

Hi, this is Chris Micheli again - a principal at Aprea & Micheli in Sacramento, and an adjunct professor at McGeorge School of Law in its Capital Lawyering program. Today we're going to look at an issue that's often discussed and debated within capitol circles. Is deal making - or vote trading - lawful in the California State Capitol?

Capitol observers often read or discuss the wheeling and dealing that takes place in the California Capitol among elected officials. And frankly, across state capitols across our country, and even in the federal government in Congress. Some have called it deal making, and lawful. Others refer to it as vote trading and claim it's improper at best or unlawful at worst. Well, which one is it?

The law is not clear. That's what I've figured out. The key question is, in these negotiations - in the push and pull, the art of compromise in the lawmaking process - at some point does it become improper or even unlawful? Well, we know that the courts have been generally reluctant to look at the internal debates and the specific activities that occur within the houses of the Legislature and what they may be doing.

But, others look at it and say if elected officials can't negotiate and reach compromise on different issues; will the legislative process get bogged down? Is it necessarily impermissible for legislators to secure tangible benefits for their legislative districts and their constituents? Many don't like the notion of pork barrel politics. It might even be unseemly to some people. But, is it improper, or is it unlawful?

We have to look at both federal and state laws, and constitutions, to figure out if there's a clear answer to this. So, let's first start with the federal criminal statutes. There are two major ones - the Hobbs Act and the Honest Services Fraud Act. The Hobbs Act is found at 18 United States Code, Section 1951. I looked at the U.S. Attorney's Office write-up, and here's what they had to say about the Hobbs Act. "The Hobbs Act prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce. Section 1951 also prescribes conspiracy to commit robbery or extortion without reference to the conspiracy statute found at 18 U.S. Code, Section 371."

The U.S. Attorney continues, "Although the Hobbs Act was enacted as a statute to combat racketeering in labor management disputes, the statute is frequently used in connection with cases involving public corruption, commercial disputes, violent criminals and street gangs, and corruption directed at members of labor unions."

Now from what I've gathered in the years at the California State Capitol, there never seems to be any allegations that there's actual, or even attempted, robbery or extortion in these legislative negotiations. So I'm not sure that the Hobbs Act actually applies.

Well how about the Honest Services Fraud Act? That act is found at U.S. Code Section 1346. The honest services fraud is a crime defined in federal mail and wire fraud statutes and it says for the purposes of this chapter, the term scheme or artifice, to defraud includes a scheme or artifice to deprive another of the intangible right of honest services. And basically, from what I've read, the statute's been applied by federal

prosecutors in cases of public corruption as well as where private individuals breached any sort of fiduciary duty. But, it's not clear whether state law violation is necessary for an honest services fraud to have occurred.

Now the U.S. Supreme Court has actually interpreted the Honest Services Fraud statute to only cover fraudulent schemes to deprive another of honest services through bribes or kick-backs supplied by a third party who has not been deceived. Now, again, being involved in some of these legislative negotiations at the California State Capitol, there doesn't appear to be any allegations of bribes or kick-backs. Certainly not from a third party involved in the negotiations. So I'm not sure that the Honest Services Fraud Act would apply either.

So, that leaves us with California state law. We have to start with the California State Constitution. Article IV deals with the Legislature, and in Section 15 it provides, "A person who seeks to influence the vote or action of a member of the Legislature in the member's legislative capacity by bribery, promise of reward, intimidation, or other dishonest means, or a member of the Legislature so influenced, is guilty of a felony."

Now, the State Constitution specifies in that section a person who seeks to influence the vote or action of a legislator, and then it goes on to use member of the Legislature three different times in the same section - that's Section 15 of Article IV. And even note that even that legislator who's so influenced is guilty of a crime. However, this code section uses person and member of the Legislature. So it appears to me that it's directed at those individuals who are not members of the California Legislature and who try to influence a legislator, acting in his or her own official capacity.

Now, in these legislative negotiations that place with the legislative leaders, with their fellow colleagues of the legislature, or with the Governor - unless the Governor is a person outside the member of the Legislature - it doesn't seem that this is likely to apply. So only non-legislators are affected by this provision. But I'm not sure that anyone else is.

Now, in the California Constitution, in Article VII, Section (8) (b), it includes a different provision that may or may not be applicable. It says, "The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice" So, in my mind, this raises a couple of questions. What's undue influence? And do these legislative negotiations that occur with their legislative colleagues and/or the Governor, amount to power, bribery, or other improper practice?

Now, one might argue that the chief executive of the state, i.e. the Governor, or even the legislative leaders, could impose some undue influence or other improper practice on members of the Legislature. But, you know, to me that seems like quite a stretch. So, let's turn to some of the California statutes and see if that helps us answer this question.

The first one is the bribery statutes. And bribery is general defined in California state law as an effort to influence a public official in conducting their official work using money or gifts. Now, I'm not aware of any legislative negotiations in which either money or gifts change hands. But, let's still take a closer look at relevant penal code sections that deal with public officers, employees, and legislative officers.

The first one is Penal Code Section 7, and it provides the general definition of bribery. How is bribery defined in California state law? Well, the word bribe means anything of value or advantage, present or prospective, or any issue or undertaking to give any asked, given, or accepted with a corrupt intent to influence unlawfully a person to whom it is given in his or her action, vote, or opinion in any public or official capacity." Oi, that's quite a mouthful. Anyways, the law doesn't require a bribe to be made or received in order to constitute a crime.

However, in my mind, do legislative negotiations amount to bribery? Have legislators been given something of value in these negotiations? Did the Governor, or the legislative leaders, or legislator's colleagues, promise something with a corrupt intent to influence those legislators? These seem to me to be pretty high thresholds to meet and I'm not sure that they're really at play in legislative negotiations.

Well, let's take a look at a couple other ones then. How about Penal Code Sections 85 and 86? Why are we looking at those? Because these two penal code sections deal specifically with bribery by, or of, legislators and other elected officials. So Penal Code Section 85 actually makes it a felony for any person to give or offer to give a legislator a bribe with a corrupt intent to influence the legislator's vote in an official matter. Here again, I would note the distinction - any person and giving or offering to give a legislator. Clearly, there are two people involved. The question is, is person a fellow legislator, or somebody outside the legislative process?

Section 85 of the Penal Code also prohibits someone from using corrupt means, like menace or deceit, to coerce a legislator to either give or to withhold his or her vote on an issue. Now interestingly, Section 85 of the California Penal Code has been interpreted to prohibit vote trading. But, is vote trading what actually occurs in these legislative negotiations?

Furthermore, in my mind, Section 85 is premised upon giving a bribe to a legislator. It seems to me that Section 85, while some courts have said it precludes vote trading, it appears to me to be an outsider - be it a lobbyist or an interest group or someone outside the process - wanting to pay money or give a gift, or even offering a gift or money, to a legislator to affect his or her vote.

In my mind, do legislative leaders or the Governor act with a corrupt intent when they're negotiating with fellow legislators over public policy issues, or the state budget, or other bills? Again, the bribery statutes are premised upon an elected official receiving a personal financial benefit. Does anyone argue that a legislator in these budget negotiations or bill negotiations receives something of a personal financial benefit?

Well, as I said earlier, this section of the California Penal Code has in fact been interpreted to prohibit vote trading. So, California state criminal laws not only outlaw bribery and vote trading, but again, any attempt to menace, deceit, suppress the truth by corrupt means or any other means to influence a legislator in giving or withholding her vote. It's a pretty broad prohibition. It may or may not be applicable in these negotiations.

In addition, California law precludes threats or force or threat to compel a public officer to perform his or her official acts. It's California's extortion law, and it's found in Penal Code Section 518. What does 518 say? It says, "Extortion is the obtaining of property from another with his consent or the obtaining of an official act of a public officer induced by a wrongful use of force or fear, or under color of official right." Of course, voting is an official act by a legislator. But again, I raise the question: Are legislative negotiations that result in votes taking place with the wrongful use of fear, or under color of an official right?

In looking at another Penal Code section, that's Penal Code Section 86, that section deals explicitly with bribes by legislators, and it makes it a felony for a legislator - not an outsider, a legislator - to ask, receive, or agree to receive something of value with a corrupt intent to influence the legislator's vote in an official matter. Section 86 also prohibits a legislator from conditioning his or her vote on that of another legislator. Pure vote trading. But again, it says, to receive or agree to receive something of value with a corrupt intent. Has a legislator, when negotiating a bill that may benefit his or her district in the State of California, and his or her constituents, in particular, have they themselves received anything of value? A gift or money? It would not appear so, and has it occurred with a corrupt intent? Again, I'm not sure this Penal Code section either that deals with bribes, and the receipt of personal financial benefits by a legislator, comes into play in these legislative negotiations.

Now, there is an interesting provision in that clause I read from Section 86 of the Penal Code that prohibits a legislator from conditioning his or her vote on that of another legislator. This clearly, in my mind at least, implies vote trading with another legislator. But the way it's been interpreted is: If you vote for my bill, AB 123, then I'll vote for your bill, AB 456. Now, do those explicit quid pro quo instances actually occur in legislative negotiations? It's hard to tell. Certainly there's nothing on the record.

So the last thing I've found there to try to answer this question - is deal making in the legislature lawful or unlawful - was an interesting U.S. Court of Appeals for the 9th Circuit decision. It's called *Porter vs. Bowen*. It's our former Secretary of State, Debra Bowen. She was sued in her capacity as the California Secretary of State. And what that federal Appeals Court said, in essence, was the first amendment to the U.S. Constitution barred the State of California from closing vote trading websites.

So this took place during the 2000 Presidential Election, and it specifically involved supporters and opponents of Ralph Nader and Al Gore, Vice President Al Gore, wherein

folks went to websites and they actually attempted to trade votes - my Nader vote for your Gore vote, or your Gore vote for a Nader vote.

What did the U.S. Court of Appeals say? They said the exchange of political benefits, here in this case, rather than personal benefits, rendered the activity protected by the First Amendment, even if the vote exchanges were somehow enforceable - which they didn't opine on. So, the point is, is that the First Amendment may allow legislators to exchange political benefits, i.e. benefits for their legislative district, vs. personal benefits, which is not occurring in these negotiations.

So, at least in my mind, without money changing hands, which is our traditional definition of bribery, I think the U.S. Constitution's First Amendment protects legislative negotiations. In other words, don't these legislative deals actually amount to political benefits, which should, and are protected by the First Amendment - and not personal benefits? Because, nothing personally, of financial benefit accrues to individual legislators.

In the end, I believe the legislators in these negotiations over the budget, over individual bills, are looking out for what's best for their legislative districts, and their constituents. And so long as they don't receive any personal financial benefit for how they vote, that it should be perfectly lawful.

Hope you'll join me for another podcast down the road.