



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 22, 2024

Scott C. Nave
Nave Law Office
30721 Russell Ranch Rd., Suite 140
Westlake Village, CA 91362

Re: Your Request for Advice
Our File No. A-24-038

Dear Mr. Nave:

This letter responds to your request for advice on behalf of Kern Valley Healthcare District (“District”) Director Fred Clark regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Kern County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTIONS

1. Does Section 1090 prohibit the Kern Valley Healthcare District (“District”) from continuing to run two advertisements with a local newspaper, which have been run automatically, at set intervals, on a regular basis, and at the same rate, given that one of the District Directors, Director Clark, recently acquired an interest in an LLC that purchased the newspaper?

2. Does Section 1090 prohibit the District from publishing required legal notices regarding unclaimed funds and property in the newspaper, which is the only “official paper of record” for the area served by the District, a remote and sparsely populated area in the mountains above Bakersfield, and the newspaper most likely to reach those who left property or money with the hospital?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Yes, because the two advertisements in question have been run automatically, at set intervals, on a regular basis, and at the same rate, and that contract was created prior to Director Clark acquiring an interest in the newspaper, the mere continuation of these two advertisements would not involve the “making” of a contract, prohibited under Section 1090. However, Director Clark may not take part in decisions relating to any contractual agreements with the *KV Sun*, including the District’s potential decision of whether to terminate the advertisements in question.

2. Under the “rule of necessity,” the District may publish required legal notices regarding unclaimed funds and property in the newspaper, the only “official paper of record” for the area served by the District. However, Director Clark may not take part in decisions relating to these decisions.

FACTS AS PRESENTED BY REQUESTER

You represent the Kern Valley Healthcare District, a special district that provides a variety of healthcare services in rural Kern County. The District Board consists of five members, including Director Fred Clark, who was elected to the District Board in 2020.

In January 2024, Director Clark became a member of an LLC that purchased the newspaper. Director Clark is one of three founders who formed KRValley Media, LLC in December 2023 and completed the purchase of the *KV Sun* in January 2024, when the previous owner was about to shut-down the newspaper. The LLC was formed solely to own and operate the *KV Sun*. Director Clark has a one-third interest in the company.

The District seeks to continue publishing in the newspaper to provide healthcare-related information to the community, along with information on the radio. These advisements have been run automatically, at set intervals, on a regular basis, and at the same rate. You state that the terms have not changed since Director Clark acquired an interest in the *KV Sun*, and the District would continue to publish at the same rates going forward.

The District advertises its services, flu and covid shots, and other health-related events on the one radio station and in the *KV Sun*, the one local, weekly newspaper. You state that the District has been running several regular advertisements in the *KV Sun* prior to the time Director Clark acquired an ownership interest in the newspaper. The costs for these advertisements have not changed, while the specific content prepared by the District varies. These advertisements include:

“\$8.95 ads,” which have regularly run since at least 2020, and a “banner ad” on the front page on the print edition at \$95.00 per week.

In addition, you state that the District posts legal notices from time to time. For instance, the District will need to publish a legal notice regarding unclaimed funds and property. The *KV Sun* is an official paper of record for the Kern River Valley. There are also a couple of newspapers in Bakersfield that are “papers of record” for the region, but they are not widely read in the relevant area, so, from a practical perspective, the *KV Sun* is the paper most likely to reach those who left

property or money with the hospital. In a follow up communication, you indicated that the District is located in a remote and sparsely populated area in the mountains above Bakersfield.

ANALYSIS

Under Section 1090, 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 a member.” Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (See e.g., *People v. Vallergera* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).)

“The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.) “Thus, that the interest ‘might be small or indirect is immaterial so long as it is such as deprives the [people] of [the official’s] overriding fidelity to [them] and places [the official] in the compromising situation where, in the exercise of his official judgment or discretion, [the official] may be influenced by personal considerations rather than the public good.’” (*Ibid.* quoting *Terry v. Bender* (1956) 143 Cal.App.2d 198, 208.)

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351) citing *Stigall v. Taft, supra*, at p., 571.) Under general principles of law, a contract is made on the mutual assent of the parties and consideration. If an agency agrees to a purchase, there is mutual assent by the parties and consideration. All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract. (*Thomson v. Call, supra*, at p. 645.)

The District would be prohibited under Section 1090 from modifying existing agreements or renewing those existing agreements that have expired by their own terms.² Your facts state that

² It is well settled that changes to existing contracts are themselves “contracts” under Section 1090. Therefore, a decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

prior to Director Clark acquiring an interest in the newspaper, the District entered into an agreement to run these specific advertisements on a regular basis at a set rate, with the ads run automatically in each edition, with no fixed termination date.

In the *Nave* Advice Letter, No. A-24-012, you sought advice as to whether Section 1090 would prohibit the District from contracting for future advertising with the *KV Sun*, where the District had previously entered into a contract for advertising, given that Director Clark recently acquired an interest in the newspaper. There, we advised that Section 1090 prohibits the renewal of the prior contract or new contracts for future advertising with the *KV Sun* by the District.

In explaining our advice in the *Nave* Advice Letter, No. A-24-012, we found *City of Imperial Beach v. Bailey, supra*, 103 Cal.App.3d 191 and a California Attorney General Opinion (81 Ops.Cal.Atty.Gen. 134 (1998)) to be particularly relevant. In *Imperial Beach*, the California Court of Appeal held that the exercise of an option to renew a lease between a city and a city councilmember constituted an impermissible “making” of a contract under Section 1090. (*Imperial Beach, supra*, 103 Cal.App.3d at p. 197.) In the Attorney General Opinion, the Attorney General advised that the negotiation of rental rates and water fees would constitute the “making” of a contract and present, at the least, the appearance of a conflict of interest that Section 1090 prohibits. (81 Ops.Cal.Atty.Gen. 134.)

Unlike the question presented in the *Nave* Advice Letter, No. A-24-012, the present circumstances are not analogous to *Imperial Beach* or the aforementioned Attorney General Opinion. Here, the District has been running two advertisements with the *KV Sun*, which have been run automatically, at set intervals, on a regular basis, and at the same rate. As the terms were agreed to when the District initially began running these advertisements, no additional negotiation of contract terms would be involved. We addressed a similar fact pattern in the *Winuk* Advice Letter, No. A-22-083, where we found that Section 1090 would not prohibit the continuation of automatically renewed subscriptions for services from a company in which a councilmember had an interest as long as the services provided, and the term price did not change. Accordingly, the mere continuation of these two advertisements, that have been run automatically at set intervals, on a regular basis, and at the same rate, and under the terms of an agreement entered into prior to the time when Director Clark obtained an interest in the newspaper would not constitute the “making” of a contract under Section 1090.³

³ In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Act prohibit a public official from making, participating in making, or using the official’s position to influence a governmental decision in which the official has an interest. A public official uses an official position to influence a governmental decision if the official contacts or appears before any official in the official’s agency or in an agency subject to the authority or budgetary control of the official’s agency for the purpose of affecting a decision. (Regulation 18704(c).) Based on the facts you have provided, Director Clark also has potentially disqualifying financial interests in the *KV Sun* as a business entity and as a source of income. (Section 87103(a), (c) and Regulation 18702.1.) To the extent communications between the City or City staff and the newspaper regarding the advertisements or public notices are not limited to representatives or employees other than Director Clark, such communications are likely prohibited under the Act. Accordingly, Director Clark should seek further advise under the Act prior to the making any attempt to communicate with a City Official or City Staff regarding the advertisements or public notices.

Rule of Necessity

We consider whether the “rule of necessity” might apply to the contracts for services such as publication of legal notice regarding unclaimed funds and property. The rule of necessity provides that a government agency may acquire “essential” goods or services from a conflict-producing source. The purpose of the rule is to allow essential government functions to be performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321.) The rule of necessity will not apply as long as the government agency can locate another business that can supply the goods or services it requires. (97 Ops. Cal. Atty. Gen. 70 (2014).)

It is important to note that the rule of necessity has only been applied in very limited situations. In 69 Ops.Cal.Atty.Gen. 102 (1986), the Attorney General noted that “the ‘rule of necessity’ is to reflect actual necessity after all possible alternatives have been explored.” (*Id.* at p. 109, fn. 6.) For example, a city could obtain emergency nighttime services from a service station owned by a member of the city council, where the town was isolated, and the council member’s station was the only one in the area that was open. (4 Ops. Cal.Atty.Gen. 264 (1944).) Also, a healthcare district in a remote area could advertise its services on a local radio station, even though one of the district’s directors was employed at the station. Many of the people served by the hospital district were elderly persons who seldom left their residences and who listed to the radio station in question. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops.Cal.Atty.Gen. 106 (2005).)

Here, you state that the District needs to publish a legal notices regarding unclaimed funds and property. The *KV Sun* is the “official paper of record” for the Kern River Valley. You also state that the District is located within rural Kern County, in a remote and sparsely populated area in the mountains above Bakersfield. Although there are also a couple of other regional “papers of record” in Bakersfield, they are not widely read in the area served by the District, and the *KV Sun* is the newspaper most likely to reach those who left property or money with the hospital.

Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the District may enter into advertising agreements with the *KV Sun* for publication of legal notices regarding unclaimed funds and property. However, Director Clark must abstain from participation in any decisions related to the contracts.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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