

July 24, 2017

HAND DELIVERED & VIA ELECTRONIC MAIL

HON. MICHELLE STEEL, Chairwoman
Board of Supervisors
County of Orange
10 Civic Center Plaza
Santa Ana, CA 92701

Re: Supervisor Spitzer's Conflict of Interests

Dear Chairwoman Steel:

I was recently invited to attend a closed session of the Board of Supervisors to be held on Tuesday, July 25, 2017. I understand the Board will consider settlement offers to resolve claims by three investigators from the District Attorney's Office.

I write to state that Supervisor Todd Spitzer should not attend Tuesday's closed session and should not be present during any future discussions related to the subject matter to be considered during the session. Supervisor Spitzer should be recused because he has an irreconcilable conflict of interest arising from his candidacy to be elected Orange County District Attorney in the upcoming election. Supervisor Spitzer's candidacy creates personal interests that are unavoidably at odds with his professional duties as a member of the Board of Supervisors.

As a public official, Supervisor Spitzer must maintain undivided loyalty to the public. The Orange County Code of Ethics states that "[c]ounty officials and employees are agents of the public and serve for the benefit of the public." They must: (1) recognize the public interest is paramount; (2) carry out the law "impartially;" and (3) "demonstrate the highest standards of morality and ethics consistent with the requirements of their position and consistent with law." (Orange County Code of Ethics, as amended by the Board of Supervisors on June 28, 2016, Section 2.)

These duties are consistent with the common law proscribing conflicts of interest. "[T]he common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171, quoting 64 Ops.Cal.Atty.Gen. 795, 797 (1981).) "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public [T]he 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 [the public]." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51, quoted in *Clark v. City of Hermosa Beach, supra*, 48 Cal.App.4th 1152, 1170-1171.)

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Indeed, “[a] public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated, *virtute officii*, to discharge their responsibilities with integrity and fidelity. . . . [T]hey may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services.” (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206.)

“A leading treatise on municipal law acknowledges the same concept: “The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. . . . A finding of self-interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act.” (*Clark v. City of Hermosa Beach, supra*, 48 Cal.App.4th 1152, 1171, quoting 4 McQuillin, *The Law of Municipal Corporations* (3d ed. rev. 1992) § 13.35, pp. 840–841.)

Supervisor Spitzer's participation in Tuesday's closed session, or any future discussions related to the subject matter, would place him in a conflicting situation of temptation to serve his own personal interests to the detriment of those whom he serves. When considering potential settlement of the district attorney investigators' claims, Supervisor Spitzer's interest should be undivided and in favor of the people of Orange County. His interests should be to protect Orange County and its taxpayers from potential liability and damages, to minimize risk and potential exposure to the County and to conserve County resources.

But candidate Spitzer has conflicting personal interests. As a candidate for district attorney, Supervisor Spitzer benefits from harming the incumbent District Attorney's reputation and public perception; thereby strengthening his campaign in the upcoming election. Supervisor Spitzer not only has a conflicting interest to increase the liability, cost, and harm to the County in connection with the investigators' claims, but also to lay the blame for the increased costs on some supposed wrongful conduct by the District Attorney. The more egregious Supervisor Spitzer could characterize the District Attorney's alleged misconduct, the better for candidate Spitzer. In fact, Supervisor Spitzer is already using the subject matter of Tuesday's closed-door session to attack the District Attorney for his own political purposes. He references the subject matter on his personal website in the “Spitzer Announces For DA,” section. Supervisor Spitzer's personal interests run contrary to the interests of the people he serves. His conflict of interest is manifest and incurable.

The Legislature warns against conflicting financial interests. The Political Reform Act of 1974 (Gov. Code, §§ 81000-91015; “Act”) has as one of its goals that “[p]ublic officials, whether elected or appointed should perform their duties in an impartial manner, free from bias caused by their own financial interests. . . .” (Gov. Code, § 81001, subd. (b).) A public official must not “make, participate in making or in any way attempt to use his official position to influence a governmental decision in

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which he knows or has reason to know he has a financial interest." (Gov. Code, § 87100.) "[I]n appropriate circumstances the official[] should be disqualified from acting in order that conflicts of interest may be avoided." (Gov. Code, § 81002, subd. (c).)

While Supervisor Spitzer certainly has a financial interest in running for district attorney, his conflicting interests are not limited to his expectation of financial gain, and the common law proscriptions against conflicts of interest discussed above extend beyond mere financial interests. (*Clark v. City of Hermosa Beach, supra*, 48 Cal.App.4th 1152, 1171, fn 18. [Political Reform Act of 1974 focusses on financial conflicts of interest while the common law extends to noneconomic conflicts of interest].) For example, in *Clark v. City of Hermosa Beach, supra*, 48 Cal.App.4th 1152, the court found a councilmember's interest in preserving his ocean view created a conflict of interest when he voted against a construction project that would affect his view even though he did not own his residence. (*Id.* at pp. 1172-1173.)

In our situation, Supervisor Spitzer likely has a host of personal reasons -- economic and noneconomic -- to be elected district attorney. But they all combine to create the debilitating conflict of interest that mandates his recusal in this situation. As the Court of Appeal states, "[a] decision maker who stands to gain or lose from a decision is clearly disqualified from acting as a decision maker." (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234.) Supervisor Spitzer should not attend Tuesday's closed door meeting and should be recused from all future discussions related to the subject matter.

So in consideration of the law and circumstances described above, I ask you as Chairwoman of the Orange County Board of Supervisors to please ask Supervisor Spitzer to recuse himself from these matters, or, in the alternative, to recuse him.

Thank you for your attention to this important matter.

Sincerely,

Tony Rackauckas
District Attorney

TR:vlb

cc: Andrew Do, Vice Chair
Lisa Bartlett, Supervisor
Shawn Nelson, Supervisor
Todd Spitzer, Supervisor
Frank Kim, CEO
Leon Page, County Counsel