

PROVIDING CONFLICT OF INTEREST ADVICE

May 2008



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I. Introduction to Conflict of Interest Laws and Ethics

Since the voters adopted the Political Reform Act in 1974, the League of California Cities, through its City Attorneys Division, has educated its members in the development and application of the laws that affect our agencies in this important area. It is among a small number of disciplines of our varied practice that demand separate focus and attention from all of us.

The Political Reform Act, however, is not the entire story relative to conflicts laws and ethics. Many other statutes, adopted both before 1974 and since, regulate the behavior of public officials relative to conflicts of interest, perception and bias.

Legal ethics under the Rules and Professional Conduct and “ethics” in the broader sense of personal or shared moral values are additional factors in evaluating conflicts of interest. Indeed, the Political Reform Act poses as many questions to those in government as it answers. Many questions focus on whether or not the standards set forth by statute and regulation define appropriate conduct or merely articulate minimum standards of non-criminal or lawful conduct. While it is true that one of the goals of conflict of interest law is to promote proper behavior in public office by elected and appointed officials, it is questionable whether the strict adherence to the conflict of interest laws alone, would achieve the desired result. All of us in public life must attend to our own sense of what is right and wrong to supplement the often minimum standards of mere legality. As public law specialists, we have a unique opportunity to invite our clients to attend to their own moral – as well as legal – commitments.

We accept that elected and appointed officials wield the power of government and serve as stewards of public resources. For this reason, the public holds its elected and appointed officials to high standards of ethical conduct. Although the law should not be the sole ethical reference point for elected officials, legal requirements necessarily impose minimum “ethical” standards. Fundamental to these ethical standards is the notion that the public expects public officials to make decisions with the public’s interest in mind, rather than to serve self-interests or other private interests. To that end, the League of California Cities has helped fund through the Institute for Local Government’s Public Service Ethics Project. One of the chief aims of this effort is to begin in earnest a debate over just this subject.¹

AB 1234: Government Code 53232.2, et seq.

¹ The website for the League’s INSTITUTE FOR LOCAL GOVERNMENT provides a number of resources, publications and links on this emerging subject. Please visit www.ca-ilg.org.

Introduction

Two important component parts to AB 1234 were enacted by the California legislature in 2006. The higher profile portion requires mandatory ethics trainings for officials who work for agencies and are compensated for their service or reimbursement for expenses. The lesser known yet very important part requires local agencies to adopt formal expense reimbursement policies and then to comply with same when reimbursing its officials for expenses. Ethics training will be discussed following this introduction.

Ethics Laws and Principles Training Requirements (AB 1234)

State law requires covered local officials to take two hours of training in ethics principles and laws every two years.² The requirement is frequently referred to by its bill number: AB 1234.

Covered Officials

Basically the requirement applies to those elected or appointed officials who are compensated for their service or reimbursed for their expenses.³

The specific trigger for this requirement is whether the agency either compensates or reimburses expenses for members of any of its Brown Act covered bodies; if it does, then all elected and appointed “local agency officials” (as defined) must receive this training.⁴ “Local agency official” means any member of a legislative body or any elected local agency official who receives compensation or expense reimbursement.⁵

“Local agency” means “a city, county, city and county, charter city, charter county, charter city and county, or special district.”⁶ Thus the training requirement does *not* include other agencies on which local officials serve (for example, redevelopment agency governing boards or joint powers agencies), although many such officials will likely be covered by virtue of their status

² Cal. Gov’t Code § 53235(a), (b).

³ The language is potentially confusing on this point. The statute says that if a local agency provides any type of compensation or reimbursement for members of its legislative bodies, then all “local agency officials” must receive training. *See* Cal. Gov’t Code § 53235(a). But the definition of “local agency official” means “any member of a local agency legislative body or any elected official who receives any type of compensation . . . or reimbursement for actual and necessary expenses incurred in the performance of official duties.” *See* Cal. Gov’t Code § 53234(c)(1).

⁴ Cal. Gov’t Code § 53235(a) (“If a local agency provides any type of compensation, salary, or stipend to a member of a legislative body, or provides reimbursement for actual and necessary expenses incurred by a member of a legislative body in the performance of official duties, then all local agency officials shall receive training in ethics pursuant to this article”); § 53234(a) (defining legislative body by reference to the Brown Act, Government Code section 54952).

⁵ Cal. Gov’t Code § 53234(c)(1).

⁶ Cal. Gov’t Code § 53234(b).

with cities, counties and special districts. Note that the definition also does not include school districts.

Note that local agencies also have the option of requiring certain employees to receive this training.⁷

Application to Charter Cities

Many city attorneys are not convinced that AB 1234 contains the necessary findings to make it applicable to charter cities, although the statute purports to apply to charter cities by including charter cities within the definition of local agency.⁸ However, a number of charter cities already have such training programs or are voluntarily complying with the spirit of AB 1234. Such an approach may reflect well on a city and city officials should the local media inquire about city officials' compliance with AB 1234.

Timing and Deadline Issues

Generally officials must receive the training within either one year of AB 1234's effective date (which was January 1, 2006, which means those officials in office as of that date must have received the training by January 1, 2007⁹) or within one year of starting their public service with the city as a covered official.¹⁰

After the initial training, officials must receive additional training every two years after that.¹¹ Thus, if an official received the required training on May 15, 2007, the official would need to receive training again on or before May 14, 2009.

Compliance and Enforcement

Local agencies must provide covered officials with a list of options for satisfying this requirement at least once a year.¹² The training can occur in-person, online or on a self-study basis (read materials and take a test).¹³

Local officials demonstrate compliance with the mandatory ethics requirements by receiving a proof of participation certificate.¹⁴ Copies of these certificates must be provided to the agency's custodian of records and maintained as public records subject to disclosure to the media, the public and others for at least five years.¹⁵

⁷ Cal. Gov't Code § 53234(c)(2).

⁸ Cal. Gov't Code § 53234(b).

⁹ See Cal. Gov't Code § 53235.1(a).

¹⁰ See Cal. Gov't Code § 53235.1(b).

¹¹ See Cal. Gov't Code § 53235.1(b).

¹² Cal. Gov't Code § 53235(f).

¹³ Cal. Gov't Code § 53235(d).

¹⁴ Cal. Gov't Code § 53235.1(e).

¹⁵ Cal. Gov't Code § 53235.2.

The new law is directory; there is no specific penalty for failing to complete the required training. The law creates, however, a public relations enforcement mechanism by making one's participation in such training (or not) a matter of public record.¹⁶ Presumably, from time to time, there will be a number of public records requests by the media and others to verify which officials have and have not met the requirements.¹⁷

Training Content

The training must cover *general ethics principles* relating to public service and ethics laws.¹⁸ "Ethics laws" are defined as including:¹⁹

- Laws relating to personal financial gain by public officials (including bribery and conflict of interest laws);
- Laws relating to office-holder perks, including gifts and travel restrictions, personal and political use of public resources and prohibitions against gifts of public funds;
- Governmental transparency laws, including financial disclosure requirements and open government laws (the Brown Act and Public Records Act);
- Law relating to fair processes, including fair contracting requirements, common law bias requirements and due process.

It's important to note that, given the breadth of the subjects that need to be covered, the goal of the training cannot be to teach local officials the law in each of these areas. Instead the goal needs to be to:

- Acquaint local officials with the fact that there are laws that govern their behavior in each of these areas,
- Motivate officials to comply with such laws (among other things by explaining the consequences of missteps) and
- Alert them on when they need to seek the advice of qualified legal counsel when issues arise with respect to such laws.

Trainer Qualifications and Resources

¹⁶ Cal. Gov't Code § 53235.2.

¹⁷ Note: in addition to maintaining records on compliance with the minimum standards imposed by AB 1234, local agencies may also want to maintain records of any additional training local agency officials received. This will enable those inquiring to ascertain the agency's and individual's full scope of commitment to understanding the ethical and legal obligations associated with public service.

¹⁸ Cal. Gov't Code § 53235(b).

¹⁹ Cal. Gov't Code § 53234(d).

The law and administrative regulations establish criteria for trainer qualifications and the content of AB 1234 training. For example, the Attorney General and FPPC have adopted guidelines for course curriculum accuracy and sufficiency.²⁰ The Attorney General's guidelines require that the ethics law portion of AB 1234 training be given only by attorneys licensed to practice law in California and knowledgeable about California's ethics laws. The FPPC or Attorney General do not certify trainers or training sessions as meeting these qualifications, however.

The League and CSAC's nonprofit research affiliate, the Institute for Local Government, have developed a number of resources to help local agency attorneys and officials satisfy the AB 1234 training requirement. These resources include:

- 1) *An Instructors Manual* (which includes a printout of the 200-plus pages of materials of reading required by the FPPC),
- 2) A CD-Rom with sample PowerPoint slides and forms (including proof of participation forms), and
- 3) Sample handouts.

The sample handouts include the following:

- *Doing the Right Thing: Putting Ethics Principles into Practice*
- *A Local Official's Reference on Ethics Laws*
- *Key Ethics Law Principles for Public Servants* (formerly the ethics law bookmark)
- *The ABCs of Open Government Laws*

Special bulk order rates are available. Sales of these materials help support the Institute's work in public service ethics. For more information (including preview electronic versions of the handouts and ordering information), visit www.ca-ilg.org/AB1234compliance. For more information about the Institute's work in public service ethics, see www.ca-ilg.org/trust.

A. Observing the Evolution

As practitioners, we may be at a critical point in our history with respect to the promulgation and understanding of ethical standards which will guide those who govern. A favorite quote guides us in this observance:

²⁰ See Cal. Gov't Code § 53235(c). The FPPC adopted its guidelines as a regulation (2 Cal. Code of Regs. § 18371) and the Attorney General issued [General Guidelines on Course Accuracy and Sufficiency](http://caag.state.ca.us/ethics/eth_loc_guide_final.pdf), which are available on the Department of Justice website: http://caag.state.ca.us/ethics/eth_loc_guide_final.pdf. A summary of the state's guidelines for training is also available at www.ca-ilg.org/AB1234compliance.

“To know what the law is, one must know what the law has been and what it tends to become.”

We have passed into a new millennium. Although mankind has existed for tens of thousands of years, the passing into this most recent millennium was different, if only in the fact that when we passed through the prior millennium we did so without broadly applicable laws and lawyers advising those who wield power. While oversimplified, the “rules” at the prior millennium “belonged to” those who had the power to enforce them and also through tradition, superstition and religion. It was relatively recently in history that the British crown could claim “The king can do no wrong” and that Louis XIV could pronounce, “I am the state.”

In more recent democracies, we have strived to be “a government of laws and not of men (and women).” In California, we can trace our earliest attempts at regulating ethical (or anti-corrupt) activity to the 1850’s with concerns about public officials’ self-dealing when they handed out public contracts²¹ and efforts in the later 19th and early 20th century to counter and control the influence of the railroad barons.²² It should also be remembered that in the last 250 years we have come to stand the expectations of those “governing” on their heads: in colonial times the franchise to vote and/or to hold office was often available only to those most likely to have what are now perceived as disqualifying conflicts of interest (land ownership was often a requirement to even vote!).

It is now nearly thirty-five years after the post-Watergate adoption of the Political Reform Act. While the Act may have done much to alleviate the fears of some of our residents with respect to how public affairs are managed, there is a building ground swell which may ultimately demand still higher levels of behavior when it comes to the conduct of their business. At the same time that fines for campaign finance violations have become so common, the press also writes stories about community activities ensnared by the complexities of the Act and observe that a tool of democratic control over governance can operate as an obstacle to participation in our democracy. Thus, as public law practitioners we are called to help adapt the Act and its regulations to meet the needs of our time, both to make it more effective, more broadly understood, and more easily implemented.

The continued evolution of this area of the law will bring challenges to municipal law practitioners. Laws strive for bright line tests; ethics are typically broad principles and thus necessarily subject to individual interpretation. Our clients often seek only the technical answer – not the additional caution or admonishment and yet we bear some responsibility to aid our clients in considering what is right and not just what is lawful.

B. Areas of Regulation

²¹ Government Code 1090, et seq.

²² Calif. Constitution Art. XII § 7.

This text addresses the following areas of conflict of interest regulation:

1. The Political Reform Act - Govt. Code § 87100, et seq.
 - Disclosure (SEI)
 - Conflict of Interest
 - Eight Step Process
 - Financial Interests
 - Gifts
 - Honoraria
 - Mass Mailings
 - Revolving Door – Govt. Code 87406.1, 87406.3 and 87407
2. Government Code Section 1090
3. Common Law Conflicts of Interest Doctrine
4. Incompatible Outside Activities – Govt. Code § 1126, et seq.
5. Common Law Doctrine of Incompatible Offices
6. Prohibition on Acceptance of Discount Passes on Common Carriers
7. Redevelopment Agencies Conflicts
8. Bias Under the Due Process Clause
9. Public Contracts Code 10410 and 10411

II. THE ROLE AND RESPONSIBILITIES OF THE CITY ATTORNEY

A. The Attorney/Client Relationship

1. The City Is the Client

The question of whether a city attorney serves a corporate “city” client, individual “public official” clients or both has been vigorously debated over the years. For example, Michael Miller, in the paper he presented to the 1987 National Institute of Municipal Officers Conference as Arcadia City Attorney, postulated at least 7 possible answers to that question.

The California courts have reached contradictory results on this issue. In *Ward v. Superior Court of Los Angeles County, et. al*, 70 Cal.App.3d 23 (1970), the court of appeal held that the county counsel represents the county as an entity. However, the California Supreme Court in *People et. rel. Deukmejian v. Brown*, 29 C 3d 150 (1981), held that, at least for some purposes, the client can be an individual board member or possibly, an employee of the government agency.

California State Bar Formal Opinion 2001-156 appears to have finally decided this issue, at least for California State Bar purposes. Cal.Eth.Op. 2001-156 (2001 WL 34029610 (Cal.St.Bar.Comm.Prof.Resp.))(2001)[hereinafter Cal.Eth.Op. 2001-156]. This Opinion held, among other things, that California Rule of Professional Conduct 3-600 applies to city attorneys and that the city as an entity is the city attorney’s client. While this Opinion is not binding on the courts, this is a much more logical and workable conclusion than the proposition that individual city officials are the city attorney’s client, and it would be surprising if courts were to take a different position.

Rule 3-600(A) provides as follows:

In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. Cal.Rules Prof.Resp. 3-600(A).

In applying Rule 3-600 rule to city attorneys, Opinion 2001-156 states as follows:

Although this rule does not explicitly indicate that a governmental entity is an organization within the scope of the rule, the Committee believes that the rule applies to a municipal corporation and is best viewed as applicable to all governmental entities. In general, the scope of rule 3-600(A) has been broadly construed in case law involving non-governmental settings. In particular, the drafters' intent for the rule to apply to attorneys for governmental entities may be inferred from the citations found in the discussion after the rule, which include a reference to *People ex rel. Deukmejian v. Brown*, ..., a case involving representation of governmental entities. *Id.* (footnotes and citations omitted.)

The identity of the city attorney's client could be different in some charter cities, depending on the language of the charter. For example, the California Attorney General, in a discussion of the duties and responsibilities of an elected city attorney in a charter city, opined that attorney-client privilege exists between a city attorney and an individual councilmember who seeks advice regarding the application of the Political Reform Act. The Attorney General reasoned that where a city charter imposes a duty on the city attorney to advise city officers in such matters, the officers become individual "clients" of the city attorney. (71 Cal.Ops.Atty.Gen. 255 (1988)). Considering that this opinion preceded the effective date of Rule 3-600, it is possible the Attorney General might reach a different conclusion today.²³

Rule 3-600(D) provides that attorneys representing entities must "explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those" of the officer or employee. Since only individual public officials, not the city itself, must comply with or can violate the PRA, city attorneys of necessity often discuss conflict of interest questions with individual city officials. Thus, it is understandable that these officials might believe that the city attorney is representing them individually in PRA matters. It is very important that the city attorney inform city officials that the city as an entity is the city attorney's client. Many city attorneys solve this problem by explicitly advising their city councils and staff in writing about the attorney/client relationship. Illustrative of such advice is the following clarification provided by one city attorney to his city council:

The Office of the City Attorney, in accordance with both the City Charter and the State Bar Rules of Professional Conduct, represents as its client the City of Roseville, acting

²³ In a more recent Opinion, the Attorney General posed the question as to the identity of the client of a governmental attorney 84 Cal.Ops.Atty.Gen. 71 (2001). The Attorney General then failed to answer the question, merely asking a series of other questions. The Attorney General discussed Rule 3-600 as follows:

"Rule 3-600 suggests that the client is the 'organization itself . . . 'acting through its highest authorized officer, employee, but offering no guidance specifically with respect to governmental agencies."

Thus, it is unclear who the Attorney General, the highest government attorney in California, thinks is the client of a city attorney.

through the City Council as the City's highest administrative authority. That is, of course, why direction is taken from a majority of the council, rather than any individual councilmember. Looked at the other way, no individual councilmember (nor any other officer or employee of the city) is a client of the City Attorney's Office. As a result, no duty to represent such individuals exists (except as directed by the Council), nor is there any privilege of confidentiality in any conversation between individuals and the professional staff of the City Attorney's Office. That is, since there is no attorney-client relationship, there is no attorney-client privilege.

Or

NO ATTORNEY – CLIENT RELATIONSHIP

Council members who consult with the City Attorney, his or her staff and/or attorney(s) contracted to work on behalf of the city cannot enjoy or establish an attorney-client relationship with said attorney(s) by consulting with or speaking to same. Any attorney-client relationship established belongs to the city, acting through the city council and as may be allowed in law for purposes of defending the city, the city council or an official acting in his or her official capacity during the course of litigation and/or administrative procedures, etc.

The unfortunate consequences of not clearly informing city officials of the identity of the city attorney's client can be seen in a California State Bar disciplinary proceeding involving an elected city attorney. Cal. State Bar Ct., Div. 7, Docket Numbers 84-I-356 LA, 85-I-063 LA (1986) In the proceeding the State Bar admonished the city attorney for filing a criminal PRA complaint against the planning director after the planning director had informed a representative of the city attorney's office of facts leading the city attorney to believe the planning director had violated the PRA. The State Bar said the city attorney's representative had an obligation to inform the planning director that the city attorney and the planning director did not have an attorney/client relationship and that the discussion between the city attorney and the planning director was not confidential. This situation involved unique facts, in particular that the city attorney in this situation was elected and had prosecutorial authority under the PRA. Nevertheless, the situation illustrates the importance of making sure the city's employees and officers know that they are not the city attorney's client.

In fact, it seems that much of the authority holding or implying that individual city officials can be a city attorney's client can be explained as an attempt to protect a government official who did not understand that he or she was not the government attorney's client. City attorneys can avoid becoming involved in such situations by following Rule 3-600(D) and ensuring that the city officials know that they do not have an attorney/client relationship with the city attorney.

2. Duty to Provide PRA Advice

Some city attorneys have concluded that the city attorney has no duty to advise individual city officials of their responsibilities under the PRA since the city as an entity is the city attorney's client rather than any official. It is certainly true that the Political Reform Act imposes no express obligation on city attorneys to advise elected or appointed officials. However, Government Code Section 41801 likely imposes such a duty for city attorneys in general law cities. This section provides as follows:

The city attorney shall advise the city officials in all legal matters pertaining to city business. (Cal.Gov't.Code § 41801).

Based on Government Code Section 41801, it appears that city officials are entitled to obtain conflict of interest advice from city attorneys even if they are not individual clients of the city attorney. Conflict of interest questions, unlike campaign reporting issues, only arise by virtue of government service, and a public agency must provide its officials with conflict of interest advice in order for them to perform their duties. In addition, Government Code Section 91003 provides courts with authority in some cases to void city actions where a public official was financially interested in the result, a possibility that has potentially serious consequences for the city as an entity. Therefore, it appears that conflict of interest questions constitute "legal matters of city business" for purposes of Government Code Section 41801 and similar charter provisions and that city attorneys can properly advise an official of their duties and responsibilities under the Political Reform Act.

3. Confidentiality

Obvious tension exists between the city attorney's role as the attorney for the city as an entity and a city official's probable expectations of confidentiality when the city attorney renders advice to the official on a conflict of interest issue. One way to resolve these competing interests is to hire separate outside counsel to advise city officials on conflict of interest questions. This person, while paid by the public agency, would represent only the interests of the particular official to whom he or she is giving advice. In such a case, the employee, not the city council, would probably be the client and hold the privilege.

It would appear that in most circumstances the better and certainly more economical approach is to recognize that the public official has a right to obtain advice on his or her duties under the conflict of interest portions of the Political Reform Act at the public agency's expense and that the city attorney is the most logical person to provide that advice. This appears to be the position taken by most city attorneys, even those who believe there is a no express duty to provide such advice.

It is clear under Rule of Professional Conduct 3-600 that advice a city attorney gives a city employee is not protected from disclosure to the employee's department head, the city manager or the city council. It is important that city officials know that the information they describe to the city attorney will not be confidential, at least within the organization, as the city attorney's written opinion to a city official on a conflict of interest matter might form the basis of a

disciplinary action against the official, especially if the official fails to follow the city attorney's advice.

Under Rule 3-600, the city council, as the holder of the privilege, could instruct the city attorney not to release to the FPPC or the general public conflict advice given to a city employee or councilmember. In this regard, it is important to recognize that some prosecutors have taken the position that since the City is the client, no privilege extends even to the city council as a whole. Therefore, in the unlikely event a city council directs a city attorney not to provide a copy of a conflict of interest opinion to a prosecutor, a dispute could arise.

Under existing authority, it is unclear what the city attorney should do if faced with such a situation. Some city attorneys attempt to avoid this potential problem by obtaining authorization in advance to release all conflict of interest opinions to the public. In the absence of such advance approval, it appears that the safest approach would be to treat conflict of interest information as privileged and refuse to provide the protected information to the FPPC or district attorney unless the city council waives the privilege.

Again, given the uncertainty in the law, city attorneys should make it clear to city councilmembers and staff that conflict of interest advice might not be protected at all by the attorney/client privilege, and, to the extent it is protected, that the privilege is held by the full city council, not the individual public employee or officer to whom the city attorney provides the advice. As long as such an admonition is given prior to providing Political Reform Act advice, it seems unlikely that a city attorney could be disciplined or criticized for following Rule 3-600 even in the unlikely event a court ultimately determines that the Rule does not apply (i.e. that each city officer and employee is the city attorney's client and that an attorney-client privilege exists with each officer and employee)²⁴.

B. How to Provide the Advice

1. Admonitions to Recipient

Clearly, one of the most important admonitions the city attorney should give to City officials when providing PRA advice is that his or her advice cannot provide the person being advised with any immunities from criminal or civil prosecutions. Only good faith reliance upon written advice from the FPPC on the particular situation at hand can protect the official.²⁵ Cal. Gov't Code §83114 (regarding issuance and effect of written opinions and advice of FPPC); see also, Okun vs. Superior Court, 29 Cal. 3d 442, 456 (1981) (stating that "[o]ne of the commission's

²⁴ In this regard, the Attorney General has opined that information provided to the city attorney by a city official in order to determine the validity of a contract under Section 1090 should be kept confidential because otherwise the official would not be candid in his or her discussions with the city attorney. 71 Ops.Cal.Atty.Gen. 255, footnote 1 (1988).

²⁵ This only applies to conflicts which arise under the Political Reform Act and then only when the advice is based on accurate facts and assumptions. Govt. Code Section 83114.

functions is to issue advisory rulings that concern possible conflict of interest involving state or local public officials. Good faith compliance with a ruling is generally a defense against enforcement of civil or criminal sanctions”).

Since a city attorney’s opinion does not confer immunity on a city official and the city attorney probably has a responsibility to disclose communications, at least internally, many city attorneys have undertaken a practice of routinely inserting admonitions to this effect in written opinions to their clients so that misunderstandings do not occur. As previously discussed, it is important to stress when providing advice to public officials that such advice might not be privileged, and that public disclosure may ultimately occur. Illustrative is the following admonition used in Political Reform Act advice letters issued by one city attorney:

You may not rely upon any assistance provided by this office to provide immunity from FPPC enforcement or prosecution. Further, you enjoy no privilege of attorney/client confidentiality in reviewing these matters with the City Attorney. In the event that facts come to our attention which lead us to believe that you should disqualify yourself from participation in a decision, we will advise the City Council of our belief that you should disqualify yourself. Finally, if, after receiving the assistance provided by this letter, you wish to participate in the decision-making process with immunity from prosecution or enforcement, this office will assist you in making direct contact with the FPPC for informal or formal advice upon which you can rely.

2. Improper Advice as a Defense to Prosecution

In *People v. Chacon* (2007) 40 Cal.4th 558, the defendant city councilmember sought and obtained appointment as city manager. Her conduct in securing that position resulted in the people charging her with violating Government Code 1090. Defendant asserted the defense of entrapment by estoppel, claiming that she acted in reliance on the advice of the city attorney. The trial court ruled in limine that the defendant could assert the defense. As a result the people announced they could not proceed and a trial court dismissed the case pursuant to Penal Code § 1385.

After the Court of Appeal reversed the dismissal, the Supreme Court unanimously affirmed the judgment of the Court of Appeal, concluding that the defense of entrapment by estoppel was not available to the defendant. The court was reluctant to extend the defense to public officials who seek to defend conflict of interest accusations by claiming reliance on the advice of their public attorneys charged with counseling them and advocating on their behalf. The court found the defense was particularly inappropriate in this case because the city attorney was subordinate to the city council, appointed by and serving at its pleasure. Defendant could not escape liability for conflict of interest violations by claiming to have been misinformed by an employee serving at her pleasure. The court considered the fact that the average citizen cannot rely on a private lawyer’s erroneous advice as a defense to a general intent crime. Defendant also could not evade this rule by asserting that the attorney who mistakenly advised her happened to hold a government position.

3. Duties to Properly Obtain the Facts and Research the Law

In Political Reform Act issues, as in all matters, attorneys have a professional responsibility to perform their legal services in a competent manner. See, e.g., Rules Prof. Resp. 3-110(A) (providing that a “member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently”). In addition to professional responsibilities, attorneys must be mindful of their general liabilities for malpractice in the negligent performance of duties undertaken.

Some city attorneys have prepared checklists to assist public officials in determining whether a conflict of interest exists in connection with a particular decision. In many cases the public official can use this form to reach his or her own conclusion on whether to abstain from a matter. At a minimum, such a list will help the official to understand the issues before discussing the matter with the city attorney. Reviewing with the public official the FPPC’s eight step analysis codified in Regulation 18700 is helpful. In addition, the FPPC’s publication, *Can I Vote? Conflicts of Interest Overview* (available at www.fppc.ca.gov), can be provided to city officials to help them understand and comply with the PRA.

4. Sources of Applicable Law

The Political Reform Act is codified as Government Code Sections 81000 through 91015. Pursuant to Section 83112, the Fair Political Practices Commission adopts regulations interpreting and implementing the Act. These regulations are very important and a city attorney cannot properly render advice or interpret the Act without reviewing them. The regulations are codified in Title 2 of the California Code of Regulations. Sections 18700-18760 are most relevant to conflict of interest issues.

In addition to adopting regulations, the FPPC is authorized to issue written advice letters and formal opinions. Formal opinions are rarely issued and require approval of the five member commission, sitting as the FPPC Board. Any city attorney issuing advice under the Political Reform Act, however, should be aware of the opinions applicable to conflict of interest issues.

Government Code Section 83114(b) authorizes the Commission to render “written advice with respect to [a] person’s duties under this title.” While Subsection (b)(7) of Regulation 18329 provides that written advice letters apply only to the specific case addressed in the letter, they are an excellent resource for city attorneys and others charged with interpreting the Act.

The advice letters are available on Westlaw and Lexis, and summaries of letters at FPPC.CA.GOV (Library). For those city attorneys not subscribing to Westlaw, the FPPC staff will locate and provide copies of relevant advice letters.

The Commission's website has the text of all of the formal opinions issued by the Fair Political Practices Commission listed by year at:

<http://www.fppc.ca.gov/index.html?id=297>

The Political Reform Act of 1974, both hard copies available from the Commission and the electronic version available in PDF format on the Commission's website at:

<http://www.fppc.ca.gov/index.html?id=51>,

include annotations under each statute that has been interpreted by a formal Commission opinion.

Various courts have interpreted and applied the Political Reform Act. However, probably due to the broad regulatory powers given to the FPPC, the case law is somewhat meager and usually of limited assistance.

A. Administrative Decisions/Precedental Value

A new regulation effective March 23, 2006, provides a framework for deeming administrative decisions as having precedental value. The Commission determined that certain administratively adjudicated enforcement decisions address key points that may aid adjudicators in the determination of future decisions. Such precedental decisions increase the consistency, predictability and uniformity of the Commission's administrative enforcement decisions.

The new regulation, Section 18361.10, provides a framework through which the Commission may deem all or parts of certain administrative enforcement decisions as having precedental value pursuant to the Administrative Procedures Act. Such precedent could be cited as binding authority in arguments made to administrative law judges, and as persuasive authority to both state and federal judges interpreting the statutes and regulations constituting the Political Reform Act in future proceedings. The Commission will maintain an index of significant legal and policy determinations contained in precedent decisions. To date, none of the Commission's decisions have been designated precedental.

5. Responsibility and Liability of the City Attorney

Government Code §83116.5 provides that any person "who purposely or negligently causes any other person to violate" or "aids and abets any other person" to violate the PRA is liable for a violation of the Act. In 1991, the Fair Political Practices Commission shocked city attorneys by filing an enforcement action against a city attorney who had issued allegedly incorrect advice causing a councilmember to violate the PRA.

Following many discussions between the City Attorneys Department of the League of California Cities and the Fair Political Practices Commission, the Commission finally resolved this situation by enacting Regulation 18316.5. This Regulation provides in relevant part as follows:

18316.5. Application of Government Code Section 83116.5

- (a) The Commission will not apply Government Code Section 83116.5 to find a violation of this title by a person who provides incorrect advice interpreting any provision of this title which causes the advisee to violate this title under any of the following circumstances:
 - (1) Government Employee or Contractors. If the person is an employee of or under contract to a state or local government agency and is giving advice interpreting the provisions of this title as part of the person's government contract or employment.
 -
 - (b) This regulation is not applicable where a person renders advice which is intended to result in a violation of this title. Furthermore, nothing in this regulation shall be construed to exempt a person from liability for a violation of any other provision of this title.

Under this Regulation, the FPPC will not commence an enforcement action against a city attorney for rendering negligent advice unless the advice was "intended to result in a violation of the" Political Reform Act. Therefore, city attorneys can currently render Political Reform Act advice to city officers and employees without being concerned that they will be the target of a Commission action if their advice proves wrong.

This regulation does not bind district attorneys who have concurrent authority to enforce the Political Reform Act, and a district attorney could conceivably still prosecute a city attorney under Section 83116.5 for rendering negligent advice under the Act. The existing regulation, however, should provide persuasive evidence that Section 83116.5 is not intended to cover city attorney negligence.

It is interesting to note that the regulation appears to recognize that a city attorney will give "advice interpreting the provisions of this title as part of the person's government contract or employment." While not directly recognizing a duty to render such advice, the regulation seems to acknowledge that giving such advice is a regular and normal part of a city attorney's duties.

There appear to be no cases or ethical opinions in which a city attorney has been disciplined by the State Bar or held liable for rendering incorrect advice under the Political Reform Act. Assuming that a city attorney gives an admonition that the city attorney's opinion provides no immunity from criminal or civil liability under the Act, it seems unlikely that a disciplinary

action could be brought against a city attorney for giving incorrect advice unless the advice was intentionally wrong or grossly negligent .

Defenses to an action seeking to hold a city attorney liable for rendering negligent conflict of interest advice would probably exist. For example, the city might not have a cause of action against an in-house city attorney. Also, a city attorney who qualified his or her advice with an admonition that the advice does not afford immunity against prosecution would probably have a defense. The city attorney might also argue that the city is the client and that, therefore, he or she has no attorney/client relationship with the employee who is fined for a Political Reform Act violation as a result of following negligent advice.

Government Code Sections 825-825.6 and 995-996.8 probably require a city to indemnify and defend a city attorney in an action brought against the city or city attorney for the city attorney's alleged negligent advice under the Political Reform Act. After determining that a city was not covered under a city attorney's errors and omissions policy, the court of appeal in Fireman's Fund Insurance Co. v. City of Turlock, 170 Cal. App. 3rd 988, (1985), provided strong dicta indicating that a city must indemnify a city attorney for the city attorney's negligence. As the court stated:

Furthermore, even assuming there was coverage under the terms of the Cal. Union policy, that policy cannot benefit either City or its own carriers because neither City nor its insurers should be allowed to benefit from its employee's insurance. Government Code section 825 provides that a public entity is required to indemnify its employee and provide him a defense and not the other way around. Id. at 1004.

Government Code Section 995.2(c) provides that a public entity may refuse to provide for the defense of an action or proceeding brought against a public entity if the public entity determines that the "defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee." This section might apply in the unlikely event another city employee or officer brings an action against a city attorney.²⁶ Turlock involved an action brought by a former employee against the city and the city attorney, but the court never discussed Section 995.2, as the city assumed the defense of the city attorney.

Government Code Section 995.6 provides that a city may, but is not required to, provide for the defense of a public employee in an administrative proceeding. This Section would probably apply to California State Bar disciplinary proceedings.

²⁶ In fact, there is at least one case pending at the trial court level in which a local official sued the public agency's full time attorney for rendering allegedly incorrect advice under Government Code Section 1090 that the official claims had adverse financial consequences for him. This case may ultimately provide authority addressing this issue.

Thankfully, it appears the reason there is so little law in this area is due to a lack of actions being filed against city attorneys. However, it is certainly possible to conceive of situations where a city attorney could be held liable for rendering negligent conflict of interest advice. At a minimum, the risk of a malpractice action alone makes it all the more imperative that each city attorney inform city officials that a city attorney opinion does not offer the official any immunity under the Act.

6. Obtaining Assistance From the FPPC Staff

Regulation 18329 governs the process by which the Fair Political Practices Commission issues written advice. Pursuant to the authorization provided in Government Code §83114(b), the regulation provides that a city attorney or other affected person can obtain both formal written advice and informal advice from the Commission pursuant to 83114(b) of the Act. The regulation provides a fairly detailed explanation of how to obtain the advice.

The Commission will not provide assistance for past conduct except to the extent that the information relates to the possible amendment of disclosure forms. Anonymous formal advice will never be given and anonymous informal assistance will rarely be given. Under the regulation, the FPPC will not give formal written advice, and may refuse to provide informal assistance, unless the person requesting the advice has the authorization of the person about whose duties the advice is being sought. Although there is no time limit on providing informal assistance, the Commission normally answers such questions immediately or in a few days.

Informal assistance is usually requested and rendered orally although such assistance is sometimes given in writing. Informal assistance does not provide the immunity formal written advice and formal opinions afford.

Formal written advice must be given within 21 business days after the advice is requested. The receipt of written advice or the filing of a complete and comprehensive written request for such advice will give the person about whom the advice is being sought immunity for violations of the Act if the person adheres to the written advice or if the advice is not rendered within the 21-day time period and the official must act before the advice is given. The 21-day period will not commence until all necessary facts have been provided to Commission staff.

The FPPC's Legal Division provides formal written advice. The Technical Compliance Division provides informal advice. Currently, the Technical Compliance Division is open five days a week, 9 a.m. to 11:30 a.m. and 1:30 p.m. to 4:00 p.m. and may be reached at 1-866-ASK-FPPC.

When contacting the FPPC, even for informal advice, it is important that the city attorney have all relevant facts in his or her possession and have the permission of the public official in question. The city attorney should also resolve preliminary technical matters before calling the FPPC.

Given recent budget constraints, the FPPC staff is overworked and should never be asked questions that can easily be resolved by reviewing the statutes and regulations. Requests for

informal assistance and formal written advice, should be limited to difficult situations. (See also the discussion on obtaining advice in Chapter III.)

a. Advice on Application of Act to a Particular Agency

Although not particularly applicable to cities, effective 2006, the FPPC clarified the criteria and procedures for determining if a governmental body is an agency subject to conflict of interest code requirements or whether it qualifies for an exemption. In addition, the new subsection (c) of 18329.5 clarifies the procedure for seeking advice or such determination from the Commission.

7. What To Do When the Official Refuses to Disqualify Him or Herself When Advised She or He Has a Conflict

Hopefully, the city attorney will rarely be faced with a situation where he or she believes that a public official is violating the Political Reform Act. The first reason is that most city officials will not participate in a decision if the city attorney advises that a conflict of interest might exist.

The second reason is that many, if not most, conflict of interest questions ultimately turn on whether the decision will have a “material financial effect” on the official’s financial interests. City attorneys should not advise public officials as to whether a material financial effect exists unless the answer is absolutely certain based upon the applicable regulations or, to the extent these are available, formal written advice letters of which the attorney is aware. Therefore, many times the city attorney’s advice to the public official will not reach a final conclusion, but will merely relate the test to be applied to the particular facts. In such a situation, while the city attorney may have his or her own opinion as to whether or not a material financial effect will be present, it is ultimately up to the public official, a real estate professional or a financial expert to determine this issue. In such circumstances, the city attorney is not in a position to directly advise the official whether or not to participate in the decision and thus will not know whether the official is violating the Political Reform Act.

Practice Pointer:

If a city attorney cannot provide clear guidance that there is no potential for a conflict of interest, then the official should not participate unless the official has received formal written advice from the FPPC.

Voting on Continuances: The question often arises whether or not the official who wants to seek formal written advice may vote to continue the hearing or governmental decision to permit them time to receive the formal advice from the Commission. The answer is generally yes unless the decision to continue the matter is substantive in nature e.g., a time delay kills the project or otherwise substantively affects the status quo.

Rarely, a city attorney may be presented with a situation where a particular official proposes to take action that clearly violates the Political Reform Act. Unfortunately, there appears to be

little guidance concerning the city attorney's ethical and legal responsibilities when confronted with this situation.

Business and Professions Code Section 6068(e) appears to prevent the city attorney from disclosing this information to a third party. This Section provides in relevant part as follows:

It is the duty of an attorney to do all of the following:

- ...
- (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (Cal. Bus. & Prof. Code § 6068(e))

Barry S. Martin, in an article in the California Lawyer, indicated that a private attorney has an obligation to report a violation of law level by level all the way up, in the corporate context, to the board of directors. Martin, When Corporate Counsel Get Caught in the Middle (Dec. 1989) Vol. 9, California Lawyer. Mr. Martin concludes that under California Professional Rules of Conduct Section 3-600, a corporate attorney cannot disclose the illegal activity to a third party, cannot participate or in any way further the illegal activity, and sometimes must resign his or her employment. The case Mr. Martin makes under the California Rules is persuasive, at least in the corporate context.

However, there is some authority indicating that a higher standard to disclose illegal activity might exist for publicly employed attorneys. City of Los Angeles v. Decker, 18 C.3rd 860 (1977), holds that an attorney in a condemnation action has a duty to disclose pertinent information to the opposing side, even though the information is adverse to the city's position. In reaching this conclusion, the court held that the duty of a public agency attorney to see that justice is done, even if such duty conflicts with the client's financial interests, is fundamentally different than that of an attorney representing a private interest.

The California Rules of Conduct do not provide any differentiation between public and private attorneys in this regard. However, Rule 1.13 of the ABA Model Rule suggests that the balance between attorney-client confidentiality and disclosure of unlawful conduct by an attorney may be different for a public agency attorney than for an attorney representing private parties. This issue has yet to be resolved in California.

In the disciplinary proceeding discussed earlier, the State Bar Court, pursuant to a stipulated agreement, reprimanded a city attorney who disclosed information obtained from a city employee that the employee believed was subject to the attorney/client privilege and then used that information to prosecute the individual. Cal. State Bar Ct., Div. 7, Docket Numbers 84-I-356 LA, 85-I-063 LA (1986). This matter involved an elected city attorney who had prosecutorial authority under the Act, which made the situation extreme. Nevertheless, the proceeding crystallizes the ethical dilemmas faced by a city attorney when he or she has obtained information from a public official which leads the city attorney to believe that a violation of the Political Reform Act has been or will be committed.

The situation involving Cindy Ossias, a staff attorney for the California Department of Insurance, caused a flurry of activity in the area of “whistleblowing” by public agency attorneys. Ms. Ossias provided committees of the California legislature with materials pertaining to allegedly illegal actions of the Insurance Commissioner.

The California State Bar’s Officer of Trial Counsel investigated Ms. Ossias’ actions for possible violation of Business and Professions Code Section 6068(e), and Rule 3-600 and addressed whether her conduct as a government attorney was protected under the California Whistleblower Protection Act (Government Code § 9149.20 *et seq.*). Donald Steedman, Deputy Trial Counsel, wrote a letter to Mr. Richard Zitrin, attorney for Ms. Ossias, indicating that:

[Ms. Ossias’] conduct should not result in discipline because: (1) It was consistent with the spirit of the Whistleblower Protection Act; (2) it advanced important public policy considerations bearing on the responsibilities of the office of insurance commissioner; and (3) it is not otherwise subject to prosecution under the guidelines set forth in this office’s Statement of Disciplinary Priorities.

Thus, the State Bar appears to believe that communication of confidential information by government attorneys does not violate the Rules of Professional Conduct. The letter, of course, does not control future decisions of the State Bar or apply to other fact situations.

The State Bar further reacted to the Ossias matter by approving an amendment to Rule 3-600 to permit disclosure of confidential information outside of the organization under certain circumstances. On May 10, 2002, however, the California Supreme Court rejected the proposed modification on the ground that it conflicted with Business and Professions Code 6068(e).

In turn, the State Legislature reacted to the California Supreme Court’s rejection of the Rule change by approving AB 363. This bill referred to the California Supreme Court’s action and authorized attorneys representing governmental agencies to refer illegal conduct of their organizations or individual persons in their organization to a law enforcement agency. However, Governor Davis vetoed this legislation because it “chips away at the attorney-client relationship.” The Governor also stated that “the effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients.”

The Attorney General, while not directly addressing Ms. Ossias’ conduct, opined that the Whistleblower Protection Act (Government Code Sections 8547-8547.12) does not supercede the attorney-client confidentiality rule codified in Business and Professions Code Section 6068(e). 84 Cal.Ops.Atty.Gen 71 (2001). The Attorney General wrote “... a public officer or employee of a state agency may insist upon and enforce the right and privilege attached to attorney-client confidences.” Unfortunately, the Attorney General declined to determine the identity of the government attorney’s client, and thus who holds the privilege.

So what is a city attorney to do when faced with a city council that insists the city attorney not report a PRA violation of one of its members? Silence appears to be the safest course of action.

The California Supreme Court and California Attorney General have determined that Business and Professions Code Section 6068(e) applies to government attorneys and prevents the attorney from disclosing incriminating information under these circumstances. Ultimately, under Rule 3-600, the attorney might be forced to resign.

Government Code Section 1096 also needs to be reviewed when the Political Reform Act question involves approval of a contract. This Section provides that when an officer “charged with the disbursement of public moneys” is presented with an affidavit that an officer “whose account is about to be settled, audited, or paid by him, has violated” Government Code Sections 1090, et. seq., the officer must cause the district attorney to “prosecute” the officer.

Possible criminal statutes might also apply. For example, Government Code Section 1222 makes it a misdemeanor for a public official “to willfully omit to perform any duty enjoined by law.” If a city attorney has a duty to disclose criminal violations by public officials, then it is conceivably possible it might constitute a misdemeanor not to disclose a violation of the Political Reform Act.

As discussed earlier, some city attorneys attempt to resolve this problem by obtaining prior authorization from the city council to publicly disclose conflict of interest violations. Since such a violation will likely arise in connection with a city council action, the disclosure would probably occur at a city council meeting. Receiving such authorization in advance avoids having to decide between reporting a violation or preserving the attorney/client privilege. In fact, this approach will usually avoid the problem altogether, because few officials are likely to participate in decisions contrary to the city attorney’s conflict advice if they know the advice will be made public.

Regardless of whether a city attorney decides to use this approach, it is important that each city attorney know how she or he will resolve such a situation before it arises. The city attorney is not likely to make the best decision on this potential career-threatening issue by waiting until a councilmember votes on a matter in which the city attorney believes the official has a financial interest. Having an approach in place ahead of time is essential.

4. Administrative/Statutory Solution

The City of Mountain View adopted a strong Code of Conduct for the city council and includes the following preamble to its compliance and enforcement section:

Councilmembers take an oath when they assume their office in which they promise to uphold the laws of the State of California, the City of Mountain View and the United States of America. Consistent with this oath is the requirement of this council policy to comply with the laws as well as report violation of the laws and policy of which they become aware of.

The Code of Conduct incorporates most of the conflict of interest laws that are applicable to councilmembers and the policy then goes on to set up a protocol which both requires and allows city attorneys to report violations or suspected violations. The code applies to employees, boards and commissions. It was adopted by resolution. A copy of the compliance and enforcement section is attached in the appendix of these materials.

III. Overview of the Political Reform Act

A. Function of the Act

The public, through the laws of the State of California, grants to the members of the city councils, boards, commissions, committees and to the staff persons who work for them the privilege of conducting the public's business, carrying out the public's policies and achieving the public's goals and objectives. Through the laws of the State of California, the public imposes upon each person who exercises that privilege the obligation:

To conduct the public's business within the lawful authority granted to **him/her**; and

To comply with established procedural requirements.

The Political Reform Act ("Act"), contained in Government Code sections 81000 through 91015, establishes one set of duties that the public expects its public officials to perform. The Act does not hinder, restrict, or conflict with the public official's privileged duty to conduct the public's business; rather, compliance with the act is an integral part of those duties.

Since the Act defines what the public expects a public official to do concerning the official's economic interests, the public official's personal views in this regard are not relevant. A failure to comply with the expectations of the public, as expressed in the Act, is not excused by the making of a quality decision or the public official's good faith, integrity, or common sense.

To ensure that the public's business is properly conducted, it is incumbent upon each public official to understand what the public expects under the Act.

B. Scope of the Act

The Act establishes duties for the public official in several different areas.

1. Disclosure of Economic Interests by Public Officials

The Act designates certain elected and appointed positions within the city's government (for example: mayor, members of the city council and planning commission, and city manager) and imposes disclosure requirements on the persons filling those positions. Upon assumption of office, annually thereafter, and upon leaving office, the person filling a designated position is required to **file** a statement which discloses those economic interests that might cause a financial

conflict of interest to arise in the performance of the official's duties. Cal. Gov't Code §§ 87200-87210.

Also, the Act requires each city to adopt a local Conflict of Interest Code which designates city positions not otherwise designated in the Act that are involved in making city decisions. The local code imposes a local disclosure requirement upon persons filling the designated positions. Cal. Gov't Code § 87302.

The Act requires designated officials to disclose various types of economic interests, to include, without limitation, the following:

- a. Investments worth \$2,000 or more in a business entity located in or doing business within the city;
- b. Interests worth \$2,000 or more in real property located within the city or within two (2) miles of the city boundaries, or the boundaries of any property owned or used by the city;
- c. A source, located in, or doing business in the city from which income (including loans) was received during the reporting period aggregating \$500 or more;
- d. Any source of a gift aggregating \$50 or more, whether or not the source does business in the jurisdiction.

When disclosure of an interest is required, the public official has a duty to disclose the interest whether there is currently or will certainly be a governmental decision involving the official's disclosed interest. Note: a public official may have certain economic interests that need not be disclosed, such as his or her personal residence, but that could still provide a basis for disqualification concerning a particular decision.

The public official lists disclosable economic interests on a form called a "Statement of Economic Interests ("SEI")" Or Form 700. Statements of Economic Interests are public records. During normal business hours, any member of the public is permitted to inspect and copy any Statement of Economic Interests on file at the city.

2. Disqualification: Public Official Barred From Participating in a Particular Decision In Which Official Has A Financial Interest

The Act provides that no city official, at any level, shall make, participate in making, or in any way attempt to use the official's position to influence a city decision when the official knows or has reason to know that the official has a financial interest in the decision. *See* Cal. Gov't Code § 87100.

3. Who is a "Public Official" For Disclosure and Disqualification Purposes

The disclosure and disqualification provisions of the Act apply to your city's "public officials" which includes every natural person who is a member, officer, employee, or consultant of your city. Cal. Gov't Code § 82048; 2 Cal. Code of Regs. § 18701(a).

A "member" includes, but is not limited to, salaried or unsalaried members of city boards or commissions with decision-making authority. A board or commission possesses decision making authority whenever:

- It may make a final governmental decision;
- It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or
- It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

2 Cal. Code of Regs. § 18701(a)(1).

City employees other than those mentioned in Government Code section 87200²⁷ have a disclosure obligation only if the person is in a position designated by state law or by the city's local conflict of interest code. Cal. Gov't Code § 87300. Whether or not they have a disclosure obligation (e.g., required to file an SEI), all city officers/employees are disqualified from participating in any city decision in which such individual has a disqualifying conflict of interest.

A "consultant" under the Act may include any natural person (individual) who provides, under contract, information, advice, recommendation, or counsel to your city. Thus, an architect, building contractor, auditor, engineer, reviewer/evaluator, or traffic engineer hired by your city may be a "consultant" under the Act with both disclosure and disqualification obligations. See page 36 for a further discussion of "consultants" under the Act.

4. Regulations for Campaigners

The Act contains regulations concerning the formation of campaign committees. For persons who participate in an election campaign either as a candidate or as a campaign treasurer, the Act establishes an obligation to file statements disclosing revenue received and expenditures. See Cal. Gov't Code § 84100 *et seq.*

²⁷ That is, those other than mayors, city managers, city attorneys, city treasurers, council members, planning commissioners, and certain other public officials who manage public investments.

Effective January 1, 2008, if an elective office is designated in a conflict of interest code, candidates for that office must file a Statement of Economic Interest (SEI) with the elections official who accepted the candidate's declaration of candidacy or nomination papers. The SEI must be filed no later than the final filing date for the declaration or nomination papers. Govt. Code Section 87302.3.

5. Restrictions Concerning Mass Mailing at Public Expense

The Act restricts the use of public funds to deliver to the public a mass mailing. An item is subject to the mass mailing prohibition if all of the following apply:

- (1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.
- (2) The item sent either:
 - (A) Features an elected officer affiliated with the agency which produces or sends the mailing, or
 - (B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.
- (3)(A) Any of the costs of distribution is paid for with public moneys; or
- (B) Costs of design, production, and printing exceeding \$ 50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.
- (4) More than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).

Regulations implementing the prohibition are quite substantial and there are exceptions to the general prohibition. *See* Cal. Code of Regs. § 18901; **See also the detailed discussion of this in Chapter VIII, infra.**

6. Lobbyists

The Act imposes restrictions on the activities of lobbyists who lobby state officials. *See* Cal. Gov't Code §§ 86100 *et seq.*

C. Administration of the Act

1. The Commission

The Act created the Fair Political Practices Commission ("FPPC"), comprised of five appointed commissioners, the Chair of which is a full-time paid position. With its staff, the Commission has primary responsibility for the impartial, effective administration and implementation of the Act. The Commission is authorized to adopt regulations to implement the Act, enforce the provisions of the Act, and provide assistance and advice concerning compliance with the Act. *See* Cal. Gov't Code §§ 83100-83123.

2. Obtaining Assistance and Advice

a. FPPC Informal Assistance

Informally, any member of the public can contact one of the advisory divisions of the Commission by phone or letter and obtain oral and written assistance regarding the Act. 2 Cal. Code of Regs. § 18329. General areas of inquiry are:

- Questions concerning Statements of Economic Interests;
- Questions concerning whether a public official is disqualified from participating in a particular governmental decision;
- Questions concerning a city's local Conflict of Interest Code;
- Questions concerning Campaign Disclosure Statements;
- Questions concerning the use of campaign funds; and
- Matters concerning an alleged violation (these matters will be referred to the Enforcement Division).

A further discussion of the FPPC's role in providing advice and assistance occurs in Chapter III on the "Role and Responsibilities of the City Attorney."

b. FPPC Formal Advice

A public official can also obtain formal written FPPC advice. *See* Cal. Gov't Code § 83114; 2 Cal. Code of Regs. § 18329. Immunity from an FPPC enforcement action or prosecution may be obtained only through formal FPPC advice. The immunity bestowed by FPPC advice is limited

to the requester in the specific factual context presented and is effective only to the extent that the material facts are accurate and the official follows the advice.

- The public official makes a written request for FPPC advice, not just assistance;
- The information the public official gives to the FPPC concerning the potential conflict of interest is complete and correct;
- The public official obtains the FPPC advice *prior* to participating in the decision; and
- The public official follows the FPPC advice exactly.

c. How to Ask for Advice – Practice Pointer

1. Follow the Eight-Step Plan – Whether seeking informal advice over the telephone or composing a letter requesting formal advice, plug the information you have into the eight-step analysis to help identify which questions you need help with – it will also better ensure that you have asked all the questions of the official.
2. Tuesday Is a Busy Day – If seeking informal telephone advice, recognize that the FPPC receives most of its calls on Tuesdays, as that is when most city councils meet.

d. Other Information Relative to Advice

1. No third party advice.
2. Call as far in advance as possible. Use the FPPC’s toll-free help line (**1-866-ASK-FPPC**).
3. Consultants are available Monday through Friday (except holidays) from 9:00 a.m. till 11:30 a.m. and 1:30 to 4:00 p.m.
4. Formal written advice takes a minimum of twenty-one (21) business days from receipt of the request. In reality it typically takes longer because of the small amount of staff resources that currently can be devoted to this task.
5. Many calls for telephone advice can be answered on the same day.
6. Telephone advice provides no immunity and the Commission will not provide written confirmation of telephone advice.
7. The FPPC staff may decline to provide advice if a question concerns past conduct, is purely hypothetical, is not related to the Act, presents vague facts, is too complex, is third party, or if the requestor is asking for anonymous advice.
8. **Written Brochure** – A written brochure on how to secure advice from the FPPC is available on the Commission’s website.

e. Requests for Written Advice and Conflict of Interest Codes

The Commission adopted regulation 18329.5 in 2003. That regulation addresses requests for advice regarding the interpretation of an agency's conflict of interest code or application of that code to a specific individual. This regulation sets out specific procedures to be followed by requesters who typically ask about their disqualification or disclosure obligations, but who sometimes simultaneously question their agency's determinations under a conflict of interest code. The PRA requires conflict of interest codes to be formulated at the most decentralized level possible. Specifically, the regulation delineates what kind of advice or assistance may be given and to whom it may be given. It also lists the information which a person requesting such advice may be asked to provide. As a general rule, when a request for advice implicates the conflict of interest code provisions of the PRA, the request will need to be authorized and/or requested by the public official's agency.

f. Commission Opinions

The Commission may issue an opinion pursuant to Government Code section 83114.

g. City Staff Assistance

The city attorney, city clerk and other City staff persons may provide assistance. However, a public official is not immunized from an FPPC enforcement action or prosecution by relying on city staff guidance.

IV. Conflicts Under the Political Reform Act Government Code 87100, et seq.

A. The Fundamental Provisions

No public official shall make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision if he or she knows or has reason to know that he or she has a financial interest in the decision. Cal. Gov't Code § 87100. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a foreseeable and material financial effect on the official or one or more of his or her economic interests. Cal. Gov't Code § 87103; 2 Cal. Code of Regs. § 18700(a).

Note several points about these fundamental provisions:

- The Act's conflict-of-interest rules apply only to *financial* conflicts—a conflict of interest may arise under the Act only with regard to those decisions in which the public official has an economic stake of a type recognized by the Act.
- Under the Act and the Commission's regulations, the terms "financial interest" and "economic interest" mean different things.

The term "financial interest" denotes a conclusion: a public official has a financial interest in a decision if it is concluded that it is reasonably foreseeable that the decision will have a material financial effect on his or her economic interest. The term "economic interest" is a label applied to the particular types of interests recognized by the Act as potential sources of a conflict of interest. *See* Cal. Gov't Code § 87103.

There are six (6) basic types of economic interests recognized by the Act, as interpreted in the Commission's regulations:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect investment worth of \$2,000 or more; (Cal. Gov't. Code § 87103(a); 2 Cal. Code of Regs. § 18703.1(a).
- A public official has an economic interest in a *business entity* in which he or she is a director, officer, partner, trustee, employee, or holds any position of management, Cal. Gov't. Code § 87103(d); 2 Cal. Code of Regs. § 18703.1(b);

- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$2,000 or more, Cal. Gov't. Code § 87103(b); 2 Cal. Code of Regs. § 18703.2;
- A public official has an economic interest in any *source of income* which aggregates to \$500 or more within 12 months prior to the decision, Cal. Gov't. Code § 87103(c); 2 Cal. Code of Regs. § 18703.3;
- A public official has an economic interest in any *source of gifts* to him or her if the gifts aggregate to \$390 or more within 12 months prior to the decision, Cal. Gov't. Code § 87103(e); 2 Cal. Code of Regs. § 18703.4. *See also* § 18940.2.
- A public official has an economic interest in his or her personal expenses of \$250, income, assets, or liabilities, as well as those of his or her immediate family— (formerly known as the “personal financial effects” or “hip-pocket” rule, it is now denominated “Personal Finances”), 2 Cal. Code of Regs. § 18703.5; 18705.5

Note that, with regard to economic interests in business entities and real property, a public official may have such an economic interest by virtue of an indirect investment. An indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. Cal. Gov't Code § 87103.

B. The Commission's Regulations and the Standard Analysis

In 1998 the Commission adopted a standard analysis for conflict of interest “problems,” and reorganized the conflict-of-interest regulations to reflect the new, eight-step analysis. While important legal issues cannot be reduced to a “checklist,” the new regulations emphasize a standardized, repeatable process—that is, a sequences of steps with a clearly identified beginning, middle, and end—for approaching conflict of interest issues. The eight-step process is set forth in Title 2, California Code of Regulations, section 18700(b):

“(b) To determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act, proceed with the following analysis:”

STEP ONE

Is a **public official** involved? - Determine whether the individual is a public official, within the meaning of the Act. *See* 2 Cal. Code of Regs. § 18701. If the individual is not a public official, he or she does not have a conflict of interest within the meaning of the Political Reform Act.

STEP TWO

Is the public official **making, participating in making**, or using or attempting to use his/her official position to **influence** a government decision? - If the public official is not making, participating in making, or using or attempting to use his/her official position to influence a government decision, then he or she does not have a conflict of interest within the meaning of the Political Reform Act. *See* 2 Cal. Code of Regs. § 18702.

STEP THREE

Does the official have a statutorily defined **economic interest**? - Identify the public official's economic interests. *See* 2 Cal. Code of Regs. § 18703.

STEP FOUR

Is the economic interest **directly** or **indirectly** involved? - For each of the public official's economic interests, determine whether that interest is directly or indirectly involved in the governmental decision which the public official will be making, participating in making, or using or attempting to use his/her official position to influence. *See* 2 Cal. Code of Regs. § 18704.

STEP FIVE

Materiality Standard - Determine the applicable **materiality standard** for each economic interest, based upon the degree of involvement determined pursuant to Title 2, California Code of Regulations, section 18704. *See* 2 Cal. Code of Regs. § 18705.

STEP SIX

Is it **reasonably foreseeable** that the governmental decision will have a **material** financial effect on the **economic interest(s)**? - If it is not reasonably foreseeable that there will be a material financial effect on any of the public official's economic interest(s), he or she does not have a conflict of interest within the meaning of the Political Reform Act. *See* 2 Cal. Code of Regs. § 18706.

STEP SEVEN

Will the decision's effect on the official's economic interest differ from the effect on the **public generally**? - When you get to Step 7 you have already determined that the official has a disqualifying conflict of interest under the Act. The fundamental provision of the Act (§ 87103) which defines "financial interest" excludes effects which are the same as the effect the decision would have on the public generally. If the reasonably foreseeable material financial effect on the public official's economic interest is indistinguishable from the effect on the public generally, he or she does not have a conflict of interest within the meaning of the Political Reform Act. *See* 2 Cal. Code of Regs. § 18707.

STEP EIGHT

Legally Required Participation - Step 8 allows you to apply a statutory version (87101) of the common law “rules of necessity” as implemented through the regulation which may allow the official to participate despite the conflict of interest. *See* 2 Cal. Code of Regs. § 18708.

A NOTE ABOUT SEGMENTATION – SECTION 18709

Under certain circumstances, decisions may be segmented so that the official can participate in some components of a decision despite having to disqualify due to the conflict of interest in other components. The segmentation process is as follows:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

With respect to budget and certain general plan adoption or amendment decisions, once all of the separate or “component” decisions related to a budget or general plan have been finalized, the public official may participate in the final vote to adopt or reject the agency's budget or to adopt, reject, or amend the general plan. (See also the detailed discussion of segmentation at the end of Chapter V of this text.)

V. The Eight Step Analysis

STEP ONE: IS A PUBLIC OFFICIAL INVOLVED?

Persons Covered

A. Statutory: Section 87200 Filers

Mayors, city managers, city attorneys, city treasurers, city chief administrative officers, councilmembers, planning commissioners, public officials who manage public investments, members of board of supervisors, district attorneys, county counsels, county treasurers, county administrative officers, and various specified state officials.

B. Designated Employees

Under Section 87302(a) in conjunction with the adoption of each agency's conflict of interest code, the agency is required to enumerate positions within the agency other than those specified in § 87200 which involve the making or participation in the making of decisions which may foreseeably have a material effect on any economic interest as well as designate for each such enumerated position the specific types of investments, business positions, interests in real property and sources of income which are reportable. See also Government Code § 82048 which defines "public official" and Government Code § 82019 which defines "designated employee".

C. Non-Profits

- Members of Non-Profit Organizations In Limited Circumstances Which Meet the *Siegel* Test (*In re Siegel* (1977) 3 FPPC Ops. 62.) See comment to 2 Cal. Code of Regs. § 18701. See also the discussion of *Siegel* in Chapter IX, page 98 of this text.

D. Boards, Commissions, Committees

A "member" of a state or local government (Government Code § 82048) includes, but is not limited to, salaried or unsalaried members of committees, boards or commissions with decision-making authority. A committee, board or commission possesses decision making authority whenever:

1. It may make a final governmental decision;
 - a. It may compel a governmental decision or it may prevent a governmental decision;
 - b. It makes substantive recommendations that are, and over an extended period of time had been, regularly approve without significant amendment or modification by another public official or governmental agency. (Regulation 18701.)
2. A committee, board or commission does not possess decision-making authority under subsection (a)(1)(A)(i) of Regulation 18701 if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decision-making authority.

Practice Pointer:

Section 82048 and Regulation 18701 do not apply to the determination of whether an entity is a state or local government agency.

E. Consultants

A “consultant” under the Act includes any natural person (individual) who provides, under contract, information, advice, recommendation, or counsel to a city. Thus, an architect, building contractor, auditor, engineer, reviewer/evaluator, planner, building inspector, or traffic engineer hired by a city may be a “consultant” under the Act with both disclosure and disqualification obligations. An individual is a consultant if either of the following apply:

- The individual serves in a staff capacity with the agency and in that capacity performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified, or that should be specified, in the city’s conflict of interest code; or
- The individual makes a governmental decision whether to:
 - ◊ Approve a rate, rule or regulation;
 - ◊ Adopt or enforce a law;
 - ◊ Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
 - ◊ Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract which requires agency approval;
 - ◊ Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specifications for such a contract;
 - ◊ Grant agency approval to a plan, design, report, study or similar item; or
 - ◊ Adopt, or grant agency approval of, policies, standards, or guidelines for the agency or for any subdivision thereof. 2 Cal. Code of Regs. § 18701(a)(2).

Practice Pointer:

Generally, the term “consultant” excludes those individuals who work on one project or a limited range of projects for an agency. If, however, a single project requires regular work over an extended period of time, persons charged with performing that work may well be “consultants” within the meaning of the Act. A consultant, outside contractor, or contract employee who fills a staff position or serves alongside agency staff in a similar capacity is probably a consultant subject to the Act.

- **Professional Engineers and Surveyors**

Section 87100.1 of the Act provides that a registered professional engineer or licensed land surveyor who renders professional services as a consultant to a local government, either directly or through a firm in which he or she is employed or is a principal, does not have a financial interest in the governmental decision where the consultant renders professional engineering or land surveying services independently of the control and direction of the public agency and does not exercise decision-making authority as a contract city engineer or surveyor.

- **Other Considerations – “Pass-through Fees”**

A source of income problem could arise from the standard practice of local agencies to collect fees and other payments from applicants who are seeking a permit, approval, or other form of entitlement. These payments typically include amounts required to cover the cost of outside consultants retained by the agency to provide professional services in connection with processing the application, such as the preparation of traffic studies or environmental impact reports.

Because the “source” of payment to these consultants is the applicant (“passed-through” the agency), the question was raised as to whether the consultant thereby acquired an economic interest in the applicant that would disqualify the consultant from rendering the services for which the payment itself was made. Moreover, since outside consultants are typically classified as independent contractors rather than employees of the agency, the compensation paid to them by the agency would not necessarily fall within the meaning of “salary” so as to be exempt under section 82030(b)(2) of the Act.

To address this issue, the Legislature enacted Government Code section 87103.6, which provides as follows:

“Notwithstanding subdivision (c) of section 87103, any person who makes a payment to a state agency or local government agency to defray the estimated reasonable costs to process any application, approval, or any other action, including but not limited to, holding public hearings and evaluating or preparing any report or document, shall not by reason of the payments be a source of income to a person who is retained or employed by the agency.”

STEP TWO: MAKING, PARTICIPATING IN MAKING, OR USING OR ATTEMPTING TO USE OFFICIAL POSITION TO INFLUENCE A GOVERNMENTAL DECISION

A. Making a Governmental Decision

A public official “makes a governmental decision” when he or she:

1. Votes on a matter;
 - Votes for a continuance to seek written advice? [See Practice Pointer on page 19.]
2. Appoints a person;
3. Obligates or commits his or her agency to any course of action;
4. Enters into any contractual agreement on behalf of his or her agency;
5. Determines not to act within the meaning of Section 18702.1(a)(1, 2, 3 or 4), unless such determination is made because of his or her financial interest.

Note that when an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais (e.g., for a consent calendar item) his or her presence shall not be counted towards achieving a quorum.

In a closed session meeting, a disqualified official shall not be present when the decision is considered or knowingly obtained or review a recording or any other non-public information (e.g., staff report) regarding the governmental decision. (Section 18702.1).

Note: About Nonprofits

Pay close attention when reading regulations about nonprofits. 501(c)(3) corporations are treated differently both in the Political Reform Act as well as in Government Code Section 1090. For ease of reference, the following is a general synopsis of the various charitable type organizations:

- *501(c)(3) – charitable, religious, scientific, literary and other charitable organizations
- *501(c)(4) – civic leagues, community organizations, and other social welfare organizations
- *501(c)(5) – labor and agricultural organizations
- *501(c)(6) – trade associations, chambers of commerce, real estate boards, and other business leagues
- *501(c)(7) – hobby clubs, country clubs, and other organizations formed for social and recreational purposes
- *501(c)(8) or 501(c)(10) – lodges and similar order and associations
- *501(c)(19) – veterans’ organizations

B. Determining When a Public Official Is Participating In Making a Governmental Decision

A public official “participates in making a governmental decision” when, acting within the authority of his or her position, the official:

1. Negotiates without significant substantive review with a governmental entity or private person regarding a governmental decision;
2. Advises or makes recommendations to the decision maker either directly or without significant intervening substantive review by:
 - a. Conducting research or making any investigation that requires the exercise of judgment and the purpose of which is to influence a governmental decision; or
 - b. Preparing or presenting a report, analysis, or opinion, orally or in writing, which requires the exercise of judgment and the purpose of which is to influence a governmental decision.(Section 18702.2).

C. Determining When a Public Official Is Using or Attempting to Use His/Her Official Position to Influence a Governmental Decision

Attempting to use one’s official position to influence a governmental decision arises in two circumstances: (1) decisions to be rendered by one’s own agency; or (2) by another agency where the public official has no decision-making authority.

1. **The Official’s Own Agency** – The official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, a client or customer.
2. **Another Agency** – The official is attempting to use his or her official position to influence a decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include the use of the official’s stationary. (2 Cal. Code Regs. 18702.3)

D. Exceptions 18702.4

1. A public official **neither makes nor participates** in making a governmental decision by doing any of the following:
 - Taking actions which are solely ministerial, secretarial, manual, or clerical;
 - Making appearances as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests;
 - Taking actions relating to his or her compensation or the terms or conditions of his or her employment or contract. In the case of public officials who are 'consultants,' as defined above, this includes actions by consultants relating to the terms or conditions of the contract pursuant to which they provide services to the agency, so long as they are acting in their private capacity. 2 Cal. Code of Regs. § 18702.4(a).
2. A public official is **not attempting** to use his or her official position **to influence** by doing any of the following:
 - a. Making appearances as a member of the general public before an agency to represent himself or herself on a matter which is related solely to his or her personal interests. An official's "personal interests" include, but are not limited to:
 1. An interest in real property which is wholly owned by the official or members of his or her immediate family.
 2. A business entity wholly owned by the official or members of his or her immediate family.
 3. A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.
 - b. Communicates with the general public or the press.
 - c. Negotiates his or her compensation or terms and conditions of his or her employment or contract.
 - d. Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before an agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.
 - e. Appears before a design or architectural review board committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the

official has prepared for a client and the three criteria set forth in the statute are met (Section 18702.4(b)(5)).

Practice Pointer:

Although not readily evident in the language of the statute or other regulations, the written advice from the FPPC has interpreted these regulations to mean that a public official may appear as a member of the general public before the agency, however, may not meet with the city manager or planning director to argue or discuss conditions even if it relates to their own permit. They can only appear as a member of the general public. Except for the limited circumstances set forth above in regulation 18702.4(b)(5), they cannot appear as an advocate.

STEP THREE: IDENTIFY THE PUBLIC OFFICIAL'S ECONOMIC INTERESTS

The six types of economic interests recognized by the Act, as interpreted by the Commission's regulations are set forth in Chapter IV, section (a), *supra*.

A. Business Entity Interests**1. Statement of the Rule**

It is a conflict of interest for any public official to make, participate in making or to use his or her official position to influence a governmental decision which the public official knows or has reason to know will have a reasonably foreseeable material financial effect on, among other things, a *business entity* in which the public official:

- has a direct or indirect investment worth \$2,000 or more; or
- is a director, officer, partner, trustee, employee, or holds any position of management.

Cal. Gov't Code §§ 87100, 87103(a) and (d); 2 Cal. Code of Regs. § 18703.1 (a)-(b).

An official also has an economic interest in any business entity which is a parent or subsidiary of, or is "otherwise related" to, a business entity in which the official has an economic interest. 2 Cal. Code of Regs. §§ 18703.1(c). A parent-subsidiary relationship exists among corporations, when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation. 2 Cal. Code of Regs. § 18703.1(d)(1). Business entities, whatever their form, are "otherwise related" if any of the following three tests is met:

- (a) One business entity has a controlling ownership interest in the other business entity.
- (b) There is shared management and control between the business entities. Factors tending to establish shared management and control include: (1) the same or substantially the same person owns or manages the two

entities; (2) there are common or commingled funds or assets; (3) the ostensibly separate entities share offices or employees, or otherwise share activities, resources or personnel on a regular basis; (4) there is otherwise a regular and close working relationship between the entities.

- (c) A controlling owner (including a majority shareholder in a corporation) of one business entity is also a controlling owner in the other entity.

2 Cal. Code of Regs. § 18703.1(d)(2).

2. Definition of a Business Entity

The term “business entity” means any organization or enterprise operated for profit, including, but not limited to, a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. Cal. Gov’t Code § 82005.

3. Definition of Investment

The term “investment” means any financial interest in or security issued by a business entity, including, but not limited to, common stock, preferred stock, rights, warrants, options, debt investments, and partnership or other ownership interest owned directly, indirectly or beneficially by the public official or his or her immediate family if the business entity or any parent, subsidiary or other wise related business entity has an interest in real property in the jurisdiction, does business or plans to do business in the jurisdiction, or has done business in the jurisdiction at anytime during the two years prior to the time the public official is call upon to make or participate in making the governmental decision in question.

“Investment” includes a public official’s pro rata share of investments in any business entity, mutual fund, or trust in which the public official or his or her immediate family owns directly, indirectly or beneficially, a ten percent interest or greater.

However, “investment” does not include a time or demand deposit in a financial institution, shares in a credit union, an insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940, or a common trust fund which is created pursuant to section 1564 of the Financial Code or any bond or other debt investment issued by any government agency. Cal. Gov’t Code § 82034.

The term “indirect investment or interest” means any investment or interest owned by the spouse or any dependent child of a public official, by any agent on behalf of a public official or by a business entity or trust in which the official, official’s agent, spouse and dependent children own directly, indirectly, or beneficially, a ten percent (10%) interest or greater. (See Cal. Gov’t Code § 87103 final paragraph.)

B. Interests In Real Property

1. Statement of the Rule

A public official has an economic interest in any real property in which the public official has a direct or indirect interest of or more in fair market value.

The Act defines “interest in real property” to include any **leaseholds, beneficial or ownership interest or an option to acquire such an interest** in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is \$2000 or more. Month to month tenancies are not considered an interest in real property (Govt. Code 82033 and Regulations, Section 18233).

Interest in real property of an individual includes a pro rata share of interest in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a ten percent (10%) interest or greater. (Govt. Code Section 82033).

C. Sources of Income

1. Statement of the Rule

An official has a financial interest in a governmental decision, within the meaning of section 87100, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or member of his or her immediate family, or on (among other things):

Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. (Cal. Gov’t Code § 87103(c), 2 Cal. Code of Regs. §18703.3).

The “source of income” economic interest is sometimes confused with the so-called “personal financial effect” rule, in that a potential conflict may result whenever the **amount** of the official’s income (or expenses) is affected or the **source** of the official’s income is affected, even if the decision has no effect upon the amount of income received by the official from that source. *Compare* 2 Cal. Code of Regs. § 18703.3 *with* § 18703.5. *See e.g., Witt v. Morrow*, 70 Cal. App. 3d 817, 139 Cal. Rptr. 161 (1977) (where decision has material financial effect upon an employer, a conflict of interest is not avoided simply because the official is on a fixed salary which is unaffected by the decision).

2. The Definition of “Income” Under the Act

a. The Basic Definition

The term “income” is defined in section 82030(a) of the Government Code as a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale (gross payment, not just profit and irrespective of any loss), gift, loan, forgiveness or payment of indebtedness received by the official, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer. This definition is exceedingly broad and encompasses forms of payment that would not necessarily be classified as “income,” as the term is normally understood in a non-legal or accounting sense.

b. Disclosure vs. Disqualification

Care should be taken to differentiate between **disclosure** and **disqualification** in the context of the definition of “income.” Disclosure requirements (under sections 87200 *et seq.* and 87300 *et seq.* of the Act) may be triggered by the broad use of the term, while disqualification (under sections 87100 and 87103 of the Act) may not.

Practice Pointer:

In 2002 the Legislature added exclusions to the Act’s definition of income in section 82030 which harmonize that section with the exclusion in section 87103(c). Thus, with regard to loans from commercial lending institutions, the exclusion is the same for disclosure and for disqualification.

c. Community Property Considerations

Under the Act, income includes any community property interest in the income of a spouse. Cal. Gov’t Code § 82030(a). Since a community property interest would normally be 50-percent of the spouse’s earned income, the threshold amount will be achieved if the spouse’s earned income from a particular source during the 12-month period is \$1000 or more. “Income” does not include the separate property assets of the official’s spouse.

In contrast, an official has an “indirect” interest in real property and investments held by the official’s spouse as separate property.

d. Domestic Partners

Regulation 18229 provides that for purposes of Title 2 and the implementing regulations, the term “spouse” shall include registered domestic partners recognized by state law. For a registered domestic partner recognized by state laws, income would be considered as community income for calculation of financial interests. It would also mean that any time the word “spouse” is used throughout the statutes or regulations, that the rule would apply with equal force to domestic partners (e.g., loans, campaign contributions, gifts, etc.).

e. Income via a Business Entity

The official's income also includes his or her pro-rata share of income to any business entity or trust in which the official or the official's spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater. Cal. Gov't Code § 82030(a). For example, if the official owned a 25-percent interest in a business and a client was a source of \$2,000 of income to that business, the official's pro-rata share of such income would be \$500 and the official would therefore have an economic interest in the client as a source of income. This economic interest would be created even where the operating expenses of the business exceed the payment from the client and no portion of such payment is personally received by the official; the statute is based upon payment of gross income to the business entity, not distribution of profits to the official.

f. Timing

It may be important to determine the amount and time of each payment where receipt of income is by installments extending back in time for a period in excess of 12 months. If the total of payments made during the 12-month period immediately preceding the decision is less than \$500, no economic interest will be created, even though the total of all payments received by the official from the same source over a long period of time is greater than \$500. *Morris* Advice Letter, No. A-92-397 (no economic interest where \$398 received over 18 months but only \$150 paid during the preceding 12 months; remember, however, the *Morris* letter was issued when the income threshold of Section 87103 was \$250).

g. Loans/Guarantors

While a loan may be classified as indebtedness for accounting purposes, it is defined by the Act as a form of income under the Act and the lender would be treated as the source of such income. Moreover, the entire unpaid balance of the loan would constitute income until repaid. If the loan has been guaranteed by another party, the guarantor would become a source of income to the borrower/official, to the same extent as the lender and regardless of whether the guarantor actually pays off any of the debt. *Kronick* Advice Letter, No. A-91-400. As noted above, a loan by a commercial lending institution made in the regular course of business on terms available to the public is generally exempted from the disclosure and **disqualification** requirements of the Act. Certain additional categories of loans and credit transactions have also been exempted from the definition of income, as listed in the next section of this paper.

h. Promised Income

Actual receipt of income is not required; an enforceable right to the income will suffice. The FPPC generally takes the position that if the right to receive income has been perfected and the official is awaiting payment pursuant to a contract, the payor would be treated as a source of promised income as of the date the official has established an enforceable right to payment.

Thus, in the case of a real estate agent, the commission income would be promised when a sale is pending (i.e., in escrow). *Larsen* Advice Letter, No. A-82-192.

Disparity in value between what is paid and what is received may also constitute “income.” Thus, in *Community Cause v. Boatwright*, 124 Cal. App. 3d 888, Cal. Rptr. 657 (1981), an official paid \$24,000 for an option having an alleged market value of between \$300,000 and \$400,000. Suit was brought claiming that the official had violated the Act by failing to disclose the difference in value as receipt of income, because it was either a discount or a gift.

Although recognizing that the Act generally does not require disclosure of the purchase price of an investment, the court ruled that a valid cause of action had been stated because in this instance “the price was relevant to ‘income’ within the meaning of the Act.” It should be noted that the definition of “income” specifically includes the term “gift,” which is separately defined in section 82028 of the Act. A “discount” being a form of gift as defined in section 82028, would also constitute income, unless made in the regular course of business to members of the public.

Unlike gifts, if income is received and the check is cashed, the official cannot subsequently return the income to avoid a potential conflict of interest. On the other hand, the official can avoid a potential conflict by declining to accept promised income not yet paid. *Albano* Advice Letter, No. A-92-191.

1. Exclusions from the Definition of “Income”

Geography

The geographic location of the source of income may provide a basis for exclusion. “Income” (but not gifts) does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, or not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time the decision is made. Cal. Gov’t Code § 82030(a).

Other Exemptions

A list of other specific exemptions from the definition of income is set forth in Government Code section 82030(b). These exemptions are as follows:

- Campaign contributions required to be reported.
- Salary and expense reimbursement received from a governmental agency, and reimbursement for travel expenses and per diem received from a bona fide educational, academic or charitable organization. “Salary” does not need to be regular payment for full time services and may include payments made on an hourly, piece-meal, part-time, or as-needed basis for services rendered. *Bordsen* Advice Letter, No. A-95-347; *Cornell* Advice Letter, No. I-91-212 (volunteer firemen); *Gallegos* Advice Letter, No. I-91-047 (hourly rates); *Jenke* Advice Letter, No. A-83-001 (on-call medical services). But, compare amended Regulation 18705.5 addressing

decisions by the official to appoint, employ, dismiss, discipline, or set/adjust the salary of governmental official or immediate family member.

- A devise or inheritance.
- Interest, dividends or premiums on a time or demand deposit in a financial institution, shares in a credit union, payments under an insurance policy, payment under a government bond or other debt instrument issued by a government agency.
- Dividends, interest or other return on a security which is registered with SEC or a registered commodity future, but proceeds from the sale of these securities may be income.
- Redemption of a mutual fund.
- Alimony or child support payments.
- Any loan from a commercial lending institution which is made in the lender's regular course of business, on terms available to the general public.
- Loans from certain designated family members, including the official's spouse, child, parent, grandparent, brother, sister, and other close relatives, provided such relative is not acting as the agent for another non-excluded person.
- Retail installment or credit card transaction, if made in the lender's regular course of business, on terms available to the general public. .
- Payments received under a qualified defined benefit plan.
- Proceeds from sale of registered securities or commodities futures, if sold on an exchange and the official does not know, or have reason to know, the identity of the purchaser.

In addition to the foregoing exemptions under section 82030(b) of the Government Code, section 18703.3(b) of the regulations provide that a **former employer** shall not be considered a source of income if: all such income was received by or accrued to the official before the time he or she became a public official; the income was received in the normal course of the previous employment; and there was no expectation by the official at the time he or she assumed office of renewed employment with the former employer.

2. Who is a Source of Income?

It is not always clear whether a particular party is or is not to be treated as a source of income to the official. This question may arise when there is no direct payment to the official or when multiple parties are involved in the same transaction. In certain situations, it is entirely possible to have multiple sources for the same payment of income. Although the regulations and FPPC advice letters provide some guidance in this area, the result will most likely depend upon a detailed investigation of the factual circumstances in each case.

As discussed above, a client of a business in which the official owns a 10-percent or greater interest will be a source of income if the official's pro rata share of income paid to the business by that client is at least \$500. *Morris* Advice Letter, No. A-92-397. But where the official is merely an employee of the business rather than an owner, the general rule is that a client who is a source of income to the official's **employer** is not an economic interest of the official.

However, be aware in the latter situation that the official's **employer** remains an economic interest of the official, even if the employer's **client** is not. If the employer's client is the subject of a decision to be made by the official, the employer is generally considered indirectly involved in the decision, too. For example, in the *La Force* Advice Letter, No. A-92-303, a council member who was employed by an insurance company was advised that he could vote on an application for subdivision approval submitted by a client of his employer, since the client was not a source of income to the council member. However, the FPPC cautioned that if there was an arrangement for the council member's employer to provide insurance coverage for the subdivision if approved, the economic effect of the decision **on the employer** could be great enough to require disqualification. The same would be true if there were other facts indicating a derivative impact on the employer.

Similarly, donors to nonprofit organizations generally are not deemed to be sources of income for an official who is employed by the organization. *Leipzig* Advice Letter, No. I-91-120. But the result would be different if the contribution was specifically earmarked for payment to the official.

Special regulations have been adopted by the FPPC pertaining to sources of commission income for brokers, agents and salespersons. See 2 Cal. Code of Regs. § 18703.3(c). It should be noted that in most instances, multiple parties will be deemed to be a source of income on the same transaction and with respect to the same payment. Moreover, the entire gross commission is attributed to each party who is deemed to be a source. 2 Cal. Code of Regs. § 18703.3(c)(4).

For example, under Regulation 18703.3(c)(2)(C), the full value of commissions received by a real estate agent is attributed to the broker and brokerage business entity under whose auspices the agent works, the agent's client, and any person who receives a finder's or referral fee for referring a party to the transaction to the broker. See also *Schenk* Advice Letter, No. I-90-460 (a discussion of sources of income in the context of law office client referrals and contributions for overhead expenses).

Where a payment made to the official's employer includes an amount which is directly payable to the official for services rendered to the payor, the payor may be deemed a source of income even though such party is not the official's employer. For example, in the *Dorsey* Advice Letter, No. A-87-176, the official was employed by a temporary personnel agency and rendered services to a client of the agency. The client had the ability to control the work schedule, assignments, and continuation of the official's services. Although payment for the official's services was made by the client directly to the employer/agency, an "inseparable" portion of such payment

was directly owed to the official. The Commission advised that both the agency and the client were sources of income to the official.

The ability to control a source of income can result in piercing through the apparent source to treat the controlling person as an additional source of income. Thus, in the *Hentschke* Advice Letter, No. A-80-03-069, a person who was the majority shareholder and president of a corporation was deemed to be a source of income to the official employed by the corporation. Similarly, an official may have a financial interest in a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity which is a source of income to the official. 2 Cal. Code of Regs. § 18703.1(c). Business entities can be “otherwise related” by reason of one entity holding a controlling ownership or where both entities share management and control. 2 Cal. Code of Regs. § 18703.1(d).

A different result has been reached in the case of an official who occupies the position of a subcontractor employed by a general contractor. Typically, the client has no right to control the hiring, supervision, continuation of services or compensation of the subcontractor, and there is no direct contractual relationship between the client and the subcontractor. Under these circumstances, the general contractor is considered to be the sole source of income to the subcontractor, despite the fact that the subcontractor’s payment is included in the payment by the client to the general contractor. *Sauer* Advice Letter, No. A-95-373; *Hart* Advice Letter, No. A-83-264.

D. Economic Interest: Source of Gifts

1. Statement of the Rule

A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$390 or more in value provided to, received by or promised to the public official within twelve (12) months prior to the time when the decision is made.

2. Discussion Regarding Gifts

Generally, gifts have reporting requirements and disqualification consequences for local officials. A public official “receives” or “accepts” a gift when the individual has actual possession of the gift or when the individual takes any action exercising direction or control over the gift, including discarding the gift or turning it over to another person. 2 Cal. Code of Regs. § 18941.

Gifts of \$50 or more per year must be disclosed along with specific information about the name, address, amount, date of the gift, and business of the donor. Cal. Gov’t Code § 87207. If the value of the gift is \$390 or more in a year, it will require the official to disqualify himself or herself from participating in any decision involving the donor/source of payment when that

decision will have a “material financial effect” distinguishable from its effect on the public generally, on the donor. Cal. Gov’t Code § 87103(c). In addition, most public officials will not be able to accept gifts from any single source totaling more than \$390 in a calendar year if they are required to report income or gifts from that source. Cal. Gov’t Code § 87103(e).

There are exceptions that provide that a gift may not be a reportable payment. Many of the exceptions from reporting are similar to those applicable to the “honorarium” ban, but they are not identical. A public official needs to determine first the nature of the payment, then determine what exceptions, if any, may apply. You should direct a public official to the applicable regulation or regulations. The following are not subject to the gift limit and are not required to be reported on a statement of economic interests (unless otherwise stated, see § 18942) pursuant to Title 2 of the California Code of Regulations §§ 18942-18943:

- Gifts that are returned (unused) within 30 days or that are donated to a 501(c)(3) charitable organization or a government agency within 30 days. (See § 18943).
- Gifts that are reimbursed to the donor within 30 days of receipt. (§ 18943.)
- Gifts from close family relatives, unless the person is acting as an intermediary or agent for the true source of the gift.
- Gifts to an official’s or candidate’s immediate family (18944).²⁸
- Gifts of hospitality, including food and lodging, provided by an individual in his or her home when the individual providing the hospitality and/or his or her family is present.
- Gifts approximately equal in value exchanged between the official and another individual (other than a lobbyist) on holidays, birthdays, or similar occasions, provided the gifts exchanged are not “substantially disproportionate in value.”
- Informational material that helps an official perform his or her job. (See definition of “Informational Material”; Section 18942.1).
- A bequest or inheritance.
- Campaign contributions.
- Personalized plaques and trophies worth less than \$250.
- Tickets to campaign fundraisers and fundraisers for 501(c)(3) charitable organizations. 2 Cal. Code Regs. § 18946.4 (b) and (c).
- Passes or tickets not used and not given to another person.
- Nominal benefits, e.g., refreshments, when giving a speech or providing a similar service.

²⁸ This “exception” should be viewed with caution, if not outright suspicion. By meeting the several prongs of this regulation, the official may avoid being charged with a disclosable (or illegal) gift, however a subsequent (or prior) decision involving the donor could give rise to a common law conflict of interest; an allegation of bias; or an allegation of corruption (e.g., bribery).

- Leave credits received under a bona fide catastrophe or emergency leave program.
- Benefits received in connection with a disaster relief program.
- Gifts given to a public official's government agency are also not gifts to the official if certain conditions are met. 2 Cal. Code of Regs. § 18944.2.

In addition to the exceptions noted above, **the following are not subject to the \$390 gift limit**, however, must be reported on the official's statement of economic interests (SEI) and may subject an official to the Act's conflict-of-interest prohibitions.

- Wedding Gifts. However, they are subject to the \$10 lobbyist/lobbying firm gift limit. 2 Cal. Code of Regs. § 18942(b).
- A prize or award received in a bona fide competition not related to a public official's status, but must be reported as income if the value of the prize or award is \$250 or more. 2 Cal. Code of Regs. § 18946.5.

3. Valuation of Gifts

The general rule is that a gift is valued at its fair market value as of the date of its receipt or promise. 2 Cal. Code of Regs. § 18946. The Commission has other regulations to assist in the valuation of certain type of gifts and providing for their return, donation, etc. 2 Cal. Code of Regs. § 18943 - 18946.3.

Invitation-only Events. In 2005 the Commission amended § 18946.2 to provide a method for determining the value of invitation-only events, testimonial dinners and ceremonial functions and identified possible exceptions or modifications thereto. One such exception has been provided for instances in which an official or candidate merely "drops in" for a limited appearance and does not receive the full benefits of attending the event.

The method for determining the value of tickets to fundraising events for nonprofit organizations has been revised to indicate that, if there is no ticket indicating a face value, the value of the gift is the pro rata share of the cost of any food and beverages consumed by the official and guests accompanying the official, plus any other specific item presented to the official. The initial reason for the study and change of the regulations for invitation-only events and the creation of a "drop-in" exception arose out of the invitation for members of the San Diego City Council to attend a Super Bowl event which, when broken down to its component parts would have charged each attendee with a value well over the gift limitation.

As a follow up, the Commission in 2006 also adopted a clarification to the scope of 18946.2(b) that while the requirement is broad enough to be interpreted to encompass attendance at weddings, birthday parties and similar special events of personal significance, the amendments were not intended to encompass the food, drink, entertainment and nominal benefits received at those events. The exemption for gift exchanges between an individual required to file a statement of economic interest and another individual (other than a lobbyist), on holidays,

birthdays or similar occasions to the extent that the gifts exchanged are not disproportionate in value was extended to include food, drink, entertainment and nominal benefits. See Barclays Digest, Register 2006, No. 21; May 26, 2006.

E. Economic Interest: Personal Finances

1. Statement of the Rule

A public official has an economic interest in his or her personal finances and those of his or her immediate family. A government decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing in an amount that would eclipse the materiality thresholds.

This is intended to be somewhat of a catchall provision and the previous regulation was referred to as the “personal financial effect” interest and casually referred to as the “hip-pocket rule.” It is not a catchall in the sense that if an economic interest falls within one of the other enumerated interests (e.g., source of income, business position or real property) this rule does not also apply. It also has a lower materiality standard than the other referenced interests.

2. Effect on Government Salary

While government salaries are generally excluded under the definition of “income” (Section 82030(b)(2)), the regulation establishing the materiality standard for personal effects clarifies that, for purposes of personal financial effects, the exception is limited to those decisions that affect only salary, per diem, or reimbursement for expenses of the public official or a member of his or her immediate family. The exception does *not* apply if the decision is to hire, fire, promote, demote, suspend, or otherwise take disciplinary action. The exception also does *not* apply to setting a salary for the official or his or her immediate family that is different from salaries paid to other employees of the agency in the in the same job classification or position, or setting a salary for a position held by a member of the immediate family if the family member is the only person in the job classification or position. (Regulation 18705.5(b).)

STEP FOUR: IS THE INTEREST DIRECTLY OR INDIRECTLY INVOLVED?

The Act does not include the notion of “direct” or “indirect” involvement. These concepts were created in the regulations to help apply materiality standards which arise in Step Five of the standard analysis.

- **Direct Involvement** – Generally means that the official’s economic interest is the subject of the decision or, in the case of real property, is so close to the subject of the decision that it can be considered directly involved.

• **Indirect Involvement** – The official’s economic interest is not the subject of the decision but may nevertheless be affected by the decision.

The regulations stipulate that for governmental decisions which affect **business entities, sources of income, and sources of gift** analysis should apply. 2 Cal. Code of Regs. § 18704.1.

For governmental decisions which affect **real property interests** the analysis should apply 2 Cal. Code of Regs. § 18704.2.

And finally, for governmental decisions which affect **personal finances**, (income, expenses, assets or liabilities) of the public official or his or her immediate family the analysis should apply. 2 Cal. Code of Regs. § 18704.5.

A. Determining Direct or Indirect Involvement for Business Entities, Sources of Income, Sources of Gift

1. A person, including business entities, sources of income and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or through an agent:
 - a. initiates a proceeding in which the decision will be made by filing an application, claim, appeal, or similar request, or;
 - b. is a named party or is the subject of the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, etc.

B. Determining Whether Real Property Is Directly or Indirectly Involved

1. **Directly Involved – From the Section 18704.2(a)**
 - a. Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:
 - (1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located "within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision" if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

- (2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.
- (3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.
- (4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.
- (5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.
- (6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.

2. **Indirectly Involved – From Section 18704.2(b)**

- a. Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is indirectly involved if:

- (1) The decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under 2 Cal. Code of Regs. Section 18705.2(b).
- (2) The decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.
- (3) The decision solely concerns the adoption or amendment of a general plan and the conditions set forth in Regulation 18704.2(b)(3).

C. Determining Direct or Indirect Involvement With Respect to Personal Finances

A public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.

STEP FIVE: APPLYING THE APPROPRIATE MATERIALITY STANDARDS

A. MATERIALITY STANDARDS: BUSINESS ENTITIES

1. Materiality Standard for Directly Involved Entities

- **General Rule:** Any financial effect of the governmental decision is presumed to be material unless the exception (described below) applies. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity. This is the “one-penny rule.”²⁹
- **Exception:** If the public official’s only economic interest in the business entity is (1) an investment interest; and (2) the public official’s investment in the business entity is worth \$25,000 or less, then the analysis applies the indirect materiality standards found in subdivision (c)(1) of the regulation if the business entity is listed on the Fortune 500 or the materiality standards in subdivision (c)(2) of 18705.1 if the business entity is listed on the New York Stock Exchange or if not listed on the New

²⁹ 2 Cal. Code of Regs. Section 18705.1(b)(1).

York Stock Exchange, for its most recent fiscal year had earnings before taxes of no less than:

- \$2.5M, or
- such other amount described in Rule 102.01(C) of the New

York Stock Exchange's listed company manual.³⁰

2. Materiality Standards for Indirectly Involved Business Entities

When a business entity in which the public official has an economic interest is indirectly involved in the governmental decision the indirect standards in 18705.1(c) must be applied. There are a number of standards, tailored to the size of the business entity in which the public official has an economic interest. The standards are expressed in terms of dollar impact over a period of time on the business entity's "gross annual receipts," "expenses," and "assets or liabilities." The following tables summarize the materiality standards for indirectly involved business entities. If more than one of the following subdivisions is applicable to the business entity in question, apply the category with the highest dollar thresholds.³¹

Material Financial Effects Where Business Entity Indirectly Involved In a Decision [2 Cal. Code of Regs. Section 18705.1(c)]

Type of Business	Gross Revenues	Expenses	Assets/ Liabilities
• Listed in Fortune 500 (§ 18705.1(c)(1)).	\$10,000,000	\$2,500,000	\$10,000,000
Listed on NYSE or most recent FY earnings of \$2.5M, before taxes (§ 18705.1(c)(2).)	\$500,000	\$200,000	\$500,000
• Listed on NASDAQ or AMEX, or most recent FY net income of \$500K, or earnings before taxes of \$750K (§ 18705.2(c)(3)).	\$300,000	\$100,000	\$300,000
• All Others	\$20,000	\$5,000	\$20,000

Material Financial Effects Where a Non-Profit Business Entity or Governmental Entity is Involved in the Decision [2 Cal. Code of Regs. Section 18705.3(b)(2)]

	Effect On
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³⁰ 2 Cal. Code of Regs. Section 18705.1(b)(2).

³¹ 2 Cal. Code of Regs. Section 18705.1(c).

GROSS ANNUAL RECEIPTS OF:	Gross Annual Receipts	Expenses	Assets
\$400M or more	\$1M	\$250K	\$1M
\$100M to \$400M	\$400K	\$100K	\$400K
\$10M to \$100M	\$200K	\$50K	\$200K
\$1M to \$10M	\$100K	\$25K	\$100K
\$100K to \$1M	\$50K	\$12.5K	\$50K
Less than \$100K	\$10K	\$2.5K	\$10K

Note About Terminology

The regulation setting forth the materiality standards for business entities includes a lengthy discussion of the terminology used within the regulation. As part of Phase 2 of the regulation revision project in 2002, the regulation now sets forth that the accounting terms described in the materiality regulation for business entities are the same as or not inconsistent with terms used in Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS). The regulation specifically provides that the subdivision should not be construed to incorporate new terms not contemplated under GAAP or GAAS nor to exclude any items that might be included in the definition of these terms under those standards. It may therefore be necessary to consult with your city auditor or finance director if you are relying, in particular, on revenues/earning figures to qualify a business under one of the higher thresholds set forth in the indirect standards, above.

B. MATERIALITY STANDARDS: REAL PROPERTY

1. Directly Involved Real Property (e.g., within 500 feet)

- Real property other than leaseholds: Effect is presumed material. The presumption is rebuttable by proof that it is not reasonably foreseeable the decision will have any financial effect on the real property. 2 Cal. Code of Regs. 18705.2(a)(1).
- **Leasehold interests** (Month to month tenancies – exempt): Materiality otherwise presumed unless there is no effect on a termination date of the lease; the amount of rent paid; the value of sublease rights; the legally allowable use or the current use of the real property by the lessee; or the use or enjoyment of the lease property. 2 Cal. Code of Regs. 18705.2(a)(2).

2. Indirectly Involved Real Property - Real property other than leasehold interests

- Effect is presumed not to be material. However, the presumption is rebuttable by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real

property in which the public official has an economic interest, which make it reasonably foreseeable the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to circumstances where the decision affects:

- The development potential or income producing potential of the real property owned by the official
- The use of the real property
- The character of the neighborhood including, but not limited to substantial effects on traffic, view, privacy, intensity of the use, noise levels, air emissions, or similar traits of the neighborhood. 2 Cal. Code of Regs. 18705.2(b)(1).

Practice Pointer:

With the advent of the 500-foot circle, we lost the 300-foot to 2500-foot “donut” portion of the circle that was used previously to evaluate materiality based on an effect of \$10,000, more or less.

Now, outside the 500-foot circle, the effect of any governmental decision is presumed not to be material unless some special circumstance applies. Although many examples may exist, a good way to picture this part of the analysis is to imagine that the governmental decision involves the approval of a lighted sports facility such as a high school football stadium or the approval of a minor league baseball facility. While outside the 500 foot circle of the public official’s property, this decision may occasion traffic, noise, crime or even lighting up the night sky and present a special circumstance that even though outside the 500 foot circle, could result in a material effect on the public official’s ownership interest.

Although the \$10,000 standard is no longer present, it can be used as a guide. You can also evaluate whether or not the public official, if selling his or her home in the winter, would have to disclose the impact of the minor league baseball stadium lights to a prospective purchaser, who will “experience” those lights the following summer.

Leasehold Interests. Effect presumed not to be material unless the decision changes the legally allowable or actual use of the real property; substantially enhances or significantly decreases the lessee’s use or enjoyment; increases or decreases the amount of rent by five percent (5%) during any twelve month period; or will result in a change in the termination date of the lease. 2 Cal. Code of Regs. § 18705.2(b)(2).

C. MATERIALITY STANDARD: ECONOMIC INTEREST IN PERSONS WHO ARE SOURCES OF INCOME

1. **Directly Involved Sources of Income:** One-penny rule. Any reasonably foreseeable financial effect on a person who is a source of income to a public official and who is directly involved in the decision before the official's agency is deemed material. 2 Cal. Code of Regs. § 18705.3(a).
2. **Indirectly Involved Sources of Income:**
 - a. Sources of Income Which Are **Business Entities**
 - Apply the materiality standard stated in Section 18705.1(c) (the indirect analysis for business entities).
 - b. Sources of Income which are **Non-Profit Entities** including Governmental Entities
 - The materiality standards for these entities can be found in Section 18705.3(b)(2) and are set forth in the Chart on page 52.
 - c. Sources of Income Who Are **Individuals**
 - The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or
 - The decision will affect the individual's real property interests in a manner which is considered material under Section 18705.2(b) (the indirect materiality standards for real property interests).
 - d. **Nexus** – Section 18705.3 also includes subdivision (c) denominated "Nexus." This provision provides as follows: any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official received or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the decision.

D. MATERIALITY STANDARD: ECONOMIC INTEREST IN PERSONS WHO ARE SOURCES OF GIFTS

1. Directly Involved Sources of Gift: One Penny Rule
2. Indirectly Involved Sources of Gift
 - Business Entities: Apply the materiality standards stated in Section 18705.1 (c) (the indirect standards)
 - Sources of gift which are non-profit entities or governmental agencies – apply materiality standards of 18705.3(b)(2) (the chart which appears on page 52).
 - Sources of gifts who are individuals – apply the materiality standards stated in 18705.3(b)(3) (same indirect standards as used for individuals who are sources of income).

E. MATERIALITY STANDARD: ECONOMIC INTEREST AND PERSONAL FINANCES

1. **Statement of the Rule:** A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any twelve-month period.

Remember this is not a catch-all provision so when determining whether a governmental decision has a material financial effect on a public official's economic interest and his or her own personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered. 2 Cal. Code of Regs. 18705.5(a).

- **Exception** – The financial effects of a decision which affects only the salary, per diem or reimbursement for expenses the public official or member of his or her immediate family receives from a federal, state or local government agency shall not be deemed material, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position or when the public official's immediate family member is the only person in the job classification or position. Cal. Code of Regs. Section 18705.5(b); amended June 2005).
 - For reference, "immediate family" means the spouse and dependent children of the public official. Cal. Govt. Code § 82029.

Practice Pointer:

A child is considered "dependent" for purposes of the Act if the child is under 18 years old, and can be claimed as a dependent for federal income tax purposes. (*Ovrom* Advice Letter, No. A-02-254; *Nebb* Advice Letter, No. I-00-017; *Doane* Advice Letter, No. A-97-211.)

STEP SIX: DETERMINING FORESEEABILITY.

- A. **Key to Step Six – Use the materiality standard to frame the crucial question:**

“Is it **reasonably foreseeable** (substantially likely) that the **materiality** standard will be met as a result of the governmental decision?”

If yes, then a conflict exists unless the public generally exception applies; if no, there is no conflict.

This is clearly the toughest step from an analytical standpoint. This step calls for a factual judgment, not necessarily a legal one. You must look at the economic interest and how it fits into the entire factual picture surrounding the decision. The Political Reform Act uses the words “reasonably foreseeable” and the FPPC has interpreted these words to mean “substantially likely.” Generally speaking, the likelihood need not be a certainty, however, it must be more than a mere possibility. If it is substantially likely that one of the materiality standards identified in Step 5 will be met as a result of the governmental decision a conflict will exist.

B. Timing

There is no express time frame for the foreseeability step although often foreseeability raises just that issue. For example, if land near a public official’s primary residence was currently developed with older industrial buildings and a general plan amendment was brought forward to redesignate that area for a park, would the public official have a conflict of interest? If a park were seen to clearly be something to enhance the value of the public official’s property, it would probably qualify as a material financial effect under both the direct and indirect test (within 500 feet or outside of 500 feet). However, if it was clear from the nature of the decision that the park may not be developed for at least ten years or perhaps never so developed (e.g., if there is no amortization period and the industrial buildings were allowed to continue until they decided to change use) is the change foreseeable?

In this context, the answer clearly is a factual question and if the industrial uses are allowed to continue ad infinitum and the general plan change is merely a “goal,” an argument could be made that is not foreseeable that this “paper change” will have a material financial effect.

Regulation 18706 codifies a concept first stated in *In re Thorner* (1975) 1 FPPC Op. 198. In that opinion, the Commission explained,

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable.

This excerpt from *Thorner* is cited repeatedly in other FPPC opinions and advice letters.

If the answer to this crucial question is yes, then the public official has a conflict of interest unless the public generally exception applies. Cal. Gov’t Code § 87103; 2 Cal. Code of Regs. §§ 18700(a), 18700(b)(6), 18706.

Recent Change: In 2002, the Commission amended Regulation 18706 to include factors to be considered in determining when a governmental decision will have a reasonably foreseeable material financial effect on an economic interest that is a source of income. This was done in response to the public's (especially real estate professionals) desire to have concrete standards to apply when determining reasonable foreseeability. These factors, though not intended to be an exclusive list, are:

- (1) The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;
- (2) The market share held by the official or the official's source of income in the jurisdiction;
- (3) The extent to which the official or the official's source of income has competition for business in the jurisdiction;
- (4) The scope of the governmental decision in question; and
- (5) The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency." 2 Cal. Code of Regs. 18706(b).

C. Materiality: Catch-All Provision

Section 18705(b) of the regulations states that whenever the specific rules contained in sections 18705.1-18705.5 (concerning material financial effect upon economic interests which are directly or indirectly involved in the decision) cannot be applied, the following general rule shall apply:

The financial effect of a governmental decision is material if the decision will have a significant effect on the official or a member of the official's immediate family, or on the source of income, the source of gifts, the business entity, or the real property, which is an economic interest of the official.

Although this general rule appears to be an independent test for the existence of a conflict, the regulations provide no explanation as to what may constitute a "significant effect" where the effect is not deemed to be "material" under the specific rules.

An example of how this provision may come into play is to reconcile the dilemma faced by the analysis under Section 18704.2(b), which provides that real property in which a public official has an interest is not directly involved in a governmental decision if one of two criteria apply. The first criteria provides that if the decision solely concerns an amendment of an existing zoning ordinance or other land use regulation that is applicable to all the properties designated in that category, the otherwise directly involved property should be considered indirectly involved and the standards of 18705.2(b) should be applied.

Since it is possible to change the zoning criteria that affects all of the properties within a zoning district and thereby qualify for the indirect standards, it is not wise to ignore the fact that the same zoning change may uniquely affect a public official voting on the matter. For example, if stand-alone bars are only allowed in a certain commercial zone, and there were only several stand alone bars left in town, and the change to the zoning text would require the elimination of those uses, the across-the-board change could be material to a public official if the public official's backyard was next to a stand-alone "biker bar."

In this case, it seems prudent that the catchall provision of 18705(b) should be considered as part of the analysis.

D. Promised Income

However, it has been held that the mere potential receipt of income can be disqualifying, even in the absence of a "promise" enforceable by a contractual right. For example, in *Downey Cares v. Downey Community Development Commission*, 196 Cal. App. 3d 983, 242 Cal. Rptr. 272 (1987), a council member was held to be disqualified from voting on an ordinance amending the city's redevelopment plan because of various conflicts of interest, including his ownership of a real estate business which maintained its office within the project area and had listings for one or two dwellings located within the area. Although no actual sales had occurred, the fact that the council member's real estate firm did not "actively avoid" listings in the redevelopment area, coupled with the fact that adoption of the redevelopment plan would increase property values (and therefore the potential income to the real estate business) was sufficient to support a "reasonable inference" that the plan would have a material financial effect on the council member's source of income.

Practice Pointer:

Clarification of Burden of Proof for Step 7 and Step 8

In 2005 the Commission amended its regulations to clarify that a public official with a disqualifying conflict of interest in a governmental decision has the burden of proving that the public generally or the legally required participation exceptions apply.

STEP SEVEN: IF YOU HAVE A CONFLICT OF INTEREST, DOES THE "PUBLIC GENERALLY" EXCEPTION APPLY?

A. What Is the Public Generally Exception?

This exception arises from language in Government Code § 87103 which provides as follows: A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect **distinguishable from its effect on the public generally**, on the official, a member of his or her immediate family or in any of the following: The statute goes on to list the five financial interests.

The FPPC has adopted nine regulations to implement the public generally exception and these regulations changed substantially in 2002 as a result of Phase 2 of the Regulations Project. The key changes were as follows: regulatory changes codified *In Re: Ferraro/In Re: Overstreet* and a new regulation 18707.9(b) were adopted that allow landlords of three or fewer residential properties to participate in rent control decisions if certain factors are met. Changes were made to the definition of a “predominate industry, trade, or profession.” and the “significant segment” definition is now clearly tied to the nature of the economic interest. Finally, with directly involved real property, the requirement that the ten percent significant segment be found within the 300-foot (now 500 foot) circle, has also been eliminated.

B. The Standard Analysis

Regulation 18707 sets forth the standard for the public generally exception and enumerates four steps to go through in analyzing whether or not the exception applies. **Section 18707.1 sets forth the criteria for using the type of interest to identify the significant segment and establishes a two-prong test to be met in most circumstances.**

- The Four Step Analysis
 - (1) **Step One:** Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.
 - (2) **Step Two:** For each person or real property identified in Step One, determine the applicable “significant segment” rule according to the provisions of 2 Cal. Code Regs. Section 18707.1(b).
 - (3) **Step Three:** Determine if the significant segment is affected by the governmental decision as set forth in the applicable “significant segment” rule. If the answer is “no,” then the analysis ends because the first prong of a two-part test set forth in 2 Cal. Code Regs. Section 18707.1(b) is not met, and the public official cannot participate in the governmental decision. If the answer is “yes,” proceed to Step Four.
 - (4) **Step Four:** Following the provisions of 2 Cal. Code Regs. Section 18707.1(b)(2), determine if the person or real property identified in Step One is affected by the governmental decision in “substantially the same manner” as other persons or real property in the applicable significant segment. If the answer is “yes” as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is “no” as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in 2 Cal. Code Regs. Sections 18707.2 through 18707.9 applies to each person or real property triggering the conflict of interest.
- **Two More Steps:** Significant Segment/Indistinguishable Effect

[See the Detailed Discussion in Section 18707.1]

C. New Rule: Real Property

In 2006, the public generally exception was amended to clarify the methods of identification of single or multiple residential properties owned by public officials within the affected area, as well as delineating the means of comparing potential financial effects on real property. The previous term “homeowners” was eliminated from regulation, 18707.1. The regulation now provides:

“While the public official must identify ten percent (10%) or more of residential property owners or five thousand (5,000) residential property owners as provided above, and not residential properties, for purposes of subdivision (b)(1)(B) the official may choose to count each residential property affected as being owned by one property owner if, and only if, the official counts himself or herself as the sole owner of the public official’s residential property regardless of his or her actual ownership interest.” 18707.1(b)(1)(B)(iii).

The regulation goes on to provide that for the purpose of this subdivision, residential property means any real property that contains a single family home, or a multi-family structure of four (4) units or fewer, on a single lot, or a condominium unit.

What Does This Mean?

A couple of things change with this amendment. First, since the ownership of real property was the economic interest, the Commission determined it was necessary to delete the term “homeowner” as confusing and not necessary if the focus is on property ownership. It could be that a public official owns property, but does not live on the property as the homeowner. Second and more significant, under interpretations and advice letters based on the prior regulation, the public official’s ownership interest, e.g., one half of a community property interest or potentially an ownership interest which could be split further (e.g., in a trust or ownership with children) had to be considered. Therefore, you not only had to identify ten percent (10%) or five thousand (5,000) similarly situated properties, but also you had to determine how those properties were owned and find at least 10% owned similarly (e.g., husband and wife or 50%/50%).

After much discussion and debate, the Commission agreed that it was next to impossible to determine how ownerships were held. Even in a husband and wife or domestic partner situation, the community property interests may not be equal. The regulation now focuses on the property rather than on the property and the ownership interest. It allows the public official to consider each of those identified properties as owned the same way as his or her property, provided the official does not want to apply some fractional ownership to their interest for the purpose of materiality.

PUBLIC GENERALLY – General Rule

Interest	Segment
INDIVIDUALS Persons, Not Businesses (18707.1(b)(1)(A))	<ul style="list-style-type: none"> • 10% or more of the population in the jurisdiction or district • 5000 residents of the jurisdiction
REAL PROPERTY (18707.1(b)(1)(B)) [see: New Small Jurisdictions: next chart]	<ul style="list-style-type: none"> • 10% or more of all property owners or all residential property owners in the jurisdiction or district • 5000 property owners or residential property owners of the jurisdiction
BUSINESS ENTITIES in which official has an interest (18707.1(b)(1)(C))	<ul style="list-style-type: none"> • 2000 or 25% of all business entities in the jurisdiction or district, provided not a single industry trade or profession (in that case, see 18707.7)
NON-PROFIT	<ul style="list-style-type: none"> • Now treated same as Business Entities, above
GOVERNMENTAL ENTITY official has an economic interest in the governmental entity (18707.1(b)(1)(D))	<ul style="list-style-type: none"> • Will affect all members of the public under the jurisdiction of that governmental entity

D. Small Jurisdictions are Back

The 2004 version of this text indicated that the “small jurisdiction” rules for the public generally had been repealed since the change from 300’ radius to 500’ seemed to make the exception unworkable and, by default, the general rule for the public general exception of 18707.1 was deemed sufficient.

The practical effect of just employing the general rule, however, was to eliminate too many public officials from participating in important decisions. The Commission struggled with this, however, ultimately agreed to adopt the new regulation and, in effect, let the public decide, through their oversight, whether or not it was better to have a marginally conflicted participant rather than insufficient number of decision-makers. The operative parts of the small jurisdiction exception are significantly different than the prior regulation:

1. The effect of the decision is not distinguishable for the domicile of the public official if the following conditions are met:
 - a. The jurisdiction of the agency has a population of 30,000 or less and covers a geographic area of ten (10) square miles or less.
 - b. The public official is required to live within the jurisdiction.
 - c. If elected, the public official has been elected in an at-large jurisdiction.
 - d. The official’s property is more than 300’ from the boundaries of the property that is the subject of the decision.
 - e. The official’s property is located on a lot not more than ¼ acre in size or not larger than one hundred and twenty five percent (125%) of the median residential lot size for the jurisdiction; and

f. There are at least twenty (20) other properties under separate ownership within a 500' radius of the boundaries of the property that is the subject of the decision that are similar in value.

For purpose of the regulation, “domicile” means the real property upon which the official makes his or her true, fixed and permanent residence and a place to which he or she has the intention of returning after any absence. A person may have more than one residence, but only one domicile. With respect to an ownership interest in any real estate containing the official’s domicile where portions of the real estate are designated for separate ownership and portions are designated for common ownership solely by the owners of the separate portions, the official’s domicile is the unit, area, or space in which the official has a separate ownership interest.

PUBLIC GENERALLY – SPECIAL RULES
2 CAL. CODE OF REGS. 18707.2, 18707.3, 18707.4, 18707.5, 18707.6, 18707.7,
18707.9

INTEREST	RULE
Rates/Assessments	See 18707.2
Small Jurisdictions	Re-enacted for 2007; see detailed test in Section 18707.10
Appointed Members of Boards and Commissions appointed to represent a <u>specific economic interest</u>	See Section 18707.4
Owners of Retail Businesses	See detailed test in Section 18707.5
States of Emergency	See Section 18707.6
Industry, Trades or Professions	See Section 18707.7
Residential Rental Property	See Section 18707.9

STEP EIGHT: DOES THE “LEGALLY REQUIRED” EXCEPTION APPLY?

A. Statement of the Rule

A public official is not legally required to make or participate in the making of a governmental decision unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

Regulation 18708 sets forth the disclosure requirements and procedures to be followed when invoking this exception and provides that the regulation shall be construed narrowly. This exception is not for convenience; not to break a tie; not when a matter can be continued; only when there is “no reasonable alternative” to make a decision; and only when the city attorney concludes the exception legitimately applies. It is the best advice to call the FPPC first, if possible.

B. Required Disclosure

Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision he or she shall state the existence of the potential conflicts as follows:

1. Disclose the existence of the conflict and describe with particularity the nature of the economic interest: The “particularity” required is spelled-out in section 18708(b)(1)(A) and (B).
2. The public official or another officer or employee of the agency shall give a summary description of the circumstances under which he or she believes the conflict may arise.
3. Either the public official or another officer or employee of the agency shall disclose the legal basis for concluding that there is no alternative source of decision.
4. **The timing** of the disclosure that is required by the regulation is set forth with particularity in Section 18708(b)(4)(A) through (C).

C. What Is Not “Legally Required”

The regulation states that it shall be construed narrowly and shall not be construed to permit any of the following:

1. To allow an otherwise disqualified official to break a tie.
2. If a quorum can be convened of other members of the agency who are not disqualified under Government Code § 87100, whether or not such other members are actually present at the time of the disqualification.
3. Require participation of the smallest number of officials with a conflict that are legally required in order for the decision to be made. The random means of selection may be used to select only the number of officials needed. When an official is selected, he or she is selected for the duration of the proceedings and all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.

D. Quorum

For purposes of Section 18708, “quorum” shall constitute the minimum number of members required to conduct business and when the vote of the super majority is required to adopt an item, the “quorum” shall be that minimum number of members needed for that adoption.

If vacancies exist on a board or commission or committee and can be legally filled by the agency, the fact that there are insufficient members to constitute a quorum who are not conflicted out or to accomplish a particular purpose (e.g., a super majority vote), those vacancies will not in and of themselves qualify the matter for legally required participation by a disqualified member.

The more difficult question is that if the vacancy exists on a city council which can longer be filled by appointment and/or whether or not a super majority vote is actually “required.” For example, if a city council wished to impose an interim land use regulation without going through the planning commission and required noticing, and the council could also accomplish the same result by providing greater notice and decide based on a majority vote, does the situation give rise to the use of Section 18708?

OTHER CONSIDERATIONS: SEGMENTATION AND FOLLOW-UP ACTIONS

A. CAN THE GOVERNMENTAL DECISION BE SEGMENTED?

Although not set forth as one of the official steps in the eight step process, section 18709 does allow for a decision that presents conflicts of interest in some form to one or more members to be bifurcated, trifurcated or otherwise segmented to allow the disqualified members to vote on the portions of the decision which are not giving rise to the conflict of interest.

1. Statement of the Rule

An agency may segment a decision in which a public official has a financial interest to allow participation by the official provided all the following conditions apply:

1. The decision can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
2. The decision in which the official has a financial interest is segmented from the other decisions;
3. The decision is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and
4. Once a decision has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

The regulation provides that decisions are “inextricably interrelated” when the result of one decision which will effectively determine, affirm, nullify, or alter the result of another decision.

2. Budget Decisions and General Plan Adoption/Amendment Decision Affecting an Entire Jurisdiction

Once all separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject or amend the general plan.

3. Prioritizations

This is a tricky area and one which turns more on facts than on the law. If a councilmember lives across the street from a future park site and the council is considering how to prioritize public dollars for the orderly development of a number of parks throughout the city, the councilmember would have to be disqualified from any ranking which affected the park across the street from their home but could possibly vote on the overall funding package or whether or not to place a ballot initiative on the next general election ballot to impose a parcel tax to pay for park development. Other financial decisions which could affect the priority of that park's development, however, would result in the councilmember's disqualification.

B. Other Follow-up Decisions

Depending on the interest, it is possible that a disqualified official may come back later and be able to participate in follow-up decisions on a project that had caused a disqualifying interest.

For example, consider the two scenarios:

(1) A big box retailer wants to build a store, but before obtaining all entitlements and permits for the project, the retailer needs to remove five oak trees so it may grade the site level with the adjacent thoroughfare and achieve more square footage on the site. The decision to remove the trees will have a material financial impact on the retailer.

(2) If, however, the retailer has all necessary permits for the project and has actually completed construction and then goes back to request permission to remove the trees to facilitate the placement of more parking or because the trees are not longer healthy, the decision whether to allow removal of the trees may not have as great an impact on the retailer. Even if the public official has an economic interest in the retailer, he or she may be able to participate in this decision because it would be an "implementation decision." Such decisions merely implement, or carry out, decisions already made. If a particular decision is an implementation decision, it is possible that the official could participate in that decision regardless of a conflict arising from another decision, provided the implementation decision does not independently create a conflict of interest.

VI. Gifts, Honoraria and Travel Payments

The Act provides that it is a conflict of interest for any public official, at any level of state or local government, to make, participate in making, or in any way, attempt to use his or her official position to influence a governmental decision which the official knows or has reason to know will have a material financial effect on any:

- Source of income, other than gifts, aggregating five hundred dollars (\$500) or more in value received or promised within twelve (12) months prior to the time when the decision is made.
- Any donor of, or intermediary or agent for a donor of a gift or gifts aggregating three hundred ninety dollars (\$390) or more provided to, received by, or promised to the public official within twelve (12) months prior to the time when the decision is made. This gift amount is adjusted every two years. Cal. Gov't Code §§ 87100, 87103(c) & (e), 89503(f).

In addition, candidates for local elected offices and most public officials of local agencies are prohibited from accepting any honoraria. Cal. Gov't Code § 89502.

A. General Rules

The circumstances under which a gift, honorarium, or reimbursed travel expenses would be prohibited, or require reporting or disqualification, begins with a review of these terms.

An “honorarium” means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. Cal. Gov't Code § 89501(a); 2 Cal. Code of Regs. § 18931, 18931.2, 18931.3.

A “gift” is any payment or other benefit provided to an individual that confers a personal benefit for which he or she does not provide goods or services of equal or greater value. A gift includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public. Cal. Gov't Code § 82028(a).

Travel expenses from governmental entities and certain nonprofit entities, IRS Code § 501(c)(3), are excluded from the definition of “income” in Government Code section 82030(b)(2). The receipt of travel expenses (including transportation, lodging, and meals) from other sources usually results in reportable gifts which may be subject to the \$390 gift limit. Gifts of \$390 or

more that are exempt from the gift limit may subject public officials to disqualification. Under some circumstances, travel payments may be a prohibited honorarium. Note that while a gift of exactly \$390 is legal, a gift of that amount may result in disqualification of the recipient.

B. Discussion Regarding Honoraria

Unlike prior law, elected officials, candidates for local elected offices, and most public officials (87200 filers) are now prohibited from accepting any honoraria. Designated employees of a local government agency are prohibited from accepting honoraria from any source from whom he or she is required to report the receipt of income or gifts on his or her statement of economic interests. Cal. Gov't Code § 89502(c).

There are numerous regulations dealing with the honoraria ban. 2 Cal. Code of Regs. § 18930-18933.

In addition to payments for speeches or attendance, "honoraria" includes payments for an "article published." A violation can result if a public official accepts a payment for writing, being identified as an author of, or doing more than secretarial work in connection with an article that is: (1) nonfictional; (2) produced in connection with any activity other than the practice of a bona fide business, trade, or profession; and (3) published in a periodical, journal, newspaper, newsletter, magazine, pamphlet, or similar publication. An "article" does not include books, plays, or screenplays. 2 Cal. Code of Regs. § 18931.2.

Giving a speech, attending a meeting, and participating in a panel may also trigger the ban. A "speech given" means a public address, oration, or other form of oral presentation, including participation in a panel, seminar, or debate. 2 Cal Code of Regs. § 18931.1. A speech does not include a comedic, dramatic, musical, or other similar artistic performance.

"Attendance" means being present during, making an appearance at, or serving as host or master of ceremonies for any public or private conference, convention, meeting, social event, meal, or like gathering. 2 Cal. Code of Regs. § 18931.3.

Sometimes these activities do not result in the receipt of a "payment," or an exception to the term "honorarium" applies, and therefore, the ban does not apply. 2 Cal. Code of Regs. § 18932.4. These include:

- Free or discounted admission to conferences.
- Refreshments (food or beverages) and similar non-cash nominal benefits provided to an official and other attendees at such events.
- Payments for transportation within California and any necessary lodging and subsistence provided directly in connection with a speech, panel, seminar, or service, including but not limited to meals and beverages on the day of the activity.

- Payments from certain family members, provided that a member is not acting as an agency or intermediary for someone else.
- Campaign contributions, although other reporting requirements apply.
- Personalized plaques and trophies with an individual value of less than \$250.

Other payments do not result in the acceptance of prohibited honoraria, but may be reportable income. For example, payments received for a comedic, dramatic, musical, or other similar artistic performance are not a “speech given,” but they are reportable income. Payments received for publication of books, plays or screenplays are not for an “article published,” but they are also reportable income.

Most notably, earned income, is not an “honorarium.” Cal. Gov’t Code §§ 82030.5 and 89501(b)(1). Earned income means a payment for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting. Cal. Gov’t Code § 89501(b)(1).

Certain criteria must be met to establish that an official is practicing a bona fide business, trade, or profession (such as maintenance of business records, licensure, proof of teaching post) before a payment received for personal services which may meet the definition of honorarium would be considered earned income. *See* Cal. Code of Regs. "18932 -18932.3.

Also, the bona fide business, trade, or profession must generate income independent from the individual’s public office or employment. *Cochran* Advice Letter, No. A-96-015. And, the sole or predominant activity of the business, trade, or profession cannot be making speeches. 2 Cal. Code of Regs. §§ 18932.1 and 18932.3.

Finally, any payment made for transportation, lodging and subsistence that satisfies the requirements of Government Code Section 89506 are not an “honorarium.” However, these payments may be reportable gifts or income, depending on the facts.

An honorarium may be returned if it is not used and, within 30 days after receipt, is either returned to the donor or delivered to the State Controller for donation to the General Fund. If an official cannot comply with either of these requirements and the honorarium is not a payment of money, the individual may reimburse the donor or the donor’s agent or intermediary, if any, for the value or use of the honorarium. 2 Cal. Code of Regs. § 18933(b).

In addition, a payment which is not delivered to an official but is made directly to a bona fide charitable, educational, civil, religious, or similar tax-exempt, nonprofit organization is not an honorarium, if certain conditions are met.

- The donation is not made as a condition for the official’s speech, article, or attendance.

- The official does not claim the donation as a deduction for income tax purposes.
- The official is not identified to the nonprofit organization in connection with the donation.
- The donation does not have a reasonably foreseeable financial effect on the official or any member of his or her immediate family.

2 Cal. Code of Regs. § 18932.5.

Any person who makes or receives a prohibited honorarium, gift or expenditure is liable in a civil action brought by the FPPC for an amount of up to three times the amount of the unlawful honorarium, gift, or expenditure. Cal. Gov't Code § 89521.

C. Discussion Regarding Travel Expenses

A discussion of travel expenses begins with a review of Government Code Section 82030(b)(2) which defines “income” to include “gifts” but excludes: “Salary and reimbursement of expenses or per diem received from a state, local, or federal government agency, and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under section 501(c)(3) of the Internal Revenue Code.”

Excluded from the definition of “gift” in Government Code Section 82028(b)(1) are “informational material such as books, reports, pamphlets, calendars, or periodicals. No payment for travel or reimbursement for any expenses shall be deemed informational material.”

Travel expenses can either be: (1) reportable and limited to \$390; (2) reportable but not limited to \$390; (3) not reportable; or (4) a prohibited honorarium. Any travel payment of \$390 or more could subject an official to disqualification. Government Code section 89506 and Title 2 of the California Code of Regulations sections 18950.1-18950.4 should be consulted.

1. Third Party Travel Reimbursements

One problem area is when there is reimbursement by a third party. In determining how to treat third party travel reimbursements, a city attorney should refer to two advice letters. *Riddle* Advice Letter, No. A-89-200, and *Quan* Advice Letter, No. A-89-182. In these, the issue was whether the reimbursement which was received for travel expenses and per diem from the Anti-Defamation League of B'nai B'rith (“League”), a qualified educational and charitable organization under section 501(c)(3) of the Internal Revenue Code, was exempt from the definition of gift under the act. The facts were that the sheriffs of San Francisco and Alameda County, and seven other top law enforcement officers from the United States, participated with Israel police to share ideas on a variety of law enforcement matters.

After reviewing the provisions of the Act dealing with “income” and “gifts” and the respective exceptions, the FPPC concluded that the exclusion from the definition of “income” of travel

expense and per diem received from the charitable organization, applies only to payments made for “consideration” in the contract sense of that term. The burden was on the recipients of the reimbursement to show that they provided “consideration of” equal or greater value to that which they received. Unless the burden was met, the payment was a “gift.”

This is of particular consequence with the \$390 gift limit in place. While treating these payments as “income” can result in reporting and disqualification, a “gift” subjects an official to a potential violation of the gift limit.

Gifts to an Agency. In 1994, the Commission adopted section 18944.2, codifying for the most part, the concepts of the Commission’s opinion in the *Matter of Stone*, 3 FPPC 52 (1977). The issue was whether providing free air transportation in a private plane to a city attorney for attendance at a court appearance and a similar private plane trip to a city council member for attendance at a legislative hearing were reportable. The Commission concluded that the air transportation provided to the city attorney, at his request and in order to enable him to attend an appointment on city business in Southern California before a scheduled court appearance in San Francisco was for the benefit of the city and not reportable.

In order to ensure that a gift is to a city, and not to a public official, the factors set out in the regulation, rather than the Commission’s opinion should be followed:

- (a) The agency must receive and control the payment.
- (b) The payment must be used for official agency business.
- (c) The agency, in its sole discretion, must determine the specific official or officials who shall use the payment. However, the donor may identify a specific purpose for the agency's use of the payment, so long as the donor does not designate the specific official or officials who may use the payment.
- (d) The agency must memorialize the payment in a written public record which embodies the above requirements and which:
 - Identifies the donor and the official, officials, or class of officials receiving or using the payment;
 - Describes the official agency use and the nature and amount of the payment; and
 - Is filed with the agency official who maintains the records of the agency's statements of economic interests where the agency has a specific office for the maintenance of such statements, or where no specific office exists for the maintenance of such statements, at a designated office of the agency, and the filing is done within 30 days of the receipt of the payment by the agency.

It is important to remind public officials that gifts to a public agency cannot be made directly to the official. The Commission will not deem the requirements of the regulation to be met when a

public official seeks to comply with the requirements after they have received the travel payment.³²

[Note: At the time this text was published, the FPPC was considering significant amendments to Section 18944.2.]

2. FPPC's Treatment of Travel Expenses

The Commission's treatment of travel and related expenses can be summarized as follows:

- **Certain travel payments may not be subject to any gift limit or be reportable on a statement of economic interests.** These include:
 - ◇ Transportation **within** California provided to a public official directly in connection with an event at which he or she gives a speech, participates in a panel or seminar, or provides a similar service.
 - ◇ Free admission, refreshments, and similar non-cash nominal benefits provided to an official during the entire event (inside or outside California) at which he or she gives a speech, participates in a panel or seminar, or provides a similar service.
 - ◇ Necessary lodging and subsistence (inside or outside California), including meals and beverages, provided directly in connection with an event at which an official gives a speech, participates in a panel or seminar, or provides a similar service.
 - ◇ Travel payments provided to an official by the State of California, any state, local, or federal government agency, or a 501(c)(3) organization where he or she provides equal or greater consideration.
 - ◇ Travel payments made in connection with campaign activities.
- **Travel payments are subject to the \$390 gift limit and reporting, unless an exception applies.** The exceptions from the limit include:
 - ◇ Travel payments which are reasonably necessary in connection with a bona fide business, trade, or profession and which are tax deductible as a business expense. (These travel payments would be considered reportable salary, wages, and other income rather than gifts.)
 - ◇ Travel payments within the United States which are reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, **and** in connection with an event at which an official gives a speech, participates in a panel or seminar or provides a

³² This "exception" should be viewed with caution, if not outright suspicion. By meeting the several prongs of this regulation, the official may avoid being charged with a disclosable (or illegal) gift, however a subsequent (or prior) decision involving the donor could give rise to a common law conflict of interest; an allegation of bias; or an allegation of corruption (e.g., bribery).

similar service. Lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech or other service provided.

- ◇ Travel payments not in connection with a speech, participating in a panel or seminar, or providing a similar service, but which are reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, **and** which is provided by: (1) A government, governmental agency, foreign government, or government authority; (2) A bona fide public or private educational institution defined in section 203 of the Revenue and Taxation Code; (3) A 501(c)(3) charitable organization; and (4) A foreign organization that substantially satisfies the requirements for tax exempt status under section 501(c)(3) of the Internal Revenue Code.
- **If an exception to the \$390 gift limit applies, the disqualification rules may still apply.**

VII. Campaign Contributions

A. Section 84308

Government Code section 84308 disqualifies any "officer" of a public agency, who is running or has run for elective office, from participating in decisions affecting his or her campaign contributors. The law *disqualifies* the officer from participating in certain proceedings if the official has received campaign contributions of more than \$250 from a party, participant or their agents within the 12 months preceding the decision. It also requires *disclosure* on the record of the proceeding of all campaign contributions received from these persons during that period. In addition, section 84308 *prohibits* solicitation or receipt of campaign contributions in excess of \$250 during such proceedings, and for 90 days after the decision, from parties, participants or their agents.

EXAMPLE A

Sarah Smith is a candidate for the Smalltown City Council. Smith is also on the Smalltown Planning Commission. John Builder has a permit request pending before the planning commission. Under Section 84308, Smith is prohibited from soliciting or receiving any contribution of more than \$250 from Builder or Builder's agent. If Smith did receive a contribution of more than \$250 from Builder, Smith and Builder would be required to announce her disqualification and disclose the contribution in the record of the planning commission meeting. Smith would also have to disqualify herself from considering Builder's permit request unless she returns that portion of the campaign contribution in excess of \$250 within 30 days after learning of the contribution and Builder's pending permit.

Who is Covered?

Section 84308 covers all elected and appointed "officers" of an "agency" and their alternates, as well as candidates for elective public office. The term "officer" is very broadly defined under Section 84308. It includes the governing board or commission of any public agency, as well as the head of an agency.

The scope of the statute is narrowed considerably, however, by the definition of the term "agency." Due to exemptions from the definition of agency (discussed below), the law applies most often to appointed members of local boards and commissions, such as planning commissions.

Section 84308 primarily regulates *agencies*, *not* individuals. As a result, a person who is a member of an exempted agency (such as an elected city council), is covered by the law when he or she acts as a voting member of *another* agency (e.g., a JPA or regional transportation board).

What Agencies Are Not Covered?

Section 84308 expressly exempts from its coverage local agencies whose members are elected by the voters (e.g., city councils and county boards of supervisors)

The exemption for these agencies extends to *committees* of the agencies, if only members of the governing body of the agency are on the committee. It also applies when the governing body, *in its entirety*, sits as the governing body of another agency (e.g., a board of supervisors designates itself as the redevelopment agency for the county). In these cases, the officers are *not appointed* to the other agency. However, as stated above, if a member of an exempt agency also serves as an appointed member of another, non-exempt agency, the prohibitions of section 84308 do apply.

Section 84308 applies to city councilmembers who also serve as members of the City of Brea Redevelopment Agency, unless the redevelopment agency is made up of the city council in its entirety without any other members. (Markman I-94-223.)

In determining whether a board or commission is exempt for purposes of Section 84308, the focus should be on the actual make-up of the board or commission. For instance, the governing board of a sanitation district that may consist of both elected and appointed members, but which, in fact, consists solely of members of the board of supervisors, is exempt under section 84308. (Dixon A-96-203.)

Prohibited Conduct

Section 84308 prohibits officers from soliciting, accepting or directing campaign contributions of more than \$250 from any party, participant or agent of a party or participant, while a proceeding is pending before the officer's agency and for three months following the date of that decision. This prohibition applies even where the contribution is directed to *another* candidate. Similarly, a party, a participant, or an agent cannot make a campaign contribution of more than \$250 to an officer during the course of the proceedings and for three months following the decision.

FPPC regulation 18438.6 defines when behavior becomes "soliciting, accepting or directing contributions." In short, for section 84308 to apply, contributions must be made to and accepted by an officer for his or her own candidacy or controlled committee.

An officer "solicits" a contribution only if he or she knows or has reason to know that the person being solicited is a party or participant (or an agent of either) and personally requests the contribution or knowingly allows his or her agent to do so. A prohibited solicitation under section 84308 does not include a request made in a mass mailing to the public, at a public gathering or in a published newspaper or other vehicle of mass media.

A person "directs" a contribution if he or she acts as the agent of another person or committee, other than his or her own controlled committee, in accepting a contribution on behalf of, or transmitting a contribution to, such other person or committee.

A planning commissioner is prohibited under section 84308 from soliciting, accepting or directing contributions for a candidate for the state office of Secretary of State, if the person making the contribution is a party, participant or an agent of a party or participant in a proceeding before the planning commission. (Calvert A-94-263.)

B. Disqualification

An officer will be disqualified from participating in a decision when, prior to making the decision, he or she learns that a party or participant in a proceeding (either individually or with or through an agent) has made a contribution of more than \$250 to the officer within the preceding 12 months.

C. Returning Contributions

If the officer returns the contribution (or that portion of the contribution which is over \$250) within 30 days from the time he or she learns of the contribution and the proceeding, then disqualification is not required. (Regulation 18438.7 discusses an officer's knowledge of pending proceedings, parties and participants to the proceeding, and their contributions.)

EXAMPLE B

A developer has filed for a conditional use permit from the city's land use agency. The developer gave a land use agency officer a \$750 campaign contribution two months before he filed for the permit. The campaign contribution did not violate section 84308 since it was given prior to the developer's request for a permit (which initiates a proceeding under section 84308). Both the officer and the developer are required to disclose the contribution and the officer must announce the conflict and disqualify himself from considering the conditional use permit, unless the officer returns at least \$500 of the \$750 (reducing the amount to \$250) within 30 days of learning of both the contribution and the proceeding.

D. Disclosing Contributions on the Record

Prior to rendering any decision, each officer who received a campaign contribution of more than \$250 within the preceding 12 months from a party, participant or agent of a party or participant must disclose the fact on the record of the proceeding. If there is a public hearing, the officer should make the disclosure on the public record at the beginning of the hearing. However, if no public hearing is held, the disclosure should be included in the written record of the proceeding.

Likewise, a party or participant to a proceeding must disclose on the record of the proceeding any campaign contribution of more than \$250 made within the preceding 12 months by the party or participant, or his or her agent, to any officer of the agency. The FPPC has prepared sample disclosure forms for this purpose which you may call the agency to request. For parties that are business entities, the names of their parent organizations subsidiaries or otherwise related

business entities who have made a contribution to any officer of the agency must also be disclosed. (Govt. Code § 84308(d); 2 Cal. Code Regs. § 18438.8(b)). The contributions of parents and subsidiaries of the party, and those businesses otherwise related to the party, must be aggregated with those of the party. (2 Cal. Code Regs. § 18438.5.)

Proceeding

A proceeding involves an action to grant, deny, revoke, restrict or modify "licenses, permits, or other entitlements for use." (Reg. 18438.2.) Section 84308 defines the phrase "licenses, permits, or other entitlements for use" to mean proceedings on all business, profession, trade and land use licenses and permits, and other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises.

Examples of the types of decisions covered by the law include decisions on professional license revocations, conditional use permits, rezoning of real estate parcels, zoning variances, tentative subdivision and parcel maps, consulting contracts, cable television franchises, building and development permits, public street abandonments, and private development plans.

Decisions on general plans, general building or development standards or other rules of general application are not covered by section 84308. In addition, "proceedings" do not include purely ministerial decisions, in which no discretion is exercised.

The prohibitions of section 84308 apply to proceedings that are "pending" before the agency with which the officer is affiliated. A proceeding is pending when: (1) an application has been filed, the proceeding has been commenced, or the issue has otherwise been submitted to the jurisdiction of an agency for its determination or other action; and (2) the proceeding is of a type that the officers of the agency are required by law to make a decision about or the matter has been submitted to those officers for their decision. (2 Cal. Code of Regs. 18438.2(b).)

Once the staff of an agency has started reviewing a request for proposal ("RFP"), the contract proceeding has commenced and is pending before the agency. From that point forward (and until three months following the date a final decision is rendered), no officer of the agency may accept, solicit or direct a contribution in excess of \$250 from any participant who attempts to influence the review of the RFP. (Alperin A-96-083.)

Party

A party is any person (including a business entity) who files an application for, or is the subject of, a proceeding involving a license, permit or other entitlement for use.

When a closed corporation is a party (or participant) in a proceeding before a board, commission, or agency, the majority shareholder of the corporation is also treated as a party (or participant), and all prohibitions and disclosures required under section 84308 will apply to the majority shareholder. (Cal. Govt. Code §84308(d).)

Participant

A participant is any person who is not an actual party to the proceeding, but who:

(1) actively supports or opposes a particular decision (e.g., lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the officers of the agency); and (2) has a financial interest in the outcome of the decision. A person does not lobby, testify or otherwise act to influence the officers or employees of an agency by communications made to the public, other than those made in the proceedings before the agency. (2 Cal. Code of Regs. 18438.4(d).)

Paul Peters and Nancy North are neighbors. North has applied for a conditional use permit to allow her to conduct an auto repair business on her driveway. In opposing North's application before the planning commission, Peters testified that granting the permit would substantially reduce the fair market value of his property. He also presented a petition signed by 20 neighbors opposed to granting the permit. North is a party. Peters is not an actual party to the proceeding, but since he testified in opposition to North's request, and has a financial interest in the outcome of the proceeding, he is a participant. The neighbors who merely signed the petition are not participants.

Agent

An agent is an individual or firm who represents a party or a participant in a proceeding. If an agent is an employee or member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents. Campaign contributions made by a party or participant are aggregated with those made by the party or participant's agent within the 12 months preceding the decision or the period of the agency relationship, whichever is shorter. (2 Cal. Code of Regs. 18438.3.)

An attorney representing a party in a proceeding and that attorney's law firm are considered agents of the party. The law firm has a PAC that wishes to make contributions to an official who sits on the board before which the proceeding is occurring. If the law firm and the PAC are directed and controlled by a majority of the same persons, the contributions of the two entities will be aggregated for purposes of section 84308. If the combined contributions of the law firm and the PAC to the official would exceed \$250, the PAC's contribution would be prohibited. (Sutton A-95-156.)

A spouse is an agent for purposes of section 84308. If the spouse of an official solicits contributions of more than \$250 from a person the official knows or has reason to know is a party, a participant, or an agent of a party or participant, a prohibited solicitation will result. (Calvert A-94-263.)

A person is the "agent" of a party to, or a participant in, a proceeding only if he or she represents that person in connection with the proceeding. An attorney representing clients before the coastal commission is an agent of those clients. If the attorney's contributions made to a member of the coastal commission exceed \$250 within the prohibited time period, the official must disqualify himself from the proceeding. (Karas I-94-211.)

VIII. Mass Mailing

A mass mailing is more than 200 substantially similar pieces of mail in a calendar month. Government Code Section 82041.5. The Political Reform prohibits the use of public funds to pay for mass mailings. A mass mailing may be a videotape, record, button or a written document. 2 Cal. Code of Regs. § 18901(a)(1). The following chapter specifies the types of mailings that may not be paid for with public funds.

A. Regulation 18901

Section 89001 of the Political Reform Act provides, “No newsletter or other mass mailing shall be sent at public expense.” A literal reading of Government Code section 89001 suggests that all mass mailings involving public funds, irrespective of content or purpose, are prohibited. In response to a variety of questions concerning the distribution of tax notices, tax refund checks, community college schedules, sample ballots, and other mass mailings customarily sent by government agencies, the Fair Political Practices Commission adopted Regulation 18901 to clarify which mailings may be paid for with public funds and which may not.

Regulation 18901 is divided into three sections. Section (a) specifies the mass mailings prohibited by the Political Reform Act while sections (b) and (c) specify exemptions to the prohibition.

1. Regulation 18901(a)

Regulation 18901(a) provides that a mailing is prohibited only if it meets the following four requirements:

- a. The item must be delivered to the recipient.
- b. The item either:
 - ◇ features an elected officer affiliated with the City which produces or sends the mailing, or
 - ◇ includes the name, office, photograph, or other reference to the elected officer affiliated with the City which produces or sends the mailing and the mailing is prepared or sent in cooperation, consultation, coordination or concert with the elected officer’s consent;

- c. The cost of distribution is paid for with public funds or more than \$50.00 in public funds are used to pay for design, production or printing costs with the intent of the item being sent with public funds;
- d. More than 200 substantially similar items were sent in a single calendar month, excluding any item sent in response to an unsolicited request (see discussion in Section C of this chapter) and excluding any items excepted from the prohibitions.

2 Cal. Code of Regs. § 18901(a).

2. Delivery

Regulation 18901(a) only restricts items that are mailed or delivered, by any means, to a person's home, place of employment or business or post office box.

3. Association with an Elected Officer

An item features an elected officer if it either includes the elected officer's photograph or signature or singles out the elected officer by the manner of display of his/her name or office in the layout of the document. The layout of the document features the elected officer's name if it is emphasized through headlines, captions, type size, typeface, or type color. 2 Cal. Code of Regs. § 18901(c)(2). Under the regulation, if an item features an elected officer and more than 200 of these items are delivered to a person's home, office, or post office box, it cannot be paid for with public funds.

An elected officer is affiliated with the agency if he/she:

- is a member, officer, or employee of the agency, or of a subunit of the agency, like a committee;
- has supervisory control over the agency; or
- appoints one or more members of the agency.

2 Cal. Code Regs. § 18901(c)(1).

A mailing that is sent with the name, photograph, or signature of an elected officer affiliated with the city or agency cannot be paid for with public funds if the mailing was prepared or sent in cooperation, consultation, coordination, or concert with the elected officer. 2 Cal. Code of Regs. § 18901(a)(2)(B). If the mailing has not been prepared or sent in cooperation, consultation, coordination, or concert with the elected officer, use of his/her name is permitted provided the officer is not featured in the mailing. However, use of his/her signature is still prohibited. 2 Cal. Code of Regs. § 18901(a)(2)(A). Thus, if the mailing is prepared by agency staff, completely independent of the elected officer affiliated with the agency, the elected officer's name may appear in the mailing. However, his name may not be singled out for attention by the manner of display.

A mailing that does not include any reference to an elected officer who is “affiliated” with the agency that produces or distributes it is not subject to the restrictions of the regulation. 2 Cal. Code of Regs. § 18901(a)(2).

4. Use of Public Funds

As stated above, Government Code section 89001 prohibits the use of public funds for mass mailings or newsletters. Regulation 18901(a)(3) specifies that a mass mailing is sent at public expense within the meaning of Section 89001 if either 1) the cost or distribution of the mailing is paid for with public moneys, or 2) more than \$50.00 of public moneys are used to pay for the costs of design or production of the item, and 3) the design or production was done with the intent of mailing the item. Thus, items designed, produced and distributed at private expense are not subject to the restrictions of Regulation 18901.

5. Definition of “Substantially Similar”

Two items are substantially similar if any of the following applies:

- The items are identical, except for changes necessary to identify the recipient and his/her address; or
- The items are intended to honor, commend, congratulate, or recognize an individual or group, or individuals or groups, for the same event or occasion; are intended to celebrate or recognize the same holiday; or are intended to congratulate an individual or group, or individuals or groups, on the same type of event, such as birthdays or anniversaries; or
- Both of the following apply to the items mailed:
 - ◊ Most of the bills, legislation, governmental action, activities, events or issues of public concern mentioned in one item are mentioned in the other.
 - ◊ Most of the information contained in one item is contained in the other.

2 Cal. Code of Regs. § 18901(c)(3)(A)(1)-(3).

Under the regulation, enclosure of the same informational materials in two items mailed does not, by itself, mean that two items are substantially similar. Informational materials include bills, public documents, or reports. 2 Cal. Code of Regs. § 18901(c)(3)(B).

B. Exceptions to 18901(a)

Both Sections 18901(b) and (c) set forth exceptions to Section 18901(a)'s prohibition on mass mailings. Section 18901(b) creates exceptions for mailings where an elected officer's name is incidentally included in the item sent. Section 18901(c) creates exceptions for mailings that are sent in response to unsolicited requests.

1. Section 18901(b) Exceptions

Following is a general description of the types of exceptions provided for in Regulation 18901(b):

a. Letterhead/Roster Listing

The inclusion of the elected officer's name or office in stationery letterhead, business cards or in a roster listing all of the elected officers in the agency is not prohibited. Use of an elected officer's name and address in the envelope portion of a proposed mailing and on a detachable postcard falls within this exception. This exception does not permit the inclusion of an elected officer's photograph or signature.

b. Press Releases

Press releases disseminated to the press by the agency are not within the prohibition on mass mailings.

c. Inter/Intra-Agency Communications

The prohibition does not apply to communications sent in the ordinary course of business between agencies or within an agency to employees, officers, deputies, and other staff. However, the prohibition does apply to communications sent to former employees, officers, deputies, and other staff of the agency.

d. Payment/Collection of Funds

Items sent in connection with the payment or collection of funds, such as tax bills, refund checks, and similar documents, may include the elected officer's name, title, or signature if necessary to the payment or collection of funds.

e. Essential Program Mailings

Items sent to program recipients, where the mailing is essential, may include the elected officer's name, title, or signature if necessary to the functioning of the program.

f. Legal Notices

Items required to be sent by law, such as sample ballots, may include the elected officer's name, title or signature if necessary to the notice.

g. Directories

General agency directories listing all the individuals in the agency may include an elected officer's name and title in the same type size, typeface, and type color as all other individuals listed.

h. Meeting Notices

A single mention of an elected officer's name may be included in an agency's announcement of an officer agency event. The event must be one for which the agency is providing facilities, staff, or other financial support. A single mention is also permitted in a notice sent to an elected officer's constituents concerning a public meeting. The elected officer must plan the event, including making the financial arrangements; he or she must also attend and conduct the meeting; and the meeting must relate to the elected officer's officer duties.

i. Agendas and Other Required Writings

The elected officer's name and title may appear in agendas and other writings required to be made available by specified statutory provisions.

C. Section 18901(c)(4) Unsolicited Request Exceptions

Unsolicited requests do not fall within the prohibition on mass mailings; they include:

- a. A written or oral communication (including a petition) which specifically requests a response and which is not requested or induced by the recipient elected officer or by any third person acting at his or her behest.
- b. An unsolicited request for continuing information. For purposes of the regulation, the continuing information request is considered unsolicited for a period not to exceed 24 months. An unsolicited request to receive a regularly published agency newsletter shall be deemed an unsolicited request for each issue of that newsletter.
- c. A communication sent by a newsletter or mass mailing recipient in response to an agency notice indicating that in the absence of a response, his/her name will be purged from the mailing list for the newsletter or mass mailing. The agency notice will not be deemed to be a solicitation if it is written in the following language, "The law does not permit this office to use public funds to keep you updated on items or interest unless you specifically request that it do so."

- d. A communication sent in response to an elected officer's participation at a public forum or press conference, or to his/her issuance of a press release.
- e. Requests for materials published in newspapers or other periodicals that are not published by elected officers.

2 Cal. Code of Regs. § 18901(c)(4)(A)-(E).

D. Method of Analysis

To determine whether a mailing falls within 18901(a) prohibitions, the following questions should be asked.

1. Is this mailing a mass mailing, *i.e.*, are 200 substantially similar pieces of mail being sent out in a single calendar month?
 - Was the mailing pursuant to an "unsolicited request"?
2. Will these items be delivered to the recipient at his/her:
 - home,
 - business, or
 - post office box?
3. Do these items either:
 - Feature an elected officer affiliated with the City; or
 - Include the name, office, photograph, or other reference to the elected officer affiliated with the City; and
 - ◊ Did the city produce or send the mailing; and
 - ◊ Were these items prepared or sent with the elected officer's consent?
4. Was the cost of distribution paid for with public funds; or
 - Did more than \$50.00 of public funds go into the design or production of the item and were these costs paid with the intent of the item being sent with public funds?
5. Do any of the 18901(b) or 18901(c) exceptions apply to this mailing?
 - Is the mailing a response to an unsolicited request?
 - Is the elected official's name only contained in a letterhead/roster listing on the mailing?
 - Is the elected official's name contained in a press release?
 - Is the mailing part of inter/intra-agency communications?
 - Is the mailing an attempt to obtain payment or collection of funds?
 - Is the mailing essential to the functioning of a program?
 - Is the mailing a legal notice?
 - Is the mailing a general agency directory?
 - Is the mailing a meeting notice?
 - Is the mailing an agenda or similarly required writing?

After answering these questions, the following decision rules should be applied.

- If the answer is no to any of questions 1-4, the mailing can be paid for with public funds.
- If the answer to questions 1-4 is yes and the answer to question 5 is no, the mailing cannot be paid for with public funds.
- If the answer to questions 1-4 is yes and the answer to question to 5 is also yes, the mailing can be paid for with public funds.

E. FPPC Interpretation of Rules

The following is a summary of FPPC formal advice letters which address the mass mailing regulations.

1. Scope of Applicability of Mass Mailing Provisions

The mass mailing provisions of the Act are applicable to all state and local governmental agencies in California, including state commissions such as the Commission for Economic Development. Letter to Ann Mills, 1991, A-91-344.

These provisions are not applicable to the Internet. According to an FPPC formal advice letter, a web page is not currently considered a mass mailing. Letter to Christine D. Lovely, 1998, A-98-017.

2. Regulation 18901(a)

a. Delivery

Section 89001 only restricts items that are mailed or delivered, by some means, to a person's home, office, or post office box. If items are set out for the public to pick upon on their own, or are handed out in a public area, the restrictions of the regulation do not apply. Letter to Brenda G. Anaya, 1991, A-91-215. Thus, brochures regarding state services for individuals with developmentally disabled children which are distributed to local agencies do not fall under the mass mailing prohibitions of the Act because they are not delivered to individual recipients at their houses, places of employment, or post office boxes. Letter to Michael B. Mount, 1995, A-95-225.

b. Association with an Elected Officer

A city may include an article about a community project in a city newsletter in which an elected officer participated as a volunteer provided the newsletter does not make any reference to the officer or feature him. Letter to Helen Fisicaro, 1996, A-96-230. Additionally, the announcement and registration materials for a conference on infant and toddler health care sponsored by a state

agency may contain the words “A Governor’s Conference” in the title without violating the mass mailing prohibition of the Act. Letter to Mike Mount, 1995, A-95-187.

However, an agency newsletter that contains an interview of one of its elected officials is a prohibited mass mailing. Letter to Cindi Norton, 1992, A-92-295. Similarly, a city may not include the text of the mayor’s presentation of his state of the city report in its newsletter. Because the newsletter is a mass mailing prepared in cooperation, consultation, coordination, or concert with the mayor, any use of the mayor’s name, photograph or office, or any reference to him is prohibited. Letter to Peter M. Thorson, 1992, A-92-022.

c. Use of Public Funds

The mass mailing restrictions of the Act prohibit a county supervisor from using public funds to send more than 200 mailings to his new constituents and former constituents informing them of the new boundaries of his supervisorial district. However, the restrictions would not prohibit a supervisor from sending a mailing with this information to all registered voters of the county on county letterhead that included a roster listing of all elected supervisors. Letter to Gaddi H. Vasquez, 1991, A-91-505.

3. Section 18901(b) Exceptions

a. Letterhead/Roster Listing

A sanitary district board’s informational letter to ratepayers which includes the board members’ name in the letterhead and refers to the “board” in the text of the letter does not violate the mass mailing restrictions of the Act. Letter to James Martin, 1991, A-91-423. However, a board member sending mailings pursuant to the “letterhead” exception to a mass mailing may not include “A message from...” on letterhead and the board member may not request that the mailing be copied by recipients and mailed to more people. Letter to Gloria White Brown, 1996, A-96-097.

Mastheads are treated the same way as letterheads. Thus, a city does not violate mass mailing prohibitions by listing the names of the mayor and city council members on the masthead of a magazine published by the city’s parks and recreation department, provided that the names appear along with those of all other elected officers having authority over the department and provided that all names appear in the same type size, typeface, type color, and location. Letter to Barbara R. Gilman, Oxnard, 1990, A-90-668.

b. Inter/Intra-Agency Communications

An office of education newsletter distributed in bulk to schools by way of courier qualifies as an inter-governmental mailing sent in the normal course of business. Letter to Carl Waggoner, 1992, A-92-247.

Intra-agency communications sent in the normal course of business to employees, officers, deputies and staff of the sheriff's office may also be sent to unpaid staff and will still be exempt from Regulation 18901 because the unpaid staff of the office perform functions similar to salaried officers and require the same level of training and information. Letter to Paul R. Curry, 1992, A-91-538.

c. Unsolicited Request Exceptions

A person who subscribes to newspaper or other periodicals has made an unsolicited request for materials published in those publications. Thus, the mass mailing restrictions do not apply to advertisements, letters, public reports, or annual reports placed in newspapers of general circulation. Letter to Donna S. Sluder, 1993, A-93-086; Letter to Joy A. Warren, 1993, A-93-152, Letter to Steve Lipton, 1992, A-92-476.

City directories are "solicited requests" and not within the unsolicited request exception where the city announces the availability of the director in utility bill inserts. Letter to Juando K. Lowder, 1995, A-95-223.

F. Conclusion

Before sending out a mass mailing, regulation 18901's provisions should be closely scrutinized. What may appear to be a letter validly paid for with public funds may violate the mass mailing provisions. For instance, a mayor in a local town sent out a letter on her stationery that alerted residents to the possible consolidation of water and sanitary districts. As a result of the mass mailing prohibition on letters that refer to an elected official and are prepared in cooperation with the elected official, the mayor was forced to reimburse the city for the cost of the mailing. In order to avoid situations like these, one should not forget to review section 18901.

SENDER IDENTIFICATION FOR MASS MAILINGS

Mass mailings are more than 200 substantially similar pieces of mail sent by an officeholder, candidate or committee in a calendar month. The sender of a mass mailing is the candidate or committee who pays for the largest portion of the mailing.

Example:

The ABC Homeowner's Association paid \$500 for a mailer supporting I.M. Winner, a school board candidate. The mailing was sent at the behest of Mr. Winner, and he paid \$200 for the postage to send the mailer. Since the ABC Homeowner's Association was not an existing committee, nor did it qualify as a committee when it sent the mailer, Mr. Winner must be identified as the sender of the mass mailing.

Identification Requirements

The sender must be identified on the outside of the mailing in the following manner:

Name
Address
City

At least six point type
Contrasting color or print style
Name of controlling candidate, if applicable

P.O. Box may be used if street address is listed on the committee's Form 410 filed with the Secretary of State

NOTE: If two or more officeholders, candidates or committees pay an equal share of the cost of a mailing, it must identify at least one on the outside of the mailing and all must be identified on the inside.

Exceptions

The following information is not required to be included in the sender ID:

- Committee's identification number
- Name of treasurer or printer
- The words "paid for by"

The FPPC does not regulate the content of mailings (i.e. false or misleading statements). The information discussed above is required under state law. Candidates and committees active in local elections should contact the local elections offices for information concerning local rules.

IX. Local Conflict of Interest Laws

A. Introduction

The purpose of the Conflict of Interest provisions of the Political Reform Act (“PRA” or “the Act”) is to prevent public decision makers from participating in government decisions in which they have a personal, financial stake. This purpose is primarily attained through the requirement that public officials who have a personal, financial interest in a decision disqualify themselves from the decision making process. The PRA also advances its purpose by requiring public officials and employees to disclose financial interests which may be impacted by their public agency’s decisions. The disclosure requirement advances this purpose in two ways. First, it serves to remind the public official of their private interests which may be impacted by their public acts. Second, because disclosure statements are public records, the requirement provides the public with the opportunity to insure compliance with the disqualification rule.

The PRA specifically requires members of city councils and planning commissions, as well as city managers, city treasurers, and city attorneys to disclose specified financial interests. *See* Cal. Gov’t Code §§ 87200-87210. The many other public officials and employees not covered by these provisions are subject to disclosure requirements set forth in local conflict of interest codes which local government agencies are required to adopt under the PRA.

This portion of the materials will address the PRA’s requirements relating to the adoption of local conflict of interest codes. The discussion will first address the procedures for adopting a local conflict of interest code and the required substantive elements for such codes. The discussion will then describe the requirement and process for updating conflict of interest codes. Next, the materials will discuss an alternative method for complying with these requirements provided by the FPPC through its “model code.” Finally, these materials will address enforcement mechanisms provided within the PRA to achieve compliance with these requirements.

A. Adoption and Promulgation of a Conflict of Interest Code

Government Code section 87300 requires every agency to adopt and promulgate a conflict of interest code. The discussion that follows describes the procedures the PRA requires local agencies to follow in adopting their conflict of interest codes, as well as the substantive requirements which must be incorporated in the code.

1. Procedure for Adopting Conflict of Interest Codes

The first issue encountered in interpreting the PRA requirements concerning the preparation of a conflict of interest code involves who prepares and proposes the code. The Act requires every “agency” adopt and promulgate a code. Cal. Gov’t Code § 87300. The term “agency” is defined as including any “local government agency.” Cal. Gov’t Code § 82003. This term is in turn defined as including, among other things, cities and any departments, divisions, commission, or board of a city. This would lead one to conclude the PRA requires a conflict of interest code be adopted for each city department. This conclusion is supported by the language in section 87301 which provides as a policy of the Act “. . . that Conflict of Interest Codes shall be formulated at the most decentralized level possible, but without precluding intra-departmental review.”

In the author’s experience with medium to small sized cities, adoption of a conflict of interest code for each department is atypical. Usually, the code is either prepared or reviewed by the city attorney, or some other official, who in turn makes recommendations for the adoption or amendment to the code to the city council. The city council then adopts the code as the conflict of interest code for the city as a whole.

This practice should be permissible, since section 87301 goes on to provide “any question of a level of a department which should be deemed an agency for purposes of section 87300, shall be resolved by the code reviewing body” (i.e. the city council). By approving a citywide conflict of interest code, a council arguably has determined that a citywide conflict of interest code is most appropriate.

The PRA also establishes procedural requirements for the time period within which an initial conflict of interest code must be adopted. The Act requires a new city or city department to provide a proposed conflict of interest code to the city council no later than six months after the new city or department comes into existence. Within ninety (90) days after receiving it, the city council must either approve the proposed conflict of interest code as proposed, or as revised by the council, or return it with directions to revise and resubmit. Any proposed code which has been returned with directions to revise must be resubmitted to the city council within 60 days. When a proposed conflict of interest code has been revised and resubmitted, it must be approved or approved as revised in a manner deemed appropriate by the city council. Cal. Gov’t Code § 87303.

Practice Pointer - New Law:

Section 87302.6 was added to the PRA to ensure timely filing of disclosure statements by officials when a new agency has no approved code. Pursuant to the statute, recently adopted regulation 18754 generally requires members of a governing board or commission of a state or local agency created on or after January 1, 2003, to file statements of economic interest pursuant to Govt. Code §§ 87200 – 87210, prior to the inclusion of the member’s position within an approved conflict of interest code in effect for that board or commission. Assuming office statements are to be filed within 30 days after assuming office. Annual and leaving office statements are to be filed in the same manner that such statements would be filed by an official listed under Gov’t Code § 87200. Once the position is included in an approved conflict of interest code, the member’s filing obligations under regulation 18754 are superseded by those imposed by the code. (See *Dresser Advice Letter*, No. A-02-249.)

2. Substantive Requirements for Conflict of Interest Codes

In addition to establishing the procedural requirements for the adoption of conflict of interest codes, the PRA sets out in great detail certain substantive requirements which must be provided in all city conflict of interest codes. The required elements for a conflict of interest code are outlined in Government Code section 87302. A local conflict of interest code must do all of the following:

- a. The code must list those positions within the city, other than those listed in section 87200, which involve making or participating in the making of decisions which may foreseeably have a material financial effect on any economic interest.
- b. The code must specify the types of economic interests (i.e. investments, real property interests, sources of income, business positions) which might be impacted by the decisions made by designated employees and require those interests to be reported.
- c. The code must require the filing of statements disclosing all reportable interests as follows:
 - 1) within 30 days after the effective date of the conflict of interest codes, or code amendments (“Initial Statement”);
 - 2) within 30 days after assuming office by a new employee (“Assuming Office Statement”);
 - 3) at the time specified in the conflict of interest codes, file an annual statement describing reportable interests held or received at any time during the prior calendar year (“Annual Statement”); and
 - 4) within 30 days of leaving office, the filing of a statement by any employee leaving the city disclosing his or her reportable interests held or received from the date of the employee’s last disclosure statement to the date of leaving office (“Leaving Office Statement”).

Additionally, a conflict of interest code must require a designated employee to disqualify himself or herself from participating in any decision which may materially affect the financial interests held by the employee. A code shall not require disqualification of a designated employee with respect to any manner which could not legally be acted upon or decided without the designated employee's participation.

The PRA grants broad discretion in cities in the development of local conflict of interest codes. However, this discretion is not unlimited. Out of apparent concern for the privacy interests of lower level employees, the PRA requires cities to exercise some care in crafting their disclosure obligations. Thus, the Act expressly prohibits the approval of the code which "fails to adequately differentiate between designated employees with different powers and responsibilities." Cal. Gov't Code § 87309(b). Thus, it appears a local conflict of interest code which merely requires all designated employees to disclose all financial interests could be subject to challenge.

For example, a person occupying a position with responsibility for purchasing equipment, may reasonably be required to disclose their business investments and sources of income. However, it would appear unreasonable to require this person to disclose their interests in real estate. Under Government Code § 87307, a person in this situation could petition their jurisdiction for an amendment to the agency's conflict of interest code. Pursuant to FPPC rules, the city could suspend the application of the disclosure rule pending the appeal, unless the city finds that the waiver would not be in the best interest of the agency or the public. 2 Cal. Code of Regs. § 18737.

3. *In re Siegel*: Non-Profit Corporations as Local Government Agencies

The FPPC has found that under very broadly defined circumstances, non-profit corporations qualify as a "local government agency" and are thus subject to the disclosure and disqualification provisions of the PRA. The FPPC opinion *In Re Siegel* developed four criteria to make this determination:

- (1) Whether the impetus for formation of the corporation originated with a government agency;
- (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
- (3) Whether one of the principle purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
- (4) Whether the corporation is treated as a public entity by other statutory provisions.

(*In Re Siegel*, (1977) 3 FPPC Ops. 62 [directors of non-profit water development corporation were public officials].) Conversely, *In re Leach* (1978) 4 FPPC Op. 48 determined that a chamber of commerce and a downtown business association were not local government agencies as both were established prior to contracting with the city, both received most funding from

private sources and citing tax laws, neither were treated as “public” by other statutory provisions.

Since issuing *Siegel*, in the City of Berkeley alone the Commission has determined that a housing development corporation (Albuquerque Advice Letter, No. A-88-422), a PEG access cable TV corporation (Gelb Advice Letter, No. I-92-624), a corporation devoted to energy conservation (Rasiah Advice Letter, A-01-020) and a resident housing council (McKinney Advice Letter, A-01-145) all constituted local government agencies. The Albuquerque Advice letter found that the fourth criterion was unnecessary to make this finding. Further, the Rasiah advice letter indicated that even if the fourth and first criteria were not met, the non-profit at issue would still constitute a local government agency as it met the remaining criteria.

On the other hand, public entities commonly assist in the formation of non-profit corporations such as the “Friends of...” when lobbied to do so and frequently fund these same organizations in substantial part despite having no control over their activities. Furthermore, virtually anything a non-profit does is also something that government has the authority to do, as public entities have broad power to undertake actions for the public good and have historically exercised that power. However, these facts have apparently not dissuaded the FPPC from broadly applying *Siegel* and its progeny. Accordingly, until *Siegel* is overruled or an implementing regulation focusing on the degree of actual governmental control over such non-profits is promulgated,³³ many independent non-profit corporations may constitute local government agencies in the eyes of the FPPC.

C. Requirement to Keep Conflict of Interest Codes Current

The drafters of the PRA were mindful that government agencies operate in an ever- changing environment. As the demands for certain types of public services fluctuate over time, so do the staffing levels of an efficient public agency. In consideration of this reality, the PRA contains two separate provisions requiring local agencies to revise their conflict of interest codes to reflect changes in agency staffing.

For example, Government Code Section 87306 requires agencies to amend their conflict of interest codes when a revision is necessary to address “changed circumstances.” This section specifically cites “the creation of new positions” and “changes in the duties assigned to existing positions” as changes requiring a code amendment. The required code amendments are to be provided to the code reviewing body within 90 days after the circumstances requiring the change have become apparent.

The requirement to amend an agency’s conflict of interest code to address changing circumstances is part of the original PRA adopted by voter initiative in 1974. In 1990, the state legislature apparently perceived a lack of adequate attention to this requirement on the part of

³³ An attempt to enact such a regulation was made in 1996 but the regulation adoption process was never completed due to the overwhelming burdens imposed on the Commission to construe, defend and implement Proposition 208.

local agencies. In that year, the legislature adopted section 87306.5. This section provides that by July 1st of every even numbered year the code reviewing body must direct the agencies subject to their jurisdiction to review their conflict of interest codes to determine if circumstances have occurred requiring amendments to the code. If such changed circumstances are noted, the agency must propose and submit a revised conflict of interest code. If no changed circumstances have occurred, the head of the local agency shall provide a written statement to that effect to the code reviewing body by October 1st of the same year.

The FPPC sends out a reminder of this requirement during June of each even numbered year to city attorneys and to city clerks.

- **The FPPC's Model Code**

The FPPC has taken significant steps to simplify the work for local agencies to adopt an adequate conflict of interest code, and to keep the conflict of interest code current. Pursuant to authority provided in the PRA, the FPPC has promulgated regulations implementing the act. These regulations are found in Title II, division 6 of the California Code of Regulations, sections 18110 *et seq.* Section 18730 contains a model conflict of interest code which when adopted by a local agency satisfies, in part, the requirements of Government Code section 87300.

The conflict of interest code provided in Section 18730 contains the required elements described in Government Code Section 87302(b) and (c). The model code describes the types of disclosure statements that covered officials are required to file, and contains an appropriate disqualification provision. To complete the process in establishing a conflict of interest code, the agency must develop an appendix to the code to:

1. list those positions the agency has determined make or participate in the making of decisions which may foreseeably have a material financial effect on the designated employee's economic interests;
2. describe the types of economic interests for each of the positions listed (i.e., investments, business positions, real property interests, sources of income) the designated employee must disclose.

Adoption of a local conflict of interest code in this manner is a convenient method for satisfying the city's obligations under the PRA. By adopting the code, the cities can be certain it meets the substantive requirements of section 87302. Moreover, adoption of the FPPC's model code simplifies the process of updating the code when necessary. The FPPC will modify the substantive provisions of the code stated in section 18730 when necessary to meet the requirements of changes in the law. The local agency need only concern itself with insuring the appendix accurately describes positions subject to the disclosure requirement, and describes what level of disclosure is required of those positions.

- **Enforcement Provisions**

The PRA contains several provisions aimed at insuring compliance with the requirements to adopt and maintain sufficient local agency conflict of interest codes. Section 87308 provides for judicial review of any action of the code reviewing body taken under the local conflict of interest code provisions of the PRA. An action seeking review under this section may be brought by the FPPC, the local agency, an officer, employee, member, or consultant of the agency, or by a resident of the jurisdiction.

As stated above, Government Code section 87303 requires a new agency to provide the conflict of interest code to its code reviewing body within six months of the agency's creation. Under section 87304, if the agency fails to meet this deadline, and if after 90 days following the expiration of this deadline, the code reviewing body fails to take appropriate action, the FPPC may take appropriate action, including the adoption of a conflict of interest code for the agency. In addition, if six months have elapsed from the time the agency is required to submit a proposed conflict of interest code to its code reviewing body, and no conflict of interest code has been adopted, the superior court can order that appropriate action be taken. Cal Gov't Code § 87305. Appropriate action can include ordering the code reviewing body to adopt a conflict of interest code prepared by the court.

Similarly, Government Code section 87306 provides for an action in superior court to enforce a local agency's requirement to amend its conflict of interest code in response to changed circumstances. Under this statute, the superior court may order the agency to adopt the appropriate amendment, if the amendment has not been adopted after nine months following the occurrence of the circumstances requiring the code amendment.

X. Enforcement Actions

A. Responsibility for Enforcement

Enforcement of public officials' obligations under the Political Reform Act can take several forms:

1. Criminal Prosecutions

The Attorney General has jurisdiction over criminal prosecutions with respect to state agencies, lobbyists and state elections. The district attorney of any county has concurrent jurisdiction with the Attorney General for violations occurring in the county is confined to violations occurring with the county. Cal. Gov't Code § 91001(a).

An elected city attorney of a charter city has jurisdiction over criminal prosecutions for violations occurring within the city. Cal. Gov't Code § 91001.5.

2. Civil Actions

The Fair Political Practices Commission has civil jurisdiction over the state or any state agency except the Commission itself. Cal. Gov't Code § 91001(b).

The Attorney General has civil jurisdiction over the Commission. Cal. Gov't Code § 91001(b).

The district attorney has jurisdiction over any other agency, but can designate in writing that the Commission bring the action with regard to any violation for which an action could be brought by a voter or resident of the jurisdiction (i.e., reporting, campaign, lobbyist and conflict of interest violations). Cal. Gov't Code § 91001(b).

The elected city attorney of any charter city may bring civil actions for violations occurring within the city. Cal. Gov't Code § 91001.5.

A person residing in the jurisdiction may bring a civil action for reporting, campaign, lobbyist or conflict of interest violations, after the person notifies the agency with enforcement authority and the agency declines to pursue the case. Cal. Gov't Code §§ 91004, 91005, and 91007.

3. Administrative Actions

The Commission has the authority to bring an administrative action for any violation of the Act. Cal. Gov't Code § 83116.

An employee who violates the disclosure or conflict of interest sections of the Act is subject to discipline by the employing agency, including dismissal consistent with that agency's personnel rules and applicable civil service laws and regulations. Cal. Gov't Code § 91003.5.

4. Injunctions

A person residing in the jurisdiction may sue to enjoin violations or to compel compliance with the provisions of the Act. Cal. Gov't Code § 91003.

B. Penalties

1. Criminal

A knowing or willful violation of the Act is a misdemeanor. Cal. Gov't Code § 91000(a).

A violator may be fined, for each violation, the greater of \$10,000 or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received. Cal. Gov't Code § 91000(b).

A person convicted of a misdemeanor under the Act is barred from being a candidate for any elective office or acting as a lobbyist for four years following the conviction. Cal. Gov't Code § 91002.

2. Civil

A person who violates the reporting requirements of the Act is subject to a civil fine not more than the amount or value not properly reported. Cal. Gov't Code § 91004.

A person who makes a cash contribution or expenditure or anonymous contribution in violation of the Act is liable in a civil action for an amount up to \$1,000 or three times the amount of the unlawful contribution or expenditure, whichever is greater. Cal. Gov't Code § 91005(a).

A state lobbyist or lobbying firm who makes a gift in violation of the Act is liable in a civil action for an amount up to \$1,000 or three times the amount of the unlawful gift, whichever is greater. Cal. Gov't Code §§ 91005(a), 86201, 86204. .

A person who makes or receives an honorarium, gift or expenditure in violation of the requirements of the Act, is liable in a civil action brought by the Commission for an amount of

up to three times the amount of the unlawful honorarium, gift, or expenditure. Cal. Gov't Code § 89521.

Any designated employee or public official specified in section 87200, other than an elected state officer, who realizes an economic benefit as a result of a violation of a disqualification provision is liable in a civil action for an amount of up to three times the value of the benefit. Cal. Gov't Code § 91005(b).

3. Administrative

A person who violates any provision of the Act is subject to an administrative order to cease and desist violation of the Act; to file any reports or statements as required, and to pay a fine of up to \$5,000 per violation. Cal. Gov't Code § 83116.

In addition to all other penalties and remedies, any person failing to timely file any statement or report, as required by the Act shall be liable to pay to the filing officer the sum of \$10 per day for each day the statement is late. Cal. Gov't Code § 91013.

4. Other

Attorneys' fees and court costs may be awarded by the court to a prevailing plaintiff or defendant (other than an agency). Cal. Gov't Code § 91012.

XI. Public Identification of Conflicts

A. Introduction

In 2002, the state legislature adopted public identification requirements that apply only to Government Code § 87200 filers. These are addressed in Section B, below. Nevertheless, there are other disclosure/identification requirements in the law, including public identification requirements in Government Code Section 1090 et seq. and Government Code § 84308 discussed in this text.

B. Public Identification of Conflicts for Section 87200 Filers

Section 87105 of the Government Code and Regulation 18702.5 now require certain public officials to publicly announce a disqualifying conflict of interest. The law applies to a public official who holds an office specified in Government Code § 87200 (members of planning commissions, board of supervisors, district attorneys, county counsels, county treasurers, chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities and other public officials who manage public investments and the candidates for any one of these offices at any election).

The “public identification” of the conflict is required when the official (1) has a financial interest in a decision within the meaning of Government Code § 87100; and (2) the governmental decision relates to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act or the Brown Act.

These public identification requirements do not apply to filers designated only under an agency’s local conflict of interest code pursuant to Government Code §§ 87300, 87302.

C. Public Identification for All Political Reform Act Filers

1. Permissive Disclosure

Section 18702.1(a)(5) provides that when the determination not to act occurs due to the official’s financial interest, the official’s determination may be accompanied by an oral or written disclosure of the financial interest.

a. Abstention/Quorum

When an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified, his or her presence shall not be counted towards achieving a quorum. 2 Cal. Code of Regs. § 18702.1(b)

b.

During a closed session meeting of the agency, a disqualified official shall not be present when the decision is considered or knowingly obtain or review a recording or any other non-public information regarding the governmental decision. 2 Cal. Code of Regs. § 18702.1(c)

c. Comment to Section 18702.1 – Local Rules

This section provides that nothing in this section authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dais and/or leave the chambers.

Practice Pointer:

Since the city manager has control over most if not all of the non-87200 filers, it is probably best to have either an official city policy adopted by the city council or an administrative instruction approved by the city manager which requires persons covered by the permissive disclosure sections to step down from the dais or staff table and leave the room. This will avoid the possibility that they may be asked a question, passed a note or give the impression to the public that they are somehow participating.

2. Mandatory Disclosure – Public Identification**a. Historical Background**

Prior to 2001, public disclosure of the reasons for disqualification of all filers was required by commission regulations and advice letters. As part of the Phase 2 portion of the regulation updating/revision process, the updated regulation which became effective in February 2001 made the announcement of disqualification **permissive** and left to the local agency rules whether an individual would have to announce and/or leave the dais or the meeting room.

The legislature acted in 2002, adopting AB 1797 (Harmon) which created Government Code § 87105 and required all 87200 filers to:

1. Publicly state the nature of the conflict in sufficient detail to be understood by the public.
2. Recuse himself/herself from discussing and voting.
3. Leave the room until it is over, unless the item is on the consent agenda.
4. The official may be allowed to address the agency as a member of the public.

Although the League had significant input into Assemblymember Harmon's bill, some ambiguities remained. In an effort to clarify how disqualification would work in practice, the FPPC adopted Regulation 18702.5 which became effective June 10, 2003. This regulation provides clear guidance on the manner in which 87200 filers must publicly announce and record their disqualification. It provides as follows:

b. Content and Timing of Identification:

Following the announcement of the agenda item that is to be discussed or voted on but before either discussion or the vote commences, the public official shall do all the following:

1. The public official shall publicly identify each type of economic interest held by the public official which is involved in the decision (i.e., investment, business position, interest in real property, personal financial effect, or receipt or promise of income or gifts), and
2. The following details identifying the economic interest(s):
 - i. If an investment, the name of the business entity in which each investment is held;
 - ii. If a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;
 - iii. If real property, the address or another identification of the location of the property unless the property is the public official's principal or personal residence, in which case identification that the property is a residence;
 - iv. If income or gifts, then identification of the source; and
 - v. If personal financial effect, then identification of the expense, liability, asset or income affected.

c. Form of Identification:

If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.

d. Recusal/Leaving the Room:

The public official must recuse himself or herself and leave the room after the identification is made. (See exception, below). The public official may not be counted towards achieving a quorum while the item is discussed.

e. Special Rules for Closed Sessions:

If a governmental decision is made during a closed session, the identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code § 87100. That declaration shall be made part of the official record.

The official may not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision. 2 Cal. Code of Regs. § 18702.1(c)

Practice Pointer:

Some agencies hold closed sessions at the beginning of their meetings and prior to the regular agenda. Pursuant to the Brown Act, each closed session is to be preceded by an open session where the closed session announcements are made. If the official plans to be present for other closed session items, they can make the identification at that time. The FPPC did incorporate an exception that relieves them of the requirement for making the announcement if they are not present for the closed session. This would most likely occur at the closed session or at the beginning of the meeting. If the public official was present at the end of the regular session and prior to closed session, they should make the announcement even if they plan to be “absent” from the remainder of the meeting (which will be conducted as a closed session).

Also, this section on closed sessions makes an allowance for a public official who inadvertently receives closed session materials. The regulation recognizes that a public official may be unaware of the conflict when he/she receives the packet prior to a meeting. Therefore, this section is only violated if they knowingly obtain or review a recording of any non-public information after they are aware they have a disqualifying financial interest.

3. Exceptions:**a. Consent Calendar:**

The exception to the requirement that a disqualified official “leave the room” [Government Code § 87105(a)(3)] for a matter on the uncontested portion of the agenda refers to items on the

consent calendar. The public official nevertheless is required to publicly identify the economic interest orally and make that identification part of the official record.

b. Absence:

No public identification duties are imposed on a public official for an item at a meeting when the public official is absent.

c. Speaking As a Member of the Public Regarding An Applicable Personal Interest:

The public official may remain in the room and listen to public discussion on the matter and speak as a member of the public, provided they have (a) complied with the public identification, recusal and leaving the dais to speak in the same area as members of the public; and (b) qualify to speak on a matter of personal interest under § 18704.2(b).

Practice Pointer: Scope of the Public Officials Participation After Leaving the Dais

Participation as a member of the public should not be read too liberally. There was considerable discussion when drafting the regulation which focused on language of the statute which said the official could speak as a member of the public, as such it would be limited to them speaking only and not attending merely to listen or otherwise remain in the room. There was some discussion as to whether or not the statute required the public official to leave the room after they had spoken.

While the regulation now provides that the public official can leave the dais, remain in the room, listen to testimony and speak, it may not allow the public official to attend study sessions on the item when no public testimony is to be taken or to attend follow-up deliberative sessions of the body after all public testimony has been taken. It may be a reasonable interpretation to allow the official to attend study sessions and/or tours as a member of the public prior to being given the opportunity to speak under the rationale that they should be privy to such information in preparation for speaking.

Finally, a “Comment” to Section 18702.5 makes it clear that nothing in the provisions of the regulation is intended to cause an agency or official to make any disclosure that would reveal the confidences of a closed session or any other privileged information as contemplated by law including but not limited to the recognized privileges found in 2 Cal. Code Regs. § 18740.

4. Legally Required Participation: Special Rules

Regulation 18708 establishes specific requirements for describing and announcing the nature of the official’s economic interest and the potential financial effects. See that section and the discussion on page 62 of this text.

5. Campaign Contributions

Please see the disclosure requirements of Government Code Section 84308, discussed, *supra*, in Chapter VII.

D. Public Identification of Disqualification Under Government Code § 1090, et seq.

1. Remote Interests

Compared to the requirements of the Political Reform Act, disclosure of a potential interest under Government Code § 1090 is far more important and operative. Government Code § 1091 sets forth various remote interests which act as “exceptions” to the bar of the agency entering into a contract when a public officer of the agency is “financially interested.”

In order to qualify for remote interests under Section 1091, the fact of that interest must be “disclosed to the body or board of which the officer is a member and noted in the official records.” Therefore, it is reasonable to interpret this language to mean that the officer’s (e.g., a councilmember) absence from the meeting and not voting on the matter will not suffice to qualify for a remote interest exception that would thereafter allow the body or board to approve the contract without the conflicted officer’s participation. The disclosure and entry into the official records appears to be a necessary element to “lift the bar.” This would also presumably apply to the special remote interest exception set forth in 1091.4 relating to special districts serving a population of less than 5,000.³⁴

2. Public Identification of “Non-Interests”

Non-interests are set forth in Government Code § 1091.5 and generally provide that an officer or employee shall not be deemed to be interested in a contract if his or her interest is limited to one of the dozen or more interests enumerated in that section. Nevertheless, disclosure obligations are imposed on the officer even though the interest is presumably a “non-interest.” The disclosure requirements are well hidden within the text of the statute and will be summarized for convenience as follows:

What this means is the following enumerated non-interests will qualify as same notwithstanding the public official’s relationship with the contracting party, provided that the disclosure is made as required:

- That of a non-salaried member of a non-profit corporation, provided the interest is disclosed to the body or board at the time of the first consideration of the contract, provided further that this interest is noted in its official records. Cal. Gov’t. Code § 1091.5(a)(7).

³⁴ The willful failure of an official to disclose his/her interest in a contract pursuant to this section is punishable the same way as any other violation of 1090 et seq.; however, the violation does not void the contract unless the contracting party had knowledge of the remote interest of the officer at the time the contract was executed [Cal. Govt. Code § 1091(d)].

- That of a non-compensated officer of a non-profit, tax-exempt corporation which as one of its primary purposes supports the function of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in the official record. Cal. Gov't. Code § 1091.5(a)(8).
- That of a person receiving salary, per diem or reimbursement for expenses from a government entity unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of the consideration of the contract, and provided further that the interest is noted in its official record. Cal. Gov't. Code § 1091.5(a)(9).

D. Non Disclosure Under the Brown Act

Until recently, there was no express deterrent to prevent public officials from disclosing confidential information acquired during a duly held closed session meeting of a local legislative body. The Attorney General had opined the confidentiality of information received by a person during a closed session is implicit in the Brown Act, but there was no express statement in the law. During the 2001-2002 Legislative Session, the Legislature enacted Government Code section 54963, which makes it unlawful to disclose any "confidential" information acquired in any duly held closed session of a local legislative body. (Cal. Gov't Code § 54963, effective January 1, 2003.)

Under this new law, a person may not reveal confidential information acquired by being present in a duly authorized closed session meeting of a local legislative body. (Gov. Code § 54963(a).) Confidential information is defined as any information made in closed session that is specifically related to the basis for the legislative body to meet in closed session. (Gov. Code § 54963(b) effective January 1, 2003.)

The new law provides the following remedies: (1) injunctive relief to prevent the disclosure of confidential information prohibited by this section; and (2) disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; and (3) referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the Grand Jury; and (4) any other remedy available at common law. (Gov. Code. § 54963(c) effective January 1, 2003.)

Pursuant to this provision of the Brown Act, if a board member serving more than one government agency may run the risk of violating the Brown Act if they reveal information disclosed in a closed session meeting of one body to another person or government agency.

XII. Interest in Contracts: Government Code Section 1090

Government Code Section 1090 restricts any government officer or employee from making a contract in which he or she is financially interested. The plain language of Section 1090, setting forth the basic prohibition, is easily understood—until one reads the wide-ranging exceptions that have been adopted by the state Legislature and have been amended piecemeal, over time. The exceptions do not disclose any obvious theme or relationship, one to the other. The basic prohibition is as follows:

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.”

In the landmark case of *Thomson v. Call*, 38 Cal. 3d 633, 637, 214 Cal. Rptr. 139 (1985), the California Supreme Court considered section 1090 and observed as follows:

"The truism that a person cannot serve two masters simultaneously finds expression in California's statutory doctrine that no public official shall be financially interested in any contract made by that person or by any body or board of which he or she is a member." [Citations omitted]

In reviewing the following material relative to Section 1090 conflicts, it is important to keep in mind several important factors:

- The prohibition may apply to employees who do not file statements of economic interest under the Political Reform Act.
- The prohibition may apply even though the dollars involved would not trigger a conflict under the Political Reform Act and even where the official will not receive any direct financial benefit from the transaction.
- Employees, board members or members of the legislative body are treated differently, both in the case law and in the opinions rendered by the Attorney General's Office. Be cautious because it is easy to read the opinions and then use the terms officer, official, board member, employee interchangeably. There is also no guarantee that a reviewing court would make the same distinctions between and among the different positions.
- The general theme of the prohibition is extremely broad and philosophical while the statutory exceptions are narrowly drawn and more objective. A practice caution here is to continue the analysis after presumably qualifying for one of the exceptions. This broader philosophical basis is discussed in section 9 of this part.
- Willful violation of Section 1090 may be punished as a felony. Conviction could involve a visit to State prison, disgorgement of anything received, and a lifetime bar from holding office in the State of California. While not technically a strict liability crime, the only intent required to be in violation of Section 1090 is the intent to enter into a contract. Where the official enters into a contract that is later found to be in violation of Section 1090, the official has committed a crime. This is true even when the official did not intend to secure any personal benefit and when the official did not intend to violate Section 1090.
- Most Important: Although conflicting-out or abstaining will typically cure a Political Reform Act problem, it may not cure a 1090 conflict – the agency may be “barred” from entering into a contract.

1. How 1090 Works—An Overview

a. The Contract

- An officer, employee or elected official may not make a contract in his or her official capacity in which he or she is financially interested. Any participation in the process by which the contract is developed, negotiated and/or executed is a violation.
- No body or board may make a contract which is financially beneficial to one of its members even if the “interested” member does not participate and abstains from the decision/vote.
- Transactions not involving written contracts, such as sales, payment authorizations, purchases or the making or receipt of a grant, can be contracts.
- If the governmental discussion in question does not involve a contract, or if the contract is never executed, no violation exists.

b. Implementation

If you determine a transaction is a contract within the meaning of Section 1090, Section 1090 will have one of the following three effects on this transaction:

- **Bar to the Transaction**—If a violation of section 1090 would result, the agency is precluded from entering into the contract, even if the interested member abstains.
- **Remote Interest**—If the official has a remote interest (as defined in section 1091), the member declines to participate in any manner, and abstains from the vote, the agency is not prevented from making the contract, provided the interest is noted in the official records of the agency. (See further discussion of remote interests, below).
- **Non-Interest**—If the interest matches one set forth in section 1091.5, it is a non-interest and the interest will neither prevent the agency from entering into the contract nor prohibit the board member or the officer, employee from participating. Disclosure may be required.

c. Effect of Violation

Again, the greatest difference between a violation of section 1090 and a violation of the conflict of interest provisions of the Political Reform Act (PRA) is that the contract made in violation of section 1090 is void and unenforceable and the official is subject to: (1) criminal and civil penalties; (2) potential disgorgement of any consideration received or any property acquired in the transaction; and (3) state prison for a willful violation.

Violation of the PRA is punishable as a misdemeanor by the district attorney or State Attorney General or by civil or administrative fines.

2. Persons Covered

Virtually all board members, officers, employees and consultants are public officials within the meaning of section 1090. Reported decisions and Attorney General's opinions have pronounced that this includes council members³⁵; county employees³⁶, city employees³⁷, contract city attorneys³⁸, consultants³⁹, school boards⁴⁰ and advisory bodies⁴¹ (if the official participates in the making of a contract through their advisory function).

3. Contract Must Be Involved

For 1090 to apply, a contract must be involved and since the statute uses the word “made,” a contract must be finalized before a violation of 1090 can occur. Any participation by an official in the making of the contract would result in a violation of 1090 if he or she had a financial interest within the meaning of the statute. Participation in the actual approval or execution of the contract is not required “if it is established that [the official] had the opportunity to, and did, influence execution directly or indirectly to promote his personal interest.”⁴²

The Attorney General recommends that when determining whether a decision involves a contract, one should refer to general contract principles. Many situations have been evaluated by the courts and the Attorney General and are enlightening when looking for authority in this area:

- A development agreement between the city and developer was a contract⁴³.
- A decision by a hospital district to pay expenses for a board member's spouse to accompany the board member to a conference was a contract⁴⁴.
- A decision to exercise an option, modify, extend or to re-negotiate an existing contract invokes section 1090⁴⁵.

³⁵ *Thomson v. Call*, 38 Cal. 3d 633, 649, 214 Cal. Rptr. 139 (1985).

³⁶ *People v. Vallerga*, 67 Cal. App. 3d 847, 136 Cal. Rptr. 429 (1977).

³⁷ *Stigall v. City of Taft*, 58 Cal. 2d 565, 568, 58 Cal. 2d 565, 568, 25 Cal. Rptr. 441 (1962).

³⁸ 70 Ops. Atty. Gen. 271 (1987).

³⁹ 46 Ops. Atty. Gen. 74 (1965).

⁴⁰ Cal. Educ. Code § 35233.

⁴¹ *Millbrae Association for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968).

⁴² *People v. Sobel*, 40 Cal. App. 3d 1046, 1052, 115 Cal. Rptr. 532 (1974).

⁴³ 78 Ops. Atty. Gen. 230 (1995).

⁴⁴ 75 Ops. Atty. Gen. 20 (1992).

- A Memorandum of Understanding or collective bargaining agreement setting out the terms and conditions of employment of a class of employees⁴⁶.

4. Participation in Making the Contract

a. Employees and Board Members Distinguished:

Typically, the courts and the Attorney General's office have distinguished between employees and members of multi-member boards, councils or commissions in determining what conduct violates Section 1090. The Attorney General's pamphlet⁴⁷ states:

Board members are **conclusively presumed** to be involved in the making of all contracts under their board's jurisdiction (*Thomson v. Call, supra*, at p. 649). With respect to all other public officials, it is a question of fact as to whether they were involved in the making of a contract. (Emphasis added)

The *Thomson* court, however, did not use the term "conclusively presumed" but rather:

Mere membership on the board or council **establishes the presumption** that the officer participated in the forbidden transaction or influenced other members of the council.

The *Thomson* court cited *Stigall v. City of Taft*, 58 Cal. 2d 565, 570-571, 25 Cal. Rptr. 441 (1962) and *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 137 Cal. Rptr. 118 (1977).

The reason to draw this distinction is to note that it is the Attorney General's opinion that mere membership on the board ends the discussion of whether or not the council member or board member is "interested" whereas the cases may allow the presumption to be rebutted⁴⁸. Nevertheless, the *Fraser* court cited the *Hobbs* case for the proposition that a council member's membership on a city council may reasonably be expected to influence his or her fellow council members in support for its reading of Government Code 1090 as "forbidding city officers from

⁴⁵ *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 162 Cal. Rptr. 663 (1980). The city entered into a contract for construction and operation of a concession stand on a pier. When one of the owners was later elected to the council, the court concluded that the exercise of the option would require the city to affirm the contract and negotiate a rate structure and, in so doing, would be making a contract within the meaning of Section 1090.

⁴⁶ *Sonoma County Organization of Public Employees v. County of Sonoma*, 21 Cal.3d 296, 304 (1979); *Glendale City Employees Assn. v. City of Glendale*, 15 Cal.3d 328, 334-338. (1975).

⁴⁷ Reference to "The Attorney General's pamphlet" refers to the pamphlet published by the Office of the Attorney General in 1989 (dated) and republished in 1998 (undated) entitled, *Conflicts of Interests* (140 pages). Please refer to this publication for a complete analysis of section 1090 questions. A revised version was published in 2004.

⁴⁸ See Cal. Evid. Code § 620; see also *Gayton v. Pacific Fruit Express Co.* 127 Cal.App. 50 (1932).

being financially interested in any contract made by them in their official capacity or **by the body or board of which they are members . . .**" (Emphasis added)⁴⁹

By comparison, when an employee is financially interested in a contract, the agency will be prohibited from making the contract only if the employee is involved in the contract-making process. So long as an employee plays no role whatsoever in the contracting process, either because it is outside the scope of his/her employment, or because the employee has disqualified himself/herself from participation, the agency is not prohibited from contracting with the employee or the business entity in which the employee is interested.

Practice Pointer:

This inquiry into "participation" or not, is extensively fact-driven and, therefore, is difficult to answer without knowledge of all facts. For example, if a city employee recommends his/her spouse for a consulting contract with a city department other than the employee's department, is that employee participating in any legal sense since he or she probably has no voice or control in the decision to retain the spouse? Or, if the employee merely arranges a meeting between the spouse and the interested department, and the employee has no jurisdiction over the making of the contract. If asked whether or not entering into a consulting contract with the spouse of an employee of another department would violate section 1090, the city attorney might answer in the negative without knowing the less obvious facts (i.e., recommending spouse; arranging the meeting). The fact that the spouse (the employee) made the recommendation may or may not be sufficient to establish a violation.

For example, the Attorney General has opined that firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity.⁵⁰

Practice Pointer:

Be cautious with the above opinion. While an employee may not be involved in "making" the contract, they could control how much of a product their agency uses and thus indirectly affect the contract by directly affecting the amount of the product purchased. In such circumstances, the resulting opinion could be different.

⁴⁹ *Hobbs, Wall & Company v. Marin*, 109 Cal. App. 316, 319, 293 P. 145 (1930).

⁵⁰ 80 Ops. Atty Gen. 41 (1997). See also 63 Ops. Atty Gen. 868 (1980) (a real estate tax appraiser employed by the county could purchase property within the county at a tax deed land sale where he/she did not participate in or influence the appraisal); see also Cal. Pub. Cont. Code § 10410 (prohibiting a contract between state employees and state agencies).

Similarly in 88 Ops. Atty. Gen. 56, the Attorney General concluded that the State Department of Forestry and Fire Protection may award a financial grant to a timber owner for planting, reforestation, and resource management even though the timber owner is a state employee since the employee's duties did not relate to or affect the awarding of such grants. They found the employee had no involvement whatsoever "in his official capacity" in the awarding of the grant by the department. His sole involvement was that of a private landowner seeking financial assistance for timber land improvements consistent with the statutory objective.

In this opinion the Attorney General also concluded that the Political Reform Act did not preclude this grant nor did common law conflict of interest principles under which public officers are required to avoid placing themselves in positions in which their personal interests conflict with their duties to the public through the securing of a grant from the Department of Forestry and Fire Protection since the employee was a timber owner and his or her official duties did not relate in any way to awarded such grants.

5. Virtually Any Involvement Qualifies

The general theme for determining when an official or employee has participated in "making a contract" as expressed by the court in *People v. Sobel*, 40 Cal. App. 3d 1046, 115 Cal. Rptr. 532 (1974), evidences the broad reach of section 1090:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner but holds that an official (or a public employee) may be convicted of a violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he **had the opportunity to and did influence execution directly or indirectly to promote his personal interest.**⁵¹

The Attorney General's Office and the California courts have opined regarding the following conduct:

- 1) Making of a contract includes preliminary discussion, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids⁵².
- 2) Applies to persons in advisory positions to the contracting agency insofar as these individuals can influence the development of a contract, during preliminary

⁵¹ *People v. Sobel*, 40 Cal. App. 3d 1046, 1052, 115 Cal. Rptr. 532 (1974).

⁵² *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, fn. 8, 69 Cal. Rptr. 251 (1968); *Stigall v. City of Taft*, 58 Cal. App. 2d 565, 25 Cal. Rptr. 441 (1962) and *People v. Sobel*, 40 Cal. App. 3d 1046, 1052, fn. 14, 115 Cal. Rptr. 532 (1974).

discussions, negotiations, etc., even though they have no actual power to execute the final contract⁵³.

- 3) Contract for employment with a board member which begins after the board member retires or resigns would create a conflict under section 1090 unless no discussions concerning this took place prior to the date of resignation or retirement⁵⁴.
- 4) Violation even if the member resigns before the contract is executed⁵⁵.
- 5) Employees who propose that their functions be accomplished through private consulting contracts would be barred from contracting with the agency to perform said services after they leave the agency⁵⁶.
- 6) Employees are prohibited from bidding on surplus real estate or personal property when they participated in their official capacity in setting up the sale process⁵⁷.
- 7) A former planning commissioner could not provide consulting services in connection with revisions to the General Plan because he participated in the policy decision to "contract out" much of the revision⁵⁸.
- 8) Hospital District (HD) cannot enter into lease with a member of a Healthcare District (HCD) board of directors where the HCD leases the space from the HD.⁵⁹

6. Correcting Problems

Section 1090 often creates problems for cities and it creates impediments to an otherwise desirable or necessary contract. The California courts have given little guidance on how to resolve these problems. However, the courts' reasoning in the eminent domain cases is instructive as to the way in which the courts may resolve these types of issues. The courts have viewed condemnation actions as statutorily governed and creating an adversarial relationship between the property owner and the agency. The courts have opined that Section 1090, which is directed at dishonest conduct, has no force in the context of a condemnation action where the

⁵³ *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 295 P.2d 113 (1956).

⁵⁴ Atty Gen. Indexed Letter No. 92-407.

⁵⁵ *Stigall v. City of Taft*, 58 Cal. App. 3d 562, fn. 15, 25 Cal. Rptr. 441, (1962) and *City Council v. McKinley*, 80 Cal. App. 3d 204, 212, 145 Cal. Rptr. 461 (1978).

⁵⁶ 66 Ops. Atty Gen. 156 (1983).

⁵⁷ 63 Ops. Atty Gen. 19 (1980).

⁵⁸ Cal. Atty Gen. Indexed Letter No. 92-1212.; *Cf.* 66 Ops. Atty. Gen. 156 (1983).

⁵⁹ 82 Ops. Atty. Gen. 92

sale of property is accomplished in an adversarial process by the operation of law and each side is ordinarily represented by counsel.⁶⁰

For example, where a city filed a quiet title action against one of its seated council members, because it was learned that the council member had inadvertently constructed a portion of his garage on city property, the court permitted a supervised settlement of the action. As a result of Section 1090 it was impossible to lease, sell or otherwise convey the property to the council member. Through the quiet title action, a settlement was supervised by the superior court in which the city deeded the property to the council member in exchange for the fair-market value of same.⁶¹

However, in another context, the Attorney General has opined that a board member could sue the government agency on which he or she sits as a member, but the agency could not settle the matter.⁶² This suggests that the Attorney General and the courts will strike a balance between the needs of an agency to conduct its business and the need to protect the public from corruption – but, only in limited circumstances.

See 91 Ops. Atty. Gen. 1, for the most recent discussion on this issue (Feb. 2008) with the Attorney General finding that a court could invalidate a litigation settlement agreement between a councilmember and the city.

7. Financial Interest

a. Is There a Financial Interest?

For section 1090 to apply, the public official must have a financial interest in the contract in question.

The term “financial interest” is not defined in the statute; however, case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. The term can include both direct and indirect interests in a contract⁶³. The term “financially interested” contained in Section 1090 has been defined in jury instructions as follows:

“The phrase “financially interested” as used in Government Code § 1090 means any financial interest which might interfere with a city officer’s

⁶⁰ *Santa Clara Valley Water District v. Grosse*, 200 Cal. App. 3d 1363, 246 Cal. Rptr. 580 (1980).

⁶¹ *Id.* at p. 1369.

⁶² See 86 Ops. Atty Gen. 142, finding that the Political Reform Act and Section 1090 do not prohibit a board member from filing a lawsuit against the public agency of which he or she is an official. The Attorney General went on to find that possible settlement of the lawsuit would present an unavoidable conflict and would violate Section 1090.

⁶³ *Thomson v. Call*, 38 Cal. 3d 633, 645, 214 Cal. Rptr. 139 (1985).

unqualified devotion to his public duty. The interest may be direct or indirect. It includes any monetary or proprietary benefit, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the city officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the city officer, or the board of which he is a member, enters into a contract in his or its official capacity with an individual or business firm, which individual, business firm, by reason of the city officer's relationship to the individual or business firm at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the city officer based on the contract the individual or business firm has received."⁶⁴

The following have been determined to give rise to the requisite financial interest:

- County Supervisor sold his business to his son in return for a promissory note secured by the business. County printing contracts awarded to the son enhanced the security for the promissory note and, therefore, a conflict existed⁶⁵.
- The employee of a contracting party.
- The attorney, agent or broker of a contracting party.
- The supplier of services or goods to a contracting party.
- The landlord or tenant of a contracting party.
- Complex multi-party transactions involving sale of property from a city council member through an intermediary corporation to the city. *Thomson v. Call*, 38 Cal. App. 3d 633, fn. 1, 637, 214 Cal. Rptr. 139 (1985).
- A shareholder in an insurance brokerage firm who would not receive compensation or business expenses from the brokerage firm as a result of a contract with his agency was nonetheless interested in the contract⁶⁶.

⁶⁴ This jury instruction has been approved in various contexts. (See *People v. Nast* (2002) 101 Cal.App.4th at page 1299, fn. 9; *People v. Honing* (1996) 48 Cal.App.4th 289, 322 – 323, 332. See also *Breakzone Billiards v. City of Torrence*, 81 Cal.App.4th 1205, 1231, (2000) finding no financial interest of councilmembers and that any interest would be too remote or speculative.

⁶⁵ *Moody v. Shuffleton*, 203 Cal. 100, 262 P. 1095 (1928).

⁶⁶ *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 137 Cal. Rptr. 118(1977).

- Contingent Payment—County employee had a financial interest in a contract where his private consulting contract was contingent upon execution of the county's contract with the city⁶⁷.
- Primary Shareholder in Contracting Party—City employee involved in purchasing books, awards a contract to a corporation in which, unknown to the city, he and his wife were primary shareholders.⁶⁸
- No fee contract with a law firm in which the councilmember is a partner—even where the firm agrees not to accept any fees for service, a financial interest will exist because the contract may serve as a potential financial loss to the public official or indirect economic benefit in the form of prestige or goodwill.⁶⁹
- Harbor commissioner whose corporation loaned money to a corporation attempting to secure a lease from the commission while the loan was still outstanding, was financially interested in the contract⁷⁰.
- Spousal Property—An official has an interest in the community and separate property income of his or her spouse⁷¹.
- Contingency or Commission Contracts—The Attorney General has opined that the terms of compensation packages for the City Attorney and other city personnel could make them financially interested in contracts to which the city is a party when compensation is based upon land values which their role in the process could affect and thereby divide their loyalty⁷².
- A public official has not only his own financial interests in a contract but also that of a spouse where he “stands in the shoes of his spouse” for purposes of Section 1090.⁷³

⁶⁷ *People v. Vallerga*, 67 Cal. App. 3d 847, 136 Cal. Rptr. 429 (1977).

⁶⁸ *People v. Sobel*, 40 Cal. App. 3d 1046 (1974)

⁶⁹ 86 Ops.Atty.Gen. 138 (2003).

⁷⁰ *People v. Watson*, 15 Cal. App. 3d 28, 92 Cal. Rptr. 860 (1971).

⁷¹ *Nielsen v. Richards*, 75 Cal. App. 680, 243 P. 697 (1925).

⁷² 66 Ops. Atty Gen. 376 (1983).

⁷³ See *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, 659; *Nielsen v. Richards* (1925) 75 Cal.App. 680.

Practice Pointer:

An official has a financial interest within the meaning of Section 1090 when he or she is financially interested in the contract—regardless of the dollar amount. In addition, as discussed in detail below, the requisite financial interest may trigger a violation of Section 1090 even when the official does not acquire the interest until after he or she leaves office. Therefore, it is important to avoid confusion with the threshold dollar amounts set forth in the Political Reform Act and the temporal nature of those types of conflicts. With the Political Reform Act, violation occurs only when an official makes a government decision. As such, a decision which affects a former council member or board member will not violate the Political Reform Act because the (now) former official did not make the requisite decision. A violation of section 1090 may nonetheless lie if the official had any influence in the making of the contract before leaving his or her office.

b. Timing of the Financial Interest

An official who has contracted in his/her private capacity with the agency before the official is elected or appointed does not violate this section simply upon election or appointment, and the official may continue in his or her position as such contracting party for the duration of the contract. The official's election or appointment does not void it⁷⁴. However, when the time comes for the contract to be extended, re-negotiated or revised, the official faces a new set of problems and the official's position will operate as a bar to further involvement with the agency.

In a 1998 opinion, the Attorney General analyzed a real property lease and water purchase agreement between a city and a general partnership where the general partner thereafter was elected to the city council. The agreement with the partnership required re-negotiation of the rental rate and water fees every five years in accordance with guidelines specified in the agreement.

The Attorney General opined that at the end of the five-year period, the city council: (1) could not approve a change in the rental fees; (2) could not allow the rent or fee changes to be decided by a third-party arbitrator in accordance with an arbitration clause contained in the agreement; (3) could not allow the agreement to remain in effect with the previously set rent and fees; but (4) could approve a change in the rent and fees upon transfer of the council member's proscribed interest to another general partner, family member, unrelated third party or trust.⁷⁵

⁷⁴ *Beaudry v. Valdez*, 32 Cal. 269 (1867).

⁷⁵ 81 Ops. Atty Gen. 134 (1998); *see also* 81 Ops. Atty Gen. 327 (1998) (finding that a school district could not renew a contract with a probationary teacher now that the teacher's spouse has been elected to the school board).

1) Interests Acquired After the Fact.

The Supreme Court in *Thomson v. Call*, 38 Cal. 3d 633, 637, 214 Cal. Rptr. 139 (1985), stated the general rule relative to the temporal nature of an official's involvement as follows:

“Public officers are denied the right to make contracts in their official capacity with themselves or to become interested in contracts thus made.” Citing *Stockton P&S v. Wheeler* (1924) 68 Cal. App. 592, 602.

The court went on to indicate:

[W]e have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement—express or implied—existed between the official and the entity contracting directly with the city.⁷⁶

Practice Pointer:

Be careful with this one for several reasons. First, a council member working on a contract approved by the city always looks suspect; if they get involved with the city attorney's "OK," no doubt your "OK" will be quoted if they are challenged. Secondly, if any problems develop with work under the contract, a PRA problem will, at a minimum, disqualify that council member and section 1090 might prevent the city from taking any further action to solve the problem (i.e., extending performance time frames, change orders) if that action affects the financial interest of the member, unless the rule of necessity applies.

HOA's Not Subject to 1090. The Attorney General recently concluded that a person who was hired by a city as a consultant in the process of forming a business improvement district is not precluded from being hired after formation of the district by a non-profit corporation that is under contract with the city to manage the district. In the opinion the Attorney General noted that although the legislature has expressly required owners' association to be subject to the open meeting requirements of the Ralph M. Brown Act and records disclosure requirements of the California Public Records Act (Section 36614.5), it has not made their contract subject to the strictures of Government Code §

⁷⁶ Id. Citing: *City of Oakland v. Calif. Const. Co.*, 15 Cal. 2d 573, 577, 104 P. 2d 30 (1940) (councilman accepted employment with defendant construction company after council awarded contract to defendant and had no interest in the contract at the time it was awarded) and *Escondido Lumber Co. v. Baldwin*, 2 Cal. App. 606, 608, 84 P. 284 (1906) (contractor who received construction contract from school district purchased—without previous arrangement or agreement—materials from corporation in which a school district trustee was a stockholder and officer).

1090. Hence, in this case, the former consultant may be retained by the owners' association to assist in administering the district once a district has been formed.⁷⁷

2) Curing the Conflict

In the case of a board member, sometimes the official must resign from office or eliminate the private interest to avoid violating Section 1090. However, simply resigning a public post may not cure a conflict in all situations. Recall the discussion, *supra*, that the participation by an official during the preliminary discussions relative to outside contracting would preclude that official from becoming a contracting party or an employee of the contracting party after the official leaves office or his/her appointment.⁷⁸

Since board membership establishes a presumption of participation in forbidden contracts under its jurisdiction, a court could conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member's time in office.

In the case of an employee, a contract may be re-negotiated so long as the employee disqualifies himself or herself from any participation in his or her public capacity in the making of a contract.

Practice Pointer:

The Attorney General has issued oral advice that a City Attorney may re-negotiate a contract without violating section 1090 but warned that attorneys would be well advised to retain another individual to conduct all negotiations with the agency. In doing so, the official would minimize the possibility for a misunderstanding to arise concerning whether the attorney's statements were made in the performance of his or her public duties or in the course of the contractual negotiations.

The Attorney General has indicated in their Conflicts of Interest pamphlet that in the absence of special circumstances, the fact that a contract City Attorney's advice to initiate or defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090. But see also the discussion regarding divided loyalties in 86 Ops. Atty. Gen. 138, between a law firm and a city.

⁷⁷ 88 Ops. Atty. Gen. 183

⁷⁸ Now see section 87404. Effective January 1, 2003, this section now applies to both state and local officials and provides that not public official shall make, participate in making or use his official position to influence any governmental decision directly relating to any person with whom he or she is negotiating or has any arrangement concerning prospective employment.

8. Exceptions

a. Eminent Domain

Because this process is statutorily mandated, absent peculiar facts, it is not subject to section 1090⁷⁹.

b. Rule of Necessity

The rule of necessity can be applied under particularly narrow circumstances.⁸⁰ See section 11, below.

c. Existing Contracts

A violation does not occur if a public official has an interest in a contract, which was entered into or negotiated before the official assumes office. The contract may continue until its expiration; however, it may not be amended, extended or re-negotiated. It is unclear whether it may be assigned if such assignment requires the consent of the legislative body.⁸¹

d. Subdivided Lands

Section 1091.1 provides that an official who owns or has an interest in land to be subdivided will not be prohibited from pursuing same, provided the interest is fully disclosed to the legislative body and the official does not participate in any manner in the approval.⁸²

The Attorney General has also found that a city council may enter into a subdivision improvement agreement and a reimbursement agreement with the landowner who is the employer of a member of the city council where each agreement is related to public improvements that are required by the subdivision map act and the city's subdivision ordinances, provided the city council discloses and abstains.⁸³

⁷⁹ *Santa Clara Valley Water District v. Grosse*, 200 Cal. App. 3d 1363, 1369, 246 Cal. Rptr. 580 (1980); *see also* 66 Op. Att'y Gen. 156 (1988); 63 Ops. Atty Gen. 868 (1980) and 63 Ops. Atty Gen. 19 (1980); but *see also* 91 Ops. Atty. Gen. 1 (2008) regarding settlement of other litigation.

⁸⁰ 76 Ops. Atty Gen. 118 (1993).

⁸¹ 76 Ops. Atty Gen. 118 (1993); *see also City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, fn. 13, 162 Cal. Rptr. 663 (1980) and 81 Ops. Atty Gen. 134 (1998).

⁸² *See also* Attorney General Opinion No. 98-1001 (November 25, 1998) (sanctioning a reimbursement agreement between the county and subdividers of a parcel where a member of the board of supervisors had an ownership interest in the parcel).

⁸³ 89 Ops. Atty. Gen. 278

e. Effect of Special Statutes

Some statutes contain special provisions which alter or eliminate the general rules of section 1090 in specific situations.

- 1) Health and Safety Code section 33130 was found to take precedence over the more general law of section 1090 in allowing an individual to be employed as both a consultant with the Redevelopment Agency and to serve as a member who served on an advisory panel reviewing and making recommendations on redevelopment bids.⁸⁴
- 2) Education Code section 35239 provides that the governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.
- 3) An act creating a board or commission that includes a very specific conflict of interest rule eliminates the need to consult either general statutes or the common law.⁸⁵
- 4) For special rules concerning hospitals and health care districts, *see* Cal. Gov't Code § 37625 (municipal hospitals), Cal. Health & Safety Code § 1441.5 (county hospitals) and Cal. Health & Safety Code § 32111 (health care districts).
- 5) Notwithstanding Section 1090, any member of a legislative body may participate in any plan of health and welfare benefits permitted pursuant to Cal. Gov't Code § 53208.5. (Cal. Gov't Code § 53208.) This section permits councilmembers to vote on their own insurance contracts.
- 6) Local agencies probably do not have the authority to "legislate around" the proscriptions of Gov't. Code 1090, however, it may be possible in some limited circumstances based on proper delegations of authority and/or charter or ordinance provisions which separate functions. (See 87 Op. Atty. Gen. 9).

⁸⁴ *Old Town Dev. Corp. v. Urban Renewal Agency*, 249 Cal. App. 2d 313, 57 Cal. Rptr. 426 (1967).

⁸⁵ 51 Ops. Atty Gen. 30 (1968).

Practice Pointer:

Special state statutes do not necessarily take precedence over the Political Reform Act unless they are adopted in accordance with the procedures set forth in Government Code section 81013. Locally enacted ordinances would, of course, not take precedence over section 1090.

9. Remote Interests of Board Members and Commissioners

The term “remote” is given a special statutory meaning by section 1091. The term always refers to the private interest, and not to any public interest, the official may have in the contract. An official whose private interest falls into one of the "remote interest" categories must:

- Disclose his/her interest to the agency, board or body;
- Have it noted in the official records of that body; and
- Disqualify⁸⁶ themselves from any vote, deliberation or influence on the matter.⁸⁷

a. Effect of Failure to Comply With Section 1091 Procedures

The willful failure of an officer to disclose the fact of his/her interest in a contract pursuant to this section is punishable the same as any other violation of section 1090 *et seq.*; however, the violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.⁸⁸

b.**Remote Interest Categories (Section 1091)⁸⁹**

- 1) **An Officer or Employee of a Nonprofit Entity;**⁹⁰ An officer or employee of a nonprofit entity exempt from taxation pursuant to Section

⁸⁶ The Attorney General has opined that disqualification is required, notwithstanding that section 1091(a) contains confusing language which could otherwise be interpreted to allow the vote or a vote of the officer with a remote interest, provided that the counting of that vote is not necessary for approval of the contract. The conclusion drawn by the Attorney General is the only reasonable one, particularly in light of section 1091(c), discussed in footnote 87.

⁸⁷ Government Code section 1091(c) provides that the remote interest exception is not applicable to any officer interested in the contract who influences or attempts to influence another member of the body or board of which he/she is a member to enter into the contract.

⁸⁸ Cal. Gov't Code § 1091(d).

⁸⁹ Remember that this section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

⁹⁰ The exception referred to in this section (for Non-Interest) narrowly applies to when a public official is a noncompensated officer of a nonprofit, tax-exempt corporation which, as its primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. The Attorney General cites the example of the nonprofit symphony association which may be organized to support the publicly operated symphony hall and symphony orchestra.

501(c)(3) or a non-profit corporation except as provided in Section 1091 5(a)(8) [non interests] has a remote interest in his or her employment.⁹¹ Cal. Gov't Code § 1091(b)(1).

The Attorney General concluded that a city council may donate public funds to a chamber of commerce operating as a non-profit corporation even though a councilmember is the president of the chamber and his spouse is an employee of the chamber. What is not clear from the opinion is whether or not the chamber of commerce at issue was indeed a 501(c)(3) corporation insofar as many, if not most, chambers are 501(c)(6) corporations which would presumably not qualify under the exemption.⁹²

The Attorney General has opined that a city council may modify a lease agreement with a private company if a member of the city council is a regional manager of the company, provided that the company has at least ten other employees and that the interested councilmember has been employed by the company for more than three years prior to joining the city council, is not an officer or director of the company, and abstains from any involvement in modifying the agreement. The Attorney General found that the councilmember's financial interest in the modification of the water company's contract with the city qualifies as a "remote interest" within the meaning of Section 1091, subdivision (b)(2). The councilmember, of course, would be required to disclose his financial interest to the city council, note the interest in the city's official record and abstain from participation in the modification of the lease. The city may engage in future renewals of its lease with the water company so long as the councilmember maintains his complete lack of personal involvement in the contracting process.⁹³

- 2) **Employee or Agent of a Private Contracting Party:** A city may purchase products from a company even though a council member or their spouse is an employee of the company and owns stock in the company where all of the following conditions are met:⁹⁴

⁹¹ A 2004 amendment to Section 1091(b)(1) extended this exception to all non-profit entities—not just non-profit corporations. This would include within the scope of Section 1091(b)(1) non-profit educational institutions, such as Stanford University, which are non-profit entities, but are not corporations. (Legis. Counsel's Dig. Sen. Bill No. 1086, 2004-2005 Regular Session, Introduced January 5, 2004.)

⁹² 89 Ops. Atty. Gen. 258

⁹³ 89 Ops. Atty. Gen. 49.

⁹⁴ Cal. Gov't Code § 1091(b)(2) overruling 81 Ops. Atty Gen. 169 (1998).

- The contracting party has 10 or more employees other than the council member or the member's spouse.
- The council member or the member's spouse was an employee for at least three years before the member took office.
- The council member or the member's spouse owns less than 3 percent of the shares and is not an officer or director.
- The council member or the member's spouse did not directly participate in formulating the bid of the contracting party

Practice Pointer:

Section 1091(b)(2) makes it possible for cities and other public agencies to buy Hewlett-Packard printers, Apple computers and Microsoft products if a member or their spouse works for the company. Previously, the Attorney General had opined that such purchases could not be made directly by the council. Be cautious in applying this remote interest exception because the member or member's spouse cannot be an officer or director. Therefore, this exception can have some profound impacts for smaller companies that did business with the public agency and where the member or member's spouse is a secretary or financial officer of the corporation and thus would not qualify under this exception. Note also that Section 1090(b)(2) was substantially modified in 1998 and many circumstances which would have been exempt under the prior statute will not qualify under the current statutory language.

- 3) **Special Contracts: Employees of Contracting Party:** This special exception in Section 1091(b)(3) will apply if all of the following enumerated factors are present:
- A. The official is an officer in the local agency located in the county with a population of less than 4 million.
 - B. The contract must be competitively bid; not for personal services; and the contracting party must be the lowest bidder.
 - C. The official must not hold a primary management position nor be an officer or director of the contracting party and holds no ownership interest.
 - D. The official did not directly participate in formulating the bid of the contracting party.
 - E. There must be at least 10 other employees.
 - F. The contracting party is the lowest responsible bidder.
- 4) **Parent:** A parent has only a remote interest in the earnings of his/her minor child for personal services. Cal. Gov't Code § 1091(b)(4).

- 5) **Landlord or Tenant:** A landlord or tenant of the contracting party has a remote interest in the contract of that party. Cal. Gov't Code § 1091(b)(5). Prior to the adoption of this amendment, the landlord/tenant relationship had been held to create an interest within the meaning of section 1090⁹⁵.
- 6) **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent:** This narrow exception may apply to an attorney of a contracting party or to an owner, officer, employee or agent of a firm which renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker or real estate agent/broker.

For the exception to apply, two conditions must be present:

- a) The individual may not receive any remuneration, consideration or commission as a result of the contract; and
- b) The individual must own 10 percent or more of the law practice or firm, stockbrokerage firm, etc.⁹⁶ Cal. Gov't Code § 1091(b)(6).
- 7) **Member of a Nonprofit Corporation Formed Under the Agricultural Code or Corporation Code:** Cal. Gov't Code § 1091(b)(7).
- 8) **Supplier of Goods and Services:** This remote interest exception can be confusing. The actual wording of the exception is as follows:

“That of a supplier of goods or services when these goods or services have been supplied to the contracting party by the officer for at least five years prior to his/her election or appointment to office.” Cal Govt. Code § 1091(b)(8).

While this exception seems simple and straightforward, it is not. This Section does not permit a council member or board member, who had been supplying goods or services to the public agency, to continue to do so after being elected or appointed. Read carefully, this exception applies only to the official who has been supplying the goods and services to the “contracting party.” The contracting party is **not** the public agency but, rather, a contractor who, in turn, supplies goods to the public agency. The legislative reasoning here is that the council member does have a financial

⁹⁵ *People v. Darby*, 114 Cal. App. 2d 412, 432, 250 P. 2d 743 (1952).

⁹⁶ For attorneys and agents/brokers who have less than a 10 percent ownership interest in their firm. See Cal. Gov't Code § 1091.5(a)(10).

interest in the contract to be gained by the "contracting party," but because there is a history and the contract is once removed (i.e., to the contractor), it can be a remote interest and the official will have to follow the remote interest disqualification/nonparticipation rules.

However, it may still be possible for the council member or board member to continue to provide goods and services to the agency under an existing contract. Where there is an existing contract to provide goods or services to the agency, this contract can continue once the member is elected, but only for the term of that agreement and cannot thereafter be re-negotiated, amended or extended without encountering the 1090 issue.⁹⁷

- 9) **Party to a Land Conservation Contract:** This exception allows some activity with respect to Williamson Act contracts; however, in one opinion, the Attorney General has advised that county supervisors who had previously made these contracts could not participate in the vote to abolish future use of the contracts based on the common-law prohibition against conflicts of interest⁹⁸ Cal. Gov't Code § 1091(b)(9).
- 10) **Director or 10 Percent Owner of a Bank or Savings and Loan:** An official who is a director, or holds a 10 percent or greater interest in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors, borrowers, creditors or debtors at the official's institution. Cal. Gov't Code § 1091(b)(10). (For officers, employees and persons holding *less* than 10 percent interest, *see* § 1091.5(a)(11); for competitively bid banking contracts, *see* § 1091.5(b).)
- 11) **Employee of a Consulting, Engineering or Architectural Firm:** An engineer, geologist or architect has a remote interest in a consulting, engineering or architectural firm so long as he/she does not serve as an officer, director or in a primary management capacity. Cal. Gov't Code § 1091(b)(11).
- 12) **Housing Assistance Contracts:** This limited exception applies to section 8 of the United States Housing Act of 1937. Cal. Gov't Code § 1091(b)(12).
- 13) **Salary, Per Diem and Reimbursement From a Government Entity:** An official has only a remote interest in the salary, per diem and

⁹⁷ 76 Ops. Atty Gen. 118 (1993); *see also City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 162 Cal. Rptr. 663 (1980).

⁹⁸ Atty Gen. Indexed Letter 73-197.

reimbursement received from a government entity. Cal. Gov't Code § 1091(b)(13). (For reimbursement provided for actual and necessary expenses incurred in the performance of official duties see Cal. Gov't Code § 1091.5(a)(2) and for payments made for health and welfare benefits see Cal. Gov't Code § 53208.)

The Attorney General has determined that the above exception has not been extended to a situation in which the public official has a personal financial interest in the terms of a contract between the governing body and its own employees and instead utilized the limited “rule of necessity” in allowing a board to renegotiate the amount of health benefits provided in a collective bargaining agreement that affected one of its board members as a retiree from the district.⁹⁹

- 14) **Stock Received As Compensation:** An officer or employee has a remote interest in stock in his or her employer or former employer received as compensation, so long as this stock equates to 3 percent or less of the shares of the company. This permits a company to contract with the agency where the officer or employee or his or her spouse has stock in the company. Cal. Gov't Code § 1091(b)(14). (For the non-interest exception covering ownership of stock in a corporation see 1091.5(a)(1).)

10. Non-Interests of Board Members and Commissioners

Section 1091.5 sets forth circumstances which the Legislature has decided, as a matter of public policy, are exempt from the operation of section 1090. Unlike the “remote interest” exception, a non-interest is treated as no interest at all, and holding such an interest does not require disqualification, but may require disclosure.

Practice Pointer:

An interest which is a non-interest under this section might still create an interest for the official under the Political Reform Act since the Political Reform Act supersedes other conflict of interest legislation where inconsistencies exist.¹⁰⁰ The common-law conflict of interest doctrine must also be considered.

a. Non-Interest Categories

An officer or employee shall not be deemed to be interested in a contract if his/her private interest is any of the following:

⁹⁹ 89 Ops. Atty. Gen. 217

¹⁰⁰ Cal. Gov't Code § 81013.

- 1) **Corporate Ownership and Income:** Section 1091.5(a)(1) exempts corporate ownership and income if all three of the following are met:
- Owns less than 3 percent of the shares of a for profit corporation.
 - The total annual income to him/her from dividends, including stock dividends, does not exceed 5 percent of his/her total annual income; and
 - Any other payments made by the corporation do not exceed 5 percent of his/her total annual income.

The Attorney General has interpreted the words “any other payments made” to include salary. Therefore, if the official is an employee as well as a stockholder, the exception will not apply.¹⁰¹ In a complicated 2006 opinion, the Attorney General interpreted this section to preclude a hospital district from entering into additional contracts with the affiliated partnerships, or renew existing ones, where (1) the limited partnership interests held in the individual retirement account represented less than three percent (3%) of the affiliated partnerships interest, (2) the total distributions and other income from the affiliated partnerships do not exceed five percent (5%) of the total income of the district director and her spouse, and (3) the district, as a general partner in both affiliated partnerships, determines the amount of cash distributed by the partnerships. In this opinion the Attorney General engaged the question of whether the interest at issue is limited to corporation shares or a share in a limited partnership.¹⁰²

In a 2006 opinion, the Attorney General concluded that members of a city airport commission may rent hangar space at the city airport if the space is rented on a first-come, first-served basis at set rates. In reaching this opinion the Attorney General rejected the suggestion that due to the limited number of airport hangars and would-be renters (i.e., owners of airplanes) these particular “public services” would not be “generally provided” within the meaning of Section 1091.5, subdivision (a)(3). In that same opinion, however, the Attorney General concluded that members of a city airport commission may not, absent a legal necessity, participate in or attempt to influence the commission’s or city council’s consideration of proposed revisions to a hangar rental rate structure if it is reasonably foreseeable that the decision will have a material effect, distinguished from its effect on the public generally on their respective finances.¹⁰³

2) **Reimbursement of Expenses**

¹⁰¹ This interpretation, found in 81 Ops. Atty Gen. 169 (1998), gave birth to Senate Bill 281, discussed in section 7(b)(2).

¹⁰² 89 Ops. Atty. Gen. 69.

¹⁰³ 89 Ops. Atty Gen. 121.

An official or employee has a non-interest in reimbursement for his/her actual and necessary expenses incurred in the performance of his/her official duties. Cal. Gov't Code § 1091.5(a)(2).

Practice Pointer:

This issue gives rise to an analysis under the Political Reform Act, particularly with respect to gifts and honoraria and reimbursement for expenses for attendance at committee meetings of the League and other nonprofits where participation by the official is not required and where the nonprofit, not the public agency reimburses the expenses.¹⁰⁴

3) Public Services

An official has a non-interest in receiving public services provided by his/her agency or board as long as they are received in the same manner as members of the public. Cal. Gov't Code § 1091.5(a)(3).

In an opinion interpreting the breadth of subsection of 1091.5, the Attorney General has found that a city councilmember may place a business advertisement in the city's community services and activities brochure if the councilmember is charged the same rate as charged other business advertisers. In this opinion the Attorney General cited the *City of Vernon v. Central Basin Municipal Water District* (1999) 69 Cal.App.4th 508, where the court found that a member of the municipal water district board who is also an owner and officer of a private water company could purchase reclaimed water from the district for his company as same constituted "public services generally provided" within the meaning of Section 1091.5, subdivision (a)(3).

4) Landlords and Tenants of Governments

Public officials who are landlords or tenants of the local, state or Federal government or any arm thereof have a non-interest in that government entity's contracts **unless** the subject matter of the contract is the very land upon which he/she is either the landlord or the tenant. In the latter case, the official would have a remote interest rather than a non-interest and would be subject to the provisions of section 1091. Cal. Gov't Code § 1091.5(a)(4).

5) Public Housing Tenants

Public housing tenants may serve as housing authority commissioners or community development commissioners. Cal. Gov't Code § 1091.5(a)(5).

¹⁰⁴ At the time this text was published, the Commission was considering amendments to 18944.2 (Gifts to an Agency) which may address this issue.

6) Spouses

Non-interest exists when both spouses in a family are public officials. An officer or employee of a public agency has a non-interest in his/her spouse's employment or office if the spouse's employment or office holding existed for at least one (1) year prior to his/her election or appointment. Cal. Gov't Code § 1091.5(a)(6). The Attorney General has interpreted this to allow the spouse of a school board member to have their teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position¹⁰⁵.

7) Unsalariated Members of a Nonprofit Corporation

This exception applies provided that his or her position is disclosed to the body or board at the time of the first consideration of the contract and that such interest is noted in the official records. Cal. Gov't Code § 1091.5(a)(7). The Attorney General indicates that although there are no cases or opinions concerning the application of this section, the office believes the reference to "members" excludes persons who serve as members of the board of directors of such organization. The exception will not apply if the member also holds a salaried position with the organization.¹⁰⁶

8) Noncompensated Officers of Tax-Exempt Corporations

This exception applies if the public official is a noncompensated officer of a nonprofit, tax-exempt corporation which, as its primary purpose, supports the functions of the public body or board or to which the public body has a legal obligation to give particular consideration. The interest must be noted in the official records. The exception offers little guidance as to its application, however, the Attorney General offers the example of a nonprofit symphony association that may be organized to support a publicly operated symphony hall and symphony orchestra. It is an open question whether this would likewise apply to a community services agency that provides help to the homeless or housing needs and is supported almost entirely by public funds of interested local agencies. Cal. Gov't Code § 1091.5(a)(8); *Cf.* Cal. Gov't Code § 1091(b)(1). A person is considered "noncompensated" even though he or she receives reimbursement from the organization for necessary travel expenses and other actual expenses incurred in the performance of his or her office.

9) Contracts between Government Agencies

The Attorney General acknowledges that the scope of this particular exception is not readily apparent. The most cogent interpretation is that it was enacted to allow a government employee who serves on the board of another public agency to vote on a contract between the agency and

¹⁰⁵ See 69 Ops. Atty Gen. 225, 259 (1986); *but see* fn. 78 (school district cannot renew contract with probationary teacher now that spouse has been elected to the school board).

¹⁰⁶ See *Conflicts of Interest*, Office of the Attorney General, p. 63.

his government employer except when a contract involves his particular employing unit.¹⁰⁷ Cal. Gov't Code § 1091.5(a)(9). The official's interest in the other government agency must be noted in the official record.

For example, a county sheriff who sits on the city council where the city is considering securing law enforcement services from the county sheriff's department could probably not vote on that contract but could vote on a contract between the city and county to provide for the joint maintenance of roadways.

The breadth of this exception was squarely before the California Supreme Court when this text was published in *Lexin v. Superior Court*. The issue presented was: did petitioner's service on the San Diego Retirement Board (and voting on an increase to pensions which affected board members) violate Govt. Code § 1090 and subject them to criminal prosecution, or did the non-interest exemption of Govt. Code § 1091.5(a)(9) apply?¹⁰⁸

10) Attorney, Stockbroker, Insurance or Real Estate Broker/Agent

If the attorney, broker or agent owns less than 10 percent of the firm, this non-interest exemption may apply under specified conditions set forth in the section 1091.5(a)(10). It is the companion to the remote interest exception where the official owns 10 percent or more of the firm. *See* Cal. Gov't Code § 1091(b)(6).

11) Officers, Employees and Owners of Less than 10 Percent of a Bank or Savings and Loan

This is the companion section to the immediately preceding remote interest exception, discussed above. Cal. Gov't Code § 1091.5(a)(11).

b. Application of Section 1091.5

If a financial interest qualifies for one of the non-interest exceptions listed in Section 1091.5, the interest is statutorily concluded not to be an interest within the meaning of Section 1090. Therefore, subject to the discussion in Section 10 below, the agency and the official are not barred from participating in the decision. However, the official must comply with any of the disclosure requirements listed in the Code.

12) Nonprofit, Tax-Exempt Conservation/Park/Historical Resources Corporation and Its Employees

¹⁰⁷ 78 Ops. Atty Gen. 362 (1995).

¹⁰⁸ 154 Cal.App.4th 1425 (2007)

This applies to bona fide nonprofit, tax-exempt corporations having among their purposes the conservation, preservation or restoration of park, natural lands, historic resources and employees of those organizations.

13) Employee, Officers and Boardmembers of the California Housing Finance Agency

This applies to officers, employees or members of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs under certain circumstances.

11. “I Found an Exception that Applies, Am I Done?”

As promised under the cautionary note in the Overview (section 1), *supra*, once you have identified that an exception may exist, you should nonetheless test your analysis by the “smell test” as to whether or not your analysis is also consistent with the general theme and philosophical underpinnings of Section 1090.

The reasons for this cautionary approach are abundant and simple. To begin with, at present, you cannot turn to the staff of the FPPC to insulate members of your agency from liability if your opinion is wrong.¹⁰⁹ Further, the exceptions are narrowly drawn and even more narrowly interpreted. Finally, the opinion you provide to an official is also an opinion you give to your agency and, candidly, the remedies and penalties of 1090 violations are too severe for close calls.

What, then, is the “philosophy” of section 1090? Cases interpreting this law offer the best guidance. They outline that the purpose of section 1090 is to make certain that:

. . . every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict of interest situations scrupulously.¹¹⁰

. . . the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor.¹¹¹

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor

¹⁰⁹ AB 1558 (Wolk; 2005) would have taken the first steps toward incorporating Section 1090 within the jurisdiction of the Commission. That effort has been tabled as of this text’s publication.

¹¹⁰ *Thomson v. Call*, 38 Cal. 3d 633, 649, 214 Cal. Rptr. 139 (1985).

¹¹¹ *Id.* at p. 648; see also *Campagna v. City of Sanger*, 42 Cal. App. 4th 533, 542, 49 Cal. Rptr. 2d 676 (1996).

does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of validity. *Capron v. Hitchcock*, 98 Cal. 427, 33 P. 431 (1893).¹¹²

Furthermore, “the statute not only strikes at situations that do involve actual fraud and dishonesty, but also at those in which the possibility exists for personal influence of an interested (officer) to be brought to bear, either directly or indirectly, on an official decision. (Citations.)” (66 Ops.Cal.Atty.Gen. at 160, fn. 3.) Therefore, the public policy behind Section 1090 is to prevent not only actual corruption, but the appearance of corruption. As such, where application of a particular exception would appear to allow an official to be influenced by their personal interests, you may consider whether application of the exception offends the public policy behind Section 1090.

Practice Pointer:

For Candidates: Because Section 1090 can have a significant effect on someone's business or other financial interest(s) if a candidate has been doing business with your agency, a preelection or preappointment briefing of candidates would be helpful to avoid misunderstandings and surprises.

12. Limited Rule of Necessity

The Attorney General's Office and the courts have applied a limited rule of necessity to the application of section 1090. The rule of necessity is judicially created in order to permit an administrative body that has a duty to act upon a matter before it to do so despite a conflict of interest. The Attorney General has opined that where a government agency is the only entity capable to act in the matter, “the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty.” 70 Ops.Atty.Gen. 45, 48 (1987).

The rule of necessity has two facets, or factual circumstances, in which it will apply. The first facet of the rule concerns a situation where a board must contract for essential services and no source other than that which triggers the conflict is available. The second facet of the rule of necessity focuses on the performance of official duties rather than upon the procurement of goods and services. The second facet is similar to the rule of necessity codified in the Political Reform Act.¹¹³ The Attorney General and the California courts have applied this rule in a number of contexts. See *Caminetti v. Pac. Mutual Ins. Co.*, 22 Cal.2d 344, 366-367 (1943), explaining the rule of necessity in nonprocurement situations; *Eldridge v. Sierra View Local*

¹¹² *Id.* at p. 649.

¹¹³ See *Eldridge v. Sierra View Local Hospital Dist.* 224 Cal.App.3d 311, 321 (1990) suggesting that the rule of necessity set out in the Political Reform Act is a codification of Section 1090's judicially created rule of necessity.

Hospital Dist., 224 Cal.App.3d 311, 321 (1990); 67 Ops. Atty. Gen. 378; 59 Ops. Atty. Gen. 604, 619 (1976); 57 Ops. Cal. Atty. Gen. 458, 463-465 (1974); 69 Ops. Atty. Gen. 102.

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, the board member must not participate in any manner. In the case of a single official or employee, the application of the rule of necessity permits the official or employee to participate in the making of the contract.¹¹⁴

In 2005 the Attorney General did find that under the “rule of necessity” a health care district may advertise on a radio station where (1) the radio station is the only station that accepts advertising in the district’s region, (2) one of the district’s directors, who assumed office in 2001, became an employee of the radio station in 1997 as an engineer and talk show host, (3) for more than five years prior to 1997, the district advertised on the radio station, (4) the station has six employees, (5) the district director’s compensation from the station exceeds fifty percent (50%) of his income, and (6) the district director does not have an ownership interest in the station or hold a supervisory or managerial position at the station.¹¹⁵

The Attorney General has determined that the above exception has not been extended to a situation in which the public official has a personal financial interest in the terms of a contract between the governing body and its own employees and instead utilized the limited “rule of necessity” in allowing a board to renegotiate the amount of health benefits provided in a collective bargaining agreement that affected one of its board members as a retiree from the district.¹¹⁶

13. Contracts Made in Violation of Section 1090 is Void and Unenforceable

a. In addition to the penalties imposed on officials making contracts in which they have a financial interest, pursuant to section 1097, a contract made in violation of section 1090 is void. Payments made to the contracting parties under a void contract must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract pursuant to the California Supreme Court’s decision in *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).

Section 1092 provides that every contract made in violation of section 1090 may be avoided by any party except the official with the conflict of interest. *See* Cal. Gov’t Code § 1092.5 (exception concerning the good faith of parties involved in the lease, sale or encumbrance of real property). Despite the wording of the section “may be avoided,” case law demonstrates that any contract made in violation of section 1090 is void, not merely voidable.¹¹⁷

¹¹⁴ *See* 65 Ops. Atty. Gen. 305, 311 (1982).

¹¹⁵ 88 Ops. Atty. Gen. 106.

¹¹⁶ 89 Ops. Atty. Gen. 217

¹¹⁷ *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139(1985); *People ex rel. State of Cal v. Drinkhouse*, 4 Cal. App. 3d 931, 84 Cal. Rptr. 773 (1970).

b. Statute of Limitations for Avoidance of Contracts: In 2007, subsection (b) was added to Govt. Code Section 1092 which provides:

“An action under this section shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation described in subdivision (a).”

14. Penalties for Violation by Officials

Any officer or person who is found guilty of willfully violating any of the provisions of section 1090 *et seq.* is punishable by a fine of not more than \$1,000 or imprisonment in a state prison. Cal. Gov't Code § 1097.¹¹⁸ For an official to act "willfully," his or her actions concerning the contract must be purposeful and with knowledge that he or she might have a financial interest in the contract.¹¹⁹

The statute of limitations for criminal prosecution under Section 1090 is three years **after discovery** of the violation.¹²⁰ An individual convicted under section 1090 is forever disqualified from holding any office in the State of California.

In a case where a city councilmember sought and obtained the appointment to the position of city manager and was later charged with violating Government Code 1090, she asserted the defense of entrapment by estoppel, claiming that she acted in reliance on the advice of the city attorney. The trial court embraced the argument and ruled in a motion in limine that she could assert that as a defense. The Appellate Court disagreed and the Supreme Court affirmed the judgment of the Appellate Court concluding that the defense of entrapment by estoppel is not available to defendant. The court did not want to extend the defense to public officials who seek to defend conflicts of interest accusations by claiming reliance on the advice of public attorneys charged with counseling them and advocating on their behalf. They felt it was particularly inappropriate because the city attorney was a subordinate officer of the city council and served at their pleasure. They pointed out that the average citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime. It made no difference that the attorney who mistakenly advised her held a government position.

¹¹⁸ See *Klistoff v. Superior Court (City of Southgate)*, 157 Cal. 4th 469 (2007). Only public officials and employees can violate Govt. Code Section 1090; private contracting party cannot be liable for conspiracy to violate Section 1090.

¹¹⁹ *People v. Honing*, 48 Cal. App. 4th 289, 334-339, 55 Cal. Rptr. 2d 555 (1996).

¹²⁰ *Id.* at p. 304, fn. 1; Cal. Penal Code §§ 801, 803. This statute of limitations would not apply for a civil action to challenge a contract made in violation of Section 1090. Although not yet decided by the courts, some experts suggest there is no statute of limitations for a civil challenge under Section 1090 because the contract is void and therefore can never be enforced by a court.

When an agency is informed by affidavit that a board member or employee has violated section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation. Cal. Gov't Code § 1096.

XIII.

Common-Law Conflict of Interest Doctrine

1. Introduction

An analysis under the common-law conflict of interest doctrine should be part of every analysis of a potential conflict of interest. Often it is under this doctrine that public attorneys, through an application of the infamous "gut reaction" or "smell test," arrive at a joint conclusion with the requester that, while there may not be a technical conflict under one of the recent statutes, regulations or opinions, there nonetheless seems to be an "appearance of impropriety."

Common law conflicts, however, are more than the "appearance of impropriety." A common law conflict is a real conflict that may require disqualification or rehearing of the matter in question.¹²¹ Although penalties and enforcement are not clear, it might follow that a court reviewing the matter could invalidate a legislative or quasi-judicial action; order an unwinding of any transaction involved; disgorgement of profit and damages; as well as costs and attorney's fees.

The Attorney General cites its readers to a good expression of the common-law doctrine found in *Noble v. City of Palo Alto*, to wit:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public.

Noble v. City of Palo Alto, 89 Cal. App. 47, 51, 264 P. 529 (1928).

The Attorney General has continued to caution that even where a conflict is not found according to statutory prohibitions, special situations could still constitute a conflict under a longstanding common-law doctrine.¹²²

The decision-maker should not be tempted by his/her own personal or pecuniary interest and the doctrine will apply to situations involving a nonfinancial personal interest.¹²³

¹²¹ See *Nasha v. City of Los Angeles*, 125 CA 4th 470 (2004); *Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547 (1994); *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81 (2003); *Mennig v. Culver City*, 86 Cal.App.3d 341 (1978).

¹²² 53 Ops. Atty Gen. 163 (1970).

¹²³ *Clark v. City Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (1996).

A good example of where a common-law conflict might lie is where a parent of an elected official owns a property as their sole and separate property and applies for a rezoning in order to develop an apartment project. The elected official may know of their parent's economic needs or know that eventually they will inherit the apartment project. This most likely presents a common-law conflict of interest.

Recently the State Attorney General in an opinion that covered an analysis of the Political Reform Act, Government Code 1090 as well as the common law conflict of interest doctrine found the city council member who served on the board of directors of a nonprofit trust created to support a national park could participate in a city council decision to lease a parcel of land to a business owner from whom the councilmember had solicited contributions on behalf of the nonprofit trust.¹²⁴

2. The Right to Fair and Unbiased Decision-makers

A. In General. While under the heading of common law conflicts of interest, it may be more accurate to view the expansion of some common law doctrines to be broader in scope than just conflicts of interest. The Institute for Local Government (ILG), a division of the League of California Cities, have set forth three different kinds of impermissible bias which include:

- **Personal interest in the decision's outcome.** The example cited is the Clark v. City of Hermosa Beach case, supra.
- **People bias.** An example is a strong animosity about a permanent applicant based on conduct that occurred outside the hearing or conversely a strong personal loyalty towards a party involved in the proceeding.
- **Factual bias.** An example is information an official might receive outside the public hearing that causes the official to a closed mind to any factual information that may be presented in a hearing. This also occurs if the official receives "ex parte information" which provides evidence not available to other decision makers or to the public and their reaction to evidence presented at the hearing.

Sample Regulation/Code Provision

¹²⁴ 88 Ops. Atty. Gen. 32, 38 – 40; This is a fascinating opinion to read as it covers a variety of areas of the law where the councilmember's conduct skirts on a number of common law doctrine as well as several noninterested and remote interest exceptions under Government Code 1090 et seq.

An example of a regulation which can be adopted by local agencies to explain the requirements relative to fair hearings and ex parte contacts, is as follows:

Ex parte contacts/fair hearings. The council (or board) shall refrain from receiving information and evidence on any quasi-judicial matter while such matter is pending before the city council or any agency, board or commission thereof, except at the public hearing.

As an elected or appointed official, it is often impossible to avoid such contacts and exposure to information. It is also necessary in fulfilling the elected role to receive contacts from constituents on important subject matter. Therefore, if any member is exposed to information or evidence about a pending matter outside of the public hearing, through contacts by constituents, the applicant or through site visits, the member shall disclose all such information and/or evidence acquired from such contacts, which is not otherwise included in the written or oral staff report, during the public hearing and before the public comments period is open.

A matter is "pending" when an application has been filed. Information and evidence gained by members via their attendance at noticed public hearings before subordinate boards and commissions are not subject to this rule.

B. Other Bases

i. Exempt Gifts. Troubling is the gift which may not require reporting or attribution to a public official however may nevertheless give rise to an allegation of bias or a violation of the common law conflict of interest doctrine. For example, current regulation 18944 allows the spouse of an official based on a bona fide friendship or social relationship with the donor to accept a \$10,000 gift to a child's college fund and, provided the official did not solicit the gift, receive the gift or exercise any dominion or control over the gift, would not be "charged" with receipt of the gift or benefit thereby. This nevertheless could form the basis of both an allegation of bias, conflict of interest or more serious allegations of corruption.

C. Bias Under the Due Process Clause

In addition to the catchall analysis of common-law conflicts of interest, increasingly, we as public attorneys, have to be vigilant for the entry of bias into decision-making that may constitute a violation of due process by the public agency. It is mentioned in this context because it appears to the general public as a "conflict" and, therefore, needs some attention rather than disregard when an interested person or applicant raises the issue as a conflict rather than a due process violation.

Whenever a city official is making a quasi-judicial decision, the common-law prohibition against biased decision-making must be considered. The official is disqualified if the official is biased in favor of or against a party involved in a quasi-judicial decision. Mere familiarity with the facts does not necessarily constitute bias. The city official must be prepared to apply the law to peculiar fact situation presented during the hearing, regardless of what prehearing opinions the official may hold.¹²⁵

Bias is a particularly important issue because bias can give rise to legal challenges on due process grounds. See *Cohan v. City of Thousand Oaks*¹²⁶ in which an applicant challenged a city council appeal of a planning commission decision on procedural due process grounds.

D. The Evolving Case Law

In addition to the *Clark v. Hermosa Beach* case, *supra*, in 2004 the Court of Appeal reversed a trial court ruling and directed that the Los Angeles Planning Commission [be directed to] conduct a new hearing based on the fact that a Commission member had authored a critical article concerning the developer's project and then participated in an appeal of the project approval to the Planning Commission that resulted ultimately in the staff's conditional approval of the project, being overturned.

The Appellate Court found that the proceeding before the Planning Commission was quasi-judicial in nature because it involved the determination and application of facts peculiar to an individual case. Thus, procedural due process principles were applicable. The developer had shown that there was an unacceptable probability of actual bias on the part of the Commission, based on the Commission member's authorship of the article attacking the project in question. They found that the authorship of the article was sufficient to preclude the Commission member from serving as a reasonable, impartial, noninvolved reviewer. The appellate decision also included a review of whether or not the developer had waived this challenge for not raising it at the administrative level.¹²⁷

In *Cohan v. City of Thousand Oaks*, the Appellate Court found that cumulative errors impaired the adequacy of the plaintiff's hearing. The denial of substantive due process resulted in the court ordering the trial court to reverse its ruling and to enter a new order nullifying the city council's appeal to itself. The procedural errors included errors in noticing, failing to follow the city's own procedural rules, shifting the burden of proof to the developer rather than to the appellant city council, and other procedural errors including failing to file timely findings. This was obviously a case involving citizens who did not want a development in their backyard and the court noted "[I]ronically, the council's very attempt to protect the due process rights of

¹²⁵ See *Mennig v. City Council*, 86 Cal. App. 3d 341, 150 Cal. Rptr. 2d 207 (1978) and *City of Fairfield v. Superior Court of Solano County*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975).

¹²⁶ *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 557, 35 Cal. App. 2d 782 (1994); see also *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 772, 122 Cal. Rptr. 543 (1975).

¹²⁷ *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470 (2004).

interested citizens cavalierly erode those same rights of the [developer]. This stands due process on its head.” They also found that “While a single procedural error might have caused appellant’s no prejudice, the cumulative effect of the council’s actions resulted in a violation of the [applicant’s] substantive and procedural due process rights.”¹²⁸

Since the *Cohan* case had reviewed issues of the adequacy of the notice of the grounds for appeal, the appeal by a member of the city council, and the issue as to who had the burden of proof going forward, the *Breakzone Billiards* case tried to build on that history. In addition to other due process issues discussed in the opinion, the opinion is worth reading as the case discusses the following common law-type conflict of interest contentions:

1. Four members of the city council were biased because they had received campaign contributions from the developer and lessor of the property for which Breakzone had applied for a CUP;
2. A member of the city council had filed the appeal of the Planning Commission’s decision and participated in and voted on the appeal;
3. The Torrance City Attorney improperly advocated on behalf of a councilmember who filed the appeal;
4. Were issues presented at the city council hearing on the appeal which had not been presented at the Planning Commission hearing and,
5. The cumulative effect of the breaches of due process as an appearance of bias.

In addition to many of the grounds reviewed by the court in *Cohan*, this opinion also discusses conflicts under the Political Reform Act; an allegation remotely invoking Govt. Code § 1090, as well as common law conflicts of interest.¹²⁹

In *Mennig v. City of Culver City* case, *supra*, the court set aside a council’s action and affirmed the Civil Service Commission’s determination of the proper disciplinary action to be taken against the police chief based on a conclusion that the councilmembers had become personally embroiled in the controversy and thus were disqualified from adjudicating the dispute. And finally, in *Nightlife Partners v. City of Beverly Hills*, the court held that the protections of procedural due process required a fair hearing before an unbiased decision maker in administrative proceedings and there was a clear appearance of unfairness and bias during this

¹²⁸ 30 Cal.App.4th 547 (1994).

¹²⁹ 81 Cal.App.4th 1205 (2000).

hearing and the overlapping of advocacy and decision making roles between the hearing officer and the assistant city attorney.¹³⁰

¹³⁰ *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81 (2003).

XIV. Other Conflict of Interest Laws

A. Introduction

This section of the booklet will address "other" conflicts of interest, meaning conflicts other than those embodied in the Political Reform Act. At a minimum, consideration of the following list of other possible areas where private interests may collide with public policy and, to a limited extent, where dual public duties themselves conflict, is a requirement. The following areas will be examined:

- Incompatible outside activities. Cal. Gov't Code § 1126.
- Incompatible offices. Cal. Gov't Code § 1099.
- Redevelopment agency conflicts.
- Housing—HUD; Section 8; CDBG conflicts.
- Discount passes on common carriers.
- Public Contracts Code: 10410 and 10411.
- Government Code 87407: The Revolving Door.

B. Incompatible Outside Activities (Government Code Section 1126)

1. Introduction

The Government Code regulates incompatible activities. It provides that a local agency, officer or employee shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with or inimical to his/her duties as a local agency officer or employee or with the duties, functions or responsibility of his/her appointed power or agency. Cal. Gov't Code §§ 1125 *et seq.*

The officer or employee is forbidden to perform any work, service or counsel for compensation outside of his/her local agency employment where any part of his/her efforts will be subject to approval by any other officer, employee, board or commission of his/her employing body, unless otherwise approved by the local agency in the manner prescribed by section 1126(b).

2. Implementation

Section 1126 is not self-executing. In order to discipline an employee for engaging in incompatible activities, the agency must promulgate a statement of incompatible activities and, before imposing sanctions, must adopt rules establishing notice and appeal rights. Cal Gov't Code § 1126(c).¹³¹

a. Persons Covered

The prohibition applies to officers and employees of all local agencies, and the Attorney General has opined that employees include temporary consultants such as special counsel hired as independent contractors.¹³²

1.

Not Applicable to Elected Officials. The Attorney General's Office has concluded that in light of the *Mazzola* case, Section 1126 does not apply to elected officials because they would not be subject to rules handed down concerning these incompatible activities by "an appointing power." Recall that in order to activate the prohibition, the appointing power must promulgate guidelines as to what activities will be incompatible and since elected officials are not subject to an "appointing authority." As such, the Attorney General, concluded that Section 1126 only applies to local employees and officers, and not to elected officials.¹³³

2.

School Board Exception. The Legislature has overruled the *Mazzola* opinion as it applies to school board members by amending Education Code Section 35233 to make school board members subject to Section 1126. In order to keep faith with the logic of the exclusion of other public officials, the Attorney General opined that the provisions of section 1126(a) were self-executing (i.e., no need for an "appointing authority") with regard to school boards notwithstanding that it is not self-executing to other elected officials.

¹³¹ *Mazzola v. City and County of San Francisco*, 112 Cal. App. 3d 141, 154-155, 169 Cal. Rptr. 127 (1980).

¹³² 70 Ops. Atty Gen. 271, 274 (1987); 61 Ops. Atty Gen. 18, 23 (1978).

¹³³ 64 Ops. Atty Gen. 795 (1981).

3. Activities That Have Been Analyzed

a. A Public Agency Has Broad Discretion to Limit Incompatible Activities of Their Employees¹³⁴

The following are examples which have been analyzed:

- A county supervisor may be employed as the secretary/executive director of the county housing authority¹³⁵.
- A member of school board found not to be incompatible with service as a member of a city personnel board.¹³⁶
- A county assessor may determine that employee's purchase of land at tax-deed sale within the county is incompatible with his/her duties as an appraiser in the assessor's office.¹³⁷ (NOTE: May have a section 1090 issue here, as well.)
- A city may allow its police chief as a private individual to act as an agent with private parties to provide private security services by off-duty police officers for a fee.¹³⁸
- A school board may determine that a board member's operation of a private preschool for profit conflicts with duties as a board member.¹³⁹

3. An Employee's Outside Employment, Activity or Enterprise May Be Prohibited If:

- Involves the use for private gain or advantage of his/her local agency time, facilities, equipment and supplies, the badge, uniform, prestige or influence of his/her local agency or office or employment. Cal. Gov't Code § 1126(b)(1).
- Involves receipt or acceptance of any money or other consideration from anyone other than his/her local agency for the performance of an act which he/she would be required or expected to render in the regular course of his/her duties with the local agency. Cal. Gov't Code § 1126(b)(2).
- Involves the performance of an act, in other than his/her capacity as a local agency officer or employee, which act may be later subject, directly or indirectly, to the control, inspection, review, audit or enforcement of any other officer or employee of the agency by which he/she is employed. Cal. Govt. Code § 1126(b)(3).

¹³⁴ *Long Beach POA v. City of Long Beach*, 46 Cal. 3d 736, 250 Cal. Rptr. 869 (1988).

¹³⁵ 81 Ops. Atty Gen. 274 (1998).

¹³⁶ 58 Ops. Atty Gen. 109 (1975).

¹³⁷ 63 Ops. Atty Gen. 868 (1980).

¹³⁸ 68 Ops. Atty Gen. 175 (1985).

¹³⁹ 70 Ops. Atty Gen. 157 (1987).

- Involves time demands that would render performance of his/her local agency duties less efficient. Cal. Govt. Code § 1126 (b)(4).

Practice Pointer:

Many of the above examples present Section 1090 and Political Reform Act issues as well. Therefore, even in the absence of a formal statement pursuant to section 1126(c), an activity which involves a contract, may require analysis pursuant to these sections. Although the official may not be prohibited from engaging in the outside activity he or she may be prohibited from participating in a decision which will impact his or her private financial interests, or the Board may be prohibited from contracting altogether. Also consider whether the doctrine of common law conflicts applies.

4. Exceptions

Section 1127 sets forth that it is **not** the intent of this article to prevent the employment of a public employee by private business, such as a peace officer, firefighter, forestry service employee, among others, to work off-duty in vocations related to and compatible with his/her regular employment, or past employment, provided the person has approval of their agency supervisor and are certified as qualified for that endeavor by their agency.

Section 1128 expressly provides that service on an appointed or elected governmental board, commission, committee or other body by an attorney employed by a local agency in a nonelected position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacating of either such office.

5. Penalties and Enforcement

The statute contains no special penalties or remedies for violation. Clearly, with respect to local government employees, disciplinary action can be taken for a violation, the severity of which will depend on the seriousness of the violation. In addition, a member of the public may have the right to seek relief through injunction or mandamus.

Practice Pointer:

For public agency attorneys who represent entities other than cities and counties, always be alert for the possibility that a statute might regulate outside employment activities. A good example would be Labor Code 1150 which provides that each member of the Agricultural Labor Relations Board and its general counsel shall not engage in any other business, vocation, or employment. This provision has been the subject of one quo warranto request to the State Attorney General.

C. Incompatible Offices

1. The 2005 Statute: Government Code 1099

In 2005 the state legislature adopted Government Code 1099 which is entitled “**Simultaneous Occupation of Incompatible Public Offices; Effects; Enforcement of Prohibition; Exceptions.**” In adopting this provision, Section 2 of the statute (uncodified) provided as follows:

“Nothing in this act is intended to expand or contract the common law rule prohibiting an individual from holding incompatible public offices. It is intended that courts interpreting this act shall be guided by the judicial and administrative precedent concerning incompatible public offices developed under the common law.”

The statute provides as follows:

§ 1099.

Simultaneous occupation of incompatible public offices; effect; enforcement of prohibition; exceptions

(a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

(1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.

(2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.

(3) Public policy considerations make it improper for one person to hold both offices.

(b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure.

(c) This section does not apply to a position of employment, including a civil service position

(d) This section shall not apply to a governmental body that has only advisory powers.

(e) For purposes of paragraph (1) of subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.

(f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

2. The Common-Law Doctrine of Incompatible Offices

a. Introduction

The doctrine of incompatibility of office concerns the potential clash of two public offices held by a single official and potentially overlapping public duties. This is to be compared to the concept of conflicts of interest which involve a potential clash between an official's private interest and his/her public duties.

b. The Basic Prohibition

To fall within the common-law doctrine of incompatibility of office, two elements must be present:

- The official must hold two public offices simultaneously, and
- There must be a potential conflict or overlap in the functions and responsibilities of the two offices.¹⁴⁰

In the landmark California Supreme Court case of *Chapman v. Rapsey*, the Court outlined issues to be addressed in evaluating the incompatibility of office issues:

- 1) Whether there is any significant clash of duties or loyalty between the offices;
- 2) Whether considerations of public policy make it improper for one person to hold both offices; and
- 3) Whether either officer exercises a supervisory, auditory, appointive or removal power over the other.

¹⁴⁰ 68 Ops. Atty Gen. 337 (1985).

Chapman v. Rapsey, 16 Cal. 2d 636, 107 P. 2d 388 (1940). These factors are now codified in Section 1099.

In *Rapsey*, a city judge accepted an appointment as city attorney, and the Court concluded that both positions were public offices and that there was a significant clash in respect to duties and functions.

c. Public Office Defined

What is Public Office? In *Rapsey*¹⁴¹, the court defined the elements of a public "office" as including "the right, authority and duty created and conferred by law—the tenure of which is not transient, occasional or incidental—by which for a given period an individual is invested with power to perform a public function for the public benefit." The Attorney General summarized the court's conclusion as follows:

For the purpose of the doctrine of incompatible public offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state.

69 Op. Att’y Gen. 337 (1985).

Therefore, members of purely advisory boards are not subject to the doctrine.

In addition, the Attorney General has opined that employment is not an office. Since an “employment” is not an “office,” the doctrine of incompatibility of office does not preclude an official from simultaneously holding an office and an employment position.¹⁴² However, the opinions have not produced clarity primarily because of the lack of precise delineation between “employment” and “office.” For example, statutorily created positions that are often held by “employees,” such as city manager, police chief, fire chief, city attorney, have been deemed public offices subject to the incompatible offices doctrine. In another example, the Attorney General has opined that a deputy principal is not necessarily holding the same office as the principal for purpose of incompatible office and only does so when he or she stands in the principal's shoes as acting principal.¹⁴³ This creates more confusion than clarity. A more recent discussion can be reviewed in 87 Ops. Atty. Gen. 142, finding that a county veterans service officer is employment and therefore the position would not be incompatible with the position of undersheriff.

¹⁴¹ *Chapman v. Rapsey*, 16 Cal. 2d 636, 640, 107 P. 2d 388 (1940).

¹⁴² 58 Ops. Atty Gen. 109, 111 (1975).

¹⁴³ 78 Ops. Atty Gen. 362 (1995), *modifying* 63 Ops. Atty Gen. 710 (1980).

Nonetheless, California Gov't. code 53277 enacted in 1995, prohibits an employee of a local agency from being sworn in as an elected or appointed member of the legislative body (i.e., city council) without resigning the employment position.

[Explanation: There may be a better spot for this, but I think it is an important point. Reading on further is this comment what you meant for Section 4, "When employment must be terminated?" If so, perhaps the section heading could be "Employee Who is Elected or Appointed to the Legislative Body"]

The Attorney General acknowledged that the county positions of auditor-controller, county administrative officer, and director of mental health services are all "offices" for purposes of the incompatible offices doctrine. The Attorney General went on to opine that these three offices can be consolidated by county ordinance.¹⁴⁴

d. Examples

For examples where the doctrine has been applied to the holding of two offices, see the following:

- Position of police chief is incompatible with that of city manager.¹⁴⁵
- A county supervisor may be employed by the county housing commission as its secretary and executive director.¹⁴⁶
- Full-time position as fire chief is incompatible with the office of city council where fire chief is responsible to the fire district and council members serve as directors of the fire district.¹⁴⁷
- Offices of school district trustee and city council member are incompatible where the district and city have common territory.¹⁴⁸
- Offices of hospital district general manager and superintendent of schools are incompatible with the office of the community services district director.¹⁴⁹

¹⁴⁴ 88 Ops. Atty. Gen. 130

¹⁴⁵ 81 Ops. Atty Gen. 304 (1998).

¹⁴⁶ 81 Ops. Atty Gen. 274 (1998).

¹⁴⁷ 76 Ops. Atty Gen. 38 (1993).

¹⁴⁸ 73 Ops. Atty Gen. 354 (1990).

¹⁴⁹ 68 Ops. Atty Gen. 337 (1985).

- Offices of school trustee for high school and elementary school districts are incompatible.¹⁵⁰
- Offices of deputy sheriff and county supervisor are incompatible even if the salary for one of the positions was waived.¹⁵¹
- Offices of county planning commissioner and city planning commissioner are incompatible.¹⁵²
- Offices of school board member and city council member are incompatible.¹⁵³
- Offices of county planning commissioner and county water district director are incompatible.¹⁵⁴
- The offices of board of directors of a public utility district and county board of supervisors are incompatible.¹⁵⁵
- County planning commissioner and city council member are incompatible offices.¹⁵⁶
- Clash of duties in water district positions was reviewed in 90 Ops. Atty. Gen. 12.
- A county officer does not forfeit his/her office by accepting a standby appointment (Gov't. Code 8638) for the office of county supervisor.¹⁵⁷
- The office of Director of the Valley County Water District is incompatible with the position of trustee of the Baldwin Park Unified School District.¹⁵⁸
- Although decided on Section 1090 grounds, the Attorney General identified incompatible offices as an issue in ruling that a councilmember's law firm could not donate its services to the city. The discussion in the opinion is instructive on divided loyalties.¹⁵⁹

¹⁵⁰ 68 Ops. Atty Gen. 171 (1985).

¹⁵¹ 68 Ops. Atty Gen. 7 (1985).

¹⁵² 66 Ops. Atty Gen. 293 (1983).

¹⁵³ 65 Ops. Atty Gen. 606 (1982).

¹⁵⁴ 64 Ops. Atty Gen. 288 (1981).

¹⁵⁵ 64 Ops. Atty Gen. 137 (1981).

¹⁵⁶ 63 Ops. Atty Gen. 607 (1980).

¹⁵⁷ 97 Ops. Atty. Gen. 54.

¹⁵⁸ 87 Ops. Atty. Gen. 153.

¹⁵⁹ 86 Ops. Atty. Gen. 138.

Practice Pointer:

In evaluating the conflict in the duties or functions, remember it is enough that there be a potential for conflict in duties and functions. An actual conflict need not be established.

e. Legislative Intervention

The common-law doctrine can be superseded by legislative enactment. Thus, the Legislature may choose to expressly authorize the holding of two offices notwithstanding the fact that dual holding would otherwise be prohibited by the common-law doctrine. For example, the Legislature has exempted Local Agency Formation Commissions,¹⁶⁰ the Coastal Commission¹⁶¹ and River Port Districts¹⁶² from the scope of the common law doctrine. As such, Councilmembers may simultaneously serve on LAFCO and on the City Council. In addition, the Attorney General has opined that Government Code section 6508 (Joint Powers Agencies) was intended to ensure that the common-law rule did not prevent council members from serving on joint powers agencies or their governing boards.¹⁶³

Incompatible situations are often presented by some of the newer legislation creating, for example, transportation corridor agencies and county transportation agencies, which by their terms, require membership of city and county representatives. Loyalties of the city representatives obviously compete in their city capacity for dollars and project priority with other city, county, and at-large members. Nonetheless, by virtue of the legislative scheme, the statutory makeup of the board avoids the common-law doctrine of incompatible offices.

This issue has been reviewed recently in 90 Ops. Atty. Gen. 24, finding that a general manager or department head of a (1) municipal water district, (2) public utility district, (3) county water district, or (4) irrigation district or a city manager or city department head may serve on the board of directors of a county water authority as the representative of a member agency.

f. Local Agency Intervention

In a recent opinion, the Attorney General indicated that a county board of supervisors may, by ordinance, consolidate the duties of three offices. In that opinion the county board of supervisors had established a number of management positions and thereafter adopted an ordinance consolidating the positions of auditor-controller, county administrative officer, and director of

¹⁶⁰ Cal. Gov't Code § 56337.

¹⁶¹ Pub. Res. Code § 30318.

¹⁶² Harb. & Nav. Code § 6835.1.

¹⁶³ 78 Ops. Atty Gen. 60 (1995).

mental health services. This can lead to the conclusion that a city can do so by ordinance, however, the city would have to be mindful of their own local charter (if applicable) which may set out those offices. In that case, the consolidation of the offices would have to be accomplished through charter amendment.¹⁶⁴

Similarly the Attorney General has concluded that the offices of county treasurer, county auditor, and county tax collector may be consolidated and held by the same person. And that a county treasurer, who is also a county auditor, may be appointed to a county retirement board operating under the county employee's retirement law of 1937. The latter question being determined by the Attorney General's interpretation of constitutional and statutory provisions relative to retirement and pension systems. 89 Ops. Atty. Gen. 152.

g. Penalties and Enforcement

Under the common-law doctrine and Government Code Section 1099(b), when a public official is found to have accepted two public offices, the doctrine and statute provides for an automatic vacating of the first office.¹⁶⁵

The doctrine can be enforced in a suit for *quo warranto* under section 803 of the California Code of Civil Procedure. Disqualification or abstention from those decisions were an actual clash of the two offices occurs is not an available remedy under the common-law doctrine or the statute.¹⁶⁶

If a *quo warranto* action is filed, notwithstanding the "legal forfeiture language", the person remains in the prior office as a de facto member until he/she actually resigns or is removed from office by the *quo warranto* or other lawsuit.¹⁶⁷

h. Brown Act Considerations

Officials who hold two or more offices should be cautious in avoiding violation of the Brown Act. Where an official releases confidential information acquired during the closed session of a government body he or she may be subject to disciplinary action and civil or criminal sanctions.

Until 2003, there was no express deterrent to prevent public officials from disclosing confidential information acquired during a duly held closed session meeting of a local legislative body. The Attorney General had opined the confidentiality of information received by a person during a closed session is implicit in the Brown Act, but there was no express statement in the law. However, the Legislature enacted Government Code section 54963, which makes it

¹⁶⁴ 88 Ops. Atty. Gen. 130

¹⁶⁵ See 66 Ops. Atty Gen. 293, 295 (1983) and 66 Ops. Atty Gen. 176, 178 (1983).

¹⁶⁶ 66 Ops. Atty Gen. 176, 177-178 (1983).

¹⁶⁷ 74 Ops. Atty Gen. 116 (1981).

unlawful to disclose any “confidential” information acquired in any duly held closed session of a local legislative body. (Cal. Gov’t Code § 54963.)

[Explanation: 2003 is not that recent anymore]

Thus, a person may not reveal confidential information acquired by being present in a duly authorized closed session meeting of a local legislative body. (Gov. Code § 54963(a).) Confidential information is defined as any information made in closed session that is specifically related to the basis for the legislative body to meet in closed session. (Gov. Code § 54963(b).)

The law provides the following remedies: (1) injunctive relief to prevent the disclosure of confidential information prohibited by this section; and (2) disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; and (3) referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the Grand Jury; and (4) any other remedy available at common law. (Gov. Code. § 54963(c).)

Pursuant to this provision of the Brown Act, if a board member serving more than one government agency may run the risk of violating the Brown Act if they reveal information disclosed in a closed session meeting of one body to another person or government agency.

3. Special Provisions for Public Attorneys

Government Code section 1128 to the Government Code concerns the right of public attorneys to hold other elective or appointive office. The statute provides the following:

Service on an appointed or elected governmental board, commission, committee or other body by an attorney employed by a local agency in a nonelected position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office.

The Attorney General has opined that this statutory provision modified the common law in several respects which allows a public attorney to hold the second appointive or elective office even where a potential conflict may arise. This would then require transactional disqualification rather than forfeiture if a conflict presents itself. Finally, the statute not only applies to a deputy who stands in the shoes of his/her principal, but to the principal himself/herself.

Specific opinions have allowed a deputy district attorney to serve on a city council;¹⁶⁸ an appointed city attorney to serve on an airport commission¹⁶⁹ and a deputy county counsel to serve on a city council.¹⁷⁰

¹⁶⁸ 74 Ops. Atty Gen. 86 (1991)

¹⁶⁹ 67 Ops. Atty Gen. 347 (1984).

¹⁷⁰ 85 Cal. Op. Atty. Gen. 115

4. When Employment Must Be Terminated

- (a) Introduction [TO BE ADDED]
- (b) Cities and Counties

See comment on page 152.

- (c) Special Applications

- The Attorney General has opined that a community college district is not required to terminate the employment of a student who becomes a member of the district's governing board.¹⁷¹

D. REDEVELOPMENT AGENCY CONFLICTS

Health and Safety Code section 33130 provides that no officer or employee who in the course of his or her duties is required to participate in the formulation or approval of plans or policies for the redevelopment of the project area shall acquire any interest in any property included within the project area.

It further provides that if any officer or employee owns or has any direct or indirect financial interest in the property included within the project area, that officer or employee shall immediately make a written disclosure of that financial interest to the agency and the legislative body, entering the disclosure in the official minutes of the agency and the legislative body. Failure to make this disclosure constitutes misconduct in office.

a. Exception.

Section 33130 does not, however, prohibit any officer or employee from acquiring an interest in property within the project area for the purpose of participating as an owner or reentering into business pursuant to the State redevelopment law if the officer or employee has owned a substantially equal interest as that being acquired for three years immediately preceding the selection of the project area.¹⁷² A rental agreement or lease of property which meets four (4) conditions set forth in the statute is not an "interest in real property" for purposes of Subdivision (a).¹⁷³

A further exception is found in section 33130.5, which permits any officer or employee of the agency to acquire property for personal residential use by lease or purchase within a project area after the agency has certified that the improvements to be constructed or work to be done on the property to be purchased or leased has been completed or has certified that no improvements

¹⁷¹ 87 Ops. Atty Gen. 23.

¹⁷² Cal. Health & Safety Code § 33130(b).

¹⁷³ Cal. Health & Safety Code § 33130(c).

need to be constructed or that no work needs to be done on the property. This section also requires immediate written disclosure to the agency, recording the disclosure in the minutes, and disqualification from voting on any matters directly affecting such purchase, lease, or residency. Finally, failure to disclose constitutes misconduct in office.

As a practical matter, an officer or employee of a redevelopment agency or city who occupies a position which requires the person to participate in the formulation of or approval of plans or policies for the redevelopment of the project area is generally disqualified from acquiring any interest in real property included within the project area, except for the narrow exceptions set forth above.

b. Non-dependent Children

The Attorney General has concluded that an adult, non-dependent child of a member of a redevelopment agency may purchase real property within the agency's redevelopment project area provided that the member does not obtain a direct or indirect financial interest in the property as a result of the purchase.¹⁷⁴

E. SPECIAL LAWS IMPACTING HOUSING

a. Housing—General

Health and Safety Code section 34281 should be consulted to evaluate conflicts presented to a commissioner or employee of a housing authority. It provides that an employee or commissioner of an authority shall not acquire any direct or indirect interest in any housing project or any property included or planned to be included in any project, nor have any direct or indirect interest in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project.

If the commissioner or employee owns or controls a direct or indirect interest in any such property, that person shall immediately make a written disclosure of either to the authority, which shall be entered in the official minutes. Failure to affect this disclosure constitutes misconduct in office.

This section also mirrors the legislative intent evidenced in section 1091.5(a)(5) to allow a tenant of an authority to serve as a commissioner of that authority, provided such tenancy is disclosed to the authority in writing and entered in the official minutes of the authority

b. CDBG Funds

¹⁷⁴ 88 Ops. Atty. Gen. 222

Most, if not all, cities administer Community Development Block Grant (CDBG) funds between the U.S. Department of Housing and Urban Development (HUD) and local nonprofit agencies that implement community-wide programs. Until recently, under HUD regulations, agencies had to submit a "conflict of interest exception request" directly to HUD to request an exception to the conflict of interest regulations for any council member who was also involved in one of the nonprofit agencies applying for the CDBG funds.¹⁷⁵

This request also included public noticing of the conflict and publishing in a newspaper of general circulation, a notice disclosing the potential conflict of interest.

These waivers were routinely granted, but also required the submitting agency's attorney to opine as to whether or not the council member or board member had a conflict under other state or federal conflict of interest laws.

Although the requirement for the federal waiver request has since been limited,¹⁷⁶ it should be noted that attorneys should pay particular attention to the operation of Government Code section 1090 with respect to the treatment of the interest of an unpaid board member of a nonprofit seeking funds from the agency. For example, council member who participates in distribution of the CDBG funds and who also serves as a board member (i.e., the American Red Cross), may need to disqualify themselves from participation in the CDBG item by virtue of the Attorney General's interpretation of section 1091(b)(1) as opposed to an alternate interpretation that it would fall within the purview of section 1091.5(a)(8), a non-interest.

Practice Pointer:

If a "ranking" of agencies to receive funds is undertaken, a common technique is to have the conflicted member not participate in the vote on funds his/her agency will receive and then allow participation in the ranking of the remaining agencies. This avoids the problem created if the "ranking" of recipients with that member's involvement could affect whether his/her agency will or will not receive a grant.

F. DISCOUNT PASSES ON COMMON CARRIERS

This basic prohibition reads as follows:

¹⁷⁵ 24 C.F.R. § 570.611, Part 570.

¹⁷⁶ The application of the requirement was limited by removing the word "personal" from the prior language ("personal or financial interest or benefit").

A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.¹⁷⁷

The Attorney General has opined that the prohibition applies in the following manner:

- a. The prohibition applies to public officers, both elected and nonelected, but not employees.
- b. The prohibition applies to interstate and foreign carriers as well as domestic carriers, and to transportation received outside of California.
- c. The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- d. Violation of the prohibition is punishable by forfeiture of office. *Quo warranto* proceeding is the appropriate way to enforce the remedy.

The Attorney General has indicated that where free flights or travel is part of a compensation package (i.e., where the public officer was a spouse of a flight attendant), the free transportation was offered to the public officer as a member of a larger group under a generally authorized or approved plan, a violation does not result.¹⁷⁸ The Attorney General has also sanctioned frequent flyer discounts and a coach to first-class upgrade as part of the airline's policy of providing free first-class upgrades to honeymooning couples.¹⁷⁹

Thus, if the pass or discount is provided to the official because of his/her position as a government official, the prohibition applies. If it is provided to the official as a member of a larger group that is not related to the functions of his/her office, the prohibition may not be applicable.

G. PUBLIC CONTRACTS CODE SECTIONS 10410 AND 10411

Section 10410 of the Public Contracts Code provides that no officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity or enterprise is required as a condition of the officer's or employee's regular state employment. No

¹⁷⁷ Cal. Const. art. XII, § 7.

¹⁷⁸ 67 Ops. Atty Gen. 81 (1984).

¹⁷⁹ 74 Ops. Atty Gen. 26 (1991).

officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

Section 10411 provides that no retired, dismissed, separated or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in the state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements or any part of the decision-making process relevant to a contract while employed in any capacity by any state agency or department. The prohibition shall apply to any person only during the two year period beginning on the date the person left state employment.

For a period of twelve months following the date of his or her retirement, dismissal, or separation from state service no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency if he or she was employed by that state agency in a policy making position in the same general subject area as the proposed contract within the twelve month period prior to his or her retirement, dismissal or separation. The prohibition does not apply to serving as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

H. GOVERNMENT CODE SECTION 87404: REVOLVING DOOR FOR LOCAL AGENCIES

The Political Reform Act places three restrictions on the activities of governmental officials who are leaving or anticipating leaving local government office or reemployment.

a. Section 87406.3: One-Year Ban

The basic prohibition in Government Code § 87406.3 provides that: (1) no specified local official, (2) shall for compensation act as a representative for any other person, (3) for one year after leaving local government office or employment, (4) before his or her former local agency, (5) for the purpose of influencing an administrative or legislative action, or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or the sale or purchase of property or goods. *See* Cal. Code of Regs. §§ 18746.2 and 18746.3.

This restriction applies to local elected officials, chief administrative officers of counties, city managers or chief administrative officers of cities, and general managers or chief administrators of special districts who held a position with a local government agency. The restriction extends for 12 months after a specified official permanently leaves or takes a leave of absence from the particular office or employment covered by the ban.

During the one-year period, the official cannot represent another person for compensation by appearing before or communicating with his or her former agency, including any officer or employee thereof, for the purpose of influencing the former agency's:

- “Administrative action,” means the proposal, drafting, development, consideration, amendment, enactment, or defeat of any matter, including any rule, regulation, or other action in any regulatory proceeding. This includes both quasi-legislative proceedings involving rules of general applicability and quasi-judicial proceedings that determine the rights of specific parties or apply existing laws to specific facts. See Cal. Code Regs. § 18746.3(b)(5)(A), (B) and (C).
- “Legislative action,” means the drafting, introduction, modification, enactment, defeat, approval, or veto of any ordinance, amendment, resolution, report, nomination, or other matter by the agency's legislative body. See Cal. Code Regs. § 18746.3(b)(5)(D).
- Discretionary acts involving permits, licenses, grants, contracts, or the sale or purchase of goods or property. See Cal. Code Regs. § 18746.3(b)(5).

For the purposes of this prohibition, an official's “former agency” includes both the local government agency for which the official served as an officer or employee and any local government agency whose budget, personnel, or other operations were subject to the direction and control of the official's agency. See Cal. Code Regs. § 18746.3(b)(6)(B).

The prohibition does not apply when a former official is representing his or her own personal interests before the agency unless the appearance is in a quasi-judicial proceeding in which the official previously participated, when the official receives no compensation for making the appearance or communication, or when the official's only compensation for the appearance or communication is for travel costs. See Cal. Code Regs. §§ 18702.4(b)(1) and 18746.3(b)(3). Additionally, the prohibition does not apply when the official is appearing or communicating with his or her former agency as an officer or employee of another government agency. See Cal. Code Regs. § 18746.3(c).

b. Section 87407: Influencing Prospective Employment

Prior to leaving government office or employment, Government Code § 87407 prohibits all public officials, including both state and local officials, from making, participating in the making, or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment. See Cal. Code Regs. § 18747.

A decision “directly relates” to a prospective employer if:

- The employer, either directly or by an agent, has initiated a proceeding in which a decision will be made by filing an application, claim, appeal, or similar request.
- The employer, either directly or by an agent, is named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.
- The employer will be financially affected by the decision, as defined in the FPPC's conflict-of-interest regulations. Cal. Code Regs. §§ 18705.1 and 18705.3. Official's should consult the conflict-of-interest regulations to determine the dollar threshold of the financial effect on the prospective employer that will trigger the official's disqualification from a decision.

The prohibition does not apply if the prospective employer is a state, local, or federal governmental agency; the official is legally required to make or participate in the making of the governmental decision; or the governmental decision will affect the prospective employer in substantially the same manner as it will affect a "significant segment" of the public generally.

c. Section 87406.1: One-Year Ban for Air Pollution Control or Air

Quality Management Districts

Government Code § 87406.1 provides a one-year ban applicable to former district board members, officers, or employees of air pollution control or air quality management districts who made, or participated in making, decisions which may have foreseeably had a material financial effect on any financial interest of the districts. Under this ban, specified officials are prohibited, after leaving the district, from representing any other person by appearing before or communicating with, their former district in an attempt to influence any regulatory action for a one-year period. For purposes of this section, "regulatory action" has been interpreted to include any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding before the district. (*Wood Advice Letter, No. A-95-167.*)

Former general managers and chief administrative officers of air pollution control and air quality management districts are subject to both Government Code § 87406.1, the one-year ban for air pollution control or air quality management districts, and Government Code § 87406.3, the one-year ban for local officials.

3.5 Compliance and Enforcement—All Rules

Councilmembers take an oath when they assume their office in which they promise to uphold the laws of the State of California, the City of Mountain View and the United States of America. Consistent with this oath is the requirement of this Council policy to comply with the laws as well as report violations of the laws and policy of which they become aware.

- 3.5.1 Any suspected violation or alleged violation by a Councilmember must be reported to the Mayor. In the case of a City staff member making the report regarding a Councilmember, the report should be made to the City Manager who will then report it to the Mayor. Upon report, the City Manager and City Attorney will assist the Mayor in following one of the two (2) protocols for addressing the violation or alleged violation:
 - 3.5.1.1 If the Mayor, City Manager and City Attorney all agree that the violation or alleged violation is minor in nature, the Mayor and either the City Manager or City Attorney may contact the individual Councilmember and advise the member of the concern and seek to resolve the matter (Protocol 1).
 - 3.5.1.2 If the Mayor, City Manager and City Attorney do not agree that the violation or alleged violation is minor (see Section 3.5.1.1) in nature, then the Mayor shall convene a special ad hoc committee of the Mayor (who will serve as Chair), Vice Mayor and most recent Mayor (the "Ethics Committee") who will meet with the City Manager and City Attorney and appropriate staff and/or witnesses to determine how the matter may proceed, be resolved or be reported to the appropriate authorities (Protocol 2).

- 3.5.1.3 In implementing the provisions of this section, the Ethics Committee will be authorized to conduct all inquiries and investigations as necessary to fulfill their obligation.
- 3.5.1.4 For purposes of Sections 3.5.1.1 and 3.5.1.2, the incident or violation is not minor if it involves the injury or potential injury to any person (e.g., physical, emotional, defamation, harassment, etc.), significant exposure to the City Treasury or the probability for a repeat occurrence.
- 3.5.2 Councilmembers wishing to report a suspected violation by a staff member should report it to both the City Manager and City Attorney.
- 3.5.3 In the event any Councilmember with a role in this policy is the subject of the inquiry, the role of that official shall be assumed by the next ranking official in the chain. For example, if the Mayor is the subject of the inquiry, the Ethics Committee shall be comprised of the Vice Mayor (who will serve as Chair) and the two (2) most recent former Mayors. If the City Manager or City Attorney is the subject, the Committee will exclude that individual.
- If there is no recent former Mayor available to fill the appropriate seat(s) on the committee, the Mayor or chair will select a member of the Council to serve-selection to be based on seniority as outlined in Policy and Procedure No. A-6.
- 3.5.4 The term "committee" or "Ethics Committee" is used for ease of reference only as it is not intended by this policy to create a permanent or standing committee but, rather, to assemble the officials necessary to review complaints should

the need arise.

- 3.5.5 This policy and the protocols set forth are alternatives to any remedy that might otherwise be available or prudent. In order to ensure good government, any individual, including the City Manager and City Attorney, who believes a violation may have occurred is hereby authorized to report the violation to other appropriate authorities.