Labor Relations
ISSUE SUMMARY

IMPACT OF THE SCHOOL ETHICS ACT ON NEGOTIATIONS

In administering and clarifying the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq*., the School Ethics Commission (SEC) has issued a number of advisory opinions and resolved several complaints that may affect boards' conduct of negotiations. This article presents the fundamental principles and concepts guiding interpretations of the Act and summarizes selected public advisory opinions and decisions that define what can constitute a conflict of interest and limit board officials' participation in negotiations.

Keep in mind that the SEC addresses only the specifics that are presented in each particular case. As such, boards will be well-advised to discuss their unique district concerns and situations with their legal and labor relations resources. A district faced with a yet unaddressed issue may ask its attorney or superintendent to file a request for an advisory opinion with the SEC. (Specific information on SEC procedures to file for an advisory opinion, and other SEC petitions can be found on the Commission's web page at *www.nj.gov/njded/legal/ethics/index.html.)*

The SEC is authorized to provide advisory opinions, upon request, as to whether any proposed activity or conduct would constitute a violation of the School Ethics Act. Advisory opinions remain confidential and are shared only with the requesting party, unless the Commission, by a vote of at least six members, directs the opinion to be made public.

Advisory opinions are just that. They offer advice. They do not have the force of law nor of administrative agencies' decisions. Yet, these opinions are indicative of the Commission's interpretation of what constitutes a conflict of interest and offer guidelines on how the SEC would approach formal decisions of complaints lodged against board officials' conduct during negotiations. Since opinions do not constitute final determinations, the State Board has ruled that it will not review these advisories and that only formal SEC decisions can be appealed to the State Board.

The information provided below reflects the most recent interpretations of the School Ethics Act. This article will be updated as needed to include the subsequent opinions and decisions that further define and clarify the scope of conflicts of interest in the context of boards' labor relations. Watch the "What's New" page of *The Negotiations Advisor Online* for notices of revised articles. Also be sure to consult with your resources, including the NJSBA Labor Relations Department, to assure that you remain aware of the latest developments in this evolving area of case law.

Basic Principles Underlying Exclusions from Participation

The Commission has held that the School Ethics Act prevents certain board members with conflicts of interest from participating in their district's negotiations efforts. These opinions and decisions are guided by broad basic principles which begin with the provisions of the Act. Specifically, the SEC has relied on the Act's declaration that school officials must avoid conduct which can create a justifiable impression that the board official is violating the public trust.[1] In accordance with the Act, these perceptions can arise when an official has a direct or indirect involvement that can be perceived to impair his objectivity[2] and/or can use information, not generally available to the public, for the purpose of securing financial gain for himself, his immediate family members or any business organization with which he is associated.[3] This statutory framework is then applied to the very specific and possibly unique factual pattern and circumstances of each case that comes before the Commission.

In cases involving collective negotiations, the SEC has found that board officials' connections with the union involved in the bargaining situation, or with the contract under negotiations, can create a conflict of interest that precludes participation in negotiations. Connections with the union may involve a relationship that exists within the board official's district as well as a relationship that exists outside the district. Connections with the union may also arise as a result of the union's endorsement of candidates during a board election.

[1] *N.J.S.A.* 18A:12-22 (a).

[2] *N.J.S.A.* 18A:12-24 (c).

[3] *N.J.S.A.* 18A:12-24 (f).

The source of the conflict will trigger the application of different standards and may result in different limits to the degree of exclusion. For example, whether conflict is based on an in-district or out-of-district connection will determine the extent of the board member's degree of exclusion from the negotiations process: in-district connections will preclude participation in negotiations as well as voting on the memorandum of agreement; out-of-district connections will preclude participation in negotiating the contract *but* not the board member's ability to vote on the tentative agreement reached by the board's negotiating team. (See discussion below on "A Definition of Exclusion.")

The specific opinions and decisions which illustrate these basic principles are listed below.

In-District Connections and Conflicts of Interest

In-district connections are based on circumstances that involve employment in the district. For example, the district's employment of a member of a board official's family creates an in-district connection. However, whether these situations create a conflict of interest is dependent on a number of factors including, the nature of the family relationship and the appearance of conflict.

The Act precludes school officials from acting in an official capacity which can benefit a member of the "immediate family." The Act also defines immediate family member to include the spouse or "dependent child" residing in the same household as the school official. *N.J.A.C.* 6:3-9.2 further defines the term dependent child to mean "any child claimed as a dependent on the school official's federal and state tax returns." However, in addressing issues involving family members employed by the district, the SEC's opinions have found that family relationships other than those involving immediate family members could reasonably raise public concerns and give the appearance of a conflict of interest.

Other considerations in the finding of a conflict include the employment status of the family member and the bargaining unit whose contract is being negotiated. In addition, administrators' terms of employment in the district can also create an in-district connection. Examples of the SEC's opinions and decisions as to what conditions create a conflict, and which do not, are summarized below.

In-District Connections Leading to Exclusion

The following circumstances have resulted in a finding that a board official has an in-district conflict of interest which requires exclusion from negotiations:

A board member, or an administrator, whose family member is employed by the district and is in the bargaining unit covered by the contract under negotiations. Specifically, a conflict of interest requiring exclusion from negotiations has been found when:

- *an emancipated child is in the bargaining unit:* even when the child no longer resides with the school official, the SEC has advised that a school official should not participate in negotiations or vote on a contract which included the "emancipated child." (Advisory Opinion A23-94, issued January 23, 1996.)
- *a brother is employed in a maintenance position represented by the same union representing teachers in upcoming negotiations:* this situation created a conflict even though no financial benefit accrued to the board member. The SEC found that a personal involvement existed in the brother's employment that could be perceived as impairing the board member's judgement and violating public trust. The SEC also noted that a similar conflict would exist in situations involving his brother's subsequent appointments or promotions. (Advisory Opinion A16-00, issued November 28, 2000.)
- *a daughter-in-law is in the bargaining unit:* the SEC advised a superintendent that he should not serve as a chief spokesperson for the board's negotiations team as his daughter-in-law was a member of the bargaining unit covered by the contract under negotiations. However, the Commission also indicated that the superintendent could continue to provide critical information as requested by the board's bargaining team or that he felt was necessary for the team's consideration. (Advisory Opinion A17-96, issued November 27, 1996. Also see later discussion on "When All Administrators Are in Conflict" *and* note different outcome in the "In-District Connections That Do Not Lead to Exclusion" summary below. Also see the discussion of a sister-in-law addressed in Advisory Opinion A08-98, issued May 26, 1998, in the "In-District Connections That Do Not Lead to Exclusion" discussion, below.)
- *parents are in the bargaining unit:* the SEC held that, because of the possibility of a perceived conflict of interest, a board official could not participate in negotiations with a bargaining unit which included a parent. However, in this specific situation, the SEC dismissed the complaint as it found that the board official's father who was covered by the contract under negotiations would retire before the contract went into effect. (C09-96, issued January 1997.)

A school official whose in-district connection does not involve the bargaining unit covered by the contract under negotiations BUT whose benefits are linked to that contract. The SEC has found that a linkage of benefits could also result in a perceived conflict of interest and has advised that exclusion would also be required when:

- *a board member's spouse is employed as an administrator in the district:* the SEC found that this situation precluded the board member's involvement in negotiating the teachers' contract. While the board member's spouse was not a member of the teachers' unit, the

district's contract with its administrators was directly linked to provisions of the teachers' unit. (Advisory Opinion A16-96, issued January 29, 1997.)

- *a district administrator whose benefits are linked to that of the contract under negotiations:* the SEC found that an administrator could not participate in negotiations with the teachers' unit. Although the administrator was not in the teachers' unit, his employment benefits were directly linked to the benefits negotiated by the teachers' association. (Advisory Opinion A37-95, issued on March 26, 1996; Advisory Opinion A26-97, issued on November 25, 1997. Also see later discussion on "When All Administrators Are in Conflict.")

In-District Connections That *Do Not* Lead to Exclusion

In-district relationships have been found to **not** require exclusion from negotiations when:

A school official has a relative in the bargaining unit covered by the contract under negotiations BUT the familial relationship is too remote to raise public concerns. The SEC has found that not all relatives in a bargaining unit provoke public concerns and has found that a conflict of interest *does not* arise in situations which involve:

- *a sister-in-law:* the unit's inclusion of a sister of the board member's spouse would not preclude the board member's participation in negotiations. Under the circumstances of this case, the SEC found that the relationship with a spouse's sibling was different than that of the relationship of a child or that involving a child's spouse and would not raise the same concerns. (Advisory Opinion A08-98, issued May 26, 1998. Note, however, that this decision was limited to that of participation in negotiations and did not address the board member's ability to vote on the appointment or promotion of the sister-in-law, as that question had not been asked.)

A school official has a relative employed by the district BUT the family member is not covered by the contract under negotiations. The SEC has found that the following circumstances do not raise a conflict of interest:

- *a parent's employment in a position not included in the bargaining unit:* a board member's mother who was employed as a substitute cafeteria worker could participate in negotiations with cafeteria employees as substitutes were not covered by the contract and were paid a different rate than the hourly rate negotiated with the union. (Advisory Opinion A08-98, issued May 26, 1998.)
- *a mother's employment as a teacher did not preclude participation in negotiations involving the secretaries' or the administrators' unit:* since each unit engaged in separate negotiations and the benefits negotiated with one unit were not linked to that of the other unit, the SEC found that a conflict of interest did not exist. (Advisory Opinion A08-98, issued May 26, 1998. But, see Note, below.)
- *a spouse is employed as a secretary, but negotiations involved the teachers' or the administrators' unit:* since each unit engaged in separate negotiations and the benefits negotiated with one unit were not linked to that of the other unit, the SEC found that a conflict of interest did not exist. (Advisory Opinion A08-98, issued May 26, 1998.

  Note: This decision did not address the issue of the units' statewide affiliation, which had been previously found to create a conflict of interest precluding participation in negotiations. (See A10-93, in the section on Out-of-District Connections later in this article.) However, in a later decision the Commission noted that when it issued A08-98, it did not have facts to indicate that the units in that district were affiliated with the same statewide union. The Commission then clarified A08-98 to reiterate that board members would violate the Act if they participated in negotiations with bargaining units affiliated with the same statewide union as the unit which represented their spouse. (C01/C02-00, issued June 27, 2000.)

Out-of-District Connections and Conflicts of Interest

Out-of-district connections can arise when a board member is a school employee in another district. Conflicts can also occur when a member of a board official's family works in another school district. However, in assessing out-of-district family connections, the SEC has not applied the same definition of family used in in-district connections. Rather, in those situations the SEC has been far more inclined to adhere to the Act's definition of "immediate family."

As of March 2000, board members who have conflicts of interest arising from out-of-district relationships are not automatically precluded from voting on a tentative agreement reached by the board's bargaining team. (See discussion below on "A Definition of Exclusion.")

Examples of the SEC's opinions and decisions as to what conditions create a conflict, and which do not, are summarized below.

Out-of-District Connections Leading to Exclusion

A conflict of interest with regard to negotiations of a union contract has been found in out-of-district situations in which:

Board members who, by virtue of their employment in another district, were members of a bargaining unit represented by the same statewide union with which the board is negotiating. Thus, a conflict of interest requiring exclusion has been found with upcoming

negotiations with a teachers' unit when board members were teachers in another district. (Advisory Opinion A14-00, issued November 28, 2000.)

A conflict of interest may be found regardless of the nature of the board member's employment. Thus, a board member who is a custodian in another district and whose position is in a bargaining unit represented by the NJEA has been excluded from negotiations with a teachers' unit also represented by the NJEA (Advisory Opinion A10-93, issued May 26, 1994).

A conflict of interest may also be found regardless of the board member's actual membership in the statewide organization. Thus, if the board member has not become a member of the organization, but her working position is included in a bargaining unit represented by the NJEA, the board member has a conflict of interest that requires exclusion. It also means that a board member who is not a member of the union, but is paying a representation fee, is also excluded from negotiations. (Advisory Opinions A10-93(b) and A07-94, issued June 23, 1994.)

A board member, or an administrator, has a spouse or a dependent child employed in another district and is a unit member of the same statewide union with which the board is negotiating. A conflict of interest has been found when:

- *immediate family members* in any unit were represented by the same statewide organization involved in negotiations (Advisory Opinion A10-93, issued May 26, 1994);
- *immediate family members are not members of the statewide organization,* but whose position is in a bargaining unit represented by the statewide organization, or who pay a representation fee to the organization (Advisory Opinions A21-93(b) and A07-94, issued June 23, 1994).

Out-of-District Connections *NOT* Leading to Exclusion

Conflicts have not been found in out-of-district employment situations in which:

A board member, or a member of the family, is a retired member of the statewide union. The SEC found that as those individuals are "inactive members of the union with an extremely limited financial and personal interest in the outcome of negotiations" they do not have a conflict of interest in ongoing negotiations. (Advisory Opinion A10-93, issued May 26, 1994).

A board member has a daughter working in another district. The SEC held that while the daughter was covered by an agreement negotiated by the same statewide union as in this situation, the daughter was not an immediate family member as defined in the Act: she did not live in the board member's household and was not claimed as a dependent on the board member's tax returns (Advisory Opinion A53-95, issued March 28, 1996).

A board member is employed by a college. The SEC found no conflict of interest for a board member who is on a college faculty, even though that bargaining unit was represented by the same statewide association with which the board is negotiating. In this situation, the Commission found: that there was little opportunity for any negotiations of the board to influence the negotiations of the faculty association; the salaries and positions of college faculty are not easily comparable to faculty in elementary and secondary schools; that the college and the board were not located in the same county; and "that the board member had no affiliations with the union other than the very nature of his employment." (Advisory Opinion A59-95, issued March 26, 1996.)

Union Endorsement of Board Candidates and Conflicts of Interest

The SEC has also found that a union endorsement of a board member's bid for election may create a personal involvement, and a benefit, for the board member that requires exclusion from negotiations. Although very dependent on the facts of each case, the SEC's initial review of questionable conflicts that could arise as a result of the union's support during a board election can provide general and instructive future guidance to board members.[4]

Standards for Determining Conflicts

In looking at these situations, the SEC has applied the standard used in determining possible ethics conflicts arising from political involvements. (*In the Matter of James Famularo*, C23-96, February 24, 1998, where a board member was found to have violated the Act when he voted to appoint as a principal in his district a political associate for whom he had served as campaign treasurer.) This standard, as applied to conflicts involving union endorsement in board elections, can be paraphrased and summarized to include three factors: 1) the prominence of the union's support in the campaign; 2) the amount of time that has elapsed between the election activity and negotiations; and 3) the extent to which the issue remains a matter of controversy. The consideration of all three factors may result in a finding that a board member should not participate in negotiations. (See Advisory Opinion A13-02, issued December 2, 2002.)

The SEC's application of the *Famularo* standard has been marked by several basic assumptions. First, it is important to note that in the cases that have come to the SEC's attention, board members' attitudes towards union endorsement were not a factor in the decisions. None of the board members solicited union support, participated in the association's decision, or consented to the union's

[4] This opinion was first made public in December 2002. The SEC's subsequent dismissal of consolidated complaints filed prior to that time indicates the Commission's intent to apply the standards prospectively and to exempt charges arising before the advisory opinion became public.

endorsement. In fact, one board member declined to attend the association's "Meet the Candidates" meeting, subsequently asked his local association to withdraw its endorsement of his candidacy and actively removed association signs supporting his candidacy. Further, no board member promised support of any association issue or received financial contributions from the union. However, the SEC found that, unrelated to the board member's conduct or attitude, the association's activities during the campaign, which included newsletters to its members urging support of these candidates and phone calls to voters promoting these individuals' elections, resulted in the candidates' increased visibility. Thus, the SEC concluded that the union's support was sufficiently prominent to meet the first component of the *Famularo* standard.

The SEC has also noted that while the issue of contract negotiations is of particular concern in the year that bargaining is scheduled to begin, collective bargaining agreements are, in general, always a subject of concern and are often controversial during, and after, a school board election. The SEC concluded that the issue of negotiations would generally meet the third factor of the standard, which examines the extent of continued controversy. It can therefore be expected that the first and third standards will generally be found to mark disputes involving conflicts between endorsements and participation in negotiations. The SEC's determinations are thus likely to hinge on the second factor: the amount of time that has elapsed between the election activity and negotiations. Thus, the timing of both the association's support and that of negotiations will be a determining factor in the need for board members to be re used from participating in negotiations.

Endorsements Requiring Exclusion From Negotiations

The following circumstances have resulted in a finding that a board official cannot participate in negotiations and cannot vote on the agreement negotiated with the association that supported the board member's election:

A board member who was endorsed just a few months before the onset of negotiations. The SEC has advised that board members who were endorsed by the association in the April 2002 election met all of the *Famularo* factors and should not participate in negotiations slated to begin in November of 2002. The Commission found that in this situation, not much time had elapsed as negotiations would be beginning just a few months after the endorsement. Therefor, the SEC concluded that board members elected in April 2002 have a personal involvement with the association that constitutes a benefit to them and thus, their participation in negotiations and their vote on the year's teachers' contract would violate the Act. (Advisory Opinion A13-02, issued December 2, 2002.)

A board member whose reelection is endorsed during ongoing negotiations. Board members who were not previously conflicted and were participating in negotiations may become newly conflicted if their campaign for reelection would be endorsed by the association in the middle of ongoing negotiations. The SEC reasoned that receiving endorsements in the middle of negotiations would create an even greater concern about the timing of the endorsement as negotiations are a subject of greater public debate and controversy during election campaigns. Accordingly, the SEC advised board members who were up for reelection in April 2003 that they may need to recuse themselves from continued participation in the negotiations process should the association endorse their bid for reelection during ongoing negotiations. (Also see discussion on "The Doctrine of Necessity" later in this article.)

Note, however, that the SEC also found that the simple fact that board members' terms will expire during ongoing negotiations does not, in and of itself, create a conflict that requires those board members to recuse themselves from participating in negotiations prior to their election campaign. While recognizing "that some members of the public may wish to infer intent to influence by the endorsement, the Commission cannot assume intent without information to support such a finding." Therefore, the SEC held that finding a pre-campaign conflict would require a showing that the board members had knowledge or reason to believe that the association intended to influence their decisions as board members by endorsing them. (Advisory Opinion A13-02, issued December 2, 2002.)

Endorsements *NOT* Requiring Exclusion From Negotiations

The following circumstances have resulted in a finding that a board official can participate in negotiations and vote on the agreement negotiated with the association that supported the board member's election:

A board member whose endorsement occurred more than a year before the onset of negotiations. After applying the *Famularo* standard, the SEC advised that the three board members who received the association's endorsement in the April 2001 election could participate in negotiations slated to begin in November 2002. While finding that the association's endorsement was prominent and that matters of negotiations are continuously controversial, the SEC concluded that sufficient time had elapsed between the union's support and the onset of negotiations. (Advisory A13-02, issued December 2, 2002.)

In this case, the SEC held that the conflict for board members elected in 2001 had "dissipated" because negotiations would be occurring more than a year after the association's endorsement. The SEC also noted that these board members would not be up for re-election until 2004, well after a collective agreement had been reached. (Advisory Opinion A13-02, issued December 2, 2002.)

A Definition of Exclusion

Board officials who have conflicts of interest must be excluded from the negotiations process. Prior to a March 2000 State Board decision, the SEC held that all board members who were in conflict for any reason, whether

related to in-district or out-of-district circumstances, could not participate in any aspect of the negotiations process that led to a new contract. However, the State Board's decision in *In The Matter of Frank Pannucci,* SB#16-97, created a different definition of exclusion for in-district and out-of-district connections.

Exclusion for In-District Conflicts of Interest

Board members who are excluded from negotiations because of an in-district connection, including conflicts arising from a union endorsement:

- *cannot be present during discussions of negotiations, including the setting of negotiations parameters;*
- *cannot serve on the board's negotiations team;*
- *cannot be present during negotiations sessions;*
- *cannot be present when the board team updated the board on the progress of negotiations;* (AO14-00, issued on November 28, 2000)*; but*
- *may be present and participate in closed sessions* ***after*** *the signing of a memorandum of agreement.* The SEC found that a board member whose wife was a teacher aide covered by the teachers' contract could participate in closed session discussions of the contract after a tentative agreement had been reached. While finding that participation in discussions involving negotiations prior to the signing of a tentative agreement would violate the Act, the Commission held that participation in discussions after a tentative agreement had been reached would be permissible as this would not provide an otherwise conflicted board member with the opportunity to influence negotiations. (C15-01, decided August 28, 2001. However, see the section on "Access to Negotiations Information" later in this article for a discussion of conflicting holdings.)
- *cannot vote on a tentative agreement reached by the board's negotiating team.* (The one exception to the general prohibition on voting existed when a majority of the board was in conflict. See discussion on the "Doctrine of Necessity," below.)
- *cannot participate in board hearings of grievances which could result in affecting the board official's family member employed by the district.* The SEC held that a grievance alleging a violation of the negotiated agreement could result in affecting a family member's employment, whether or not the outcome turned on past practice or an interpretation of the written terms of the contract. Therefore, a board member whose daughter was employed in the district, could not participate in the grievance hearing, even though his daughter was an "emancipated" child. Relying on Advisory Opinion A23-94, issued January 23, 1996 (cited earlier in this article), the SEC held that the public would perceive that a parent has an interest in seeing his child obtain a better salary and benefits even if the child is emancipated. Advisory Opinion A22-98, issued December 22, 1998. (Contrast participation arising from out-of-district conflict, later in this article.)

Exclusion for Out-of-District Conflicts: Voting *NOT* Precluded

As of March 2000, the ***prohibition against voting on a negotiated agreement does not apply to board members who have out-of-district connections.*** Board members have been permitted to vote on a memorandum of agreement when:

- ***a board member, employed in another district, was a member of a bargaining unit represented by a local union affiliated with the same statewide organization,*** *In The Matter of Frank Pannucci,* SB#16-97, issued March 1, 2000; Advisory Opinion A14-00, issued November 28, 2000.
- ***a board member's spouse was employed in another district in the same county and represented by the same statewide union with which the board was negotiating,*** *In the Matter of Bruce White,* 2000 *S.L.D.*, June 1, 2000.
- ***a board member was employed as a supervisor in another district,*** *In the Matter of Bruce White, supra.*

Rationale for Different Voting Exclusions The State Board's *Pannucci* decision overturned six years of SEC's prohibitions of contract votes by board members who had a conflict of interest based on out-of-district connections. The State Board reached its decision as it found that the SEC's interpretation was an overly broad and unintended interpretation of the School Ethics Act.

In *Pannucci,* the State Board heard an appeal from a board member who, as a teacher in another district, was found to have violated the Act when, as a board member, he voted on the memorandum of agreement reached in negotiations with the districts' teachers' union. The State Board held that it was "unreasonable" to assume that an individual who is represented by the same statewide union would necessarily be influenced by that affiliation when voting on a contract negotiated by a different local affiliate. The State Board found that the unreasonableness of a blanket disqualification on voting was even more dramatic when it was applied because of a board member's spouse out-of-district connection. Concluding that the School Ethics Act does not mandate this result, the State Board ruled that school board officials who were in conflict because of out-of-district connections could not be precluded from voting on a memorandum of agreement reached by their board's negotiating team.

In reviewing the *Pannucci* case, the State Board was asked to address the one issue of voting. Accordingly, the decision focused exclusively on board members' ability to vote on a contract when they had a conflict of interest based on an out-of-district connection. The narrowness of the *Pannucci* decision thus raised questions as to whether out-of-district connections could continue

to preclude other aspects of board members' involvement in negotiations. The SEC soon addressed that issue in its subsequent cases.

Out-of-District Connections: Requires Exclusion From Participation

While board members with out-of-district connections can vote to ratify a memorandum of agreement, they are still precluded from participating in any aspect of negotiations leading to the tentative agreement. This means that like board members with in-district connections, those with out-of-district connections cannot serve on a bargaining team. They can also not participate in the setting of parameters, nor be in attendance at any meeting where the bargaining team reports to the full board during on-going negotiations. (Advisory Opinion A14-00, issued November 28, 2000.)

Rationale for Distinctions Between Participating in Negotiations and Voting on the Contract The SEC has held that the *Pannucci* decision permitted voting on the contract, but not participation in negotiations. The SEC has reasoned that there is a strong and meaningful distinction between participating in negotiations and voting on a memorandum of agreement. This distinction was fully explained in AO14-00, issued on November 28, 2000. There, the SEC found

> *that votes are taken in public meetings, while negotiations are held in complete privacy. Not only are negotiations private at the time, the discussions in negotiations never become subject to public scrutiny as to how settlements were reached.*

Further, the SEC cited its earlier interpretation *In the Matter of Bruce White (Decision on Return)*, SEC #C18/C22-99 (March 28, 2000), Commissioner (June 1, 2000). There, the Commission held that voting on a memorandum of agreement

> *is the act of approving that which others negotiated or worked upon, which is a ministerial act, albeit a necessary and important act. However, negotiations actually establish the benefits and rate of increases in salary which impact the rest of the school budget as well as the local tax base to be voted upon by the Board and ultimately the public.*

The SEC also cited other findings (see, for example, Advisory Opinion A10-93, issued on May 26, 1994) which held that it is generally understood that comparing salaries of neighboring and similar statewide districts is a well-established practice of negotiations. Thus, an increase in benefits or pay in one district could influence an increase in the rate of pay to all members of the same statewide union and thereby benefit board members who had out-of-district connections. Given all of these factors, the Commission has concluded that, although board members with out-of-district connections could *vote* on a memorandum of agreement, they could *not participate* in the process of negotiating that contract.

- ***Not Excluded: Participation in Hearing of Certain Grievances*** The SEC has held that board members with out-of district connections to the union who had no other potential conflicts, could participate in a board level hearing of a grievance. Finding that the outcome of the grievance would not rely on the interpretation of contract language but would depend on past practice, the SEC found that the resolution of the grievance would not impact upon the terms and conditions of employment of employees in another district. Under these facts, the SEC held that these board members could participate in a board level hearing. *Advisory Opinion A22-98, issued December 22, 1998.* (Contrast participation arising from in-district conflict, earlier in this article.)

Out-of-District Connections and Access to Negotiations Information

The SEC has also held that board members with an out-of-district connection who cannot participate in negotiations cannot have access to negotiations information. They, like other board members with a conflict of interest, cannot be present when the negotiating team, in closed session, is updating the board on the progress of negotiations. The Commission stated that it does not want board members who are prohibited from negotiating "to negotiate by the back door by making their views known during closed session meetings" while negotiations are going on. (Advisory Opinion A14-00, issued November 28, 2000.)

However, the SEC also recognized the need of "board members who are conflicted from negotiations, but are able to vote on the contract, to have knowledge of the terms of the contract prior to the vote." Therefore, the Commission advised board members who were teachers in another district that they would not be violating the Act by participating in closed session meetings of the board where the contract is discussed *after* the bargaining team has signed a memorandum of agreement. (Advisory Opinion A14-00, issued November 28, 2000. See discussion below for a review of access to negotiations information after invoking the Doctrine of Necessity.)

Administrators' Conflicts and Participation in Negotiations

As noted above, administrators as school officials can also be found to have a conflict of interest that precludes their participation in negotiations. Typically, administrators who sit on the bargaining team, even those who in rare instances serve as the board's spokesperson, do not sign the memorandum of agreement and do not have a vote on the contract. Administrators' participation in negotiations generally consists of providing information, advice and recommendations to the board and its bargaining team. Administrators who are in conflict have been advised to not participate in their traditional role in negotiating their districts' contracts.

However, the SEC has recognized that a board needs

and depends upon the information obtained from its administrators. Therefore, in a district where all administrators had a form of conflict, the SEC held that the administrators could participate in the negotiations process, *"to the extent necessary to provide technical assistance to a collective bargaining team as requested."* The Commission added that it believes that such an allowance will not compromise its general intent and is necessary in order to not impede districts from bargaining without necessary data and information. (Advisory Opinion A021-93, issued March 23, 1994.) In Advisory Opinion A37-95, issued on March 26, 1996, the Commission further clarified the level of participation of administrators could participate by providing technical advice *"when no one else in a school district can provide that information to the negotiating team."*

In several opinions, the SEC addressed the specific participation of conflicted business administrators. The SEC found that these administrators are responsible for the board's budget and are needed to answer financial and budgetary questions that arise in negotiations. Therefore, the Commission concluded that this special knowledge fell within the allowance of providing technical information and that these otherwise conflicted administrators could participate in negotiations for the limited purpose of providing technical assistance, as necessary, and limiting their comments to financial information. (Advisory Opinion A13-99, issued September 28, 1999; Advisory Opinion A14-02, issued November 15, 2002.)

Recognizing the difficulties that may face conflicted administrators' participation, the SEC advised that:

> *If you are concerned about where to draw the line between giving technical information and giving an opinion, you should always disclose to the board negotiating team and the board in closed session that you have a conflict so that it becomes a matter of record. This is a similar method to the Doctrine of Necessity that allows board members to vote in certain circumstances when so many board members have a conflict that the board would be unable to take action otherwise. With full disclosure, the board can make an informed decision on contract negotiations. To fail to disclose your conflict would violate the School Ethics Act.* (Advisory Opinion A37-95, issued on March 16, 1996.)

When the Board President Is In Conflict

A board president who is in conflict due to an in-district or out-of-district relationship is also expected to refrain from participating in the negotiations process. However, the SEC has also held that these conflicts do not necessarily require a board president to refrain from performing the responsibilities of a board president, such as:

- *appointing the board's negotiating team.* In a situation where the president had an in-district conflict, the SEC held that it viewed "the appointment of persons to serve on the negotiations committee differently than it views participation in negotiations." Finding that the president's "responsibility is to appoint members to committees who would best serve the District", the SEC held that it "could not conclude that a reasonable person would expect that the president could not be objective in fulfilling this task" simply because his wife was an aide in the district. Accordingly, the Commission advised the president that the act of appointing members to the committee would not be a violation of the Act. Advisory Opinon A01-01, issued January 23, 2001.
- *signing negotiations related documents.* The SEC also found that a board president's in-district conflict did not preclude the performance of the president's ministerial signatory functions, such as the signing of: 1) the collective bargaining agreement ratified by both parties; 2) the retainer hiring a professional negotiator; and 3) the monthly payroll authorizing payment to employees. The Commission found that these actions were "perfunctory" and were required to ratify or represent that which had already been decided by the Board

However, the board president, in conflict because his wife was a district employee, was also advised to abstain from voting on the monthly payroll which affected his wife. (Note, that in this case, the president did not vote on the appointment of the professional negotiator and did not intend to participate in negotiations or to vote on the collective bargaining agreement.) Advisory Opinion A19-03, decided August 27, 2003.

The Doctrine of Necessity

The SEC has recognized that the School Ethics Act cannot interfere with a board's statutory obligation to engage in collective negotiations and to approve a tentative agreement reached by the board's appointed negotiations team. Accordingly, the Commission has authorized the use of the Doctrine of Necessity to permit boards to meet their responsibilities.

The Doctrine of Necessity is a legal principle which permits a board to waive conflicts of interest which otherwise would prevent a board from taking necessary actions. The SEC has authorized the use of this doctrine when conflicts with negotiations would clearly prevent a board from voting on a contract or from engaging in negotiations. However, invoking the doctrine is not always appropriate. Courts have held that the use of the doctrine must be restricted to limited situations where the conflict precludes a public body from taking an imperative action in a matter of public importance that cannot be put aside until a later date. The courts further have found that there is no basis for invoking the doctrine when sufficient members remain qualified to take action on matters of "stern necessity."[5]

[5] See, for example, *Allen v. Toms River Bard of Education*, 233 N.J.Super 642,1989.

The SEC's defined circumstances and procedures for invoking the doctrine in cases addressing conflicts of interest and negotiations are summarized below.

Circumstances Authorizing the Doctrine of Necessity

The SEC has found that the following circumstances require boards of education to invoke the doctrine:

Assuring a Board Quorum Circumstances may arise where a numerical majority of the board is in conflict and cannot participate in negotiations. In these situations, the board may be unable to have the quorum that is necessary to take action to vote on the tentative agreement. Invoking the doctrine permits all board members, including those in conflict, to participate in the vote. Therefore, invoking the doctrine permits board action when a board would not otherwise be able to vote because of the absence of the requisite quorum. (Advisory Opinions A10-93(b) and A07-94 issued June 23, 1994; Advisory Opinion A38-95, issued February 28, 1996.) Most of the SEC's opinions advising the use of the doctrine have involved boards' inability to vote on a negotiated agreement due to the lack of a quorum.

To Assure The Board's Ability to Have A Negotiations Committee The SEC has held that "one board member does not constitute a committee." In one case, the Commission provided an advisory opinion to a board who had only one board member who was not in conflict and was therefore the only board member who could participate in negotiations and sit on the board's committee. In this unique situation, the Commission advised the board that since the number of nonconflicted board members was insufficient to form a committee, it would have to invoke the Doctrine of Necessity for the board to actually conduct and engage in negotiations. After the application of the doctrine, board members who were in conflict could join the nonconflicted member to participate in negotiating the contract, serving on the board's bargaining committee, and voting on the tentative agreement. (Advisory Opinion A03-98, issued May 30, 1998.) However, a different outcome is required when more than one board member is not in conflict.

Circumstances NOT Authorizing the Doctrine of Necessity

The SEC has found that the following circumstances do not authorize the use of the Doctrine:

When There are Sufficient Board Members to Negotiate The SEC has held that as long as there are "two or three board members" who can participate in negotiations, these non-conflicted members can negotiate on behalf of the board and the Doctrine of Necessity should not be invoked to allow the entire board's participation. (Advisory Opinion A55-95, issued January 1996; Advisory Opinion 14-02, issued November 15, 2002.) However, if the number of non-conflicted board members is not sufficient to constitute a board quorum, then the doctrine needs to be invoked to permit the board to vote on the tentative agreement negotiated by the board's team. (See discussion above.)

When Administrators in Conflict Provide Technical Advice The SEC has held that conflicted Business Administrator could participate in negotiations to provide expertise and technical advice as requested, without invoking the doctrine. (Advisory Opinion 140-02, issued November 15, 2002. Also see discussion "Administrators' Conflicts and Participation in Negotiations" earlier in this article.)

Conflicted Board Members' Access To Negotiations Information After the Doctrine of Necessity

The issue of board members who are permitted to vote on a contract because of the Doctrine of Necessity remains somewhat unsettled. In early decisions, the SEC issued an opinion holding that board members who were allowed to vote under the Doctrine of Necessity should not be allowed to enter into an executive session discussion of the memorandum of agreement before the contract became an agenda item for a public meeting. The Commission held that, after the Doctrine of Necessity had been invoked, these board members could obtain an understanding of the agreement though the written agenda that was prepared for the public. (Advisory Opinion A08-96, issued July 24, 1996.)

However, this holding may be affected by a subsequent Commission opinion which stated the "there is a need for the board members who are conflicted from negotiations, but are able to vote on the contract, to have knowledge of the terms of the contract prior to the vote." (Advisory Opinion A14-00, issued November 28, 2000.) This later opinion focused on advice given to board members with an out-of-district connection who could vote on the memorandum of agreement, and the SEC specifically stated that "board members so *situated* may participate in closed session meetings of the board in which the contract is discussed *after* the memo of agreement had been signed." *(emphasis added.)* Whether the 2000 Advisory will also be applicable to board members with in-district connections whose ability to vote on the contract is dependent upon the use of the Doctrine of Necessity is an issue that will need further clarification. For expected developments in this area, please consult with your legal and labor resources.

Procedures to Invoke the Doctrine

When the number of board members who are in conflict interferes with the board's ability to conduct negotiations, or to vote on the contract, the board attorney may invoke the Doctrine of Necessity. Like many other issues involving the interpretation of the School Ethics Act provisions, the procedures to be followed in invoking the doctrine have been subject to change.

In early opinions, the SEC indicated that the rule

should be invoked after a board attorney advises a school board that his rule is needed. At that time, the school board should publicly announce that the doctrine is invoked because a majority of the board members are in conflict. This announcement, including the nature of the conflicts, should be contained within the minutes of the meeting where the rule is invoked and the vote is taken. At that time, the SEC also advised there is no need for the board to adopt a resolution to invoke the doctrine: an announcement that includes the reasons for invoking the doctrine which appears in the board's minutes would be sufficient. (Advisory Opinion A08-96, issued July 24, 1996; also see Advisory Opinion A03-98, issued April 1, 1998.)

However, in February 2003 the SEC adopted a Resolution on Invoking the Doctrine of Necessity. In that document the Commission directed boards of education and charter school boards of trustees to read a resolution at a regularly scheduled public meeting, post it where public notices are generally posted for a period of 30 days, and provide the SEC with a copy. The Commission also stated that the resolution to be adopted would be distributed to various relevant agencies including school districts, charter schools, and county superintendents.

A failure to abide by these procedures, however, may not be seen as an automatic violation of the Act. In *Vernon Township Board of Education* (Docket No.C07-96, issued July 23, 1996) the Commission dismissed a complaint that the board violated the Ethics Act when it did not invoke the doctrine properly. The Commission found that the board had to invoke the doctrine in order to vote on the contract and that the board had subsequently amended the minutes pursuant to a Commission request. Therefore, the SEC did not find probable cause that the board had violated the Act. However, following procedures deemed appropriate by the SEC would seem to in boards' best interest. Boards facing a possible need to invoke the doctrine would by well-advised to contact the Commission to obtain direction as to the Commissions latest expectations.

How Do the Opinions Affect Boards' Negotiations Efforts?

The SEC's definition of who can participate in negotiations fundamentally affects a board's bargaining preparations and organization of its negotiations efforts. The Commission's decisions and opinions influence the role of the full board during negotiations, the definition of a board majority for the purpose of negotiations, the structure of the board's bargaining team, as well as the board's conduct of its ratification vote.

The Role of the Full Board in Negotiations

A well-coordinated board bargaining effort typically involves all members of the board. While delegating the responsibility for face-to-face negotiations to its bargaining team, the full board is typically involved in setting direction (parameters) for negotiations, reassessing its parameters during the process, and ultimately ratifying a tentative agreement that falls within its established parameters. SEC holdings, however, may preclude some board members from participating in providing input into the direction of negotiations and others from participating and voting on the contract.

As a result, the "full" board that can participate in negotiations can be smaller than the actual board. For example, if three board members on a nine member board are in conflict and cannot participate in negotiations, then the board is transformed into a six member board for the purposes of negotiations. The "reduced" size of the board means that a negotiated teachers' contract, a major district policy that affects approximately 75% to 80% of a district's budget as well as a district's ability to staff its educational program, can be set by a limited number of board members. It thus becomes particularly important for districts working under these conditions to establish a well coordinated approach to their conduct of negotiations that assures that all board members who are not in conflict can remain unified and committed to the same district bargaining goals. (For additional information, see Chapter 4 of the NJSBA publication *Collective Negotiations*, vol. 5 of the School Board Library Series.)

Defining a Board Majority

The exclusion of certain board members from participating in negotiations and on voting on the contract can affect the definition of what constitutes a majority of the board. To become effective, a tentative agreement requires the affirmative vote of a majority of those voting, not a majority of the full board. For example, if three members of a nine-member board are in conflict, only six members of the board can vote on the negotiated contract. Therefore, under these circumstances, four "yes" votes would be needed to ratify the agreement.

As boards begin to prepare for negotiations, they must assess whether or not the School Ethics Act requires a change in their "normal" definition of what constitutes a board "majority." This is a consideration that may affect many boards of education as a number of board members may have a conflict that precludes their ability to participate in negotiations. While board members with out-of-district connections can vote on the tentative agreement, board members with conflicts arising from an in-district connection or union endorsement during a recent election may not. Further, reelection of sitting board members during ongoing negotiations may alter the quorum identified at the beginning of negotiations. Assuring a quorum for the ratification vote then becomes a basic, and possibly ongoing, consideration for many boards of education. (See discussion on Ratification, later in this article.)

In addition, the definition of what constitutes a board majority for the purposes of negotiations also affects the structure of the board's bargaining team.

The Board's Bargaining Team

The board's bargaining team is charged with representing the board's interest in negotiations. How the team is

structured can be an important factor in the committee's ability to be most effective in carrying out its responsibility to engage in face-to-face negotiations. However, SEC decisions and opinions have added complexities to the issues that must be considered in the appointment of boards' negotiations committee.

The Size of the Team Case law requires board members who sign the tentative agreement reached at the bargaining table to vote in favor of ratifying the settlement reached at the bargaining table. Therefore, for many years, there has been a generally pervasive understanding that boards lose bargaining leverage if a majority of the board sits at the bargaining table. Accordingly, boards' bargaining teams have typically been comprised of a numerical minority of the board.[6]

Thus, when a board majority consists only of six voting members, it is advisable for no more than three board members to sit on the board's bargaining team. Should that board's bargaining team consist of four members, then the team's action to approve the tentative agreement would essentially result in the disadvantageous situation where the board's final ratification would be guaranteed at the bargaining table.

In general, then, SEC rulings can result in reductions in the size of a board's negotiating team. These reductions may become particularly troublesome if conflicts of interest reduce participation in boards that consist of seven or five members. Boards facing these circumstances should consult with their resources, including the NJSBA Labor Relations Department, to explore possible options in providing adequate representation at their bargaining table.

The Composition of the Team The selection of team members has generally been based on board members' experience, skills and particular characteristics. In addition, boards have also given some consideration to the expiration of board members' terms of office. To assure continuity of representation after an election, boards have typically avoided teams composed of a majority of board members who would be up for reelection during ongoing negotiations. Nevertheless, the expiration date of a board member's term has rarely been used to preclude the appointment of an otherwise well-qualified, experienced and willing board member to the board team. In fact, the possibility of team members' turn-over during negotiations has convinced many boards to include a professional negotiator on their bargaining teams.

The issue of mid-negotiations reelections is likely to become more important in light of the SEC's rulings that union endorsements during a reelection campaign can result in board members' exclusion from continued participation in ongoing negotiations. Boards of education will need to be aware of the complexities of these rulings and to be prepared to respond to the potential disruptions to their board teams' and their bargaining efforts.

Assuring Availability of Administrators' Input

The importance of administrators' input to negotiating a contract that preserves school management's discretion and authority cannot be overemphasized. (See the article "The Role of Administrators in Negotiations" in the Bargaining Skills section of *The Negotiations Advisor*.) When key administrators like the superintendent and the business administrator are in conflict, a board must assure that it has access to other administrators who can provide the board and its team with the information that is necessary to their negotiations efforts.

In the absence of other knowledgeable and informed administrators, boards must be prepared to work with administrators who are in conflict. Boards must understand the source of their administrators' conflict, but they must also be prepared to seek and to accept these individuals' professional and technical expertise in the districts' fiscal, educational and operational needs. (See the discussion "Administrators' Conflicts and Participation in Negotiations" earlier in this article. Also note that the SEC has not fully defined the extent of the term "technical expertise.")

It is also advisable for boards to assure that their employment contracts with key administrators do not become a source of conflict. Too frequently, a potential for conflict is built into these individual contracts. For example, a contract with a new superintendent which simply declares that the CSA will enjoy all the benefits contained in the teachers' negotiated contract can establish a linkage with the contract under negotiations and will create a conflict of interest that may preclude the CSA's participation in negotiations. On the other hand, an individual employment contract that specifically lists the level of benefits that will be available to the administrator diminishes the possibility of an automatic conflict of interest and increases the likelihood that the administrator will be able to directly and fully provide expert guidance to the board and its bargaining team.

The Ratification Vote

Board members who cannot vote on the tentative agreement cannot cast an affirmative or negative vote nor an abstention to the motion to approve the tentative agreement. An exception to this general rule emerges when a majority of the board is in conflict and the absence of a quorum would preclude board action on the contract. Under those circumstances, the board, upon the advice of its attorney, can invoke the Doctrine of Necessity. Declaring this doctrine permits all board members to vote on the contract. However, board members who can vote only because the doctrine has been invoked may have limited access to information of the terms of the contract until the doctrine has been announced at the meeting where ratification is to take place.

[6] Fo a full discussion of the structure of bargaining team, please see Chapter 4 of the NJSBA publication *Collective Negotiations,* vol.5 of the School Board Library Series.

So far, the Commission has permitted a board to invoke the Doctrine of Necessity for the purposes of setting negotiations parameters and for the conduct of negotiations in only one case: when only one of the board members did not have a conflict under the School Ethics Act. However, it must be kept in mind that the Commission provides opinions only on the specific issues posed by local boards. It would thus appear that the Commission has not yet been asked to address the question of how a board with a majority of conflicted board members can assure that its bargaining parameters and its tentative agreement reflect the goals of the majority of the board who will be required to vote on the tentative agreement.

Board Members and Boards' Conduct of Negotiations

Board members, and boards of education, are expected to conduct negotiations in accordance with the SEC's public advisory opinions. Perceived noncompliance with the Commission's advice can lead to the filing of a formal complaint and a possible penalty against the offending party. It is therefore most prudent for boards of education to rely on their legal and labor relations resources to assure their knowledge and familiarity with the opinions and decisions of the SEC *before* they begin to plan their approaches to successor negotiations.

In addition, boards will need to remain alert to conditions that may arise during ongoing negotiations that change the designation of conflicted board members. For example, a board member may become conflicted during the course of negotiations if a member of the family accepts employment in the school district or in another district; similarly, union endorsement of board members' reelection campaign during the course of negotiations may create a new conflict.

Clearly, over the years, a general direction and sense of what will be seen to be a conflict of interest has emerged. However, not every possible situation or set of facts has been reviewed by the Commission. Further, while the SEC has primary expertise and jurisdiction over the interpretation of the Ethics Act, it may not have a full understanding of the impact and the interplay of their opinions on board's statutory negotiations obligation. Boards will therefore be best served by asking their legal and labor relations resources to fully present their novel and unique situations to the SEC and to fully brief the Commission on the implications of its opinions on a board's ability to conduct its negotiations.

Complaints and Penalties

In addition to issuing advisory opinions to guide boards' understanding of their potential ethical conflict in participating in negotiations, the SEC is also authorized to receive and resolve formal complaints that the Act has been violated by board officials. The procedures for handling complaints, delineated in *N.J.A.C.* 6:3-9.19 authorize the SEC to conduct investigations, hold hearings, compel the attendance of witnesses and the production of documents, and to examine witnesses in order to determine whether there is probable cause to process the complaint. If the Commission determines that probable cause exists, it refers the matter to the Office of Administrative Law for a hearing that will be conducted in accordance with the Administrative Procedure Act. The SEC is also required to notify the complainant and the school official named in the complaint.

Upon completion of the hearing before the OAL, the SEC determines by majority vote if the conduct cited in the complaint constitutes a violation of the Act or whether the complaint should be dismissed. The SEC's decisions in resolving these complaints are beginning to establish a body of case law regarding school officials' ethical conduct in regard to board business, including negotiations. Dismissals of complaints can be helpful in identifying permissible participation in negotiations. However, it must be kept in mind that a dismissal of a particular complaint may reflect a lack of sufficient evidence, rather than the SEC's endorsement of a particular degree and type of involvement in negotiations. A full reading of the decision and the specific acts found by the Commission are necessary to understand the rationale for the dismissal.

Penalties

If the SEC finds that the official named in the complaint violated the Act, it is authorized to recommend an appropriate penalty to the Commissioner of Education. The Commission's recommended sanction, determined by a majority vote, may include a reprimand, censure, suspension or removal of the school official. As defined by *N.J.A.C.* 6:3-9.2, a "reprimand" is a letter from the SEC rebuking a school official for having been found to have breached the School Ethics Act's standards of conduct;. A "censure" means a formal public action read into the record of the SEC to rebuke a school official who has been found to have violated the Act. *N.J.A.C.* 6:3-9.19(c); it also requires the district board of education to read the SEC's Resolution of Censure at its next public meeting following the Commission's adoption of the censure and to post the resolution where the board posts public notices.

The Commissioner may adopt or modify the SEC's recommendation. In a number of decisions, the Commissioner has held that his jurisdiction is limited to a review of the SEC's recommended sanction, but does not extend to a review of the Commission's factual findings and conclusions of law. The SEC's determinations and/or the Commissioner's decision regarding the sanction may be appealed to the State Board of Education.

Developing Case Law

A body of case law based on complaints challenging participation in negotiations is beginning to emerge. Again, the specific facts of each case will be carefully weighed in both the determination of a violation and of the appropriate sanction. It appears that conduct, which does not comply with the standards expressed in the SEC's public

"advisory" opinions, is likely to be deemed to be a violation of the Act. It also appears that knowledge of the advisory opinions can influence the sanction that will be imposed for a violation.

Dismissals of Complaints Complaints will be dismissed when the Commission finds that there is not probable cause that the Act has been violated. For example, the SEC held that there was no probable cause to credit allegations in a complaint that a board member with an in-district conflict violated the Act by his involvement in an executive session during negotiations. The Commission found that the discussion occurred after a memorandum of agreement had been reached, involved the budget and was not designed to influence the settlement. Accordingly, the SEC dismissed the complaint against the board member. (Docket No. C19-99, issued March 28, 2000.)

The Commission has also found that there was no probable cause when a board member, in good faith, misunderstood an advisory opinion which did not clearly address the impropriety of participating in negotiations with units affiliated with the same statewide union. (C01/C02-00, issued June 27, 2000.) The SEC also dismissed a complaint when there were no extenuating circumstances to warrant allegations which were filed later than the one-year filing deadline established by N.J.A.C. 6A:28-1.8(a). (C15-01, issued August 28, 2001.)

In addition, the SEC has generally been reluctant to find probable cause when the challenged action occurred prior to the issuance of a contrary public advisory opinion. In other words, advisory opinions would appear to be applied only to future actions. Similarly, a complaint will be dismissed if a board member complied with a prior advisory opinion provided by the Commission. (See, for example, C34-02, issued January 28, 2003.)

Imposition of Penalties When the SEC finds a violation of the Act, it will recommend a sanction. The Commissioner of Education's review of penalties imposed by the SEC has resulted in both affirmations or modifications of the recommended penalty. For example, a complaint was filed against a board member who, notwithstanding his membership in the NJEA, attended a closed session discussion where the board was discussing negotiations with its teachers' unit. The SEC recommended a reprimand. However, since the board member had been given a copy of Advisory Opinion A33-95, which advised against such participation, the Commissioner disagreed with the recommended sanction and concluded that the more severe imposition of censure was appropriate. (Complaint Nos. C35-95 and 33-95)

In another complaint, the SEC found upon remand after *Pannucci* that a board member with an out-of-district connection did not violate the Act by voting on the contract. However, the SEC also found that other aspects of the board member's conduct (such as engaging in secret negotiations with the union without board authorization) were sufficiently disturbing to warrant a penalty of removal from the board. The Commissioner disagreed and ordered a 45-day suspension. The State Board dismissed the complainant's appeal as it found that the Act did not confer the right to prosecute the matter on the individual who filed the complaint. (*In the Matter of Bruce White,* 2000 *S.L.D.* September 6, 2000.)

Under other circumstances, the penalty recommended has been approved by the Commissioner. For example, in one case, the SEC found that a conflicted board member's participation in negotiations was based, in part, on the initial but incorrect advice of the board attorney. While the SEC found that the board member's conduct violated the Act, it concluded that the penalty should be mitigated by the attorney's advice. The Commissioner agreed that the recommended sanction of a reprimand was appropriate under the circumstances of this case. (Complaint No. C32-97)

These examples underscore the importance of the specific factual patterns surrounding each particular case. They also emphasize that the SEC's advisory opinions, and board members' awareness of, and compliance with, these SEC public opinions will have an impact on the penalties imposed by the SEC and reviewed by the Commissioner of Education.

A Final Word

This is a rapidly evolving and volatile area of new law. Please consult with your board attorney, your professional negotiator, and the NJSBA Labor Relations Department to assure that you have the very latest information concerning the opinions of the School Ethics Commission. New developments will also be reported in *School Board Notes* and posted on the NJSBA Website at *www.njsba.org.* Given the importance of specific factual patterns, it is also important for you to discuss your district's particular situations and concerns with your labor and legal resources to determine how to proceed to conduct negotiations without violating the School Ethics Act.