Admin. November 5, 2020

Memorandum 2020-60

Interstate Reciprocity for Higher Education Distance Learning

At its October meeting, the Commission[1] considered the First Supplement to Memorandum 2020-52, which presented a letter from Kristin Soares, writing on behalf of the Association of Independent California Colleges and Universities ("AICCU"). In its letter, AICCU requested that the Commission undertake a study of whether a statute should be enacted to enable California to participate in the National Council for State Authorization Reciprocity Agreement (SARA). SARA is an agreement under which post-secondary educational institutions in participating states can offer distance learning to students in other participating states.

At the October meeting, the staff reiterated that the Commission is legally restricted to working on topics that have been expressly authorized by legislative resolution or statute.[2] At this time, there is no resolution or statute that authorizes the Commission to study interstate reciprocity for higher education distance learning. Consequently, the Commission cannot undertake such a study unless the Legislature affirmatively grants it authority to do so, by resolution or statute.

The Commission expressed interest in requesting such authority and directed the staff to prepare two memoranda to assist in considering the possibility.[3]

The first will provide background information on the Commission's study authority and the process for changing it. That memorandum has not yet been released.

The second memorandum will present draft language that could be used by the Legislature to grant the Commission the necessary authority to study

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Gov't Code § 8293(a).
3. Minutes (Oct. 2020), p. 3.

interstate reciprocity for higher education distance learning. This is that memorandum.

In addition, this memorandum includes a brief discussion of how the conflict of interest laws would apply to a Commission study of post-secondary education. As noted at the October meeting, some current Commissioners are employed by public higher education institutions. **The short answer is that such employment should not, by itself, be cause for disqualification from participation in the proposed study.**

AUTHORIZING LANGUAGE

One likely policy objection to California's participation in SARA is the fact that SARA seems to preclude participating states from setting and enforcing their own consumer protections rules for distance learning. The staff is not sure whether there is any way to address that objection.

For that reason, the staff recommends that any language authorizing the Commission to study interstate reciprocity be worded broadly. Rather than seeking authority to study SARA specifically, the Commission could request authority to study interstate reciprocity generally. This would allow the Commission to consider both SARA and alternatives to SARA.

The staff believes that this could be achieved with language along the following lines:

> … and be it further
>
> Resolved, That the Legislature authorizes the California Law Revision Commission to study, report on, and prepare recommended legislation to address interstate reciprocity for higher education distance learning.

That language would provide a simple grant of authority. The grant would be permissive, rather than mandatory. There would be no fixed deadline. The Commission would not be required to consider any specific factors. The Legislature might decide to add such constraints, but the staff is inclined to start without them. The fewer conditions on the grant of authority, the more flexibility the Commission would have in structuring and prioritizing the new work.

Does the Commission wish to request authority based on the above language, with or without changes?

The remainder of this memorandum describes conflict of interest laws that would apply to the proposed study.

The discussion that follows is not comprehensive. It does not address all of the ways that a Commissioner might theoretically have a conflict of interest with respect to the proposed study. Instead, it focuses on the main consideration that appears to be relevant to the current Commissioners — the receipt of income from a public institution of higher learning.

Two main sources of conflict of interest law are discussed, the Political Reform Act of 1974 and the common law. The former is very specific, having been established by statute and further elaborated by regulation. The latter is quite general.

Political Reform Act of 1974

Disqualification Requirement

The foundational statutory provision on government decisionmaking and conflicts of interest is Government Code Section 87100, which provides:

> No 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.

Key elements of that rule are discussed below.

Financial Interest

The term "financial interest" is defined in Government Code Section 87103:

> 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 her immediate family, or on any [specified type of interest.]

One of the specifed types of interest is a "source of income" of $500 or more in the year preceding the decision at issue.[4] It is the staff's understanding that some current commissioners are employed by public institutions of higher education, which would be affected by the proposed study. **Thus, they do**

4. Gov't Code § 87103(c).

appear to have a "financial interest" in the study for the purposes of Section 87100.

Material Financial Effect

The next step in the analysis is to determine whether it is reasonably foreseeable that the proposed study would have a "material financial effect" on a Commissioner's source of income.

The meaning of "material financial effect" is defined by regulation. The meaning differs based on the type of entity that is the source of income.

If the source of income is a private nonprofit entity, a government decision has a material financial effect if any of the following conditions are met:

> (A) The decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than:
> (i) $1,000,000; or
> (ii) Five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than $10,000.
> (B) The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than:
> (i) $250,000; or
> (ii) One percent of the organization's annual gross receipts and the change in expenses is equal to or greater than $2,500.
> (C) The official knows or has reason to know that the organization has an interest in real property and:
> (i) The property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6); or
> (ii) There is clear and convincing evidence the decision would have a substantial effect on the property.[5]

An equivalent standard applies if the source of income is a private for-profit entity.[6]

It is the staff's understanding that the current Commissioners who receive income from *public* colleges or universities. If that is correct, the standards described above would not apply.

A decision only has a material financial effect on a public entity if it would also have a "unique effect" on the Commissioner making the decision.[7] A

5. 2 Cal. Code Regs. § 18702.3(a)(3).
6. 2 Cal. Code Regs. §§ 18702.1(a)(2)-(4), 18702.3(a)(4), .
7. 2 Cal. Code Regs. § 18702.3(d).

decision has a unique effect on an official if it would have a "disproportionate effect" on either of the following:

> (5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.
> (6) An official's personal finances or those of his or her immediate family.[8]

It seems unlikely that the proposed study would have a disproportionate financial effect on the source of a Commissioner's income or on the Commissioner's personal finances or the Commissioner's family. The only reasonably foreseeable financial effect of the proposed study would be a possible reduction in the cost of establishing interstate reciprocity for California's colleges and universities. The staff sees no likelihood that such savings would have a "unique effect" on the interests of Commissioners, solely as a consequence of receiving salaries from public colleges and universities.

It is possible to imagine that a Commissioner could have a unique personal interest in the outcome of the study, if the Commissioner's employment included a duty to try to bring about a certain result in the study. That kind of interest is also included in the regulatory definition of "material financial effect" — the financial effect of a decision can be material "if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal."[9]

To the staff's knowledge, none of the current Commissioners' incomes are tied to achieving a certain result in the proposed study.

For the reasons discussed above, the staff does not believe that the proposed study would have a material financial effect on any Commissioner's source of income, sufficient to require disqualification under Government Code Section 87100.

If any Commissioner (or Commissioner's spouse) has any interest in the outcome of the study that was not addressed above, the Commissioner should discuss the matter further with the staff and may wish to seek individualized advice from the Fair Political Practices Commission.[10]

8. 2 Cal. Code Regs. § 18703(c)(5)-(6).
9. 2 Cal. Code Regs. § 18702.3(b).
10. This can be done by emailing advice@fppc.ca.gov or calling 866-ASK-FPPC (866-275-3772).

"Public Generally Exception"

While the discussion above seems sufficient to answer the question of whether a Commissioner who is employed by a public college or university in California would be disqualified from participation in the proposed study, there is one further point that should be mentioned for completeness.

There is a general exception to the disqualification requirement if the effect that a decision would have on an official's financial interest is indistinguishable from the effect that it would have on the public generally. That exception applies if "a significant segment of the public is affected and the effect on the official's financial interest is not unique compared to the effect on the significant segment."[11]

The analysis of this rule again depends on the character of the affected interests. If a decision affects a public entity (e.g., public colleges and universities), the exception applies if the decision has no "unique effect" on the official's interests.[12] The meaning of "unique effect" is the same as described above, and the staff's analysis is the same as well. There seems to be no "unique effect" that the proposed study would have on Commissioners who are employed by public colleges or universities.

Thus, it appears that the public generally exception provides a second reason why Commissioners who receive income from a public college or university would not be disqualified from participating in the proposed study.

Common Law Conflict of Interest Doctrine

There is also a long-standing common law doctrine against conflicts of interest in government decisionmaking. The Attorney General summarizes this doctrine as follows:

> The common law doctrine requires a public officer "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 (citations omitted).) Therefore, actual injury is not required. Rather, "[f]idelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal." (Ibid.) Stated another way, "[p]ublic officers are obligated, . . . [by virtue of their office], to discharge their

11. 2 Cal. Code Regs. § 18703(a).
12. 2 Cal. Code Regs. § 18703(e)(7).

> responsibilities with integrity and fidelity." (Terry v. Bender (1956) 143 Cal.App.2d 198, 206.) For example, in Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a nonfinancial personal interest. (Id. at p. 1171, fn. 18; 92 Ops. Cal. Atty. Gen. 19 (2009).)
>
> …
>
> If a situation arises where a common law conflict of interest exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter. (26 Ops. Cal. Atty. Gen. 5, 7 (1955); 70 Ops. Cal. Atty. Gen. 45, 47(1987).) For example, this office has advised that where an adult child of a board member made an application to the board for a loan, the parent, who also shared a rented apartment with the child, should disqualify herself from any participation in the loan decision under the common law prohibition. (92 Ops. Cal. Atty. Gen. 19 (2009).)

The staff does not believe that the mere fact of employment by a public college or university would create a personal interest that would conflict with the Commissioner's duty to act in the public's interest. Again, if a Commissioner has an interest in the outcome of the study other than employment by a public college or university, that Commissioner should consult further with the staff and perhaps seek advice from FPPC.

Respectfully submitted,

Brian Hebert
Executive Director