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GIFT GIVING DILEMMAS

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Stay Out of Prison – Avoid Even the Appearance of Impropriety When Sending or Receiving Gifts

'Tis the season of gift giving. The problem with such generosity in the construction industry, there may be an intent to influence someone's judgment that has approval power over your projects. Although not a "risk management" topic like our prior monthly newsletters, and somewhat of an "ethical topic," we will discuss the following situations regarding gifts to and from design professionals (architects and engineers).

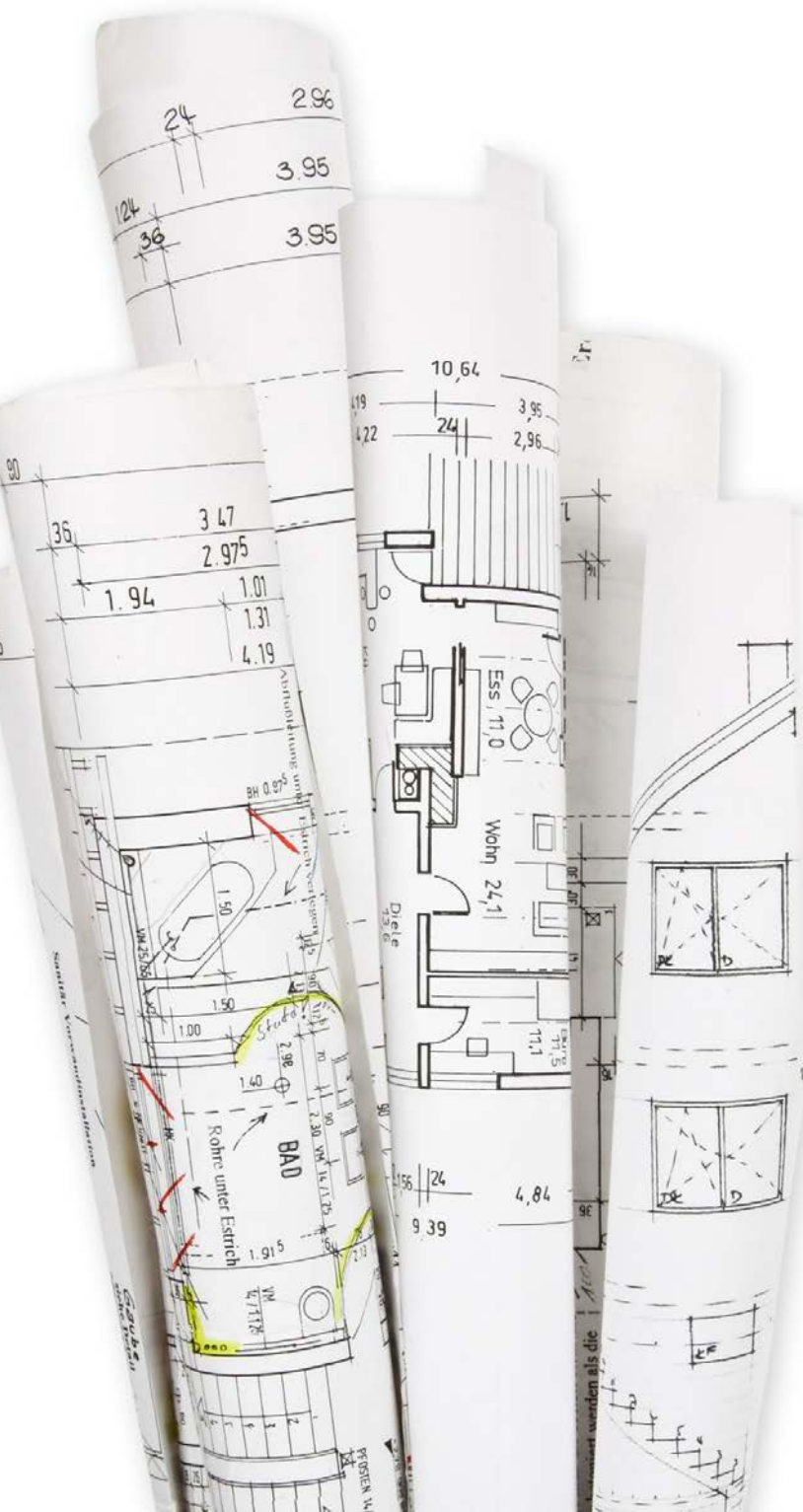
Three Case Studies

Case No. 1:

A design professional is a Chair of a Board of Zoning & Building Appeals (BZA). The vast majority of matters in front of the BZA is to either grant or deny variances from the zoning code. A developer planned for a high-end condo project in the city, but needed several variances in order to obtain approvals. Despite numerous trivial make-weight objections by residents adjacent to and nearby the site, the BZA passed all of the variance requests at the December BZA hearing.

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The day after the BZA hearing, the developer showed up at the Chair's residence offering an apparent substantial gift. It was a "thank-you" gift for granting the variances, which could not have influenced the Chair's judgement since the BZA hearing was the day before. After a moment of indecision, the Chair declined the gift and thanked the developer, despite the protests of his wife. The next day, the city's Law Director called the Chair to make sure that he did not accept the gift. As explained, the Chair's thought process didn't have an ethics code number to cite at the moment of the gift, but knew that it

was best to avoid even the appearance of impropriety. In reality, since the developer could come back with another project needing future variances, the gift would influence the Chair's upcoming decisions on BZA matters.

An official cannot solicit, accept, or use the authority of his public position to secure anything of value, including a gift, meal, or entertainment that could have a "substantial" and "improper" influence upon him in the performance of his duties. (**Ohio Ethics Commission Information Sheet #7** - *depending upon the facts, ethical violations may be a first-degree misdemeanor with a maximum penalty of six months in prison and/or a \$1,000 fine, with additional penalties for accepting supplemental compensation.*)

In addition, if the Chair of the BZA is a member of the American Institute of Architects (AIA), Rule 2.103 of the 2018 Code of Ethics & Professional Conduct could apply.

Members serving in a public capacity shall not accept payments or gifts, which are intended to influence their judgment.

Conclusion:

When serving in a public capacity (such as a board or commission member) related to land use or the construction industry, accepting a gift to influence judgment or thanking them for their decisions should be avoided to eliminate even the appearance of any impropriety.

Case No. 2:

Even when it is permissible to give a gift to a public official, such as in another country, consider the following **National Society's Professional Engineers Code of Ethics' (NSPE) Board of Ethical Review (BER) No. 98-2: Engaging in a Practice which is Legally Acceptable in One Country, but Not in His Country.**

An **NSPE** Engineer, a legally recognized engineer and resident in his country and an NSPE International Member, provided consulting, engineering, and construction contracting services to foreign national and local governments. Under the laws of Engineer's country, it is not illegal for individuals and companies to provide cash payments to public officials in foreign countries in order to obtain business from those public officials. The laws of Engineer's country even permit companies to claim a business tax deduction for cash payment to foreign officials in order to obtain or retain work.



However, **NSPE II.5.b.** states that:

Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.

Utilizing **NSPE Rule II.5.b.**, the **BER's** discussion and conclusion is as follows:

In the 70's, the **BER** noted that the so-called "When in Rome..." rule, whereby engineers could engage in the legal and ethical practices of the host country was not consistent with the **NSPE Code of Ethics (see BER Case 76-6)**. The **BER's** decision at that time was proper then and continues to be proper today. The **BER** firmly believes that it would be a major error for the **NSPE** to apply one standard of conduct to one set of **NSPE** members and another standard of conduct to another set of **NSPE** members.

The BER's Conclusion:

It would not be ethical for Engineer to provide cash payments or in-kind property to public officials in foreign countries in order to obtain and retain business from those public officials.

Case No. 3:

An architect's client is the state agency of her residence and office. The holidays were fast approaching, and she is very appreciative that the state is one her best clients. She decided that it would a good idea to show that appreciation by sending her client's project manager, who is the main contact for her projects (but not necessarily one of the decision makers when awarding projects), a wine basket. The question was whether her gift would influence the state's project procurement selection process. As a general ethics rule of thumb, in order for a person to be unethical, three things must occur:

- There has to be a need, desire or intent to do something unethical.
- There has to be an opportunity to do something unethical, to fuel the fire.
- A person has to rationalize that that what that they do is not unethical.

Applying the rule of thumb, the **Ohio Ethics Commission's "Gifts & Entertainment" Bulletin February 21, 2013** states:

Gifts from Vendors (such as a gift from a design professional to a public official): You are prohibited from accepting a gift or entertainment, of a substantial value, from a vendor to your agency. However:

- The Ethics Law does not prohibit you from socializing with anyone.
- If you are going to a restaurant with an agency vendor and the cost of the meal will be substantial, you should pay your own way.
- If you are invited to attend an open house hosted by one of your agency's vendors, in most cases, you would be able to accept the invitation because the per-person value of an open house is unlikely to be substantial.
- If you are invited to attend an expensive event hosted by a vendor, or an event that includes expensive tickets (such as a sporting event, concert, theater performance, or any similarly valued event), you should either: (a) decline the invitation; or (b) pay the per-person cost to attend the event and the greater of the face value of, or the amount the giver paid for, the tickets.



- The **Commission** has said in prior advisory opinions that meals at expensive restaurants, exclusive golf outings, season tickets to games of a sports team, and travel, meal and lodging expenses are also of a substantial value.

Remember that you cannot accept compensation from anyone other than the agency you serve. This means that if a vendor gives you cash or a cash-equivalent (such as a gift card) as a “thank you” for your public duties, you must return it.

Conclusion:

Arguably, her state’s ethics laws could apply, although the gift may be de minimis, and the project manager may not have a voice in the project procurement process. However, to be safe, the best course of action is to avoid the appearance of even the appearance of impropriety. Also, if she is a member of the AIA, **Rule 2.102 of the 2018 Code of Ethics & Professional Conduct** could apply.

Members shall neither offer nor make any payment or gift to a public official with the intent of influencing the official’s judgement in connection with an existing or prospective project in which the Members are interested.

Summary:

When generosity finds itself in professional settings, be wary when giving gifts, particularly when gifts are intended to influence the judgements of those having jurisdiction of your design professional services. If you are an architect or engineer, hopefully you haven’t already sent those Super Bowl tickets or hotel and airline accommodations to your public official client. Moreover, construction contractors and politicians are not immune to improper influential gifting, some of whom are still in prison.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB, ORSA has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group’s experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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DON'T MISS ONE OF ERIC'S UPCOMING SPEAKING ENGAGEMENTS!

Mark your calendars for Eric's upcoming Continuing Education Programs:

Webinars:

"Project Delivery for Engineers"

Cleveland Engineering Society Webinar
April 24, 2019 - 11:30 a.m. – 12:30 p.m.

Conference Seminars:

"Cybersecurity: Technology, Risk and the Law"

Half Moon Education Seminars, Middleburg Heights, OH
March 12, 2019 - 8:30 a.m. – 5:00 p.m.

"Empowering your Ethics in a Changing Architectural Culture"

Quebec City Conference
Ontario Association of Architects, Quebec, Canada
May 23 and 24, 2019 - 10:30 a.m. – 12:00 p.m.

"Engineering Law & Ethics"

Half Moon Education Seminars, Middleburg Heights, OH
May 30, 2019 - 8:30 a.m. – 5:00 p.m.

"Owner-Architect Contract Clauses that You Should Really Pay Attention To"

AIA National Conference on Architecture 2019, Las Vegas, NV
June 8, 2019 - 10:30 a.m. – 12:00 p.m.

FUN CHRISTMAS FACTS:



- 1. “Jingle Bells” was written for Thanksgiving, not Christmas.** The song was written in 1857 by James Lord Pierpont and published under the title *“One Horse Open Sleigh”*. It was supposed to be played in the composer’s Sunday school class during Thanksgiving as a way to commemorate the famed Medford sleigh races. “Jingle Bells” was also the first song to be broadcast from space.
- 2. Want to know a useful way to recycle your Christmas tree?** Some zoos take donated Christmas trees and use them as food for the animals.
- 3. Brenda Lee recorded “Rockin’ Around the Christmas Tree”** when she was only 13 years old.
- 4. The first batch of eggnog** in America was crafted at Captain John Smith’s Jameston settlement in 1607, and the name eggnog comes from the word “grog,” which refers to any drink made with rum.
- 5. To purchase the gifts from The 12 Days of Christmas** in 2018 it will cost you \$39,093.94. And to purchase all 364 items (the number of the items as repeated in the song) it will cost \$170,609.46.

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