[9] Smith participated in a vote in which the county decided to appeal an injunction against the local hospital. The complainant argued there would be a potential reduction or transfer of staff from the hospital (where Smith was employed) if the injunction should issue, and therefore Smith had a disqualifying interest in the decision. The superior court found there was a "reasonable probability that the decision on appealing the federal order could affect the whole professional life of Smith and his wife." (*Id.* at 210.) However, the Court of Appeal noted:

> No judicial decision has been cited or found which discusses the meaning of "reasonably foreseeable" in the context of Government Code section 87103. Smith has attached to his exhibits a copy of an opinion of the Fair Political Practices Commission (FPPC) (In re Thorner (Dec. 4, 1975) FPPC Dec. No. 75–

[9] Smith's wife was also employed by the same local hospital.

> 089 [1 FPPC Opns. 198]) and copies of several advice letters in which the FPPC has explained its interpretation of the phrase. For example, the FPPC has stated: "An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable." (*Id.* at 212.)

The Court of Appeal adopted the position of the FPPC with regard to the meaning of "reasonably foreseeable," finding the FPPC's interpretation of the phrase was in accord with its plain meaning. (*Ibid.*)

Likewise, here, there is a strong argument there is no "substantial likelihood" that Mr. Barrera's participation in any decision where the Labor Council itself is not a subject and not a party would affect his livelihood. Although it is a *possibility* that the trades union members to the PSA, SDEA, or CSEA may lobby against his continued employment in retaliation for any adverse decision Mr. Barrera may make against them in a District proceeding, this may not rise to the level of "substantial likelihood" set forth in *Smith*. We therefore do not believe it is reasonably foreseeable that Mr. Barrera's economic interests will be materially affected by his decisions on any matter not affecting the Labor Council itself, or on which the Labor Council has not advocated a specific position. As we note above, however, there is some risk that a court would find the member trades unions to be alter-egos of the Labor Council and that, therefore, the Labor Council itself is a party.

**7. Is the potential effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public?**

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Gov. Code § 87103; 2 C.C.R. § 18707(a).)

The "public generally" exception has often been limited to situations where the official has a confluence of interests with a significant segment of the members of the jurisdiction. (See Attorney General Conflict of Interest Guide at p. 20.) Here, we do not believe that Mr. Barrera's interest—his interest in maintaining his position as Secretary-Treasurer/CEO of the Labor Council—may plausibly be similar to the interests of the public at large.

**8. Despite a disqualifying conflict of interest, is the public official's participation legally required?**

This final question invokes the "rule of necessity," which essentially allows a conflicted member to vote despite the conflict of interest because the body *must* act and *cannot* act without the participation of that member. This arises when a required quorum of Board members would not be present if the conflicted Board member recused himself or herself. Although not impossible,

we know of no situation where Mr. Barrera's participation is legally required despite a conflict of interest.

Overall, Mr. Barrera is a public official and would participate in governmental decisions. His economic interest—which we have identified as his interest in continuing to receive his salary as Secretary-Treasurer/CEO of the Labor Council (or alternatively, maintaining his position on the Labor Council through the end of his term in April 2016)—is a qualifying type of economic interest under the PRA in that it is a "source of income" and affects his "personal finances." There is also a risk that Mr. Barrera's interest will be deemed "directly involved" in any government decision regarding which the Labor Council has advocated a position, where a significant portion (or majority) of the Executive Board membership may be affected by the decision, or where the Labor Council itself is a party or otherwise a subject of the proceeding. Although any such financial effect would presumably be "material," under the law the *potential* effects of many of these decisions would not present a "substantial likelihood" of affecting Mr. Barrera's economic interest so as to render the effect "reasonably foreseeable." Therefore, we believe the "reasonably foreseeable" element may be lacking.

While we believe there is authority indicating that Mr. Barrera cannot participate in decisions to which the Labor Council itself is a subject or a party, or on which the Labor Council has advocated a specific position, there is no express, existing authority providing that Mr. Barrera would be disqualified from participating in any decision affecting only member organizations of the Labor Council.

We note again there is a possibility that a court would apply a parent-subsidiary/alter-ego analysis in this context and essentially, in a case of first impression, find that a decision affecting a majority of the Executive Board membership is a decision involving the Labor Council itself. However, we recognize there is no existing law supporting this legal theory. Nevertheless, the danger or possibility that the member organizations will retaliate against Mr. Barrera for any decisions he makes in his capacity as a trustee is insufficient to meet the "substantial likelihood" standard, and therefore, unless a court employs a new parent-subsidiary/alter-ego standard to the Labor Council/member union context, this element will be lacking and Mr. Barrera would not be precluded from participating in decisions affecting member unions, or even a majority thereof.

In any case, however, Mr. Barrera's participation in any decision involving member union matters may have an appearance of impropriety that will be difficult to mitigate. Simply because an action is lawful does not mean the press will not publicize it and attach negative implications. This is a practical risk of which Mr. Barrera is and should remain aware.

### C. Common Law Conflict of Interest

Simply because something may not constitute a conflict of interest under the PRA or Government Code section 1090 [re contracts], that does *not* mean it is not a conflict of interest under the *common law*.

The common law rule governing conflicts of interest is that a public officer must be able "to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) To the extent *any* outside influence renders this responsibility difficult for the public officer, there is a common law conflict of interest.

Courts have interpreted conflicts of interest so broadly that a conflict may be found in something as intangible and subjective as the desire to maintain an ocean view from one's residence (even though the official did not own the property, and had a month-to-month lease). (*See Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152.) Thus, whenever the official can think of *any* interest, however attenuated, that may affect his ability to make official decisions in an objective manner, we advise the official to disclose the interest and refrain from exerting any influence over the decision-making process on related matters.

It is no secret that Mr. Barrera is a champion of organized labor and the rights of workers, and that he was a champion long before he became a candidate for the Board let alone employed by the Labor Council. There is therefore no reason to believe he will analyze labor-related issues and decisions as a Trustee any differently now than he has in the past. Nevertheless, as stated above, it is our recommendation that he consider recusing himself from decisions involving trades union parties to the PSA, and that he exercise caution to ensure his decisions are not compromised due to his service on the Labor Council when SDEA or CSEA are involved.

### D. Recusal

While it is still unsettled whether a school district governing board member is subject to the Government Code provisions requiring specific steps for recusal set forth in Government Code section 87105, it has been our firm's consistent approach to advise school districts to follow the statutory recusal steps until there is clear guidance on the issue.

Government Code section 87105(a) provides that a public official who has a financial interest in a decision within the meaning of the PRA, "upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter," must do all of the following:

> (1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required; and
>
> (2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100; and

> (3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters (i.e. the consent agenda).

This provision also provides, however, that a public official recusing himself or herself as described above "may speak on the issue during the time that the general public speaks on the issue." (Gov. Code § 87105 subd. (a)(4).)

Please feel free to contact me if you have any questions or would like to discuss this matter further.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Mark R. Bresee

MRB:mrb