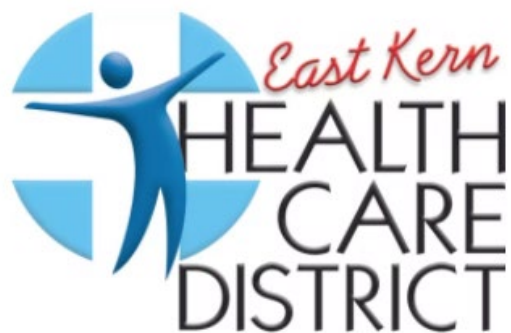




Aleshire & Wynder

# Board Member Orientation Guide



# NEW BOARD MEMBER ORIENTATION GUIDE

## Table of Contents

- 
1. INTRODUCTION TO THE FIRM – ALESHIRE & WYNDER
  2. OVERVIEW OF LEGAL ISSUES
    - ❖ Brown Act
    - ❖ Agendas
    - ❖ Action Taken by a Legislative Body
    - ❖ Meetings
    - ❖ Public Participation
    - ❖ Closed Sessions
    - ❖ Penalties for Failing to Comply with the Brown Act
    - ❖ Conflicts of Interest Under Political Reform Act of 1974
    - ❖ Conflicts of Interest in the Making of Contracts
    - ❖ Incompatible Offices
    - ❖ Parliamentary Procedures
  3. PERSONAL LIABILITY FOR ACTS OF OFFICERS AND EMPLOYEES OF THE DISTRICT
  4. CONFLICTS OF INTEREST LAWS
  5. ETHICS LAW FOR PUBLIC SERVANTS: *KEY THINGS TO KNOW*
  6. FINANCIAL MANAGEMENT FOR ELECTED OFFICES: *QUESTIONS TO ASK*
  7. UNDERSTANDING THE BASICS OF PUBLIC SERVICE ETHICS

## CONTACT US:

### DISTRICT COUNSEL

**Alex Lemieux**

2659 Townsgate Rd., Suite 226

Westlake Village, CA 91361

Office: 805-495-4770

Cell: 949-433-7043

Email: [alemieux@awattorneys.com](mailto:alemieux@awattorneys.com)

**Secretary:**

Deborah Kananen

Direct: 805-409-2687

Email: [dkananen@awattorneys.com](mailto:dkananen@awattorneys.com)

# TAB 1

## OUR PURPOSE

Aleshire & Wynder is a “full service” public law firm. We provide our public agency clients with a wide spectrum of legal specialties, including in land use and zoning, personnel and labor, environment, affordable housing, conflicts of interest, elections, condemnation, police, civil rights, code enforcement and public finance.

Our senior members have represented districts in California continuously for over 40 years. We have enjoyed long-term relationships with our district clients, some dating back to the 1970s. Our senior members have collectively worked in all the major public law firms. Ultimately we came to conclude that none of them really made public law the priority we thought it should be: large firms were expensive and faced conflicts between their public and private practice; small firms lacked resources and specialty expertise.

Accordingly, in 2003 with ten attorneys and the six cities we’d represented for decades, we left the 85-year old firm we were in and started this firm. We’ve grown from 10 to more than 60 attorneys in seven offices (Irvine, Los Angeles, Riverside, Fresno, Oakland, Westlake Village, and San Diego). No public law firm has grown faster in this time, and no firm our size has 97% of its practice with public agencies. This gives us unique advantages.

Our client base goes beyond representation of cities. We represent public agencies of every possible nature. Our public agency client base consists of over 50 local governmental entities, including serving in various communities as special and general counsel to successor agencies, housing authorities, water districts, community service districts, financing authorities, special districts, joint powers authorities and many other entities.

As a full service public law firm we handle all aspects of most legal issues confronting municipalities. Thus, we handle police and civil rights cases for cities with police departments, federal interface issues for airports, personnel issues and labor negotiations, general plan revision programs, subdivision legal issues, conflict of interest questions including interfacing with the FPPC ethics training, counseling and compliance (including AB 1234), public record requests, adoption of city charters, franchising programs and utility undergrounding, condemnation cases for site assembly for economic development and housing projects, negotiation of purchase, development agreements, impact fee ordinances, assessment districts and other public financing as well as municipal finance and Proposition 218 issues, cable television franchise ordinances, endangered species questions, CEQA litigation, environmental cleanup and mining reclamation plans, trash contract renewals and AB 939 issues, construction contract disputes and litigation, and community choice energy aggregation.

## OUR VALUES

We are a law firm that has focused its practice on an area some may consider a legal specialty: public agency representation. A number of our attorneys have over 20 years of public service, and collectively our attorneys have worked for a majority of the major municipal law firms in Southern California. Individually and collectively, we love public service. We enjoy the complexity and variety of issues, including unique areas of law such as land use, constitutional and environmental law. We also enjoy the dynamic of the political process and working with elected officials and professional staff who are similarly motivated to serve the public. Above all, we have a deep appreciation for democratic values and processes at the local level. Accordingly, we have developed the following Mission Statement.

### ***Mission Statement***

Aleshire & Wynder exists to do one thing: to provide the highest possible quality of legal services to public agencies within a fee structure that is below the average in our field. We do this by adhering to the following core values.

### ***Expertise***

We are public law specialists, and our expertise encompasses virtually all areas of law that may be presented to a public agency. For example, we have handled all the legal affairs for full-service cities with their own police and fire departments, their own risk management and code enforcement, and with an airport, convention center, wastewater treatment plant, cogeneration plant, and 36-hole golf course facilities.

### ***Accountability***

Accountability means not only achieving a good result, but doing so at a reasonable cost. A case or transaction must be evaluated early. The determination must be made if a litigation matter is winnable and at what cost. If a lawsuit must be settled, it should be settled early. If the client determines to “litigate,” then we accept responsibility to make sure our advice is clear and strategies are cost effective. Our clients have rarely been surprised by the outcome of a lawsuit or outcome of a negotiation, either by the results or the cost. In short, accountability requires management.

### ***Cost Control***

Cost control requires clear mechanisms for receiving and reporting on assignments, supervising the attorney work to prevent excessive time, using paralegals on appropriate assignments, and cost recovery from developers whenever possible. Another even more important measure is preventive counseling: identifying issues which need to be remedied before they turn into litigation and handling disputes so they are resolved early and by informal means.

### ***Focus and Timeliness***

We are not a large bureaucracy. Our attorneys enjoy a collaborative working relationship with each other and with the clients of the Firm. Each client is vital to us; we focus on their needs and no one gets “lost in the shuffle.” We believe that, as a medium size law firm, we can offer focus in lieu of bureaucracy, timeliness rather than delay, and a consistent “team” of known attorneys rather than just a group of researchers.

### ***Creativity***

Focus makes us results-oriented. We view our legal services to be a part of a problem-solving team. As members of that team, it is our obligation to be creative and help find winning solutions, not simply give reasons why something can’t be done.

### ***Integrity and Impartiality***

As participants in the democratic process and as “officers of the court,” we play a critical role in protecting the integrity of governmental decision making. In many ways district/agency counsel acts as “umpire.” The attorney must remain independent, while at the same time being sensitive to the political process but not controlled by it. The attorney must also make sure that the organization’s procedures are fair for all.

### ***Commitment***

We are passionate about the practice of public law, and committed to working as a member of the management team that assists elected and appointed officials in meeting the needs of each community.

Aleshire & Wynder, LLP was created to do what, in our judgment, is not being done in other professional environments: form a collegial group of quality lawyers totally committed to providing high quality legal services to public agencies in cost-effective and long-term relationships. To demonstrate our commitment to our public clients, we have done what no other private firm practicing in this area is willing to do: with very limited exceptions, such as where the private client serves a public interest in water law, we do not represent private clients in litigation against municipalities. We have no divided loyalty.



# Rosenberg's Rules of Order

REVISED 2011

*Simple Rules of Parliamentary Procedure for the 21st Century*

*By Judge Dave Rosenberg*





## MISSION AND CORE BELIEFS

To expand and protect local control for cities through education and advocacy to enhance the quality of life for all Californians.

## VISION

To be recognized and respected as the leading advocate for the common interests of California's cities.

### About the League of California Cities

Established in 1898, the League of California Cities is a member organization that represents California's incorporated cities. The League strives to protect the local authority and autonomy of city government and help California's cities effectively serve their residents. In addition to advocating on cities' behalf at the state capitol, the League provides its members with professional development programs and information resources, conducts education conferences and research, and publishes Western City magazine.

© 2011 League of California Cities. All rights reserved.

### ABOUT THE AUTHOR

Dave Rosenberg is a Superior Court Judge in Yolo County. He has served as presiding judge of his court, and as presiding judge of the Superior Court Appellate Division. He also has served as chair of the Trial Court Presiding Judges Advisory Committee (the committee composed of all 58 California presiding judges) and as an advisory member of the California Judicial Council. Prior to his appointment to the bench, Rosenberg was member of the Yolo County Board of Supervisors, where he served two terms as chair. Rosenberg also served on the Davis City Council, including two terms as mayor. He has served on the senior staff of two governors, and worked for 19 years in private law practice. Rosenberg has served as a member and chair of numerous state, regional and local boards. Rosenberg chaired the California State Lottery Commission, the California Victim Compensation and Government Claims Board, the Yolo-Solano Air Quality Management District, the Yolo County Economic Development Commission, and the Yolo County Criminal Justice Cabinet. For many years, he has taught classes on parliamentary procedure and has served as parliamentarian for large and small bodies.



## TABLE OF CONTENTS

About the Author .....	ii
Introduction .....	2
Establishing a Quorum.....	2
The Role of the Chair.....	2
The Basic Format for an Agenda Item Discussion .....	2
Motions in General.....	3
The Three Basic Motions.....	3
Multiple Motions Before the Body.....	4
To Debate or Not to Debate.....	4
Majority and Super-Majority Votes .....	5
Counting Votes.....	5
The Motion to Reconsider.....	6
Courtesy and Decorum .....	7
Special Notes About Public Input .....	7

## INTRODUCTION

---

The rules of procedure at meetings should be simple enough for most people to understand. Unfortunately, that has not always been the case. Virtually all clubs, associations, boards, councils and bodies follow a set of rules — *Robert's Rules of Order* — which are embodied in a small, but complex, book. Virtually no one I know has actually read this book cover to cover. Worse yet, the book was written for another time and for another purpose. If one is chairing or running a parliament, then *Robert's Rules of Order* is a dandy and quite useful handbook for procedure in that complex setting. On the other hand, if one is running a meeting of say, a five-member body with a few members of the public in attendance, a simplified version of the rules of parliamentary procedure is in order.

Hence, the birth of *Rosenberg's Rules of Order*.

What follows is my version of the rules of parliamentary procedure, based on my decades of experience chairing meetings in state and local government. These rules have been simplified for the smaller bodies we chair or in which we participate, slimmed down for the 21st Century, yet retaining the basic tenets of order to which we have grown accustomed. Interestingly enough, *Rosenberg's Rules* has found a welcoming audience. Hundreds of cities, counties, special districts, committees, boards, commissions, neighborhood associations and private corporations and companies have adopted *Rosenberg's Rules* in lieu of *Robert's Rules* because they have found them practical, logical, simple, easy to learn and user friendly.

This treatise on modern parliamentary procedure is built on a foundation supported by the following four pillars:

1. **Rules should establish order.** The first purpose of rules of parliamentary procedure is to establish a framework for the orderly conduct of meetings.
2. **Rules should be clear.** Simple rules lead to wider understanding and participation. Complex rules create two classes: those who understand and participate; and those who do not fully understand and do not fully participate.
3. **Rules should be user friendly.** That is, the rules must be simple enough that the public is invited into the body and feels that it has participated in the process.
4. **Rules should enforce the will of the majority while protecting the rights of the minority.** The ultimate purpose of rules of procedure is to encourage discussion and to facilitate decision making by the body. In a democracy, majority rules. The rules must enable the majority to express itself and fashion a result, while permitting the minority to also express itself, but not dominate, while fully participating in the process.

### Establishing a Quorum

The starting point for a meeting is the establishment of a quorum. A quorum is defined as the minimum number of members of the body who must be present at a meeting for business to be legally transacted. The default rule is that a quorum is one more than half the body. For example, in a five-member body a quorum is three. When the body has three members present, it can legally transact business. If the body has less than a quorum of members present, it cannot legally transact business. And even if the body has a quorum to begin the meeting, the body can lose the quorum during the meeting when a member departs (or even when a member leaves the dais). When that occurs the body loses its ability to transact business until and unless a quorum is reestablished.

The default rule, identified above, however, gives way to a specific rule of the body that establishes a quorum. For example, the rules of a particular five-member body may indicate that a quorum is four members for that particular body. The body must follow the rules it has established for its quorum. In the absence of such a specific rule, the quorum is one more than half the members of the body.


### The Role of the Chair

While all members of the body should know and understand the rules of parliamentary procedure, it is the chair of the body who is charged with applying the rules of conduct of the meeting. The chair should be well versed in those rules. For all intents and purposes, the chair makes the final ruling on the rules every time the chair states an action. In fact, all decisions by the chair are final unless overruled by the body itself.

Since the chair runs the conduct of the meeting, it is usual courtesy for the chair to play a less active role in the debate and discussion than other members of the body. This does not mean that the chair should not participate in the debate or discussion. To the contrary, as a member of the body, the chair has the full right to participate in the debate, discussion and decision-making of the body. What the chair should do, however, is strive to be the last to speak at the discussion and debate stage. The chair should not make or second a motion unless the chair is convinced that no other member of the body will do so at that point in time.

### The Basic Format for an Agenda Item Discussion

Formal meetings normally have a written, often published agenda. Informal meetings may have only an oral or understood agenda. In either case, the meeting is governed by the agenda and the agenda constitutes the body's agreed-upon roadmap for the meeting. Each agenda item can be handled by the chair in the following basic format:



**First**, the chair should clearly announce the agenda item number and should clearly state what the agenda item subject is. The chair should then announce the format (which follows) that will be followed in considering the agenda item.

**Second**, following that agenda format, the chair should invite the appropriate person or persons to report on the item, including any recommendation that they might have. The appropriate person or persons may be the chair, a member of the body, a staff person, or a committee chair charged with providing input on the agenda item.

**Third**, the chair should ask members of the body if they have any technical questions of clarification. At this point, members of the body may ask clarifying questions to the person or persons who reported on the item, and that person or persons should be given time to respond.

**Fourth**, the chair should invite public comments, or if appropriate at a formal meeting, should open the public meeting for public input. If numerous members of the public indicate a desire to speak to the subject, the chair may limit the time of public speakers. At the conclusion of the public comments, the chair should announce that public input has concluded (or the public hearing, as the case may be, is closed).

**Fifth**, the chair should invite a motion. The chair should announce the name of the member of the body who makes the motion.

**Sixth**, the chair should determine if any member of the body wishes to second the motion. The chair should announce the name of the member of the body who seconds the motion. It is normally good practice for a motion to require a second before proceeding to ensure that it is not just one member of the body who is interested in a particular approach. However, a second is not an absolute requirement, and the chair can proceed with consideration and vote on a motion even when there is no second. This is a matter left to the discretion of the chair.

**Seventh**, if the motion is made and seconded, the chair should make sure everyone understands the motion.

This is done in one of three ways:

1. The chair can ask the maker of the motion to repeat it;
2. The chair can repeat the motion; or
3. The chair can ask the secretary or the clerk of the body to repeat the motion.

**Eighth**, the chair should now invite discussion of the motion by the body. If there is no desired discussion, or after the discussion has ended, the chair should announce that the body will vote on the motion. If there has been no discussion or very brief discussion, then the vote on the motion should proceed immediately and there is no need to repeat the motion. If there has been substantial discussion, then it is normally best to make sure everyone understands the motion by repeating it.

**Ninth**, the chair takes a vote. Simply asking for the “ayes” and then asking for the “nays” normally does this. If members of the body do not vote, then they “abstain.” Unless the rules of the body provide otherwise (or unless a super majority is required as delineated later in these rules), then a simple majority (as defined in law or the rules of the body as delineated later in these rules) determines whether the motion passes or is defeated.

**Tenth**, the chair should announce the result of the vote and what action (if any) the body has taken. In announcing the result, the chair should indicate the names of the members of the body, if any, who voted in the minority on the motion. This announcement might take the following form: “The motion passes by a vote of 3-2, with Smith and Jones dissenting. We have passed the motion requiring a 10-day notice for all future meetings of this body.”

## Motions in General

Motions are the vehicles for decision making by a body. It is usually best to have a motion before the body prior to commencing discussion of an agenda item. This helps the body focus.

Motions are made in a simple two-step process. First, the chair should recognize the member of the body. Second, the member of the body makes a motion by preceding the member’s desired approach with the words “I move . . .”

A typical motion might be: “I move that we give a 10-day notice in the future for all our meetings.”

The chair usually initiates the motion in one of three ways:

1. **Inviting the members of the body to make a motion**, for example, “A motion at this time would be in order.”
2. **Suggesting a motion to the members of the body**, “A motion would be in order that we give a 10-day notice in the future for all our meetings.”
3. **Making the motion**. As noted, the chair has every right as a member of the body to make a motion, but should normally do so only if the chair wishes to make a motion on an item but is convinced that no other member of the body is willing to step forward to do so at a particular time.

## The Three Basic Motions

There are three motions that are the most common and recur often at meetings:

**The basic motion.** The basic motion is the one that puts forward a decision for the body’s consideration. A basic motion might be: “I move that we create a five-member committee to plan and put on our annual fundraiser.”

**The motion to amend.** If a member wants to change a basic motion that is before the body, they would move to amend it. A motion to amend might be: “I move that we amend the motion to have a 10-member committee.” A motion to amend takes the basic motion that is before the body and seeks to change it in some way.

**The substitute motion.** If a member wants to completely do away with the basic motion that is before the body, and put a new motion before the body, they would move a substitute motion. A substitute motion might be: “I move a substitute motion that we cancel the annual fundraiser this year.”

“Motions to amend” and “substitute motions” are often confused, but they are quite different, and their effect (if passed) is quite different. A motion to amend seeks to retain the basic motion on the floor, but modify it in some way. A substitute motion seeks to throw out the basic motion on the floor, and substitute a new and different motion for it. The decision as to whether a motion is really a “motion to amend” or a “substitute motion” is left to the chair. So if a member makes what that member calls a “motion to amend,” but the chair determines that it is really a “substitute motion,” then the chair’s designation governs.

A “friendly amendment” is a practical parliamentary tool that is simple, informal, saves time and avoids bogging a meeting down with numerous formal motions. It works in the following way: In the discussion on a pending motion, it may appear that a change to the motion is desirable or may win support for the motion from some members. When that happens, a member who has the floor may simply say, “I want to suggest a friendly amendment to the motion.” The member suggests the friendly amendment, and if the maker and the person who seconded the motion pending on the floor accepts the friendly amendment, that now becomes the pending motion on the floor. If either the maker or the person who seconded rejects the proposed friendly amendment, then the proposer can formally move to amend.

### Multiple Motions Before the Body

There can be up to three motions on the floor at the same time. The chair can reject a fourth motion until the chair has dealt with the three that are on the floor and has resolved them. This rule has practical value. More than three motions on the floor at any given time is confusing and unwieldy for almost everyone, including the chair.

When there are two or three motions on the floor (after motions and seconds) at the same time, the vote should proceed *first* on the *last* motion that is made. For example, assume the first motion is a basic “motion to have a five-member committee to plan and put on our annual fundraiser.” During the discussion of this motion, a member might make a second motion to “amend the main motion to have a 10-member committee, not a five-member committee to plan and put on our annual fundraiser.” And perhaps, during that discussion, a member makes yet a third motion as a “substitute motion that we not have an annual fundraiser this year.” The proper procedure would be as follows:

**First**, the chair would deal with the *third* (the last) motion on the floor, the substitute motion. After discussion and debate, a vote would be taken first on the third motion. If the substitute motion *passed*, it would be a substitute for the basic motion and would eliminate it. The first motion would be moot, as would the second motion (which sought to amend the first motion), and the action on the agenda item would be completed on the passage by the body of the third motion (the substitute motion). No vote would be taken on the first or second motions.

**Second**, if the substitute motion *failed*, the chair would then deal with the second (now the last) motion on the floor, the motion to amend. The discussion and debate would focus strictly on the amendment (should the committee be five or 10 members). If the motion to amend *passed*, the chair would then move to consider the main motion (the first motion) as *amended*. If the motion to amend *failed*, the chair would then move to consider the main motion (the first motion) in its original format, not amended.

**Third**, the chair would now deal with the first motion that was placed on the floor. The original motion would either be in its original format (five-member committee), or if *amended*, would be in its amended format (10-member committee). The question on the floor for discussion and decision would be whether a committee should plan and put on the annual fundraiser.

### To Debate or Not to Debate

The basic rule of motions is that they are subject to discussion and debate. Accordingly, basic motions, motions to amend, and substitute motions are all eligible, each in their turn, for full discussion before and by the body. The debate can continue as long as members of the body wish to discuss an item, subject to the decision of the chair that it is time to move on and take action.

There are exceptions to the general rule of free and open debate on motions. The exceptions all apply when there is a desire of the body to move on. The following motions are not debatable (that is, when the following motions are made and seconded, the chair must immediately call for a vote of the body without debate on the motion):

**Motion to adjourn.** This motion, if passed, requires the body to immediately adjourn to its next regularly scheduled meeting. It requires a simple majority vote.

**Motion to recess.** This motion, if passed, requires the body to immediately take a recess. Normally, the chair determines the length of the recess which may be a few minutes or an hour. It requires a simple majority vote.

**Motion to fix the time to adjourn.** This motion, if passed, requires the body to adjourn the meeting at the specific time set in the motion. For example, the motion might be: “I move we adjourn this meeting at midnight.” It requires a simple majority vote.

**Motion to table.** This motion, if passed, requires discussion of the agenda item to be halted and the agenda item to be placed on “hold.” The motion can contain a specific time in which the item can come back to the body. “I move we table this item until our regular meeting in October.” Or the motion can contain no specific time for the return of the item, in which case a motion to take the item off the table and bring it back to the body will have to be taken at a future meeting. A motion to table an item (or to bring it back to the body) requires a simple majority vote.

**Motion to limit debate.** The most common form of this motion is to say, “I move the previous question” or “I move the question” or “I call the question” or sometimes someone simply shouts out “question.” As a practical matter, when a member calls out one of these phrases, the chair can expedite matters by treating it as a “request” rather than as a formal motion. The chair can simply inquire of the body, “any further discussion?” If no one wishes to have further discussion, then the chair can go right to the pending motion that is on the floor. However, if even one person wishes to discuss the pending motion further, then at that point, the chair should treat the call for the “question” as a formal motion, and proceed to it.

When a member of the body makes such a motion (“I move the previous question”), the member is really saying: “I’ve had enough debate. Let’s get on with the vote.” When such a motion is made, the chair should ask for a second, stop debate, and vote on the motion to limit debate. The motion to limit debate requires a two-thirds vote of the body.

**NOTE:** A motion to limit debate could include a time limit. For example: “I move we limit debate on this agenda item to 15 minutes.” Even in this format, the motion to limit debate requires a two-thirds vote of the body. A similar motion is a *motion to object to consideration of an item*. This motion is not debatable, and if passed, precludes the body from even considering an item on the agenda. It also requires a two-thirds vote.

## Majority and Super Majority Votes

In a democracy, a simple majority vote determines a question. A tie vote means the motion fails. So in a seven-member body, a vote of 4-3 passes the motion. A vote of 3-3 with one abstention means the motion fails. If one member is absent and the vote is 3-3, the motion still fails.

All motions require a simple majority, but there are a few exceptions. The exceptions come up when the body is taking an action which effectively cuts off the ability of a minority of the body to take an action or discuss an item. These extraordinary motions require a two-thirds majority (a super majority) to pass:

**Motion to limit debate.** Whether a member says, “I move the previous question,” or “I move the question,” or “I call the question,” or “I move to limit debate,” it all amounts to an attempt to cut off the ability of the minority to discuss an item, and it requires a two-thirds vote to pass.

**Motion to close nominations.** When choosing officers of the body (such as the chair), nominations are in order either from a nominating committee or from the floor of the body. A motion to close nominations effectively cuts off the right of the minority to nominate officers and it requires a two-thirds vote to pass.

**Motion to object to the consideration of a question.** Normally, such a motion is unnecessary since the objectionable item can be tabled or defeated straight up. However, when members of a body do not even want an item on the agenda to be considered, then such a motion is in order. It is not debatable, and it requires a two-thirds vote to pass.

**Motion to suspend the rules.** This motion is debatable, but requires a two-thirds vote to pass. If the body has its own rules of order, conduct or procedure, this motion allows the body to suspend the rules for a particular purpose. For example, the body (a private club) might have a rule prohibiting the attendance at meetings by non-club members. A motion to suspend the rules would be in order to allow a non-club member to attend a meeting of the club on a particular date or on a particular agenda item.

## Counting Votes

The matter of counting votes starts simple, but can become complicated.

Usually, it’s pretty easy to determine whether a particular motion passed or whether it was defeated. If a simple majority vote is needed to pass a motion, then one vote more than 50 percent of the body is required. For example, in a five-member body, if the vote is three in favor and two opposed, the motion passes. If it is two in favor and three opposed, the motion is defeated.

If a two-thirds majority vote is needed to pass a motion, then how many affirmative votes are required? The simple rule of thumb is to count the “no” votes and double that count to determine how many “yes” votes are needed to pass a particular motion. For example, in a seven-member body, if two members vote “no” then the “yes” vote of at least four members is required to achieve a two-thirds majority vote to pass the motion.

What about tie votes? In the event of a tie, the motion always fails since an affirmative vote is required to pass any motion. For example, in a five-member body, if the vote is two in favor and two opposed, with one member absent, the motion is defeated.

Vote counting starts to become complicated when members vote “abstain” or in the case of a written ballot, cast a blank (or unreadable) ballot. Do these votes count, and if so, how does one count them? The starting point is always to check the statutes.

In California, for example, for an action of a board of supervisors to be valid and binding, the action must be approved by a majority of the board. (California Government Code Section 25005.) Typically, this means three of the five members of the board must vote affirmatively in favor of the action. A vote of 2-1 would not be sufficient. A vote of 3-0 with two abstentions would be sufficient. In general law cities in

California, as another example, resolutions or orders for the payment of money and all ordinances require a recorded vote of the total members of the city council. (California Government Code Section 36936.) Cities with charters may prescribe their own vote requirements. Local elected officials are always well-advised to consult with their local agency counsel on how state law may affect the vote count.

After consulting state statutes, step number two is to check the rules of the body. If the rules of the body say that you count votes of “those present” then you treat abstentions one way. However, if the rules of the body say that you count the votes of those “present and voting,” then you treat abstentions a different way. And if the rules of the body are silent on the subject, then the general rule of thumb (and default rule) is that you count all votes that are “present and voting.”

Accordingly, under the “present and voting” system, you would **NOT** count abstention votes on the motion. Members who abstain are counted for purposes of determining quorum (they are “present”), but you treat the abstention votes on the motion as if they did not exist (they are not “voting”). On the other hand, if the rules of the body specifically say that you count votes of those “present” then you **DO** count abstention votes both in establishing the quorum and on the motion. In this event, the abstention votes act just like “no” votes.

*How does this work in practice?*

*Here are a few examples.*

Assume that a five-member city council is voting on a motion that requires a simple majority vote to pass, and assume further that the body has no specific rule on counting votes. Accordingly, the default rule kicks in and we count all votes of members that are “present and voting.” If the vote on the motion is 3-2, the motion passes. If the motion is 2-2 with one abstention, the motion fails.

Assume a five-member city council voting on a motion that requires a two-thirds majority vote to pass, and further assume that the body has no specific rule on counting votes. Again, the default rule applies. If the vote is 3-2, the motion fails for lack of a two-thirds majority. If the vote is 4-1, the motion passes with a clear two-thirds majority. A vote of three “yes,” one “no” and one “abstain” also results in passage of the motion. Once again, the abstention is counted only for the purpose of determining quorum, but on the actual vote on the motion, it is as if the abstention vote never existed — so an effective 3-1 vote is clearly a two-thirds majority vote.

Now, change the scenario slightly. Assume the same five-member city council voting on a motion that requires a two-thirds majority vote to pass, but now assume that the body **DOES** have a specific rule requiring a two-thirds vote of members “present.” Under this specific rule, we must count the members present not only for quorum but also for the motion. In this scenario, any abstention has the same force and effect as if it were a “no” vote. Accordingly, if the votes were three “yes,” one “no” and one “abstain,” then the motion fails. The abstention in this case is treated like a “no” vote and effective vote of 3-2 is not enough to pass two-thirds majority muster.

Now, exactly how does a member cast an “abstention” vote?

Any time a member votes “abstain” or says, “I abstain,” that is an abstention. However, if a member votes “present” that is also treated as an abstention (the member is essentially saying, “Count me for purposes of a quorum, but my vote on the issue is abstain.”) In fact, any manifestation of intention not to vote either “yes” or “no” on the pending motion may be treated by the chair as an abstention. If written ballots are cast, a blank or unreadable ballot is counted as an abstention as well.

Can a member vote “absent” or “count me as absent?” Interesting question. The ruling on this is up to the chair. The better approach is for the chair to count this as if the member had left his/her chair and is actually “absent.” That, of course, affects the quorum. However, the chair may also treat this as a vote to abstain, particularly if the person does not actually leave the dais.

## The Motion to Reconsider

There is a special and unique motion that requires a bit of explanation all by itself; the motion to reconsider. A tenet of parliamentary procedure is finality. After vigorous discussion, debate and a vote, there must be some closure to the issue. And so, after a vote is taken, the matter is deemed closed, subject only to reopening if a proper motion to consider is made and passed.

A motion to reconsider requires a majority vote to pass like other garden-variety motions, but there are two special rules that apply only to the motion to reconsider.

First, is the matter of timing. A motion to reconsider must be made at the meeting where the item was first voted upon. A motion to reconsider made at a later time is untimely. (The body, however, can always vote to suspend the rules and, by a two-thirds majority, allow a motion to reconsider to be made at another time.)

Second, a motion to reconsider may be made only by certain members of the body. Accordingly, a motion to reconsider may be made only by a member who voted in the majority on the original motion. If such a member has a change of heart, he or she may make the motion to reconsider (any other member of the body — including a member who voted in the minority on the original motion — may second the motion). If a member who voted in the minority seeks to make the motion to reconsider, it must be ruled out of order. The purpose of this rule is finality. If a member of minority could make a motion to reconsider, then the item could be brought back to the body again and again, which would defeat the purpose of finality.

If the motion to reconsider passes, then the original matter is back before the body, and a new original motion is in order. The matter may be discussed and debated as if it were on the floor for the first time.

## Courtesy and Decorum

The rules of order are meant to create an atmosphere where the members of the body and the members of the public can attend to business efficiently, fairly and with full participation. At the same time, it is up to the chair and the members of the body to maintain common courtesy and decorum. Unless the setting is very informal, it is always best for only one person at a time to have the floor, and it is always best for every speaker to be first recognized by the chair before proceeding to speak.

The chair should always ensure that debate and discussion of an agenda item focuses on the item and the policy in question, not the personalities of the members of the body. Debate on policy is healthy, debate on personalities is not. The chair has the right to cut off discussion that is too personal, is too loud, or is too crude.

Debate and discussion should be focused, but free and open. In the interest of time, the chair may, however, limit the time allotted to speakers, including members of the body.

Can a member of the body interrupt the speaker? The general rule is “no.” There are, however, exceptions. A speaker may be interrupted for the following reasons:

**Privilege.** The proper interruption would be, “point of privilege.” The chair would then ask the interrupter to “state your point.” Appropriate points of privilege relate to anything that would interfere with the normal comfort of the meeting. For example, the room may be too hot or too cold, or a blowing fan might interfere with a person’s ability to hear.

**Order.** The proper interruption would be, “point of order.” Again, the chair would ask the interrupter to “state your point.” Appropriate points of order relate to anything that would not be considered appropriate conduct of the meeting. For example, if the chair moved on to a vote on a motion that permits debate without allowing that discussion or debate.

**Appeal.** If the chair makes a ruling that a member of the body disagrees with, that member may appeal the ruling of the chair. If the motion is seconded, and after debate, if it passes by a simple majority vote, then the ruling of the chair is deemed reversed.

**Call for orders of the day.** This is simply another way of saying, “return to the agenda.” If a member believes that the body has drifted from the agreed-upon agenda, such a call may be made. It does not require a vote, and when the chair discovers that the agenda has not been followed, the chair simply reminds the body to return to the agenda item properly before them. If the chair fails to do so, the chair’s determination may be appealed.

**Withdraw a motion.** During debate and discussion of a motion, the maker of the motion on the floor, at any time, may interrupt a speaker to withdraw his or her motion from the floor. The motion is immediately deemed withdrawn, although the chair may ask the person who seconded the motion if he or she wishes to make the motion, and any other member may make the motion if properly recognized.

## Special Notes About Public Input

The rules outlined above will help make meetings very public-friendly. But in addition, and particularly for the chair, it is wise to remember three special rules that apply to each agenda item:

**Rule One:** Tell the public what the body will be doing.

**Rule Two:** Keep the public informed while the body is doing it.

**Rule Three:** When the body has acted, tell the public what the body did.





1400 K Street, Sacramento, CA 95814  
(916) 658-8200 | Fax (916) 658-8240  
[www.cacities.org](http://www.cacities.org)

To order additional copies of this publication, call (916) 658-8200.

\$10

© 2011 League of California Cities. All rights reserved.

Printed on recycled paper.

# TAB 2

## OVERVIEW OF LEGAL ISSUES

### A. BROWN ACT – THE “OPEN MEETING LAW” (GOVERNMENT CODE §§ 54950, ET SEQ.)

#### 1. The Brown Act:

Requires all meetings of legislative bodies and advisory bodies to be open and public, including meetings of:

- a. Board of Directors.
- b. Commission and committee bodies.
- c. Bodies created by formal action to provide an advisory role and/or exercise authority delegated by the legislative body.
- d. **Note:** Also applies to elected officials before they actually assume office.
- e. **Note:** Does not apply to (i) bodies of less than a quorum of the legislative body intended to play an advisory role or (ii) meetings of individual members of a legislative body with staff or meetings of staff generally.

#### 2. Agendas:

- a. An agenda must include all matters to be transacted or discussed, including topics to be discussed in closed session.
- b. No action may be taken if an item is not on the agenda (unless it is an emergency item).
- c. Each item on the agenda must include a brief description, sufficient to inform the public of the nature of each item of business, which allows the public to determine whether to participate. Closed session item descriptions have specified formats. (See #6 below for more on closed session items.)
- d. Each agenda must be conspicuously posted 72 hours prior to the meeting in a place readily accessible to public. Special or emergency meetings agendas do not require 72 hours' notice. (See #4 (h-i) below.)
- e. Each agenda must include a reasonable period of time for public comment before or during consideration of an agenda item, although there is no requirement to allow separate public comment immediately before each specific item. Comments can also be made on items of interest to the public and within the subject matter jurisdiction of the agency.
- f. The legislative body may add an item to the agenda when the immediate need to act arose subsequent to the posting of the agenda and if there is a 2/3 vote of the body or a unanimous vote if less than 2/3 of the body are present.
- g. No discussion may be had of any item not on agenda except: a brief response to statements or questions from members of public; asking questions for clarification; providing reference to staff or other resources for factual information; requesting staff to report at subsequent meeting on any matter; or directing staff to place a matter on a future agenda.

**3. Action taken by a legislative body:**

- a. Includes a collective decision, or a promise to make one, by a quorum.
- b. Includes an actual vote by a quorum upon a motion, proposal, resolution, ordinance, or order.
- c. No preliminary or final action may be taken by secret ballot on public agenda items.

**4. Meetings:**

- a. A meeting takes place if a quorum of the legislative body receives information on, discusses, or deliberates on any item on which the body may legally act.
- b. Includes communication by email, phone, texting, fax, or similar means to develop a collective concurrence as to action to be taken.
- c. Serial and rotating meetings or polling are prohibited, but social gatherings are permitted if the business of the legislative body is not discussed.
- d. Does not include (with conditions) a quorum in attendance at a conference open to public or at public meetings organized by a person or agency other than the local agency to address a topic of local concern.
- e. Must generally be held within the boundaries of the agency, i.e., “retreats” not permitted.
- f. A regular meeting may be adjourned to a specified new date, place and time. If the new meeting date is within 5 days, no new agenda posting is required.
- g. Regular meetings with place and time must be provided by ordinance, resolution or bylaws.
- h. A special meeting must be called by the presiding officer or a majority of members with 24 hour notice to all media requesting such notice, written notice to each member and notice to the public.
- i. Emergency meetings may be called when a quorum determines that an emergency severely impairs public health and safety. One hour notice of the meeting must be given to media.
- j. Remote attendance at meetings is allowed only under one of the following circumstances (and certain procedural details apply):
  - ♦ During a declared state of emergency, where the Board has approved by a majority vote that meeting in person would be a threat to public safety. Must be renewed every 30 days (sunsets January 1, 2024); or,
  - ♦ One or more members of the Board (but less than a quorum) have “just cause” for not attending the meeting in person (childcare or family caregiving need, contagious illness, physical or mental disability need, or travel while on official public business) and such absence is limited to no more than 2 meetings per year (effective January 1, 2023); or,
  - ♦ One or more members of the Board (but less than a quorum) experience an emergency circumstance (a physical or family medical emergency that prevents in-person attendance) and such absence is limited to less than 3

consecutive months or 20% of regular meetings (effective January 1, 2023);  
or,

- ♦ One or more members of the Board may appear remotely if properly noticed on the agenda **and the remote location is open and accessible to the public.**

**5. Public Participation:**

- a. Any member of the public may attend an open meeting. The legislative body cannot require an attendee to provide his name or address or impose other conditions on attendance or public comment.
- b. The agency may not prohibit public criticism of policies, procedures, programs, services, acts, or omissions of the agency.
- c. The public may record the proceedings by video, film, or audiotape, unless the body finds that the recording constitutes a persistent disruption through noise, illumination, obstruction of view, etc.
- d. An individual or group may be removed from a meeting only if a warning has been given and the disruption is such that it impedes the orderly conduct of the meeting.

**6. Closed Sessions:**

- a. Closed sessions are meetings conducted in private without the attendance of the public or press.
- b. Closed sessions may only be conducted when authorized by law.
- c. Most common reasons for closed session meetings:
  - ♦ Pending Litigation:
    - Adjudicatory proceeding.
    - Initiation of litigation - when a case has been filed against the agency or when the agency has, or when the agency has decided or is deciding to initiate a lawsuit, or when litigation has been formally initiated.
    - Exposure to litigation - applies only under specified circumstances.
  - ♦ Real property negotiations - the agenda description must identify the property involved, the parties negotiating, and the general issues.
  - ♦ Labor negotiations.
  - ♦ Personnel matters.
- d. The agency's available funds, funding priorities, or budget may not be discussed in closed session.
- e. Requirements for closed session meetings:
  - ♦ 72-hour notice should be provided for regular closed sessions.
  - ♦ The agenda description must be in a specific format and the item must be announced in open session, in advance of the closed session.
  - ♦ Immediately after the closed session, the legislative body must reconvene in open session and make any required disclosure.

- ♦ The legislative body may designate someone to keep minutes during a closed session meeting.

**7. Penalties for failing to comply with the Brown Act:**

- a. It is a misdemeanor to take action on an item with the intent to deprive the public of information.
- b. Injunction, mandamus and declaratory relief are available to cure Brown Act violations.
- c. A decision made in violation of the Brown Act may be voided.
- d. A person alleging a Brown Act violation must demand corrective action within 90 days from the date that the action was taken, or within 30 days if the action was taken in open session but in violation of agenda requirements.
- e. A challenged action will not be upheld if a person challenging notice provisions had actual notice at the appropriate time.

**8. Note:** Emails or other writings containing information relating to the conduct of the public’s business are public records. Other types of public records generally include:

- a. All writings distributed to the legislative body by any person in connection with matter subject to discussion or action at a public meeting.
- b. Final documents approved in closed session.
- c. Any tape or film record of an open meeting made by or at the direction of the legislative body.

**9.** Pursuant to AB 992, effective January 1, 2021 Board Members (and members of other bodies subject to The Brown Act) should not communicate with other Board Members on social media about matters that could come before the Board. Under this new law, even “liking” another board member’s post on a topic within the Board’s subject matter jurisdiction could be deemed a violation of The Brown Act.

- a. The Brown Act prohibits a majority of members of a legislative body from engaging in a “series of communications,” directly or through intermediaries, to “discuss, deliberate, or take action on an item” that is within the legislative body’s subject matter jurisdiction.
- b. AB 992, which amends Government Code section 54952.2, explains what kind of communications a public official may have via social media and what kind of communications are prohibited.
- c. A Board Member may use social media to answer questions and give or request information from the public regarding a matter within the Board’s subject matter jurisdiction. However, giving and requesting information can only be used if a majority of the Board does not use that social media platform to discuss official business among themselves or observe the discussion of other members. Under AB 992, “discuss among themselves” includes making posts, commenting, or reacting to communications made by other members of the Board.

- d. Second, a single contact between two Board Members is generally not a prohibited serial meeting under The Brown Act. However, AB 992 prohibits a member of a Board from responding directly to any communication on social media regarding a matter that is within the subject matter jurisdiction of the Board that is made, posted, or shared by any other member of the Board.
- e. This law applies to Internet-based social media platforms that are open and accessible to the public. The law defines “open and accessible to the public” to mean that “members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom, and cannot be blocked from doing so, except when the Internet-based social media platform determines that an individual violated its protocols or rules.”

**B. CONFLICTS OF INTEREST UNDER POLITICAL REFORM ACT OF 1974 (GOVERNMENT CODE § 81000 ET SEQ.)**

- 1. Each agency must adopt Conflict of Interest Code.
  - a. The code must list all officers who must report (those making or influencing decisions).
  - b. The code must include the following disclosure categories:
    - ♦ Real property income, investments, and business interests.
- 2. Statements of economic interest must be filed pursuant to Code: file when you enter office, annually, and when leaving office.
- 3. Generally, the Political Reform Act prohibits a public official from participating in or attempting to use influence to affect decisions which affect financial interests.
  - a. Procedure. If a public official has a disqualifying interest, then she or he must, immediately prior to the consideration of the matter:
    - ♦ publicly identify the financial interest that gives rise to the conflict;
    - ♦ recuse herself or himself from discussing and/or voting on the matter; and
    - ♦ leave the room until after the discussion, vote, or other disposition of the matter.

\* If an official *leaves a meeting in advance of the agenda item* in which the official is disqualified, the official must publicly identify the agenda item and the financial interest prior to leaving the meeting.

\* An official *first joining a meeting after the consideration of an agency item* in which the official is disqualified must publicly identify the agenda item and the financial interest immediately upon joining the meeting.
  - b. Acting as Member of the General Public. The official may, however, make a public appearance before the body or board as a member of the general public, but only to represent herself or himself on matters related solely to the official’s personal interests.
  - c. “Legally Required” Exception. There is an exception to the general rule that allows a public official to participate if her or his participation is “legally required.” This

exception is narrowly construed, and applies only if there is no alternative source of decision. This exception may not be used simply to break a tie amongst non-conflicted members, and may not be used if a quorum of non-conflicted members may be convened. The FPPC provides detailed procedures that must be followed for the “legally required” exception to apply, and it is advised that you should seek counsel from your district council before application of this procedure.

4. A conflict of interest will exist if the official has an economic interest in the decision and all the following occur:
  - a. It is reasonably foreseeable that the decision will affect the Board Member’s economic interest.
  - b. The effect of the decision on the Board Member’s economic interest will be material.
  - c. The effect of the decision on the Board Member’s economic interest will be distinguishable from its effect on the public generally.

\* There are extensive rules and statutes that govern application of above rules. Board Members are encouraged to confer with district council when reviewing a potential conflict of interest in a decision.

5. Five basic types of economic interests (includes personal and immediate family):
  - a. Business Entity. A public official has an economic interest in a business entity in which he or she
    - ♦ has a direct or indirect investment worth \$2,000 or more; and
    - ♦ 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.
  - b. Real Property. 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.
    - ♦ An interest in property, **within 500 feet or less of the property** which is the subject of the decision, is considered to be materially affected, unless there is clear and convincing evidence the decision will not have any measurable impact on the official's property.
    - ♦ An interest in property, located **more than 500 feet but less than 1,000 feet** from the property which is the subject of the decision, is considered to be materially affected if the decision impacts the property’s development potential, income producing potential, and a list of other factors.
    - ♦ An interest in property, located **1,000 feet or more** from the property which is the subject of the decision, is presumed not to be material. Presumption may be rebutted with clear and convincing evidence decision would have a substantial effect on the official's property.
  - c. Income. 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.
  - d. Gifts. A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$590 or more within 12 months prior to the decision.



- e. Personal Finances. A public official has an economic interest in a personal measurable financial benefit or loss for him or her (including expenses, income, assets or liabilities), as well as those of immediate family.
6. **Campaign Contributions** (*effective January 1, 2023; for further analysis and discussion - and potential immediate applicability of these new laws to Board Members - please see more detailed memorandum from District Council's Office entitled "Conflict of Interest Laws"*).
- a. Campaign Contributions When Council Decision Pending and Afterwards. A Board Member cannot accept a campaign contribution of more than \$250 from any party or participant (or agent) with a financial interest in District proceeding involving a license, permit, or other entitlement, while proceeding is pending before Board for decision, and for 12 months after the decision. A violation, after a Council decision is made, can be cured under certain conditions, if contribution returned within 14 days.
  - b. Campaign Contributions 12 Months Before Council Decision. If a Board Member has received a campaign contribution in an amount greater than \$250 in the 12 months prior to a decision involving a license, permit, or other entitlement, from a party or participant (or agent) with a financial interest in the decision, then that Board Member cannot participate in the decision. Disclosure at the council meeting required. Participation permitted if contribution returned within 30 days from when the Board Member knows, or should have known, about the contribution and the proceeding.
7. **Penalties for violation:**
- a. Misdemeanor.
  - b. Removal from office.
  - c. Decision voidable.
8. If it is unclear whether a conflict exists, the FPPC will provide a letter opinion.
9. Advise the district council of potential conflict early enough to allow the district council to provide adequate advice.

**C. CONFLICTS OF INTEREST IN THE MAKING OF CONTRACTS (GOVERNMENT CODE § 1090)**

1. Prohibits a government officer or employee acting in his or her official capacity, from making a contract, or participating in the making of a contract, in which he or she is financially interested. Virtually any involvement in the contract-making process is considered participation in the making of a contract.
2. Financial interests presumptively include:
  - a. Landlord or tenant of contract party
  - b. Attorney or agent of contracting party
  - c. Supplier of goods or services to the contracting party.

**Note:** A public official has not only his or her own financial interests in a contract but also that of a spouse where he or she stands in the shoes of the spouse for purposes of Section 1090.

3. An officer or employee shall not be a purchaser at any sale or a vendor in any purchase made in his or her official capacity.
4. No conflict of interest for “remote interests” and “non-interests”. However, the officer or employee must still disclose the financial interest, abstain from influencing the contract-making process, and note the interest in the legislative body’s official records.
5. A disclosure of the conflict does not cure the conflict.
6. The contract will be void an unenforceable and the official will be subject to:
  - a. Criminal and civil penalties
  - b. Potential disgorgement of any consideration received or property acquired in the transaction (Example: *Thompson v. Call* (1985) 38 Cal.3d 633 [City able to retain title to parcel of land sold and Board Member liable to city for the amount of the purchase price from the sale (\$258,000) plus interest.])
  - c. Willful violation of Section 1090 may be punished as a felony.

**D. INCOMPATIBLE OFFICES (COMMON LAW DOCTRINE AND GOVERNMENT CODE § 1099)**

1. Common law doctrine prohibits a single official from holding two public offices with potential overlap in the functions and responsibilities of the two offices.
2. Offices include elected and appointed offices as established by municipal code.
3. Under Government Code § 1099, incompatibility includes:
  - a. Conflicting supervisory authority.
  - b. Possibility of a significant clash of duties or loyalties between the offices.
4. Remedy: Removal from office first assumed.

**E. ROSENBERG’S RULES OF ORDER (ATTACHED)**

# TAB 3

## PERSONAL LIABILITY FOR ACTS OF OFFICERS AND EMPLOYEES OF THE DISTRICT

### I. INTRODUCTION

As a new member of the Board, you may be concerned about the extent of your personal liability, as a Board Member, for acts taken by the council or by advisory committees and District employees. Therefore, we are providing you with a general overview of both state and federal law without reference to any particular set of circumstances.

### II. CALIFORNIA GOVERNMENT TORT CLAIMS ACT

From the earliest days of California's legal history, public officers and employees have been held personally liable in damages for injuries suffered through malfeasance, omission, or neglect in the performance of their duties.<sup>1</sup> A broad exception to the rule of official liability is the doctrine of official immunity for discretionary action. In *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, the Court stated that:

“Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious.”<sup>2</sup>

This statement is an accurate representation of California law as it existed at the time of the *Lipman* decision. The policy consideration for this immunity is said to be that:

The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation.”<sup>3</sup>

To paraphrase Judge Learned Hand, it is impossible to know whether the claim is well-founded until the case has been tried. Thus, to require public officials to incur the risk of trial would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.<sup>4</sup>

The effect of the Tort Claims Act was to abolish all common law actions against governments and government officials and employees as they existed prior to the date of enactment and to establish an entirely statutory procedure for claims against public entities, officials and employees. Government Code Section 820 provides that, except as otherwise provided by statute, a public employee is liable for injury caused by his act or omission to the same extent as a private person. The most significant portion of this statement is the “except as otherwise provided by statute.” The legislature has substantially adopted the discretionary immunity doctrine as set forth in the *Lipman* case, as well as various other grounds of immunity for governmental officials and employees.

---

<sup>1</sup> See, e.g., *Lick v. Maddin* (1868) 36 Cal. 208.

<sup>2</sup> 35 Cal.2d at 229.

<sup>3</sup> Id

<sup>4</sup> *Gregories v. Biddle* (2d Cir. 1949) 177 F.2d 579, 581.

The following is a review of the provisions of the California Tort Claims Act as they pertain to the acts of officers and employees of governmental entities.

**1. Exercise of Discretion**

Government Code Section 820.2 states that except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the **exercise of the discretion** vested in him, whether or not such discretion be abused.

**2. Execution or Enforcement of Laws.**

Government Code Section 820.4 states that a public employee is not liable for his acts or omissions when exercising **due care** in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for a false arrest or false imprisonment. Note that the exclusion of false arrest or imprisonment does not preclude the application of other immunity statutes which may be applicable.

**3. Acting Under Authority of Law.**

Government Code Section 820.6 states that if a public employee acts in **good faith, without malice**, and under the apparent authority of an enactment that is found to be unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable. Due care is not required for the application of this immunity; “good faith, without malice” is required. This immunity is somewhat broader than that previously contained in Government Code Section 1955 which applied only to actions pursuant to unconstitutional statutes.

**4. Vicarious Liability.**

Government Code Section 820.9 states that Board Members are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body. However, nothing in this section exonerates an official from liability for injury caused by that individual’s own wrongful conduct.<sup>5</sup> Vicarious liability is a device a court may use to impute liability upon one for the wrongful conduct of another. For example, an employer can be held vicariously liable for the action of his employees in certain circumstances. This section does not allow liability to be imputed to a Board Member for the acts or omissions of the council or other advisory bodies.

**5. Adoption of or Failure to Adopt an Enactment.**

Government Code Section 821 states that a public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment. This section is a continuation of a common law doctrine of immunity as set forth in *Martelli v. Pollock* (1958) 162 Cal.App.2d 655; city councilmember immune from action as councilmember.

---

<sup>5</sup> For example, although an elected or appointed official has the same right anyone else has to alert City code enforcement staff about possible code violations, if complaints from a public official can be deemed to have produced a legal action of “singling out” one business or property owner without reasonable justification, the City can be sued for selective enforcement of its laws.

**6. Actions, re: Permits, Licenses, Etc.**

Government Code Section 821.2 states that a public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

**7. Inspections.**

Government Code Section 821.4 states that a public employee is not liable for injury caused by his failure to make an inspection or by reason of making an inadequate or negligent inspection of any property other than the property of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

**8. Malicious Prosecution.**

Government Code Section 821.6 states that a public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.<sup>6</sup>

**9. Entry on Property.**

Government Code Section 821.8 states that a public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

**10. Money Stolen from Custody.**

Government Code Section 822 states that a public employee is not liable for money stolen from his official custody. Nothing in this section exonerates a public employee from liability if the loss was sustained as a result of his own negligent or wrongful act or omission.

**11. Misrepresentation.**

Government Code Section 822.2 states that a public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation is negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.

**12. Discretionary Acts.**

Government Code Section 820.2 states that except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion is abused.

---

<sup>6</sup> In *McClure v. City of Long Beach* (2004), a jury awarded a business owner \$22.5 million as a result of selective enforcement of municipal codes which resulted in the closing of the business. In the *McClure* case, councilmembers, in response to complaints from neighbors, urged code enforcement staff to issue citations and correction notices to Ms. McClure, who was engaged in the business of operating 6-bed homes for Alzheimer's patients. When Ms. McClure went out of business she filed a lawsuit alleging her civil rights were violated due to selective enforcement.

This is basically a restatement of pre-existing California law, as noted above. Examples of statutes providing for liability, even though discretionary authority may be exercised, are as follows:

- A) Dangerous conditions of public property. (Government Code §840.2);
- B) Willful acts of disaster workers and owners of shelters or aid stations. (Civil Code §1714.5); and
- C) Misrepresentation involving actual fraud or actual malice. (Government Code §822.2).

Government Code Section 820.2's grant of immunity is perhaps the most significant grant of immunity in the Tort Claims Act. The most authoritative statement on the distinction between discretionary and ministerial acts is contained in the California Supreme Court case *Johnson v. State* (1968) 69 Cal.2d 782. The *Johnson* court made clear that the distinction is controlled principally by the concept of separation of power. The basic purpose of immunity is the assurance of judicial abstention in areas where the responsibility for basic policy decisions has been committed to coordinate branches of government. The Court believed that any wider judicial review would place the Court in the unseemly position of determining the propriety of decisions expressly entrusted to a branch of government and, moreover, the potential that such review might affect the body's decision-making process.

The mere classification of an act as discretionary will not provide immunity, however, if the injury results from the negligence of the employee in performing the act rather than from the exercise of the discretion vested in him.<sup>7</sup> For example, in *Johnson*, the Court held certain state employees liable for their failure to warn a foster mother of a youth's propensity for vicious and homicidal behavior when the youth was placed with the foster mother for foster care by the California Youth Authority. The Court found that the basic policy decision to parole the boy was a discretionary policy consideration entrusted by statute to the California Youth Authority and that the Youth Authority could not be held liable for this decision. The Court further held, however, that in implementing this policy, the state employees acted in such a manner as to constitute a classic case for the imposition of tort liability and that, in view of their negligent performance of the policy as established, the employees were subject to liability to the foster mother.

Concurrent with all of the above-listed immunities is the right to be defended and indemnified by the public entity for judgments, compromises, or settlements arising out of an act or omission occurring in the scope of employment as an employee of the public entity.<sup>8</sup> While this indemnification provision specifically excludes that part of a claim or judgment for punitive or exemplary damages, a 1985 amendment provides for some relief by authorizing a public entity to pay the punitive or exemplary damages part of a judgment if the governing body finds all of the following:

- A) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

---

<sup>7</sup> Accord, *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252.

<sup>8</sup> Gov. Code §825.

- B) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
- C) Payment of the claim or judgment would be in the best interests of the public entity .

### III. LEGISLATIVE ACT IMMUNITY

Members of local legislative bodies have complete immunity from liability based on their legislative acts.<sup>9</sup> In *Kuzinich*, an adult entertainment operator sued the county and its board of supervisors claiming violations of his constitutional rights. After the adult entertainment operator's use permit had expired the county board of supervisors directed their county counsel to file an action to enjoin the operation of the adult entertainment businesses and adopted, as an emergency measure, an amendment to the zoning ordinances which made the adult business unlawful in the areas they were operating. The federal court of appeals found that immunity existed in regards to the passing of the zoning amendment, as a legislative act. The court also considered the board's direction to county counsel to initiate a lawsuit an executive act, rather than legislative, giving the board qualified, rather than absolute, immunity.<sup>10</sup>

The Court in *Shoultes v. Laidlaw* (6th Cir. 1989) 886 F.2d 114, 117-118 provides an explanation of the policy basis for this immunity. In *Shoultes*, a council adopted a zoning ordinance restricting the location of "adult" bookstores and entertainment. The adult bookstore operator was cited for code violations and fined for violating the ordinance. On appeal, a state court held the ordinance invalid because it had been adopted without following the applicable statutory procedures. The adult bookstore operator sued the council and mayor under 42 U.S.C. Section 1983.

The *Shoultes* court adopted the Supreme Court's view in *Tenney v. Brandlove* (1951) 341 U.S. 367, that legislators should not be deterred from "uninhibited discharge of their legislative duty," especially at the local lawmaker level.<sup>11</sup> The *Shoultes* court reasoned that the threat of liability might be an even greater deterrent to service at the local level, where the rewards of pay and prestige are generally less than at the federal or state level.<sup>12</sup>

In sum, Board Members are completely immune for those actions considered to be legislative acts.

### IV. FEDERAL -- CIVIL RIGHTS ACT PROCEEDINGS

The Federal Civil Rights Act, 42 U.S.C. Section 1983, is a powerful legislative remedy (which provides for injunctive relief as well as compensatory and punitive damages) enacted by Congress for the protection of certain rights "secured by the Constitution and laws" against infringement by the States.

Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

---

<sup>9</sup> *Kuzinich v. County of Santa Clara* (9th Cir. 1983) 689 F.2d 1345.

<sup>10</sup> *Id* at 1350.

<sup>11</sup> *Shoultes, supra*, 866 F.2d at p. 117.

<sup>12</sup> *Ibid*.



privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Prior to the United States Supreme Court decision in *Monell v. New York City Dept. of Soc. Serv.* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, municipalities were not subject to suit in a 42 U.S.C. Section 1983 Civil Rights action.<sup>13</sup> However, the Supreme Court in *Monell* held:

“Local governing bodies . . . can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where [the] action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 ‘person,’ by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision-making channels.”<sup>14</sup>

The question of immunity was addressed in *Owen v. City of Independence* (1980) 445 U.S. 622, where the United States Supreme Court held that municipalities have no immunity from damages liability resulting from constitutional violations.<sup>15</sup> However, at the same time, the *Owen* court emphasized the maintenance of a qualified good faith immunity for public officials to avoid an undue chilling effect on the exercise of their decision-making responsibilities.<sup>16</sup>

As more case decisions are rendered, the contours of liability and immunity under Section 1983 continue to be defined. For example, the landmark decision of *Parratt v. Taylor* (1981) 451 U.S. 527, requires consideration of the adequacy and availability of remedies under state law before deciding whether a deprivation of life, liberty or property violates due process of law. The decisions of the United States Supreme Court also underscore the significance of a considered inquiry into the purpose and history of the Civil Rights Act, as well as present public policy considerations.<sup>17</sup>

The good faith immunity defense as applied to public officials and employees was qualified in *Harlow v. Fitzgerald* (1982) 457 U.S. 800. In *Harlow*, the qualified immunity under the good faith defense was judged according to an objective standard viewed in two parts:

- A) Whether the applicable law that the defendant public official purportedly violated was clearly established at the time of the incident;
- B) If the law was clearly established, the defendant must then prove:
  - ♦ That he was not aware of such law and therefore of the impropriety of his actions; and

---

<sup>13</sup> *Monroe v. Pape* (1961) 365 U.S. 167

<sup>14</sup> *Monell*, 436 U.S. at 690, 56 L.Ed.2d at 635

<sup>15</sup> *Id.* at 657.

<sup>16</sup> *Id.* at 653-654

<sup>17</sup> See *Smith v. Wade* (1983) 461 U.S. 30; *Briscoe v. Lattue* (1983) 460 U.S. 325; *Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 258; *Imbler v. Pachtman* (1976) 424 U.S. 409, 417

- ♦ That the average person in his situation would not have known of such law and therefore that such actions were wrong.

If a defendant public agency or employee fails to establish either of these facts, a good faith defense will fail. The import of the Harlow decision is that a defendant does not have to raise the good faith defense unless the court has found that the relevant law was clearly established when the incident occurred.<sup>17</sup><sup>18</sup>

Hundreds of cases have utilized the Harlow standard since its inception in 1982. Examples of such decisions are:

1. *Whisenant v. Yuam* (4th Cir. 1984) 739 F.2d 160 -- Good faith of police officers and prison officials was no defense to claim that they were deliberately indifferent to pretrial detainee's serious medical needs where law requiring adequate medical attention is clearly established.
2. *Alexander v. Polk* (E.D. Pa. 1983) 572 F. Supp. 605 (aff'd by 750 F.2d 250) -- City officials were protected by qualified immunity from liability in their personal capacities for denial of due process and statutory notice to recipients of benefits under a supplemental food program where issues of entitlement and notice requirements under the priority program were issues of first impression.

(See also *Mitchell v. Forsyth* (1985) 86 L.Ed.2d 411; *U.S. v. Leon* (1984) 82 L.Ed.2d 677.)

Exhaustion of state remedies is not a prerequisite to bringing an action under Section 1983.<sup>19</sup> Additionally, in California, a Section 1983 action is cognizable in state court as well as federal court.<sup>20</sup> Notably, neither state governmental tort immunities<sup>21</sup> nor state claims statutes<sup>22</sup> apply to federal civil rights actions. State courts look to federal law to determine whether the conduct in question is actionable under Section 1983.<sup>23</sup>

## V. FEDERAL -- SHERMAN ANTI-TRUST ACT

Anti-competitive acts of a municipality can give rise to liability under the Sherman Anti-Trust Act. In *Parker v. Brown* (1943) 317 U.S. 341, the United States Supreme Court created a "state action exception." "The basis of the State action exception is the free market principles embodied by the Sherman Anti-Trust Act must give way to the countervailing principles rooted in federalism . . . that states must be free to act upon local concerns, even if these actions have anti-competitive results."<sup>24</sup> This exception was later expanded to protect municipalities in *Community Communications Co. v. City of Boulder* (1982) 455 U.S. 40, 51-52. In *Boulder*, the Supreme Court held that anticompetitive acts of

<sup>18</sup> *Heslip v. Lobbs* (E.D. Ark. 1982) 554 F.Supp. 694.

<sup>19</sup> *Patsy v. Board of Regents* (1982) 457 U.S. 496

<sup>20</sup> See *Martinez v. California* (1980) 444 U.S. 277, 283, fn. 7; *Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, 69; *Novick v. City of Los Angeles* (1983) 148 Cal.App.3d 325, 330; *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 560

<sup>21</sup> *Martinez v. California, supra*, 444 U.S. at 284, fn. 8; *Guillory v. County of Orange* (9th Cir. 1984) 731 F.2d 1379, 1382; *Fenton v. Groveland Community Servs. Dist.* (1982) 135 Cal.App.3d 797, 808.

<sup>22</sup> *May v. Enomoto* (9th Cir. 1980) 633 F.2d 164, 167. .

<sup>23</sup> *Bach v. County of Butte, supra*, 147 Cal.App.3d at 561.

<sup>24</sup> *Boone v. Redevelopment Agency of City of San Jose* (9th Cir. 1988) 841 F.2d 886, 890.

a municipality that would normally give rise to liability under the Sherman Anti-Trust Act are shielded if the municipality acted pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition with regulation.

Therefore, a municipality should not take anti-competitive actions unless the California Legislature has both authorized the municipal action and intended to displace competition with regulation.

The Local Government Anti-Trust Act of 1984 (15 U.S.C. § 34) prevents federal anti-trust claimants from recovering compensatory damages, treble damages, or costs of attorneys’ fees from any local government or from any local government official or employee acting in an official capacity who is found guilty of an anti-trust violation, effectively restricting municipal anti-trust liability to declaratory and injunctive relief.

## **VI. CRIMINAL SANCTIONS**

Governmental officials and employees are, of course, not immune from prosecution for criminal acts committed in the course of official duties or otherwise. The following code provisions specifically relate to actions by governmental officials or employees.

Penal Code Section 182 provides that it is the crime of criminal conspiracy to conspire to commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the law.

Government Code Section 3060 authorizes the prosecution of a public officer for willful or corrupt misconduct in office. The penalty on conviction is removal from office.

Government Code Section 91000 provides that it is a misdemeanor for any person to knowingly or willfully violate any provision of the Political Reform Act.<sup>24</sup> The Political Reform Act prohibits participation in decisions in which the decisionmaker has a financial interest and requires disclosure of a decision-maker’s financial interests. A permissible penalty for each violation under this provision is a fine of up to the greater of ten thousand dollars (\$10,000.00) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

# TAB 4



Aleshire & Wynder

# CONFLICTS OF INTEREST LAWS

*Political Reform Act, Campaign Contributions,  
Disclosure Statements, Govt. Code § 1090  
and AB 1234 Ethics Training*

*\*\*The Political Reform Act and underlying FPPC regulations are complex, and each situation is unique and requires individualized analysis. This memorandum is meant as an overview of the regulations to help public officials identify potential financial conflicts of interests. This paper only provides a summary and is not meant to provide legal advice. Specific questions should be directed to your General Counsel or your personal attorney for a determination of the materiality of a potential conflict of interest well in advance of when a decision needs to be made.*

## Table of Contents

---

### Table of Contents

I.	Introduction .....	1
II.	The Political Reform Act .....	2
A.	DISQUALIFICATION .....	2
1.	General Rule .....	2
2.	Analysis .....	2
B.	WHAT TO DO IF DISQUALIFICATION .....	8
1.	Procedure .....	8
2.	Acting as Member of the General Public .....	9
3.	“Legally Required” Exception .....	9
C.	CAMPAIGN CONTRIBUTIONS .....	9
D.	DISCLOSURE STATEMENTS .....	10
1.	Who Must File and When .....	10
2.	What Must Be Disclosed .....	11
III.	CONTRACTUAL CONFLICTS OF INTEREST (GOVERNMENT CODE SECTION 1090) .....	12
IV.	AB 1234 TRAINING .....	12
V.	CONCLUSION .....	13

# CONFLICT OF INTEREST LAWS

## I. INTRODUCTION

California has a number of laws that affect the role of a public official. For example, some laws require a public official to abstain from participating in certain decisions because of a financial interest that official may have in the outcome of that decision. Some laws prohibit a contract between public agencies and businesses in which a public official has an ownership interest. Also, some laws prohibit officials from holding more than one public office.

The purpose of this paper is to give you a broad overview of some of these laws to better prepare officials and future officials when they are confronted with situations that might pose such issues, which can generally be described as conflicts of interest. This paper does not attempt to provide any specific advice for a specific situation. If you believe that you might have a potential conflict of interest, you should immediately contact your General Counsel or private counsel to request an analysis of your specific situation. Also, the Fair Political Practices Commission (“FPPC”) may give you guidance on such issues.

You should also be aware that the opinion of the General Counsel or your personal attorney that no conflict exists and that you may participate in a matter does not immunize you from action by the FPPC or your local district attorney if such agencies determine that a conflict exists.

In some instances – especially those dealing with potential conflicts of interest involving real property interests – a conflict analysis may require a factual as well as a legal analysis. The factual analysis could include an appraisal of property to determine if the proposed decision would have a material impact on your property and would thus preclude you from participating or voting on that decision. The factual analysis could also involve an investigation of the business entity in which you may have an interest and the effect of the decision on that entity.

The detailed analysis necessary in many cases cannot be provided if you disclose a potential conflict immediately before or during a meeting. In such cases you will most likely be advised not to participate until a proper analysis can be completed. The FPPC can provide written advice regarding conflicts of interest which, if followed, will provide immunity from prosecution.<sup>1</sup> However, this process typically takes a significant time to complete.

**Therefore, it is essential that if you believe you might have a conflict and desire advice, you should advise your General Counsel or private counsel as soon as possible in advance of the time a matter will be considered so that an appropriate investigation and legal analysis can be made.**

In addition, do not assume that the General Counsel’s office is familiar with all of the specific facts of your personal financial situation, including all of your investments and those of your immediate family, or your relationships with individuals who may be connected with the project or matter that is being considered.

You should disclose all of this information to your counsel at the earliest possible time prior to consideration of the item so that proper advice can be provided for your specific situation.

Conflicts of interest are analyzed under two distinct sets of statutory regulations.

---

<sup>1</sup> The FPPC also operates a telephone advice line (1-866-ASK-FPPC or 866-275-3772) and can be emailed at [advice@fppc.ca.gov](mailto:advice@fppc.ca.gov). While the advice given by FPPC advisors through this service cannot immunize an official from prosecution, the general guidance provided may be useful in assessing potential conflicts of interest. The FPPC also maintains a helpful website at [www.fppc.ca.gov](http://www.fppc.ca.gov).

The first is contained in the Political Reform Act of 1974 (Government Code §87100 and following) referred to herein as the “PRA” or the “Act,” which regulates all of the official actions of a public official.

The second set of statutes is Government Code sections 1090-1097, which regulate public officials whenever they negotiate or make contracts on behalf of the District.

## **II. THE POLITICAL REFORM ACT**

The Political Reform Act addresses conflicts of interest through the disclosure of potential conflicts of interest and the prohibition of participation in the making of decisions which are actual conflicts of interest.

In addition to the provisions of the PRA found in the Government Code, the FPPC has adopted detailed regulations implementing the PRA that are set forth in Title 2, Division 6 of the California Code of Regulations at Sections 18110-18998 (the “FPPC Regs.”).<sup>2</sup>

The California Attorney General, the FPPC, and the local district attorneys are empowered to enforce the PRA through civil liability and civil penalties as well as criminal sanctions.<sup>3</sup>

Although the penalties for violations of various provisions of the Act vary, civil penalties are generally based upon the amount of money or value of a gift or contribution not reported, and can be as high as \$10,000 or three times the amount not reported, whichever is greater.<sup>4</sup> Generally, criminal violations of the Act are prosecuted as misdemeanors. If convicted, an elected official is generally barred from running for office or acting as a lobbyist for a period of four years.<sup>5</sup>

Because good faith may sometimes be relevant in determining criminal and civil liability, it is particularly important to seek advice whenever a potential problem appears.<sup>6</sup>

### **A. DISQUALIFICATION**

#### **1. General Rule**

The Political Reform Act provides that:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”<sup>7</sup>

A public official has a financial interest in a decision 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 on any economic interest.<sup>8</sup>

#### **2. Analysis**

The Act prohibits any public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest.<sup>9</sup> The FPPC has adopted extensive regulations to assist with

---

<sup>2</sup> References to FPPC Regulations will be indicated by the following: “FPPC Regs. § \_\_\_”; all other references are to the Government Code unless otherwise noted.

<sup>3</sup> Sections 91000 and 91001.

<sup>4</sup> Section 91000.

<sup>5</sup> Sections 91000 and 91002.

<sup>6</sup> Section 91001(c).

<sup>7</sup> Section 87100.

<sup>8</sup> Section 87103.

<sup>9</sup> Section 87100.



determining whether a public official has a conflict of interest under the Act. The four steps (FPPC Regs. §18700(d)) used by the FPPC for analysis are:

- (1) Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?
- (2) Will the reasonably foreseeable financial effect be material?
- (3) Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?
- (4) Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?

A conflicts analysis under the FPPC regulations answers each of those questions in turn, before proceeding to the next step. For example, if it is not reasonably foreseeable the governmental decision will have a financial effect on a public official's financial interest, then there is no need to proceed to Step Two of the analysis.

Each of those steps is discussed in more detail, but the FPPC regulations provide certain definitions that are required to effectively engage in the four-step analysis. The FPPC regulations "apply only to public officials and only to governmental decisions that have a financial effect."<sup>10</sup> "Public official" is defined broadly to include "every member, officer, employee, or consultant of a state or local government agency," (with a few exception).<sup>11</sup> "Governmental decision" is defined as "any action taken by a government agency that has a financial effect on any person other than the governmental agency."<sup>12</sup> Finally, "financial effect" is defined as "an effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value."<sup>13</sup>

**Step One: Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?**

Categories of "financial interests" (these include financial interests of any member of his or her immediate family) are: (1) a business entity with a direct or indirect investment worth at least \$2,000, or a business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management; (2) real property with a direct or indirect interest of at least \$2,000; (3) a source of income amounting to at least \$500 within 12 months before a decision is made; (4) a source of gifts amounting to at least \$590 within 12 months before a decision is made (for calendar year 2023-2024); and (5) the public official's personal finances (including immediate family) including expenses, income, assets, or liabilities.

The clearest way for this step to be met is if the financial interest is the subject of a governmental decision that is before the official or the official's agency.<sup>14</sup> In that case it is clearly reasonably foreseeable that the decision could have a financial effect on the financial interest.

Examples of a financial interest being the subject of a proceeding include the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest,

---

<sup>10</sup> FPPC Regs. §18700(b).

<sup>11</sup> FPPC Regs. §18700(c)(1).

<sup>12</sup> FPPC Regs. §18700(c)(4).

<sup>13</sup> FPPC Regs. §18700(c)(5).

<sup>14</sup> FPPC Regs. §18701(a).

and includes any governmental decision affecting an interest in real property.<sup>15</sup> The analysis becomes more complicated if a financial interest is not explicitly involved in the decision.

A financial effect does not need to be likely to be considered reasonably foreseeable. Rather, it must only be a “realistic probability and more than hypothetical or theoretical.”<sup>16</sup> The FPPC regulations include a non-exhaustive list of factors which should be considered in determining whether a financial effect is reasonably foreseeable:

- (1) The extent to which the occurrence of the financial effect is contingent upon intervening events.
- (2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.
- (3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.
- (4) Whether the financial effect of the governmental decision on the public official’s financial interest might compromise an official’s ability to act in the best interests of the public.
- (5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage, for one of the official’s financial interests.
- (6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on their financial interest in formulating a position.<sup>17</sup>

If the answer to the Step One question is “No,” then there is no disqualifying conflict of interest under the Act. If the answer is “Yes,” then the analysis must proceed to Step Two.

#### **Step Two: Will the reasonably foreseeable financial effect be material?**

Determining whether a reasonably foreseeable financial effect is material is the heart of a conflict of interest analysis under the PRA and is also the most complicated step. The FPPC regulations have a different standard for determining whether a financial effect is “material” for each of the five specified types of financial interests. The five categories of financial interests are financial interests in: (1) a business entity; (2) real property; (3) a source of income; (4) a source of gifts; and (5) the public official’s personal finances, or the personal finances of a member of his or her immediate family.<sup>18</sup> These materiality standards are detailed and complex, and this memorandum provides an overview of the various

---

<sup>15</sup> Ibid.

<sup>16</sup> FPPC Regs. §18701(b)

<sup>17</sup> Ibid.

<sup>18</sup> FPPC Regs. §18702(a).

standards. If any of these financial interests are implicated in a decision, whether you believe it to be material or not, we recommend seeking advice from the General Counsel or your private counsel.

**(a) Financial Interest in a Business Entity**

A financial interest in a business entity is materially affected if the business entity is subject to proceedings by the official's agency. This includes when: (1) the business entity initiates the proceeding (by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency) in which the governmental decision will be made; (2) bids on, or enters into, a contract with the agency, or is identified as a subcontractor on a bid or contract with the agency; (3) offers to sell products or services to the agency; (4) is the named or intended manufacturer or vendor of any products to be purchased by the agency with an aggregate cost of \$1,000 or more in any 12-month period; (5) applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency; (6) is the subject of any inspection, action, or proceeding under the regulatory authority of the agency; or (7) is subject to an action taken by the agency that is directed at the entity.<sup>19</sup>

A financial interest in a business entity is materially affected if the governmental decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or more than: (1) \$1,000,000; or (2) Five percent of the entity's annual gross revenues and the increase or decrease is at least \$10,000.<sup>20</sup> A financial interest in a business entity is also materially affected if the governmental decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than: (1) \$250,000; or (2) One percent of the entity's annual gross revenues and the change in expenses is at least \$2,500.<sup>21</sup>

Concerning real property, a financial interest in a business entity is materially affected if the official knows or has reason to know that the business entity has an interest in real property and: (1) there is clear and convincing evidence the decision would have a substantial effect on the property; or (2) the property is a named party in, or the subject of, the decision under FPPC Regs. §§18701(a) and 18702.2(a)(1) through (6).<sup>22</sup>

**(b) Financial Interest in Real Property**

A financial interest in real property is materially affected when the relevant governmental decision: (1) involves the adoption of or amendment to a development plan or criteria affecting the property; (2) determines the real property's zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion or exclusion from a jurisdiction; (3) involves taxes, fees, or assessments that affect the real property; (4) authorizes the sale, purchase, or lease of the property; (5) involves the issuance, denial, or revocation of a land use entitlement; or (6) involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services.<sup>23</sup>

Concerning the **location** of real property, a financial interest in real property is materially affected when the relevant governmental decision: (1) involves property located **500 feet or less from** the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property; or (2) **involves property located more than 500 feet but less than 1,000**

---

<sup>19</sup> Ibid.; FPPC Regs. §18702.1(a).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> FPPC Regs. §18702.2(a)

**feet** from the property line of the parcel, and the decision would change the parcel's: (a) development potential; (b) income producing potential; (c) highest and best use; (d) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or (e) market value.<sup>24</sup>

The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property **1,000 feet or more** from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property.<sup>25</sup>

Concerning the **leasing** of real property, the reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material *only* if the governmental decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) change the official's actual or legally allowable use of the property; or (4) impact the official's use and enjoyment of the property.<sup>26</sup>

Exceptions from these regulations include: (1) a governmental decision solely concerning repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or other improvements<sup>27</sup>; or (2) the adoption or amendment of a general plan that is not initiated by the public official, identifies only planning objectives or policies, and requires further implementing action by the public official's agency.<sup>28</sup>

### (c) *Financial Interest in a Source of Income*

There are two main tests for a disqualifying financial interest in source of income, both applicable, being identifying the specific source and the "nexus test."

As for specific source<sup>29</sup> of income, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if any of the following criteria are met: (1) the source is a **named party** in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party; or (2) the source is an **individual** and: (a) The decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by \$1,000 or more, or (b) The official knows or has reason to know that the individual has an interest in a business entity that will be financially affected under the materiality standards in FPPC Regs. §18702.1, or (c) The official knows or has reason to know that the individual has an interest in real property and: (i) The property is a named party in, or the subject of, the decision as defined in FPPC Regs. §§18701(a) and 18702.2(a)(1) through (6), or (ii) There is clear and convincing evidence the decision would have a substantial effect on the property; or (3) the source is a **nonprofit organization** and one of the following applies: (a) The decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than: (i) \$1,000,000, or (ii) Five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000, (b) The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than: (i) \$250,000, or (ii) One percent of the organization's annual gross receipts and the change in expenses is equal to or greater than \$2,500, (c) The official knows or has reason to know that the organization has an interest in real property and: (i) The property is a named party in, or the subject of, the decision under FPPC Regs.

---

<sup>24</sup> Ibid.

<sup>25</sup> FPPC Regs. §18702.2(b)

<sup>26</sup> FPPC Regs. § 18702.2(c)

<sup>27</sup> FPPC Regs. §18702.2(d)(1).

<sup>28</sup> FPPC Regs. §18702.2(d)(2).

<sup>29</sup> FPPC Regs. §18702.3(a)

§§18701(a) and 18702.2(a)(1) through (6), or (ii) There is clear and convincing evidence the decision would have a substantial effect on the property; or (4) The source is a **business entity** that will be financially affected under the materiality standards in FPPC Regs. §18702.1.

The “nexus test”<sup>30</sup> is that any reasonably foreseeable financial effect on a source of income to a public official or the official’s spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official’s spouse receives or is promised the income for achieving the purpose or goal. There are some limited exceptions in FPPC Regs. §18702.3(c-d).

**(d) Financial Interest in a Source of Gift**

A public official has a financial interest in the sources of gifts he or she receives. This financial interest is materially affected when the source is a named party or otherwise identified as the subject of the governmental proceedings, is a member of the official’s immediate family, is an individual that has an interest in a business entity or real property that will be affected under the regulations for those interests, is a nonprofit that will be financially affected under the materiality standards applied to a nonprofit source of income interest in FPPC Regs. §18702.3, or the source is a business entity that will be affected under the standards governing business entities.<sup>31</sup>

**(e) Financial Interest in a Personal Financial Effect**

A public official has a financial interest in the effects of a governmental decision on his or her personal finances, as well as the personal finances of his or her immediate family. As a general rule, this financial interest is materially affected if the decision may result in the official or the official’s immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.<sup>32</sup> FPPC Regs. §18702.5(b) has a few exceptions.

If the answer to Step Two is “No”, and the financial effect is not material, then there is not a disqualifying conflict of interest under the Act. If the answer is “Yes,” then the analysis must proceed to Step Three.

**Step Three: Can the public official demonstrate that the material financial effect on the public official’s financial interest is indistinguishable from its effect on the public generally?**

A reasonably foreseeable material effect on a public official’s financial interests does not create a conflict under the Act if the effect on the official’s interest is indistinguishable from its effect on the public generally.<sup>33</sup> The effect is indistinguishable from the effect on the public generally if the official establishes that a significant segment of the public is affected, and the effect on his or her financial interest is not unique.<sup>34</sup>

“Significant segment of the public” is defined as at least 25 percent of all business or non-profit entities, real property, or individuals within the jurisdiction.<sup>35</sup>

A unique effect on a public official’s financial interest includes a disproportionate effect on: (1) the development potential or use of the official’s real property or on the income producing potential of the official’s real property or business entity; (2) an official’s business entity or real property resulting from the proximity of a project that is the subject of a decision; (3) an official’s interests in business entities or real properties resulting from the cumulative effect of the official’s multiple interests in similar entities or

---

30 FPPC Regs. §18702.3(b)

31 FPPC Regs. §18702.4.

32 FPPC Regs. §18702.5.

33 FPPC Regs. §18703(a).

34 Ibid.

35 FPPC Regs. §18703(b).

properties that is substantially greater than the effect on a single interest; (4) an official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage; (5) a person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official; or (6) an official's personal finances or those of his or her immediate family.<sup>36</sup>

There are also specific rules for certain circumstances, including public services and utilities, general use or licensing fees, limited neighborhood effects, rental properties, required representative interests, states of emergency, and governmental entities.<sup>37</sup>

If the answer to Step Three is "Yes," and the effect on the public official is indistinguishable from the effect on the general public, then there is no disqualifying conflict of interest under the Act. If the answer is "No," then the analysis must continue to Step Four.

**Step Four: Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?**

If the analysis has proceeded to this final step, and it is reasonably foreseeable that the governmental decision will have a material effect on a financial interest of the public official, then the official cannot make, participate in making, or attempt to use his or her position to influence the government decision.

A public official "makes" a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.<sup>38</sup> A public official "participates in making" a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.<sup>39</sup> An official can "influence" a governmental decision by contacting or appearing before any official in his or her own agency, or any other agency under the purview of the agency, for the purpose of affecting a governmental decision, or by purporting to make such contact or appearance on behalf of his or her own agency.<sup>40</sup>

There are exceptions to this step in the analysis, including for ministerial actions, appearances by the official as a member of the general public if the official is appearing on matters related solely to the official's personal interests (including real property owned entirely, or a business entity either owned entirely or fully controlled), actions by the official relating to his or her terms and conditions of employment, and comments made by the official to the general public or media.<sup>41</sup>

If the answer to Step Four is "Yes," then the public official has a disqualifying interest under the Act.

**B. WHAT TO DO IF DISQUALIFICATION**

**1. Procedure**

If a public official has a disqualifying interest, then he or she must, immediately prior to the consideration of the matter: (1) publicly identify the financial interest that gives rise to the conflict, (2) recuse himself or

---

36 FPPC Regs. §18703(c).

37 FPPC Regs. §18703(e).

38 FPPC Regs. §18704(a).

39 FPPC Regs. §18704(b).

40 FPPC Regs. §18704(c).

41 FPPC Regs. §18704(d).

herself from discussing and/or voting on the matter, and (3) leave the room until after the discussion, vote, or other disposition of the matter.<sup>42</sup>

**If an official leaves a meeting in advance of the agenda item** in which the official is disqualified, the official must publicly identify the agenda item and the financial interest prior to leaving the meeting.<sup>43</sup>

**An official first joining a meeting after the consideration of an agency item** in which the official is disqualified must publicly identify the agenda item and the financial interest immediately upon joining the meeting.<sup>44</sup>

## 2. Acting as Member of the General Public

The official may, however, make a public appearance before the body or board as a member of the general public, but only to represent himself or herself on matters related solely to the official's personal interests (including real property owned entirely, or a business entity either owned entirely or fully controlled).<sup>45</sup>

## 3. "Legally Required" Exception

There is an exception to this general rule that allows a public official to participate if his or her participation is "legally required."<sup>46</sup> This exception is narrowly construed, and applies only if there is no alternative source of decision.<sup>47</sup> This exception may not be used simply to break a tie amongst non-conflicted members<sup>48</sup>, and may not be used if a quorum of non-conflicted members may be convened.<sup>49</sup> The FPPC provides detailed procedures that must be followed for the "legally required" exception to apply, and we advise that you should seek counsel from your General Counsel before application of these procedures.

## C. CAMPAIGN CONTRIBUTIONS

Since 1982, the Levine Act has imposed campaign contribution prohibitions upon certain municipal officials like planning commissioners - but it has not (until now) been applied to Board Members.

Senate Bill 1439 (signed on September 29, 2022; effective January 1, 2023), through amendment of Section 84308 of the PRA, extends these prohibitions to Board Members, prohibits public officials from accepting, soliciting, or directing a contribution exceeding \$250 from a party or participant while such a proceeding is pending and for 12 months after the final decision of the proceeding.

However, starting 2025, SB 1243 and SB 1181 increase the contribution window to \$500, adds a circumstance in which a violation may be cured, and defines terms.

In summary, SB 1243 and SB 1181 provides as follows:

1. If an official has willfully/knowingly received a contribution in an amount greater than \$500 in the 12 months prior to a decision involving a license, permit, or other entitlement in which they know or have reason to know that the party/participant (or agent thereof) has a financial interest in the decision, then the official cannot participate in the decision. This fact would also have to be disclosed on the record of the proceeding.<sup>50</sup>

---

42 FPPC Regs. §18707.

43 FPPC Regs. §18707(a)(2).

44 Ibid.

45 FPPC Regs. §18704(d)(2).

46 FPPC Regs. §18705.

47 FPPC Regs. §18705(a).

48 FPPC Regs. §18705(c)(1).

49 FPPC Regs. §18705(c)(2).

50 Section 84308(c)(1).

2. A party to a proceeding involving a license, permit, or other entitlement for use must disclose on the record of the proceeding any contribution in an amount of more than \$500 made within the preceding 12 months by the party or the party's agent.<sup>51</sup>
3. When an officer accepts, solicits, or directs a prohibited contribution in excess of \$500 within 12 months after the final decision is rendered, the officer will be permitted to cure the violation by returning the contribution in excess of \$500 within 30 days of accepting, soliciting, or directing the contribution, whichever comes latest. However, as is the case with current law, if the officer knowingly and willfully accepted, solicited or directed the prohibited contribution, the cure is not permitted.<sup>52</sup>
4. The definition of "license, permit, or other entitlement for use" currently includes all contracts, except:
  - Contracts valued under \$50,000;
  - Competitively bid contracts that are required to be awarded pursuant to a competitive process;
  - Labor and personal employment contracts;
  - Contracts where no party receives financial compensation;
  - Contracts between two or more government agencies;
  - Periodic reviews and renewals of development agreements and competitively bid contracts unless there are material modifications; and
  - Modifications or amendments to contracts that are exempt from this definition, other than competitively bid contracts.<sup>53</sup>
5. Pending in a proceeding involving a "license, permit, or other entitlement for use" will now be defined and will include, for an officer, when either an item involving the "license, permit or other entitlement for use" is placed on the agenda of the body of which the officer is a member, or when the officer knows the proceeding is within the jurisdiction of the agency for action and it is reasonably foreseeable that the decision will come before the officer in the officer's decision.<sup>54</sup>

A violation of these prohibitions is a misdemeanor. The FPPC has further oversight and may also impose fines.

Given SB 1243 and SB 1181 were relatively recently adopted, the FPPC and other regulatory agencies are still determining the scope of implementation.

#### **D. DISCLOSURE STATEMENTS**

##### **1. Who Must File and When**

Board Members, candidates for the Board, commissions, the general manager, the treasurer, public officials who manage public investments, and anyone else so required by the District's Conflict of Interest

---

<sup>51</sup> Section 84308(b)(1).

<sup>52</sup> Section 84308(d).

<sup>53</sup> Section 84308(a)(5)(A).

<sup>54</sup> Section 84308(a)(7)(A).



Code must file conflict of interest disclosure statements, known officially as a “Statement of Economic Interests.”<sup>55</sup>

Elected officials and most appointed officials must file an “assuming office statement” within thirty (30) days after assuming office.<sup>56</sup> Thereafter, an annual Statement of Economic Interests must be filed no later than April 1 of each year.

The time period covered by each annual statement is January 1 through December 31. If an office is assumed between October 1 and December 31, and an assuming office statement is filed, then the annual Statement of Economic Interests need not be filed until one year later than would otherwise be required.<sup>57</sup> Officials must file a final disclosure statement covering the period since the official’s prior statement within 30 days after leaving office.<sup>58</sup>

The purpose of these filings is to alert public officials about their own economic interests and potential areas of conflict in relation to their duties. The filings also provide information to members of the public who may desire to monitor official actions for any conflicts.

## 2. What Must Be Disclosed

The FPPC provides all forms required for disclosing economic interests. These forms include detailed instructions on filling out the form and on the types of interests which must be disclosed. Generally, the statements require two types of information:

### (a) *Real Property and Investments*

All statements must disclose direct and indirect interests in real property located in the District worth over \$2,000, excepting the family residence.<sup>59</sup> If a property interest is worth more than \$2,000, the filer must disclose the name, address and general description or nature of the investment or interest in the real property.<sup>60</sup>

### (b) *Income, Gifts and Honorarium*

Gifts from a single source aggregating to \$50 or more must be disclosed, and gifts aggregating to \$590 or more during any 12-month period may subject an official to disqualification with respect to the source.<sup>61</sup>

All gift income exceeding \$50 must be disclosed by amount and date of receipt.<sup>62</sup> If the gift is made from the donor through a middleman to the official, then the donor must disclose his or her identity to the official and the official must name both the donor and intermediary on his or her statement.<sup>63</sup>

Under Government Code sections 89501 and 89502, all officials subject to the disclosure requirements are prohibited from accepting any honorarium (e.g., the payment for speeches or attendance at public or private events) unless the income is for services which are customarily provided in connection with the practice of a bona fide business or profession.

***NOTE: The rules and regulations relating to disclosure statements are governed by the Government Code and FPPC Regulations. This paper is only meant to provide basic information and your General***

---

55 Section 87200.

56 Section 87202.

57 FPPC Regs. Section 18723.

58 Section 87204.

59 Sections 87206 and 87103; FPPC Regs. Section 18730.

60 Section 87206.

61 Section 89505; Section 87103(e); FPPC Regs. Section 18940.2

62 FPPC Regs. Section 18945.2

63 FPPC Regs. Section 18945.2

*Counsel or your personal attorney should be consulted if you have any specific questions regarding such disclosure statements.*

### **III. CONTRACTUAL CONFLICTS OF INTEREST (GOVERNMENT CODE SECTION 1090)**

Government Code section 1090 prohibits District officers and employees from having financial interests in contracts made by them or by any board or body of which they are members. The term “contract” is used very broadly, however, and applies to any agreement between the District and another party whether written or oral and whether formal or informal.<sup>64</sup> Although Section 1090 is otherwise much narrower than the PRA, it does cover some different interests than the PRA and, in any situation, a person must act in a manner that satisfies the requirements of both the PRA and Section 1090.

For example, if a member of an agency that authorizes a contract has a financial interest in the contract, the member may avoid a violation of the PRA by abstaining from participation in the decision, but such abstention will not avoid a violation of Section 1090 unless there is an authorized exception to the statute.

Section 1090 applies in two basic situations. First, if the financially interested District officer or District employee is a member of a board or other body that actually approves the contract (e.g., the Board), the potential conflict prohibits the District from entering into the proposed contract, regardless of whether or not the officer participates in or abstains from the actual decision. Second, if a staff member has a financial interest in a contract with the District, there is a conflict only if that staff member actually participates in the making of the contract. In either case, if such a contract is made, the District (or the other party to the contract) may void it.<sup>65</sup>

An exception to Section 1090, set forth in Section 1091, provides that “remote” interests in a contract do not create a conflict if the officer or employee (1) discloses his or her financial interest, (2) abstains from any participation in the making of the contract, and (3) the legislative body authorizes the contract in good faith by a sufficient vote without counting the vote of the party with a remote interest. Section 1091 is essentially a laundry list of what constitutes a “remote” interest and such list should be consulted on a case by case basis. Similarly, Section 1091.5 sets forth a number of additional situations where an officer or employee is “deemed” not to have a prohibited interest in a contract.

### **IV. AB 1234 TRAINING**

As a local elected official who will be compensated and reimbursed for your service, you are required to take two hours of training in ethics - better known as AB 1234 training (named after Assembly Bill 1234). AB 1234 training will cover general ethics principles relating to public service and ethics laws.

“Ethics laws” are defined as including:

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); and

---

<sup>64</sup> In 2002, Attorney General made a broad application of 1090. It found 1090 to apply where a staff member was negotiating a development agreement and the staff member’s spouse was an independent contractor on retainer with the developer (doing community outreach) even though the spouse would not work on the particular project. See Attorney General Opinion No. 01-601 (March 6, 2002).

<sup>65</sup> Section 1092.

Law relating to fair processes including fair contracting requirements, common law bias requirements and due process.

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); and

Law relating to fair processes including fair contracting requirements, common law bias requirements and due process.

AB 1234 mandates that you receive this training within one year of starting your service and then receive the training every two years after that. Upon completion of your training, you will receive proof of participation. The District Clerk's office will keep your proof of participation on file as a public record subject to disclosure for at least five years.

## **V. CONCLUSION**

The four-step checklist for conflict analysis (on page three of this paper) is very general in nature but should provide a guideline for all public officials to use in determining the basic issues involved as to whether or not a disqualification is required under the Political Reform Act and/or FPPC regulations. Each item on the checklist, however, has numerous issues which need to be addressed in order to make a thorough analysis of any given fact situation.

We hope the above discussion provides a helpful guide to the general requirements of California's conflict of interest laws. It should again be stressed that this paper is not intended to answer any specific questions with regard to such laws for a specific situation. Therefore, should any specific questions arise, or should you have any questions regarding any issues discussed in this paper, please do not hesitate to contact your General Counsel or personal attorney.

# TAB 5

# Ethics Law Principles for Public Servants:

## ➔ KEY THINGS TO KNOW

*Note that the following are not statements of law, but rather principles the law is designed to achieve. The goal in providing this list is to identify the kinds of issues addressed by public service ethics laws. If an issue arises for you under these principles, public officials should consult agency counsel.*

### PERSONAL FINANCIAL GAIN

#### Generally speaking, public officials:

- Cannot request, receive or agree to receive anything of value or other advantages in exchange for a decision.
- Must disclose their financial interests to the public.
- Must disqualify themselves from participating in decisions that may affect (positively or negatively) their financial interests in a material way.
- Cannot have a financial interest in a contract made by their agency.
- Cannot be involved in agency decisions affecting a potential future employer once the official and employer each have expressed an interest in a professional relationship.
- Cannot receive compensation to lobby their agency for one year following their departure from the agency.

### PERK ISSUES: INCLUDING COMPENSATION, USE OF PUBLIC RESOURCES AND GIFTS

#### Generally speaking, public officials:

- Receive limited compensation for their service to the public.
- Cannot receive compensation for speaking, writing an article or attending a conference.
- May be reimbursed for only those activities and necessary expenses allowed in the agency's expense reimbursement policies.
- Cannot use public agency resources (money, travel expenses, staff time and agency equipment) for personal or political supplies or purposes.



- Cannot send or be featured in mass mailings at public expense.
- Cannot make gifts of public resources or funds.
- Must disclose gifts they receive from each single source that has given gifts worth \$50 or more in a single calendar year through the Form 700 process.
- May not receive gifts worth a total of \$520 (2021-22 amount) from a single source in a single calendar year. *Note: this amount changes every two years.*
- May only accept free trips and travel expenses under limited circumstances.
- May not accept free or discounted transportation from transportation companies.
- May not use campaign funds for personal benefits not directly related to a political, legislative or governmental purpose.

## TRANSPARENCY

### Generally speaking, public officials must:

- Disclose their economic interests when they take office, annually while they are in office and when they leave office. These economic interests can include: sources of income, property ownership, investments, certain family members' interests, business interests, loans, contracts and gifts received.
- Disclose information about who has agreed to donate significant resources (\$5,000 or more) to legislative, governmental or charitable purposes at an elected official's request.
- Disclose campaign contributions and abide by applicable limits.
- Conduct the public's business in open and publicized meetings, except for the limited circumstances when the law allows closed sessions.
- Allow the public to participate in meetings and listen to the public's views before making decisions.
- Allow public inspection of documents and records generated, owned, used or retained by public agencies, except when non-disclosure is specifically authorized by law.
- Disclose gifts given to the public agency and how they are ultimately used.

## FAIR PROCESS AND MERIT-BASED DECISION-MAKING

### Generally speaking, public officials:

- Cannot receive loans from other staff, officials or contractors, and must disclose and comply with certain requirements for loans from others.
- Cannot engage in vote-trading.
- Have a responsibility to ensure fair and competitive agency contracting processes.
- Cannot participate in quasi-judicial proceedings in which they have a bias with respect to the parties or facts.
- Must conduct public hearings in accordance with fair process principles.
- Cannot participate in decisions that will benefit their immediate family (spouse/domestic partner and dependent children).



- Cannot simultaneously hold certain other public offices or engage in other outside activities that would subject them to conflicting loyalties.
- Cannot participate in entitlement proceedings—such as those regarding land use permits—involving campaign contributors (does not apply to elected bodies).
- Cannot solicit campaign contributions of more than \$250 from permit applicants while an application is pending and for three months after a decision (if sitting on an appointed body).
- Cannot directly solicit agency employees for political support or donations for their political causes.
- Cannot retaliate against whistleblowers who report improper government activities.

## KEY CONCEPTS

A public agency's decision should be based solely on what best serves the public's interests.

The law is aimed at the perception, as well as the reality, that a public official's personal interests may influence a decision. Even the temptation to act in one's own interest could lead to disqualification, or worse.

Having a conflict of interest does not imply that a public official has done anything wrong; it just means that the official has financial or other disqualifying interests.

Violating the conflict of interest laws could lead to monetary fines and criminal penalties for public officials, and may lead to proceedings to remove the official from office. Don't take that risk.



## BASIC RULE

A public official may not participate in a decision — including trying to influence a decision — if the official has financial or, in some cases, other strong personal interests in that decision. When an official has an interest in a contract, the official's agency may be prevented from even making the contract.

## WHEN TO SEEK ADVICE FROM AGENCY COUNSEL

The rules are very complex. A public official should talk with agency counsel early and often and when an action by the public agency may affect (positively or negatively) any of the following:

**Income.** Any source of income of \$500 or more (including promised income) during the prior 12 months to the official or official's spouse/domestic partner.

**Immediate Family.** The official's spouse/domestic partner and dependent children.

**Business Management or Employment.** An entity for which the official serves as a director, officer, partner, trustee, employee or manager.

**Real Property.** A direct or indirect interest in real property of \$2,000 or more that the official or official's immediate family has, including such interests as ownership, leaseholds (but not month-to-month tenancies) and options to purchase.

**Gift Giver.** A giver of one or more gifts worth a total of \$520 (2021-22) or more to the official in the prior 12 months, including promised gifts.

**Lender/Guarantor.** A source or guarantor of a loan to the official.

**Personal Finances.** The official or official's immediate family's personal expenses, income, assets or liabilities.

**Contract.** A contract that the agency is considering entering into, in which the official or a member of the official's immediate family may have an interest (direct or indirect).

**Business Investment.** An interest in a business that the official or the official's immediate family have a direct or indirect investment worth \$2,000 or more.

**Related Business Entity.** An interest in a business that is the parent, subsidiary, or is otherwise related to a business in which the official:

- Has a direct or indirect investment worth \$2,000 or more; or
- Is a director, officer, partner, trustee, employee or manager.

**Business Entity Owning Property.** Real property owned by a business entity or trust of the official.

**Campaign Contributor.** A campaign contributor of the official (applies to appointed decision-making bodies only).

**Other Personal Interests and Biases.** The official has important, but non-financial, personal interests or biases (positive or negative) about the facts or the parties that could cast doubt on the official's ability to make a fair decision.

## WHAT WILL HAPPEN NEXT?

Agency counsel will advise the official whether 1) the official may participate in the decision and, 2) if a contract is involved, whether the agency can enter into the contract at all. Counsel may suggest asking either the Fair Political Practices Commission or the California Attorney General's Office regarding their opinion about the potential conflict.

## EVEN IF IT'S LEGAL, IS IT ETHICAL?

The law sets only minimum standards. Officials should ask themselves whether members of the public will question whether the officials are acting solely in the public's interest. If even a perceived conflict exists, officials should consider excusing themselves voluntarily from that particular decision-making process.



## BEYOND THE LAW:

### Ethics and Values

- Ethics is what one *ought* to do in a given situation. It's the kind of conduct that would make the world a better place if everyone engaged in it.
- The law provides only minimum standards for ethical conduct. Just because a course of action is legal doesn't mean it is right.
- What one ought to do is typically tied to a series of values:
  - » Trustworthiness
  - » Respect
  - » Responsibility
  - » Compassion
  - » Loyalty
  - » Fairness

ILG developed a Good Governance Checklist to help local officials identify ways they can go above and beyond legal requirements to promote public trust and confidence. To access the checklist visit: [www.ca-ilg.org/goodgovernance](http://www.ca-ilg.org/goodgovernance).

## AB 1234 TRAININGS

California law requires local officials to periodically receive training on public service ethics laws and principles (AB 1234). ILG offers trainings and self-test options to help local officials comply with this law.

ILG offers two, one-hour self-study exercises as an option for local officials to satisfy AB 1234 requirements. Find out more at: [www.ca-ilg.org/ab1234selfstudy](http://www.ca-ilg.org/ab1234selfstudy).

ILG can also come to your community to train your local officials and staff. Contact ILG at [ethicsmailbox@ca-ilg.org](mailto:ethicsmailbox@ca-ilg.org) for more information on how to schedule an ethics workshop.

ILG is grateful to the following firms for making this document possible in 2022:

- Best Best & Krieger
- Burke Williams & Sorensen, LLP
- Colantuono Highsmith & Whatley, PC
- Hanson Bridgett LLP
- Kronick Moskowitz Tiedmann & Girard
- Liebert Cassidy Whitmore
- Renne Public Law Group
- Richards, Watson & Gershon



The Institute for Local Government is the nonprofit education affiliate of the League of California Cities, the California State Association of Counties and the California Special Districts Association.

Its mission is to promote good government at the local level.

ILG's current program areas include:

- Leadership and Governance
- Public Engagement
- Sustainable and Resilient Communities
- Workforce and Civics Education

© 2022 by The Institute for Local Government All rights reserved.

### CONTACT US:

1400 K Street, Suite 205  
 Sacramento, CA 95814  
[www.ca-ilg.org](http://www.ca-ilg.org)



# TAB 6

## **Financial Management for Elected Officials: Questions to Ask**

### **Inside: Key Things to Know About**

- Local Agency Financial Policies
- Budget Creation and Monitoring
- Financial Reporting
- Long-Term Financial Planning
- Cash Management and Investments
- Capital Financing & Debt Management
- Purchasing and Contracting Practices
- Finance Terminology (Glossary)

## Introduction

One of an elected official’s most important responsibilities is oversight of agency finances. Local agency finance can be complex. In addition, local agencies face significant financial constraints in California; this includes revenue instability due to state budget decisions and economic factors, state-mandated activities and procedural restrictions on raising new revenues.

What can elected officials do to exercise the kind of careful fiscal stewardship over taxpayer resources that the community expects?

This guide provides a series of tips and questions to assist elected officials in performing this important function. In reviewing these ideas, it is important to keep in mind that local agencies vary by size, complexity of operation, and scope of activities. As a result, some of the questions and practices described may not make sense for every local agency. For example, as a budget and accounting matter, some agencies perform one function and may therefore have one “fund.” Others may have multiple funds.

This guide is a starting point for conversations between local elected officials and staff. The ultimate goal is to help make sure that everyone is playing their necessary and proper roles as informed and responsible stewards of scarce public agency resources.

### Where to Find What

Introduction .....	2
Local Agency Financial Policies and Practices .....	3
Budget Creation and Monitoring .....	7
Financial Reporting and Accounting.....	12
Looking Ahead: Long-Term Financial Planning.....	14
Cash Management and Investments.....	15
Capital Financing and Debt Management .....	17
Purchasing and Contracting Practices .....	19
Brief Glossary of Financial Management Terms .....	21
Endnotes .....	29

## Local Agency Financial Policies and Practices

Financial policies can provide a solid foundation for sound public agency fiscal practices. Adopted by the governing body, such policies provide:

- A means through which the governing body can communicate its collective policy judgments and goals to staff, the public and others.
- Direction to staff and standards against which current practices can be measured, and proposals for changes in practices can be evaluated.

Ratings agencies (who assess local agencies' credit for borrowing) also look at local agencies' financial policies; well-crafted policies can mean higher rating grades which can translate into lower borrowing costs.

### Questions to Ask

#### Financial Policies

- Does the agency have written financial policies?
- If so, what do they cover? See sidebar on next page for a checklist of possible topics.
- How often does the governing body review them?
- With respect to each policy, is it clear who is responsible for implementing that policy?
- What procedures does management use to make staff aware of such policies? What training does staff receive to allow them to competently implement such policies?
- How does the agency monitor compliance with such policies?

#### Financial Practices

- Are agency accounting policies and procedures documented in writing?
- What kinds of practices does the agency use (sometimes referred to as "internal controls") to make sure that the agency has systems for cross checks to minimize the risk of mistakes or maximize the likelihood that misconduct is detected?
- Does agency financial staff participate in relevant professional organizations to keep abreast of developments in the field and best practices?

- Are agency financial staff familiar with and do they adhere to the codes of ethics applicable to their professions? For example, both the California Society of Municipal Finance Officials<sup>1</sup> and the California Municipal Treasurers Association<sup>2</sup> have codes of ethics.

### Financial Planning Policies.<sup>3</sup>

- **Budget Policy.** Such a policy commits to a balanced operating budget (and defines what that is) and requires that decision-makers be alerted when deviations are either planned or otherwise occur.
- **Long-Range Planning.** Such a policy supports financial analysis and strategies to assess the long- term implications of current and proposed capital improvement needs, cost of services, operating budgets, budget policies, cash management and investment policies, program and assumptions. For example, a capital improvement plan enables the agency details the agency’s plans and relative priorities for making improvements to and replacing capital facilities (a process that normally takes years to complete).<sup>4</sup>

### Checklist of Financial Policy Topics<sup>5</sup>

Local agencies have various—and various levels—of financial policies. Some policies relate to big picture, strategic topics (for example, budget policy, long-range planning and debt policy); others are very specific and practical policies (for example, credit card policies and expense reimbursement).

Having a range of policies (from big picture to practical and operational) helps an agency to chart a wise course financially and avoid operational missteps. Whether a specific policy makes sense given the nature and scope of an agency’s operations will vary.

- **Asset Inventory.** Such a policy requires an up-to-date listing of all major capital assets including. The policy can also require an assessment of asset condition and a plan for replacing assets (sometimes referred to as a “capital plan”). The definition of what constitutes a “major” asset is established by local policy, as is the determination of how often the inventory is to be updated.
- **Long-Range Planning for Pension and Other Post-Employment Benefit Costs.** Such a policy analyzes how the agency will meet the future costs of agency employee pensions and other employee benefit obligations.
- **Reserve and Other Fund Balances.** Such a policy enables decision-makers to maintain a prudent level of resources to protect against a need to reduce service levels or increase revenues due to revenue shortfalls or unpredicted one-time expenses. Specific kinds of reserves can also enable an agency to set aside moneys to replace assets (for example, fleet replacement reserves).

**Revenue Policies.**<sup>6</sup> These policies help decision-makers understand and manage revenue flows.

- **Revenue Diversification.** Such a policy encourages a diversity of revenue sources to protect the agency against fluctuations in individual sources, such as sales taxes, which can rise and fall dramatically with the general economy.
- **User Fees and Charges.** Such policies establish the extent to which users of agency services are expected to cover the cost of providing the service and how those costs are determined. Note that most fees may only be used for the purposes for which they were collected and may not exceed the cost of providing the service for which the fee is charged.<sup>7</sup> Such policies also can provide for regular review of fee levels and calculation methods to assure that the agency meets its objectives relating to cost-recovery on an ongoing basis.
- **One-Time and Unpredictable Revenues.** A goal of such a policy is to encourage the use of one-time or unplanned revenues for one-time needs or reserve replenishment rather than for ongoing expenses.
- **Limited Purpose Revenues.** By law or policy, certain revenues must be spent for specific purposes (for example, proceeds from special taxes). This policy explains which funds are restricted and why, limits their use to those purposes, and explains how the agency tracks their use to ensure the funds are spent only on permissible expenses.

**Expense Policies.**<sup>8</sup> These policies enable decision-makers to manage and monitor how the agency incurs expenses.

- **Financial Reporting.** Financial reports compare actual expense levels (and revenue levels) to those predicted in the agency's budget. This policy specifies the content and frequency (for example, quarterly) of these reports to decision-makers and the public.
- **Debt Financing.** This kind of policy allows an agency to specify when it can use debt for either short- or long-term needs. The policy also establishes what levels of debt and debt service payments are appropriate for the agency. It can also be a tool for complying with ongoing disclosure requirements associated with the agency's debt and monitoring compliance with those requirements.
- **Expense Reimbursement.** Such policies determine the circumstances under which elected officials and staff may be reimbursed for expenses incurred in the course of their service to the agency. This includes setting limits on certain kinds of expense levels (for example, meals and hotel rates) according to community standards. Policies also specify the kind of documentation that must be provided to demonstrate that the expense was incurred in compliance with the policy before an expense will be reimbursed. Agency counsel should review the policy for compliance with AB 1234 and other state laws.<sup>9</sup>

- **Credit and Purchase Card Use Policies.** The practice of issuing credit cards to agency officials and staff is increasingly rare because of the potential for misuse, either accidentally or intentionally. It can however, be useful to have one or more agency credit cards to make travel arrangements and the like. Some agencies also use purchase cards. A policy specifies controls to prevent misuse of such cards.<sup>10</sup>
- **Petty Cash Policies.** Such a policy provides guidelines and accountability mechanisms for day-to-day cash handling by the agency and its departments.

**Cash Management and Investments.** State law requires agencies to adopt an investment policy specifying how the agency may invest funds not needed for the agency's immediate and short-term needs.<sup>11</sup> Such a policy allows the governing body to establish and keep current the agency's investment philosophy and risk tolerance. Although well-defined policies are more than a list of allowed investments,<sup>12</sup> such policies should be reviewed by agency counsel to make sure that the agency's investments and practices conform with state law.<sup>13</sup>

**Purchasing/Procurement.** These policies determine the processes the agency uses in determining with whom it does business (including under what circumstances contracts are competitively bid) and which staff have decision-making responsibility in that area. Such policies also typically specify how the opportunity to do business with the agency is to be announced, with the goal being to reach

## Budget Creation and Monitoring

Budgets are an agency's tool for linking near-term goals with the resources available to achieve them, while keeping in mind long-term goals and resources and how the agency's annual budget fits into its capital plan. Budgeting typically involves:

1. Establishing goals and priorities for the agency;
2. Allocating resources according to those goals and priorities; and
3. Comparing actual expenses and revenues to those estimated in the current budgeted expenses, making adjustments during the course of the budget year as necessary.

As important of a function as budgeting is, decision-makers may find that their options are limited in determining how the agency's monies are actually spent. The limitations may result from legal restrictions on how funds may be used, matching funds issues (that will result in loss of revenues if the agency does not spend a certain amount), and state mandates.

Budgets play the following roles:

- **Financial Plan.** The budget document shows where agency revenues come from and how they are used. It demonstrates an agency's ability to meet recurring expenses with recurring revenues. As the fiscal year proceeds, there may need to be adjustments in the agency's financial plan—the role of elected officials is to understand why such adjustments were necessary and what steps were taken to avoid having to make these adjustments.
- **Communications Tool.** The document also is an opportunity to explain to decision-makers, the news media, staff and the public:
  - What the agency does and why;
  - How the agency is organized to deliver programs and services;
  - The kinds of programs, services and activities planned for the budget period and what kinds of costs are involved;
  - Key fiscal issues facing the agency; and
  - How the agency assesses the efficiency and effectiveness of agency efforts (see also note on performance measurement on page 11).
- **Yardstick.** Once adopted, local officials and others can use budget numbers as a reference against which to compare expenditures and revenues throughout the year. As such, the budget provides an ongoing financial management tool to make sure the agency spends within its means and balances expenses against revenues.



The budget document should be easily understood by the average member of the community. To help make this happen, financial information can be presented a variety of ways (including text, tables and charts). Including performance measures in the budget document can help the public see the relationship between costs and benefits.

Because of the public information role the budget document serves, the Government Finance Officers Association recommends that budget documents be shared via the agency's website.<sup>14</sup>

## Questions to Ask

### Role of Governing Body Members

- Do governing body members have a clear understanding of their role in the budget process?
- Do governing body members have a meaningful opportunity to shape major goals and objectives *before* the preliminary budget is prepared (for example, in budget workshops conducted sufficiently in advance of the preliminary budget's preparation)?
- Do governing body members feel like they have been given an opportunity to understand and react to key decision points within a preliminary budget (versus being subjected to a long, random presentation about numbers)?

### General Questions about the Numbers in the Budget

- What are the budget's underlying assumptions (examples of key assumptions include population changes, projected case loads or service demands, state and federal funding, construction activity, utilities costs, service demands, inflation, and interest rates)? Are these assumptions realistic? What are the potential sources of uncertainty and risks regarding these assumptions?
- Does the budget explain the projections for the most significant general fund revenue sources? (These probably account for close to a large percentage of total general fund revenues.)
- For agencies providing social services, how are caseload and benefit costs forecast and managed?

### Budgets Don't Tell the Whole Story

Operating budgets and financial reports do not address many important issues that decision-makers must consider. For example, they do not:

- Show postponed or avoided costs (for example, deferred maintenance on facilities or infrastructure)
- Use of one-time or expiring revenue sources.
- Indicate changes in purchasing power due to inflation or deflation.
- Measure the decline or depreciation of infrastructure (like roads, bridges and sewer lines) and public facilities (like buildings and parks).

Local officials may wish to ask staff to provide an analysis of how these variables affect the agency's ability to deliver services and facilities.

- Does the budget summarize major expenses:
  - By function or program tied to areas of public service(s) or facilities the agency provides?
  - By category? (Examples include capital expenses, debt service, and operating expenses like staffing, contract services, and supplies).
  - By fund type? (Examples include the general fund and various enterprise funds, if the agency has special funds).
- Is the budget balanced by one-time fixes or is there a sustainable long-term funding strategy (this is also an issue to be addressed in the agency's long-term financial planning documents, see page 14)?
- Does the budget clearly show the beginning and ending balances in each fund (fund balances)?
- Is the general fund budget balanced (in other words, are there enough projected revenues to fund estimated expenses)?
- Does the budget use one-time revenues only for one-time expenses (rather than ongoing expenses)?
- Does any fund have a deficit (in other words, is it projected to spend more than it brings in)? Why? Is it the deficit temporary or permanent?
- What are the most significant changes since last year's adopted budget?
- With respect to the agency's general fund, how is the fund balance projected to change?
  - How are other funds' fund balances projected to change?
  - How will any resulting changes affect the agency's compliance with its reserve policies?
- Does the budget compare actual expenses and revenues from past years so decision-makers and the public can understand how the agency's budgeted numbers compared to reality?
- Does the budget show changes in the agency's overall financial condition? What measures of financial condition does it use?

- How does the agency’s budget compare with other agencies in the geographic area (both for the next fiscal year and the trend over the past five years)?
  - If there are differences, what are they and what factors account for the differences? (For example, are other agencies using different assumptions and why?)
  - Is the agency’s budget dependent on any other agencies, in terms of revenues (or expenditures)?
  - Are the other agencies planning changes that should affect the agency’s assumptions?
- Where is the agency in terms of constitutional limits on state and local spending? (In 1979 the California voters in 1979 approved a ballot measure<sup>15</sup> that limited the growth in state and local spending to a formula tied to increases in population and inflation. Finance professionals sometimes refer to this as the “Gann Limit” named after the ballot measure’s sponsor. Local voters can approve an increase in the formula, for a period of up to years.<sup>16</sup>)
- If changes to the budget prove necessary during the fiscal year, why are those adjustments necessary? What steps were taken to avoid having to make mid-year changes? What steps can be taken to avoid such changes in the future?

### **Local Agency Budgeting: Resources for Further Information**

Government Finance Officers Association, *Recommended Budget Practices: A Framework for Improved State and Local Budgeting* (1998), available at [www.gfoa.org/services/df/budget/RecommendedBudgetPractices.pdf](http://www.gfoa.org/services/df/budget/RecommendedBudgetPractices.pdf)

Institute for Local Government, *A Local Official's Guide to Public Engagement in Budgeting* (2010), available at [www.ca-ilg.org/public-engagement-best-practices/engaging-public-budgeting](http://www.ca-ilg.org/public-engagement-best-practices/engaging-public-budgeting).

### **Personnel-Related Questions**

- What procedures does the agency use to forecast and manage projected personnel expenses?<sup>17</sup> When do labor agreements expire?
- How does the agency set its salary and benefit levels or ranges?
  - Are there salary-setting guidelines available for positions within the agency? Has the agency considered and followed them?<sup>18</sup>
  - Does the agency research and consider salaries and benefits other agencies provide for positions with similar responsibilities in the agency’s geographic area?
  - How are changes in compensation determined? For unrepresented employees not subject to a memorandum of understanding, are changes based on an annual goal-setting and performance review process? What other variables does the agency consider (overall agency fiscal health, public perception, relationship to other agencies’ practices, etc.)?

- Note: If the agency uses employment contracts, carefully consider the potential future fiscal impacts of automatic contract renewals, automatic increases in compensation, and provisions linking compensation increases to third-party contracts. These may hamper the agency's abilities to control its costs in the future.
- Are position vacancies monitored (including length of each vacancy), to determine if salary savings can be achieved, if position actually required, or if service levels are suffering?
- What is the status of the agency's funding for pension and other post employment benefits liabilities?

### Public Information and Transparency

- What processes will the agency use to inform the public about budget issues? What mechanisms will there opportunities will be provided for public input on budget challenges and priorities?

Are the agency's budget and supporting documents made available on the agency's website?<sup>19</sup>

#### Note about Performance Measurement

“Performance measurement” (which is sometimes known by other names) enables an organization to assess its performance against organizational goals. This can occur as part of the budgeting process or as part of general management practices involving assessing the degree to which an organization's activities and priorities are aligned with pursuit of an organization's mission and strategy. Under either approach, the Government Finance Officers' Association recommends that performance measurement be linked to budget decision-making. See <http://www.gfoa.org/downloads/budgetperfmanagement.pdf>

More specifically, performance measurement is a management tool for systematically collecting clearly defined data regarding the effectiveness and efficiency of service delivery. The initial questions for elected officials to ask are:

- 1) Whether and how the agency uses performance measurement to assess its activities,
- 2) If the organization uses performance measurement, how is the resulting data analyzed and used in management decision-making (including decisions on allocating resources), and
- 3) How are those results communicated to elected officials and the community?

There are a number of good sources on performance measurement for public agencies, including the International County-City Management Association (ICMA—[icma.org/en/results/center\\_for\\_performance\\_measurement/home](http://icma.org/en/results/center_for_performance_measurement/home)) and the Government Finance Officers Association (GFOA – [www.gfoa.org/index.php?Itemid=250&id=479&option=com\\_content&task=view](http://www.gfoa.org/index.php?Itemid=250&id=479&option=com_content&task=view)).

## Financial Reporting and Accounting

Financial reports are an essential oversight tool. There are two basic kinds of financial reports:

- **Interim Reports.** These include monthly reports, quarterly reports and mid-year budget reviews.
- **Annual Reports.** Well-managed public agencies typically prepare a report at the end of the year explaining revenues and expenditures levels.

In addition, local agencies that receive federal or other grant moneys may be subject to specific funder financial reporting requirements.<sup>20</sup>

Good interim reporting identifies important trends in time for local officials to act on them before serious problems arise. Audited financial reports alert governing body members if there are irregularities in financial practices and financial reporting. Both kinds of reports require a solid financial information system to track revenues and expenditures and provide that information to decision-makers.

### Questions to Ask

#### Interim Reporting

- What kind of reports do agency managers receive? What do they do with them?
- How often do elected officials receive interim financial reports? Does staff review the information in these reports with local officials?
- Do the reports provide meaningful information that gives local officials an accurate portrayal of the agency's current financial picture to date?
- Do the reports compare expectations with actual results? Do they discuss key variances between the two?

#### Some Financial Warning Signs

- Operating expenses exceeding revenues by more than five percent during the year
- Large mid-year variances in budgeted revenues and expenditures versus actual
- Inadequate or late financial reports
- Depletion of reserves to balance budget, for example if the reserves fall below ten percent of operating costs.
- Outstanding loans between funds at the end of the fiscal year
- Expenses exceeding revenues for two consecutive years, with the second year's deficit being larger than the first year's
- Debt service exceeds 10 percent of current revenues
- Increase in debt service as percentage of operating budget each year
- Qualified auditor's opinions
- Reports of internal control weaknesses from the agency's auditors with no corresponding plan to address (or repeated reports of such weaknesses from year to year)
- Large turnover in staff responsible for monitoring financial status

- Are there adverse patterns?
- Does staff have a plan to address problem areas?
- Are there inconsistencies or conflicting trends?
- Do the reports identify areas of uncertainty or risk in any forecasts contained in the reports?
- Do the reports frequently contain surprises (unexpected developments)?

## Annual Reporting

- Are the annual financial reports prepared by a certified public accountant, in accordance with generally accepted accounting principles? Are these reports audited by an outside or independent auditor?
- Have all the required disclosures, for example, those required by the Governmental Accounting Standards Board (GASB—sometimes pronounced “gaz-bee”) been made?
- How long has the outside or independent auditor been auditing the agency? Does the agency periodically change auditors every few years to provide a fresh view of the agency’s financial practices and reports?
- What is the relationship between the auditor and both the agency staff and the governing body? Is the auditor getting the information he or she needs in a timely manner? Is communication open and encouraged?
- Are the audited annual financial reports timely—within six months after year-end?
- Should the agency have an audit committee to select and supervise the work of the outside or independent auditor?<sup>21</sup>
- Are the auditors' opinions “unqualified?” (An “unqualified” opinion means that the auditor concludes the agency followed all accounting rules and that its financial reports present an accurate picture of the agency's financial condition. A qualified opinion is a significant warning sign that demands attention from the governing body.)
- Does the auditor prepare a transmittal letter that clearly and concisely describes the agency's fiscal status?
- Does the auditor issue a letter to the governing body reporting on the agency’ internal controls?
- Does the agency follow the “Award for Excellence in Financial Reporting” guidelines of the Government Finance Officers Association?<sup>22</sup> If not, why not?

## Looking Ahead: Long-Term Financial Planning

- **Why Do Fiscal Forecasts?** Forecasting helps the agency think about the factors affecting the agency's fiscal health (and what can and cannot be done about them). Forecasting also helps elected officials, staff and the community understand the long-term fiscal challenges and opportunities they face, as well as possible advance warning of future uncertainties (for example, voter initiatives and state budget decisions).
- **Recognize Limitations.** Circumstances change and assumptions become outdated. Clearly stating the agency's assumptions in making a forecast encourages the review, and re-evaluation of those assumptions, when necessary.

### Questions to Ask

- Does the agency periodically prepare and / or update a long-term fiscal forecast?
- If so, does the forecast take into account key variables relating to revenues and expenses? Variables include demographic factors like changes in population and case loads. They can include economic factors like inflation, new construction, property values and the overall business climate (which can affect sales taxes). Other external factors can include legislative developments and court decisions. Projected costs related to pension obligations and labor agreements are another potential variable.
- Does the forecast reach clear conclusions about what these variables mean for the agency's future revenues and expenses?
- Does the forecast also identify areas of risk and uncertainty that may limit the degree to which the agency can rely on the forecast?
- To what extent are the results of the forecast shared with decision-makers, the news media and the public?
- What level of detail do decision-makers want to receive regarding the agency's long-term financial planning? (Some governing bodies will want fairly detailed information whereas others will want bigger picture information. There is not a right level of detail – the goal is to give governing body members the level of detail that makes them comfortable.)

## Cash Management and Investments

Sometimes, public agencies have funds on hand that are being held for longer-term needs. These may be invested in a variety of bonds (but not stocks), notes and other instruments allowed by state law.

The governing body's role is to be a wise steward of the public's resources. The objectives in managing public funds are, in priority order:

1. Safety (the likelihood that the agency will get all its money back)
2. Liquidity (the agency's ability to withdraw funds on short notice)
3. Yield (the interest or other return on the investment)

In light of these objectives, prudent public agency investment managers never seek to earn maximum returns on the agency's portfolio at the expense of safety or liquidity. This would expose the agency to an unacceptable level of too much risk.

Instead, they focus on seeking to earn a reasonable rate of return on the agency's investments, while preserving capital in the overall portfolio and meeting the cash flow needs of the agency.

There are funds that specialize in investing public agency funds; the Local Agency Investment Fund (LAIF) of the State Treasurer's office and CalTrust are examples.

### Questions to Ask

- What oversight procedures does the agency use for its investments? Who is responsible for the day-to-day supervision of the agency's investment activities? If that authority has been delegated to the agency's treasurer, has that authority been delegated annually as required by law?<sup>23</sup>
- If that authority has been contracted out, who is responsible for oversight?
- What is the agency's investment policy? Is it understandable? Does the governing body review it annually as the law requires?<sup>24</sup>
- Do governing body members receive and review periodic investment reports?<sup>25</sup> Do these reports include an analysis of cash flow needs?
- Are the investment reports clear and understandable? (A lack of clarity can be a sign of problems or undue investment complexity.)



- Do the reports show numerous investments and transactions? Why? (Many public agencies do not have portfolios that justify “active” management with lots of sales, purchases and trades.)
- Are the agency’s investments diverse or are the agency’s assets invested in just a few places?
- Do the agency’s policies allow investments in derivatives or other potentially high-risk instruments? Does that agency have any such high risk investments?
- Are any bank holdings over the FDIC insurance limit (which may vary from bank to bank) and do such depositories otherwise comply with state and federal standards to provide security for public agency deposits?<sup>26</sup>

## Capital Financing and Debt Management

Debt financing is neither a “bad” nor a “good”—it is simply a tool for achieving community goals. However, debt does come at the price of costs of issuance and interest charges, as well as the obligation to make regular loan payments and conform to market disclosure and terms of the debt instruments on an ongoing basis.<sup>27</sup> Allowing these payments to become a dominant part of the agency’s budget limits the agency’s ability to respond to unplanned expenses.

Debt financing is usually appropriate for:

- **Temporary Short-Term Cash Flow Issues.** An agency may need to bridge cash flow gaps while waiting to receive key revenues (like property taxes in December and franchise fees in April). The agency may cover these gaps by issuing “tax” or “revenue” anticipation notes (sometimes known by the acronym “TRANS”). In this case, any amount borrowed must generally be paid back within a year.
- **Long-Term Improvements.** Debt financing is also appropriate for truly high-priority, one-time improvements – when it makes sense for current taxpayers to share the cost with those who will benefit 20 or 30 years in the future. By contrast, borrowing for ongoing operational expenses or short-term capital needs is inadvisable. The length of the debt should never exceed the useful life of the debt-financed asset.

Any agency’s ability to borrow and repay debt capacity is limited. Amounts borrowed for today’s project are funds that cannot be borrowed tomorrow. Amounts required for debt repayment in the future are funds that will not be available for other programs and services.

Recognizing the significance of the decision to incur long-term debt for a public agency, California’s constitution requires the public voters to approve debt<sup>28</sup> that would be repaid from future general fund revenues.<sup>29</sup> While there are a number of exceptions to this requirement (including the special fund doctrine for revenue bonds<sup>30</sup> and an exception for financing leases), the constitutional principle is important to keep in mind. Incurring debt obligates the community into the future and reduces financial flexibility. Accordingly, the benefits of doing so should outweigh these costs.<sup>31</sup>

### Questions to Ask

- Does the agency have a multi-year capital improvement plan? (Having such a plan enables decision-makers to consider key factors like project priorities, debt capacity and what role fees will play in financing).
  - If the agency has such a plan, is it realistic? If not, what steps are necessary to make it realistic?

- If an agency has such a plan, what does the plan *not* include? For example, does it assume that new development will bear the costs of capital improvements necessitated by that development? If so, the plan should so state.
- Does the multi-year capital improvement plan include specific information about how future maintenance costs will be paid for? It's not wise to build an asset the agency cannot afford to maintain.
- Does the agency have clear capital financing and debt management policies? Who is responsible for implementing and monitoring compliance with these policies?
  - Do these policies provide decision criteria for when incurring debt is appropriate?
  - Do these policies address what type of debt financing is appropriate (for example, a) variable versus fixed rates, and b) are interest rate swap agreements allowable and under what circumstances?)
  - Do these policies address protection of credit quality?
  - Do these policies address debt capacity?
  - Do these policies address costs/benefits of risk examinations for proposed debt?
  - Do these policies address who is on the agency's financing team and how consultants like bond counsel, financial advisors, trustees, assessment engineers and underwriters are selected? Are the selection criteria being followed?
  - Do these policies address disclosure to and relations with debt rating agencies?
  - Do these policies address who is responsible for conformance with bond covenants (obligations the agency agrees to as part of bond financing) on an ongoing basis?
- Does the agency have a debt advisory committee? If so, does the membership of the committee include representatives from the local community?

## Purchasing and Contracting Practices

Procurement policies and practices enable an agency to promote maximum value and economy for the agency's constituents through fair and competitive processes. The goal underlying such policies is to select vendors and service providers using processes in ways that minimize opportunities for favoritism and that provide for competitive pricing. For service providers, the task also involves assessing whether the provider's skills best meet the agency's needs.

Purchasing presents a number of ethical and legal hazards for local officials, despite what can be a relatively small impact on overall agency spending. This is because missteps can undermine the public's overall confidence in the agency's financial practices. For more information, see [www.ca-ilg.org/post/fair-procurement](http://www.ca-ilg.org/post/fair-procurement).

For public works projects, state law generally defines when local agencies must use competitive bidding.<sup>32</sup>

### Questions to Ask

- What steps does the agency use to have a fair, open and competitive purchasing process?
- Does the agency's purchasing process explain the respective roles of staff and elected officials in that process?
- Have employees involved in the purchasing process received training or informational materials on the importance of both the appearance and substance of fairness in the procurement process?
- Are the purchasing rules straightforward enough so that everyone who has a part in implementing them understands the underlying goals and key rules? One element of clarity can be having separate policies depending on the nature of the purchase (for example, one for goods, one for services and another for public works projects).
- If the agency has a decentralized purchasing system (in other words, if purchase are made separately by different departments), does the agency have clear organization-wide standards and guidelines?
- Does the agency take advantage of cooperative purchasing opportunities with other public agencies?
- Does the agency have policies in place to comply with applicable prevailing wage requirements? These are especially common for vehicles and other big-ticket items.
- Would increased reliance on "just-in-time" deliveries that eliminate large inventories and warehouse systems be useful for the agency?

- Does the agency have policies in place for the proper disposal of surplus property? How has staff been made aware of such policies?
- Is the agency alert to and actively monitor contract terms for cost escalators and automatic renewals that can cause increases that can cause the agency to lose control of costs?
- Are staff responsible for purchasing decisions required to file annual disclosure statements relating to economic interests and gift receipt (known as “Form 700s”)?

### **Limits on Agency Expenses/ Proper Uses of Public Resources**

Invariably, there are more worthy uses for public funds than there are funds available. Deciding how limited public resources will be allocated is a key responsibility of elected officials, although it is important to acknowledge that decision-makers may have less discretion than one might expect in deciding how public monies are spent.

That being said, the law imposes some basic restrictions on how public resources may be used. For example, any use of public resources must serve the needs of the agency’s constituents. California’s Constitution expresses this principle by prohibiting “gifts” of public funds by the Legislature, general law cities, and agencies created by state statute;<sup>33</sup> some city charters also contain this restriction. Agency counsel can provide guidance on the issue of what constitutes an impermissible gift of public funds. An example, however, is a payment to another public agency for their purposes, with no benefit flowing back to the donor agency’s constituents.<sup>34</sup>

Along similar lines, personal or political uses of public resources also are not allowed.<sup>35</sup> This prohibition applies to not only public money, but also to anything paid for with public money (for example, agency equipment, supplies and staff time). An example of how this prohibition applies is that public resources may not be used for advocacy efforts on ballot measures. (For more information, see [www.ca-ilg.org/BallotMeasureLegalIssues](http://www.ca-ilg.org/BallotMeasureLegalIssues)). Elected officials should ask how staff and newly elected officials are made aware of these restrictions.

Finally, local agencies must adopt expense reimbursement policies for elected and appointed officials.<sup>36</sup> Agency counsel should review the policy for compliance with state law. Most agencies have adopted expense reimbursement policies for staff as a matter of sound practice.

## Brief Glossary of Financial Management Terms

*Note: The following glossary is designed to help non-finance experts understand some of the terminology used in public agency financial management. Public agency financial management frequently involves terms that are unfamiliar to non-experts, the definitions of which also involve other unfamiliar terms. The definitions and explanations offered below sometimes sacrifice technical accuracy in order to promote a general understanding of what a term means.*

*The Institute for Local Government encourages those that wish absolute technical accuracy to consult additional sources.*

### **Accounting Standards**

Generally accepted accounting principles (sometimes referred to by the acronym GAAP) published by the Governmental Accounting Standards Board (sometimes referred to by the acronym GASB) that guide local and state agencies' recording and reporting of financial information. The standards establish such guidelines as when transactions are recognized and annual financial report content.

### **Accrual Basis Accounting**

An accounting method in which revenues (or income) are entered into the accounting system when they are payable (even though the money may not have been received yet), and expenses are recognized when the commitment to pay is made (even though no payment may have occurred yet). *Compare with Cash Basis Accounting.*

### **Bond**

An interest-bearing promise to repay a specified sum of money borrowed (known as the principal amount) by a specified date. *See also "General Obligation Bonds."*

### **CalTRUST**

A joint powers authority created by public agencies to provide a safe and convenient method for public agencies to pool their assets for investment purposes.

### **Capital Budget**

A spending plan for improvements to or acquisition of land, facilities, and infrastructure. The capital budget balances revenues and expenditures, specifies the sources of revenues, and lists each project or acquisition.

### **Capital Improvement Program (CIP)**

The section in the agency's budget for capital improvement projects, such as street or park improvements, building construction, and various kinds of major facility maintenance.

<b>Capital Outlay</b>	Spending that results in the acquisition of or addition to the agency's land, buildings, equipment, machinery, vehicles, and the like to provide services to the community (sometimes these are referred to as "fixed assets"). .
<b>Cash Basis Accounting</b>	An accounting method in which revenues are entered into the agency's accounting system when the cash is received and spending is entered into the system when the agency makes a payment. To comply with generally accepted accounting principles, local agencies must use accrual basis accounting, rather than cash basis. <i>Compare with "Accrual Basis of Accounting."</i>
<b>Construction / Development Tax</b>	A tax imposed on development and/or the availability or use of public agency services. <i>See also "Development Impact Fees."</i>
<b>Contingency</b>	In budgets, an amount that is set aside to meet unforeseen circumstances.
<b>Debt Financing</b>	Issuing bonds and other kinds of debt instruments to finance agency activities in service to the public.
<b>Debt Service</b>	Annual principal and interest payments an agency owes on money that it has borrowed.
<b>Debt Service Funds</b>	One or more funds in an agency accounting system established to track payments made to repay principal and interest on debt.
<b>Development Impact Fees</b>	Amounts charged in connection with land development to pay for facilities or services that will be needed to serve the new development that are tied to the proportionate costs of providing those facilities or services to that development.
<b>Enterprise Fund</b>	A separate fund used to account for services supported primarily by service charges. An example would be a solid waste fund supported by charges solid waste service receivers pay.
<b>Entitlement Program</b>	A benefit program in which funding is allocated according to eligibility criteria. All persons or agencies must meet the criteria specified by federal or state laws in order to receive the benefit.
<b>Estimated Revenue</b>	The amount of revenue the agency expects receive during a fiscal year.

<b>Expenditure</b>	An amount paid for goods and services associated with the provision of public services, including payments for debt retirement and capital outlays.
<b>Fee</b>	A charge for the cost of providing a particular service. Public agency fees may not exceed the estimated reasonable cost of providing the particular service or facility for which the fee is charged, plus overhead.
<b>Fines, Forfeitures and Penalties</b>	Revenues received and/or bail monies forfeited upon when an individual is convicted of a misdemeanor or municipal infraction.
<b>Full Faith and Credit</b>	When a local agency uses debt financing, more specifically general obligation bonds, it makes a pledge to bondholders the agency will use all available funds to meet the agency's obligation to repay bondholders.
<b>Full-Time Equivalent (FTE)/Staff Year</b>	The number of hours per year that a full-time employee is expected to work. If there are two workers, each of whom works half that number of hours per year, the two workers together equal one full-time equivalent or one staff year.
<b>Fund</b>	A self-balancing set of accounts. For agencies with more complex budgets, accounting information is organized into funds, each with separate revenues, expenditures, and fund balances.
<b>Fund Balance</b>	Difference between the assets (revenues and other resources) and liabilities (amounts spent or committed to) of a particular fund.
<b>General Fund</b>	Fund used to account for all financial resources except those accounted for in another fund (for example, enterprise or grant funds). Usually, the general fund is the largest fund in a local agency.
<b>General Obligation (G.O.) Bonds</b>	A form of debt in which the agency pledges its "full faith and credit" to collect enough money each year to repay the amount borrowed plus interest.
<b>General Tax</b>	A tax imposed for general governmental purposes, the proceeds of which are deposited into the general fund. An agency must comply with certain procedural requirements to impose, increase or extend a general tax, including securing approval of the tax by majority vote of the electorate. <i>See also "special tax."</i>



<b>Generally Accepted Accounting Principles (GAAP)</b>	Uniform minimum standards used by state and local agencies for financial recording and reporting which have been established by the Governmental Accounting Standards Board (sometimes referred to by the acronym GASB).
<b>Governmental Accounting Standards Board (GASB) –</b>	The body that sets accounting standards for governmental entities at the state and local levels.
<b>Grant</b>	A payment of money from one entity to another for a specified purpose, activity or facility. Generally, grants do not have to be repaid by the recipient, as long as the recipient uses the funds for the promised purposes, activities or facilities.
<b>Intergovernmental Revenue</b>	Revenues from other public agencies in the form of grants, entitlements, shared revenues or payments in lieu of taxes.
<b>Investment Earnings</b>	Revenue earned from the investment of public funds.
<b>Licenses and Permits</b>	These represent the agency’s permission to engage in certain kinds of activities. Local agencies often charge fees designed to reimburse local agency for costs of regulating activities being licensed, such as licensing of animals, bicycles, etc.
<b>Lien</b>	A claim on assets, especially property, for the payment of taxes or utility service charges.
<b>Liquidity</b>	The ability to convert a security into cash promptly with minimum risk of principal.
<b>Local Agency Investment Fund (LAIF)</b>	A special investment fund in the state treasury into which local agencies may deposit money for investment.
<b>Maintenance of Effort (MOE)</b>	A requirement often imposed as a condition of receiving certain kinds of funding, that the agency maintains a certain level of spending. The goal of such requirement is to have the funding being provided increase the level of spending on the program (and conversely, avoid having the extra funding be used to replace existing spending).
<b>Mandate</b>	A state or federal requirement that local agencies perform a task in a particular way or perform a task to meet a particular standard, often without providing the revenues to do so.

<b>One-Time Expenditures</b>	A term used to differentiate routine, ongoing costs within a given budget from non-recurring costs that will not be repeated in future years. A capital expenditure can be a one-time expenditure (although an agency may need to evaluate whether the agency will incur maintenance or replacement costs. This category may also include single-year appropriations for special purposes.
<b>Other Post Employment Benefits (OPEB)</b>	A pension is a form of “post-employment benefit,” that is, a benefit an employee receives after their service to the agency ends. <i>Other</i> forms of such benefits can include health insurance and other health-related benefits provided to former employees.
<b>Performance Measures</b>	Indicators used in the budget to show items such as 1) the amount of work accomplished, 2) the efficiency with which tasks were completed, and 3) the effectiveness of a program. Such indicators can help the public understand what public agency spending accomplishes.
<b>Portfolio</b>	The collection of investments held by a local agency.
<b>Prevailing Wage</b>	The basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area (if a majority of such workers are paid at a single rate). Prevailing wage laws require all bidders to use the same wage rates when bidding on a public works project.
<b>Principal</b>	The original amount of a bond or debt (sometimes also referred to as “face” or “par value”), not including accrued interest.
<b>Program Revenues</b>	Income generated by programs and/or dedicated to offset the program’s costs.
<b>Rating</b>	Letters and numbers used by rating agencies to express their assessment of the likelihood of a bond or debt being repaid.
<b>Rating Agencies</b>	Firms that evaluate the likelihood bonds or debts will be repaid by assigning ratings to those bonds or debts. A bond rating is often the single most important factor affecting the interest cost on bonds. There are three major rating agencies for municipal bonds: Moody's Investors Service, Standard & Poor's, and Fitch Ratings.

<b>Realignment</b>	Actions taken by the State of California in 1991 and 2011 to restructure the state-county fiscal relationship by making certain health, social service, criminal justice, and mental health service programs county responsibilities, and providing some funding to help pay for the new responsibilities.
<b>Rents</b>	Revenues received through the rental of public properties to private parties such as convention space and library facilities.
<b>Reserve</b>	Amounts set aside to provide a funding source for extraordinary or unforeseen expenses or revenue shortfalls. Sometimes also referred to as “fund balance(s)” to reflect multiple agency funds. <i>See also</i> definition of “fund.”
<b>Revenue</b>	Income received by the local agency. For more information on <b>sources</b> of county and city revenues, see Institute for Local Government, <i>Understanding the Basics of County and City Revenues</i> (2008), available at <a href="http://www.ca-ilg.org/revenueguide">www.ca-ilg.org/revenueguide</a> .
<b>Revenue Bonds</b>	A form of debt in which the agency pledges the income received from the operation of the facilities being financed with the debt to repay the amounts borrowed plus interest.
<b>Salaries and Benefits</b>	Salaries includes the compensation paid to full-time, part-time, temporary, and extra-help employees, including overtime, vacation pay, sick leave pay and any type of premium pay. Benefits include the agency's share of the costs for health, dental, life insurance, retirement, Social Security and Workers' Compensation.
<b>Sales Tax</b>	A tax imposed on the total retail price of merchandise sold by a retailer.
<b>Secured Roll</b>	A list containing all assessed property secured by land subject to local taxation
<b>Securities</b>	Pieces of paper (sometimes referred to as “instruments”) that represent financial value. Examples include bonds and stocks.
<b>Service Charges</b>	Amounts charged to cover the cost of providing services to individuals or companies.

<b>Short-Term Financing Methods</b>	Techniques used for many purposes, such as meeting anticipated cash flow deficits, interim financing of a project, and project implementation. Using these techniques involves issuance of short-term notes.
<b>Special Revenue Fund</b>	Funds used to account for proceeds from specific revenue sources that are legally restricted as to how the revenues may be spent. A special revenue fund must have a separate budget adopted annually.
<b>Tax and Revenue Anticipation Notes (TRANS)</b>	A short term loan that local agencies use to even out cash flow during the year. The loans take the form of a debt (“note”) that is secured by anticipated tax and other revenue collections.
<b>Tax Base</b>	The objects or transactions to which a tax is applied (for example parcels of property, retail sales, etc.). State law or local ordinances define the tax base and the objects or transactions exempted from taxation.
<b>Tax Rate</b>	The amount of tax applied to the tax base. The rate may flat, incremental or a percentage of the tax base, or any other reasonable method.
<b>Total Appropriations and Total Revenues</b>	The consolidation of all revenues and expenditures for all funds. The purpose is to report accurately the full amount of governmental revenues and expenditures for the budget period
<b>Use Tax</b>	A tax imposed on the use or storage of tangible personal property when sales tax is not paid. <i>See also “sales tax.”</i>
<b>User Fee</b>	Fees charged for the use of a public service or program. An example is fees charged to participants in recreation programs. User fees for property-related services are referred to as property-related fees.
<b>Utility Rate</b>	A category of user fee paid by the user of utility services.
<b>Utility Users Tax</b>	Tax imposed on the consumer (residential and/or commercial) of any combination of electric, gas, cable television, water, and telephone services.
<b>Vehicle License Fee (VLF)</b>	Annual registration fee imposed on vehicles.

**Williamson Act and Open Space Subvention**

Officially known as the California Land Conservation Act of 1965, a law that allows local agencies to enter into contracts with private landowners to restrict specific parcels of land to agricultural or related open space use. In return, landowners receive property tax assessments which are much lower than normal because they are based upon farming and open space uses as opposed to full market value. The program contemplates local agencies receive an annual subvention of forgone property tax revenues from the state.

**Yield**

The total amount of revenue an agency expects to receive from a tax, determined by multiplying the tax rate by the tax base. Also, the annual rate of return on an investment, expressed as a percentage of the investment.

## Endnotes

<sup>1</sup> The California Society of Municipal Finance Official Code of Ethics can be found at: <http://www.csmfo.org/index.cfm?fuseaction=Detail&CID=4&NavID=154>.

<sup>2</sup> The California Municipal Treasurers Association Code of Ethics can be found at: <http://www.cmta.org/?page=4>.

<sup>3</sup> GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), <http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf>.

<sup>4</sup> See GFOA website with long-term financial planning resources: [http://www.gfoa.org/index.php?option=com\\_content&task=view&id=360&Itemid=186](http://www.gfoa.org/index.php?option=com_content&task=view&id=360&Itemid=186).

<sup>5</sup> GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), <http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf>.

<sup>6</sup> GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), <http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf>.

<sup>7</sup> See, for example, Cal. Gov't Code § 66016.

<sup>8</sup> GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), <http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf>.

<sup>9</sup> See Cal. Gov't Code § 53232.2(b) ("If a local agency reimburses members of a legislative body for actual and necessary expenses incurred in the performance of official duties, then the governing body shall adopt a written policy, in a public meeting, specifying the types of occurrences that qualify a member of the legislative body to receive reimbursement of expenses relating to travel, meals, lodging, and other actual and necessary expenses."). See also <http://www.leginfo.ca.gov/calaw.html> for additional information on what such policies must include.

<sup>10</sup> See GFOA Best Practices: Purchasing Cards, <http://www.gfoa.org/downloads/PurchasingCardFINAL.pdf> for suggested practices for preventing and detecting abuse.

<sup>11</sup> See Best Practices for Treasury Management, Government Finance Review (April 2000), available at <http://www.gfoa.org/downloads/CASHTreasuryapr00.pdf>. The California Municipal Treasurers' Association offers sample investment policies at <http://www.cmta.org/?page=39>.

<sup>12</sup> [Back to Basics: Making the Case for Investment Policies](http://www.gfoa.org/downloads/CASHInvestPol0802.pdf), Government Finance Review (August 2002) available at <http://www.gfoa.org/downloads/CASHInvestPol0802.pdf>.

<sup>13</sup> See Cal. Gov't Code §53600 and following (note that an agency is not required to authorize the full range of all investments allowed by state law). See also <http://www.leginfo.ca.gov/calaw.html> for specific statutory language.

<sup>14</sup> GFOA Recommended Best Practice: Using Websites to Improve Access to Budget Documents and Financial Reports (2003), <http://www.gfoa.org/downloads/cafr-budgets-to-websites.pdf>. See also <http://www.gfoa.org/downloads/websitepresentation.pdf>.

<sup>15</sup> See Cal. Const. art. XIII B (added by Proposition 4 on the 1979 ballot and sometimes referred to as the "Gann Limit" after the ballot measure's leading proponent). See also Cal. Gov't Code § 7900 and following.

<sup>16</sup> Cal. Const. art. XIII B, § 4.

<sup>17</sup> See GFOA Recommended Best Practice: Managing the Salary and Wage Budgeting Process (2010), [http://www.gfoa.org/downloads/GFOA\\_ManagingtheSalaryandWageBudgetingProcessBP.pdf](http://www.gfoa.org/downloads/GFOA_ManagingtheSalaryandWageBudgetingProcessBP.pdf).

---

<sup>18</sup> See, e.g., League of California Cities City Manager Compensation Guidelines, available at <http://www.cacities.org/UploadedFiles/LeagueInternet/91/911307cc-e899-43cb-ba97-7d28bf20640c.pdf>

<sup>19</sup> GFOA Recommended Best Practice: Using Websites to Improve Access to Budget Documents and Financial Reports (2003), <http://www.gfoa.org/downloads/caafr-budgets-to-websites.pdf> . See also <http://www.gfoa.org/downloads/websitepresentation.pdf>.

<sup>20</sup> See Single Audit Act Amendments of 1996, OMB Circular A-133, the OMB Circular Compliance Supplement and Government Auditing Standards, [http://www.whitehouse.gov/omb/financial\\_fin\\_single\\_audit](http://www.whitehouse.gov/omb/financial_fin_single_audit).

<sup>21</sup> GFOA Recommendation: Audit Committees (2008), [http://www.gfoa.org/downloads/caafrAudit\\_Committee\\_revised.pdf](http://www.gfoa.org/downloads/caafrAudit_Committee_revised.pdf).

<sup>22</sup> Available at <http://www.gfoa.org/downloads/GENERALPURPOSECHECKLIST.pdf>.

<sup>23</sup> See Cal. Gov't Code § 53607.

<sup>24</sup> See Cal. Gov't Code § 53646(a).

<sup>25</sup> See Cal. Gov't Code §§ 53607, 53646(b).

<sup>26</sup> See Cal. Gov't Code § 53630 and following.

<sup>27</sup> GFOA Recommendation: Understanding Your Continuing Disclosure Obligations for Debt (2010), [http://www.gfoa.org/downloads/GFOA\\_understandingcontinuingdisclosureBP.pdf](http://www.gfoa.org/downloads/GFOA_understandingcontinuingdisclosureBP.pdf).

<sup>28</sup> Cal. Const. art. XVI, § 18(a) (“No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose, except that with respect to any such public entity which is authorized to incur indebtedness for public school purposes, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the purpose of repairing, reconstructing or replacing public school buildings determined, in the manner prescribed by law, to be structurally unsafe for school use, shall be adopted upon the approval of a majority of the voters of the public entity voting on the proposition at such election; nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and to provide for a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the indebtedness.”) Note that subdivision (b) goes on to provide for additional details relating to school debt.

<sup>29</sup> See *Rider v. City of San Diego*, 18 Cal.4<sup>th</sup> 1035, 1045 (1998).

<sup>30</sup> See, for example, *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 587 (1976).

<sup>31</sup> See generally, GFOA Recommendation: Debt Management Policy (1995 and 2003), <http://www.gfoa.org/downloads/debt-management-policy.pdf> .

<sup>32</sup> For county projects, the threshold for complying with state law relating to public work contracts and bidding procedures is based on population: counties with populations of 500,000 or more (\$6,500); counties with populations of 2 million or more (\$50,000); and all other counties (\$4,000). See Cal. Pub. Cont. Code §§ 20120-20123. See also Cal. Pub. Cont. Code § 20390- 20409 (relating to work on county roads). For general law cities, public works projects worth more than \$5,000 are subject to the state’s competitive bidding requirements. Cal. Pub. Cont. Code §§ 20160-20162. The state’s Public Contract Code also has various competitive bidding requirements for special districts based on the kind of district. See Cal. Pub. Cont. Code §§ 20190-20381.

Note that it is a misdemeanor to split projects to avoid competitive bidding requirements. *See, e.g.*, Cal. Pub. Cont. Code §§ 20123.5, 20163.

<sup>33</sup> Cal. Const. art. XVI, § 6.

<sup>34</sup> *See, for example, Golden Gate Bridge & Highway Dist. v. Luehring*, 4 Cal. App. 3d 204 (1970).

<sup>35</sup> *See* Cal. Gov't Code § 8314; Cal. Penal Code § 424. *See also* Cal. Gov't Code § 54964.

<sup>36</sup> *See* Cal. Gov't Code § 53232.2(b) (“If a local agency reimburses members of a legislative body for actual and necessary expenses incurred in the performance of official duties, then the governing body shall adopt a written policy, in a public meeting, specifying the types of occurrences that qualify a member of the legislative body to receive reimbursement of expenses relating to travel, meals, lodging, and other actual and necessary expenses.”). *See also* <http://www.leginfo.ca.gov/calaw.html> for additional information on what such policies must include.



**Generous support for this publication  
provided by:**

**Aleshire & Wynder, LLP**

**Best Best & Krieger**

**Burke Williams & Sorensen, LLP**

**Hanson Bridgett LLP**

**Kronick Moskowitz Tiedemann & Girard**

**Liebert Cassidy Whitmore**

**Meyers Nave**

**Renne Sloan Holtzman Sakai LLP**

**Richards, Watson & Gershon**

**San Diego Gas and Electric / The Gas Company**

**Southern California Edison**

## Acknowledgments

Special thanks to the following individuals whose expertise contributed to the 2010 version of this publication:

Laura Allen, City Manager, Town of Colma

Bob Clary, Administrative Services Officer,  
Community Services, County of Sutter

Michael G. Colantuono, Colantuono &  
Levin, PC

Michael Coleman, Fiscal Policy Advisor,  
League of California Cities

Diane Dillon, Supervisor, Napa County

James N. Fincher, County Counsel, County  
of Merced

Mike Garvey, ICMA Senior Advisor

Rick Haffey, County Administrator, County  
of Nevada

Jean Hurst, Legislative Representative,  
California State Association of Counties

Peter J. Kampa, SDA, General Manager,  
Tuolumne Utilities District

Dan Kaplan, Finance Director, Social  
Services Agency, County of Alameda

Marlene Kelleher, Finance Manager, Vista  
Irrigation District

James Marta CPA ARM, Principal, James  
Marta & Company

Chris Marx, County Debt Officer, County  
Executive's Office, County of Sacramento

James Morales, Executive Analyst, County  
of San Bernardino

Donna Mooney, Senior Assistant City  
Attorney, City of Alameda

Randy Murphy, Deputy Director of  
Operations, Department of Planning &  
Public Works, County of Glenn

Staff from the City of Newport Beach

Kenneth Rozell, Deputy City Attorney, City  
of Merced

Catherine Shaw, Management Analyst,  
County Administrative Office, County of  
San Benito

Bill Statler, Director of Finance and  
Information Technology (retired), City of  
San Luis Obispo

Ed Tewes, City Manager, City of Morgan  
Hill

Hubert "Hub" Walsh, County Supervisor,  
County of Merced

Steve Walsh, Principal Administrative  
Analyst, County Administrator's Office,  
County of Alameda

Nancy Watt, Chief Executive Officer,  
County of Napa

Len Wood, President, Len Wood and  
Associates, Rancho Palos Verdes

*All decisions about the final content and formatting of this publication  
were made by the Institute for Local Government.*

## About the Institute for Local Government

The Institute for Local Government promotes good government at the local level with practical, impartial and easy-to-use resources for California communities.

The Institute is the research and education affiliate for the California State Association of Counties and the League of California Cities.

The Institute's current program areas include:

Local Government 101  
Public Engagement  
Public Service Ethics  
Sustainability



INSTITUTE FOR  
LOCAL GOVERNMENT

© 2010 by the Institute for Local Government  
1400 K Street, Suite 205  
Sacramento, CA 95814  
916.658.8208  
[www.ca-ilg.org](http://www.ca-ilg.org)

# TAB 7

Understanding the Basics of

# PUBLIC SERVICE *ETHICS*

# LAWS





The Institute for Local Government is the nonprofit research affiliate of the League of California Cities, the California State Association of Counties, and the California Special Districts Association. Its mission is to promote good government at the local level.

The Institute's current program areas include:

- » Sustainable Communities
- » Public Engagement
- » Ethics and Transparency
- » Local Government Basics
- » Collaboration and Partnerships

The Institute is grateful to the following firms for their commitment to public service ethics:

Aleshire & Wynder LLP

Best Best & Krieger LLP

Burke Williams & Sorensen, LLP

Hanson Bridgett

Liebert Cassidy Whitmore

Meyers Nave Riback Silver & Wilson, PLC

Murphy Austin Adams Schoenfeld LLP

Richards Watson & Gershon

Renne Sloan Holtzman Sakai LLP

Special thanks to the following individuals whose time and effort contributed to this publication:

Jeff Ballinger, Partner, Best Best and & Krieger

Ruben Duran, Partner, Best Best & Krieger

Martin Gonzalez, Executive Director,  
Institute for Local Government

Amit Katzir, Associate, Liebert Cassidy Whitmore

Michael Martello,  
Institute for Local Government Volunteer

Colin Roberts, JD, Institute for Local Government

Alysha Stein-Manes, Associate, Liebert Cassidy Whitmore

Scott Tiedemann, Managing Partner,  
Liebert Cassidy Whitmore

Gary Winuk, Managing Attorney, Kaufman Legal Group

All final decisions about the content, tone and formatting of this publication were made by the Institute for Local Government.

Understanding the Basics of Public Service Ethics

© 2016 by the Institute for Local Government

1400 K Street, Suite 205

Sacramento, CA 95814

(916) 658-8208 [www.ca-ilg.org](http://www.ca-ilg.org)





Understanding the Basics of  
**Public Service Ethics Laws**

## CONTENTS

<b>Chapter 1: Introduction</b>	<b>1</b>
What Is an Ethics Law? .....	1
Understanding California Ethics Laws .....	2
The Key Laws to Know .....	3
Laws as Minimum Standards .....	3
The Limits of this Information.....	4
Endnotes .....	4

**Chapter 2: Personal Financial Gain Laws**

- Receiving Special Favors or Money for Official Actions ..... 8
  - Basic Rules..... 8
  - Penalties..... 8
    - California Law Penalties..... 8
    - Federal Penalties ..... 9
- Disqualification Based on Financial Interests Under the Political Reform Act ..... 11
  - Basic Rules..... 11
- Political Reform Act – The Four Step Conflict of Interest Test ..... 13
- Identifying Economic Issues ..... 15
  - What Kinds of Economic Interests Are a Concern? ..... 15
  - Real Property Interests ..... 16
  - The “Public Generally” Analysis ..... 17
  - What Happens if an Official is Disqualified?..... 18
    - General Rule ..... 18
    - Effect of Disqualification ..... 18
  - Penalties..... 19
    - Political Reform Act Penalties..... 19
    - Effect on Agency and Those Affected by ..... 19
    - Agency’s Decision ..... 19

Interests in Agency Contracts Barred .....	20
Basic Rules.....	20
FPPC Jurisdiction over Section 1090 Questions .....	21
Exceptions to Rules.....	22
Non-Interest Exception .....	22
Remote Interest Exception .....	22
Limited Rule of Necessity.....	23
Penalties.....	23
Criminal Penalties .....	23
Effect on Contract .....	23
Employment-Related Restrictions.....	24
Basic Rules.....	24
Penalties.....	24
Endnotes and Additional Information .....	25

## Chapter 3: Perk Issues, Including Compensation, Use of Public Resources, and Gift Laws

27

Compensation Issues.....	29
Basic Rules.....	29
Counties.....	29
Special Districts .....	29
Cities.....	31
Charter Cities.....	31
General Law Cities .....	31
Local Agency Chief Executives and Staff .....	32
Special Issue: Speaking and Other Fees.....	33
Basic No-Honoraria Rule .....	33
Exceptions to No-Honoraria Rules .....	33
Penalties.....	33
Reimbursement of Expenses.....	34
Basic Rules.....	34
When May Expenses Be Reimbursed? .....	34
Process Requirements.....	34
Amounts.....	34
Penalties.....	35
California Law Penalties .....	35
Federal Law Penalties .....	35

Restrictions on Use of Public Resources.....	36
Basic Rules.....	36
No Personal or Political Use of Public Resources .....	36
No Use of Public Resources on Ballot Measure Related Activities.....	36
Prohibition Against Mass Mailings at Public Expense .....	36
Penalties.....	37
Gifts to Public Officials.....	38
Basic Rules.....	38
Questions for Public Officials to Ask About Nice Gestures .....	38
Exceptions/Gifts Subject to Special Rules.....	39
Special Rules Relating to Who Receives the Gift.....	39
Gifts Subject to Special Valuation Rules .....	39
Special Rules for Certain Sources of Gifts.....	39
Gestures that Are Part of An Exchange.....	39
Additional Special Rules Based on Type of Gift .....	39
Gifts can be:.....	39
What to Do About Unwanted Gifts? .....	40
Penalties.....	41
California Law Penalties.....	41
Federal Law Penalties .....	41
Income Tax Violations.....	41
Use of Campaign Funds.....	42
Basic Rule.....	42
Penalties.....	42
Endnotes and Additional Information .....	43

## Chapter 4: Transparency Laws

49

Economic Interest Disclosure .....	51
Basic Rules.....	51
Penalties.....	53
Campaign Contribution Disclosure .....	54
Basic Rules.....	54
Penalties.....	55
Charitable Fundraising Disclosure .....	56
Basic Rules.....	56
Penalties.....	57
Penalties for Extortion under State and Federal Law .....	57
Honest Services Fraud.....	57
The Public’s Right to Access Records.....	58
Basic Rules.....	58
Penalties.....	59
Conducting the Public’s Business in Public .....	60
Basic Rules.....	60
Good Ethics Equals Good Politics .....	61
Typical Closed Session Issues .....	62
Penalties.....	63
Nullification of Decision .....	63
Criminal Sanctions .....	63
Other Consequences.....	63

<b>The Public’s Right to Participate in Meetings</b> .....	<b>64</b>
<b>Basic Rules</b> .....	<b>64</b>
Posting and Following the Agenda.....	64
The Public’s Right to Materials Not Included in the Agenda Packet .....	64
<b>Special Issues</b> .....	<b>64</b>
Electronic Recording of Meetings is Allowed.....	64
Sign-In Must Be Voluntary.....	64
The Public’s Right to be Heard.....	64
<b>Penalties</b> .....	<b>66</b>
Nullification of Decision .....	66
Criminal Sanctions .....	66
Other Measures.....	66
Potential Civil Rights Violations .....	66
<b>Endnotes and Additional Information</b> .....	<b>67</b>

## Chapter 5: Fair Process Laws and Merit-Based Decision-Making 74

The Right to Fair and Unbiased Decision-Makers .....	74
Basic Rules.....	74
Effect of Violations .....	75
Effect on Decision .....	75
Due Process Violations.....	75
Vote-Trading .....	75
Basic Rules.....	75
Penalties.....	76
Personal Loans.....	76
Basic Rules.....	76
Penalties.....	76
Decisions May Not Benefit Family .....	77
Basic Rules.....	77
Penalties.....	77
Restrictions and Disqualification Requirements Relating to Campaign Contributions .....	79
Basic Rules.....	
Affected Officials .....	80
Extortion under California and Federal Law .....	81
Kinds of Proceedings Affected .....	81
Actions That Must Be Taken.....	81
Penalties.....	82



Agency Staff and Political Activities.....	83
Basic Rules.....	83
Employment Decisions, Soliciting Support and Campaign Contributions.....	83
Engaging in Political Activities During Work Hours or While in Uniform .....	83
Penalties.....	83
Holding Multiple Public Offices.....	83
Basic Rules.....	83
Special Issues.....	84
Employees Who Run for the Governing Board of Their Public Agency Employers .....	84
Individual Agency Guidelines .....	84
Penalties.....	84
Competitive Bidding Processes for Public Contracts.....	85
Basic Rules.....	85
Exceptions .....	85
Emergency .....	85
Professional Services.....	85
Special Services .....	85
Design-Build .....	86
Penalties.....	86
Whistle-Blowing Protections.....	87
Basic Rules.....	87
Penalties.....	87
Endnotes and Additional Information .....	88



# CHAPTER 1: Introduction



## What Is an Ethics Law?

The notion that one should enter into public service to benefit the public and not one's own personal financial interests is almost axiomatic in American politics. News coverage of elected and appointed officials who break either the written or unwritten rules (or both) against self-interested actions in their official capacities dominate at every level of public discourse, from cable and national network news to the neighborhood newsletter and local internet blog.

Ethics laws are designed to preserve the public's trust in its public institutions and those who serve in them by setting a framework to guide conduct and behavior.<sup>1</sup>

This guide discusses several types of ethics laws and principles and their important role in public service.

For more information on these principles, see [www.ca-ilg.org/ethics](http://www.ca-ilg.org/ethics).

# Understanding California Ethics Laws

California has a complex set of ethics laws to guide local officials in their service to their communities. How does the well-intentioned local official keep track of them all?

Keeping four core principles in mind helps:

- » Public officials may not use their offices for **personal financial gain**.
- » Holding public office does not entitle one to **personal advantages or perks**.
- » **Transparency** promotes public trust and confidence.
- » Merit-based decision-making based on **fair processes** produces the best results for the public.

Each chapter of this guide is organized around one of these four principles and will discuss a variety of specific topics and penalties associated with violation of the laws.

## » Chapter 2: Personal Financial Gain Laws.

This chapter covers the prohibitions against receiving favors or money for official actions, stepping aside from the decision-making process when there is an economic interest in the outcome, and restrictions on employment in certain capacities after leaving public office.

## » Chapter 3: Gifts and Other Perks.

This chapter focuses on laws and regulations related to compensation, reimbursement of expenses, restrictions on the use of public resources, gifts to public officials, and the use of campaign funds.

## TYPES OF ETHICS LAWS

### Prohibitions

Many of these ethics laws are prohibitions: they forbid certain actions that would undermine the public's trust that decisions are being made to benefit the public's interests (as opposed to the personal or political interests of the decision-maker). Making decisions in the public's interest is also a key responsibility of public service.<sup>2</sup> Prohibitions deter betrayals of the public's trust by creating penalties for such betrayals.

Laws against misusing public resources are a form of prohibitory law, as are laws that prevent a decision-maker from being involved in a decision if the decision-maker has a real or perceived conflict of interest. Laws against bribery or other forms of "pay to play" are another important ethics law prohibition.

### Transparency Requirements

Other ethics laws simply require transparency: they provide the public and the media with information on how the public's business is being conducted, who is receiving campaign contributions and gifts from whom, and what kinds of financial interests a public official has. With transparency laws, the public judges whether a public official or group of public officials is acting in a trustworthy fashion—typically as part of the elections process. Transparency laws also encourage trustworthy behavior by reminding public officials that their actions will likely be scrutinized and judged.

### Fairness

Other ethics laws require that public agency decision-making processes meet minimum standards of fairness.<sup>3</sup>

» **Chapter 4: Transparency Laws.** This chapter focuses on various disclosure requirements, including campaign contributions, economic interests, and charitable fundraising. Other topics include conducting public business in a public manner, the public's right to participate in meetings, and the right to access public records.

» **Chapter 5: Fair Processes and Merit-Based Decision-Making.** This chapter focuses on prohibitions against vote-trading, restrictions on personal loans, and disqualifications based on the receipt of campaign contributions and benefits to the official's family. It also covers the competitive bidding process for public contracts, bias, separating agency staff from politics, and prohibitions on holding multiple offices. The chapter concludes with a discussion of the whistleblower protections available to protect public employees from retaliation for reporting unlawful behavior.

A key goal of this guide is to alert local officials on when to ask for legal advice on how ethics laws apply in a particular situation.

## The Key Laws to Know

While there are innumerable statutes, regulations, policies and court decisions that shape California ethics and transparency laws, there are a handful of specific, fundamental laws that embody many of the issues commonly encountered by local officials and employees, and that often directly govern their actions. These key laws include:

- » **Brown Act:** Requires the governing bodies of local agencies to conduct open and public meetings, subject to limited exceptions, and to post meeting agendas beforehand. See Chapter 4 for more information.
- » **Government Code section 1090:** Prohibits public officials and employees from being financially interested in any contract made by them in their official capacity or by any body or board of which they are members. See Chapter 2 for more information.
- » **Political Reform Act:** Governs campaign financing and prohibits local agency officials and employees from participating in governmental decisions affecting their financial interests. See Chapter 2 for more information.

» **California Public Records Act:** Subject to specified exemptions, requires public agencies to make writings created, used or possessed by the agency available to the public, upon request. See Chapter 4 for more information.

It is not necessary for local agency officials and employees to have a thorough understanding of all the nuances and intricacies of each of these laws but they should be aware of the purpose and general requirements of each. Along with numerous other bodies of law, each of these key laws will be comprehensively discussed in this guide.

## Laws as Minimum Standards

Because public trust and confidence is vital to the strength of a democratic system, ethics laws sometimes set very high standards for public official conduct. Even though public officials may feel at times that some of these high standards of conduct are unduly burdensome or intrusive of their private lives, they must accept that adhering to these standards, including broad financial disclosure rules for gifts and income, is simply part of the process of public service.

Even so, it is important to keep in mind that these standards are only minimum standards; it is simply not possible or practical to write laws that prevent all actions that might diminish the public's trust.

For this reason, the laws should be viewed as a floor for conduct, not a ceiling. Just because a given course of conduct is legal does not mean that it is ethical (or that the public will perceive it as such).

This means that public officials facing ethical issues are well-advised to engage in a three-step analysis:

- » **Step One:** What, if anything, does the law say about a given course of action?
- » **Step Two:** Is the given course of action consistent with one's own values and analysis of what would constitute "ethical" conduct?
- » **Step Three:** What will the public's perception be of the conduct, given the information the public is likely to have available?

A helpful tool for analyzing the third question is whether one would like to see the course of conduct reported on the front page of the local newspaper.

## The Limits of this Information

Although the Institute endeavors to help local officials understand technical and legal concepts that apply to their public service, this publication is not technical nor is it intended to provide legal advice. Officials are encouraged to consult technical experts, attorneys and/or relevant regulatory authorities for up-to-date information and advice on specific situations.

### FOR MORE INFORMATION

On ethics laws and principles, see:

» [www.ca-ilg.org/ppoe](http://www.ca-ilg.org/ppoe).

» [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/ethics-training.html).

## Endnotes

- 1 Rushworth M. Kidder, *How Good People Make Tough Choices* (Simon and Schuster, 1995).
- 2 Id.
- 3 Id.

CHAPTER 2:

# Personal Financial Gain Laws



Blank Page



# Chapter 2: Personal Financial Gain Laws

## CONTENTS

- Receiving Special Favors or Money for Official Actions .....8
  - Basic Rules.....8
  - Penalties.....8
    - California Law Penalties.....8
    - Federal Penalties .....9
- Disqualification Based on Financial Interests Under the Political Reform Act ..... 11
  - Basic Rules..... 11
- Political Reform Act - The Four Step Conflict of Interest Test ..... 13
- Identifying Economic Issues ..... 15
  - What Kinds of Economic Interests Are a Concern? ..... 15
  - Real Property Interests ..... 16
  - The “Public Generally” Analysis ..... 17
  - What Happens if an Official is Disqualified?..... 18
    - General Rule ..... 18
    - Effect of Disqualification ..... 18
  - Penalties..... 19
    - Political Reform Act Penalties..... 19
    - Effect on Agency and Those Affected by ..... 19
    - Agency’s Decision ..... 19
- Interests in Agency Contracts Barred ..... 20
  - Basic Rules..... 20
  - FPPC Jurisdiction over Section 1090 Questions ..... 21
  - Exceptions to Rules.....22
    - Non-Interest Exception .....22
    - Remote Interest Exception .....22
  - Limited Rule of Necessity.....23
  - Penalties.....23
    - Criminal Penalties .....23
    - Effect on Contract .....23
- Employment-Related Restrictions.....24
  - Basic Rules.....24
  - Penalties.....24
- Endnotes and Additional Information .....25

# Receiving Special Favors or Money for Official Actions

## BASIC RULES

Perhaps the most blatant and extreme form of using one's public position for financial gain is graft. Graft involves using one's public position to get money or anything else of value. Examples of graft include bribery and extortion.

A bribe involves conferring a benefit on a public official to influence a person's vote, opinion, action or in-action.<sup>1</sup> Asking for that bribe is illegal, of course, but so is receiving one or agreeing to receive one.<sup>2</sup> Under California's criminal laws, a "bribe" includes anything of value; it also includes receiving "advantages." The advantage can be a future one and need not involve the payment of money.<sup>3</sup> The federal law definition of bribery is even broader.<sup>4</sup>

Extortion involves, among other things, getting something from someone by wrongfully using one's public position.<sup>5</sup> For example, a public official may not demand money in return for the performance of his or her official duties.<sup>6</sup> This includes demanding campaign contributions in return for action in one's official capacity.

Public officials are also forbidden from receiving a reward for appointing someone to public office or permitting someone to perform the duties of their offices.<sup>7</sup>

## PENALTIES

### California Law Penalties

#### *Bribery*

Receiving or agreeing to receive a bribe is a crime, punishable by a combination of prison time, fines and forfeiting and being forever disqualified from holding public office.<sup>8</sup>

Fines vary according to whether the bribe was actually received. If it was, the fine is a minimum of \$2,000 up to either \$10,000 or double the amount of the bribe, whichever is greater. If a bribe was not actually received, there still is a fine between \$2,000 and \$10,000. The specified prison sentence is two to four years in state prison.

Those who offer bribes also face penalties. Those who bribe a member of a legislative body of a city, county, school district or other special district face two to four years in state prison.<sup>9</sup>

#### *Extortion*

Extortion by public officials is a misdemeanor.<sup>10</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.<sup>11</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings (also known as "quo warranto") for official misconduct.<sup>12</sup>

#### *Appointing Someone to Office*

An official who receives payment or favors for making an appointment faces the following punishments: forfeiture of office, disqualification from ever holding public office again and a fine of up to \$10,000.<sup>13</sup>

### DON'T COUNT ON A CODE OF SILENCE

Faced with the temptation of receiving a bribe, it can be easy to underestimate the chances of being caught, let alone successfully prosecuted. Fortunately, bribery is fairly rare, which may lead one to mistakenly assume prosecutors never find out about bribery.

In some instances, prosecutors learn about illicit activities from informants from within an agency. In other instances, those who believe they have been asked for a bribe will turn the asking officials in. Sometimes, observers will notice that a public official seems to have more resources than before and start asking questions.

The media views itself as a key watchdog on such issues, of course. Unfortunately, some officials discount the likelihood of getting caught and prosecuted. They figure that everyone involved in illicit activities will have a strong incentive to keep quiet. What they don't realize is that prosecutors can offer powerful incentives to those involved to testify against others in exchange for reduced penalties, and that the prospect of successfully prosecuting an elected official provides prosecutors a high-visibility opportunity to make an example of an offender, perhaps reasoning that such an example will serve as a deterrent to others.

## IF I GET INTO TROUBLE, CAN THE AGENCY PAY MY DEFENSE?

Don't count on it. To provide a defense in a criminal action, for example, the agency must find that:

1. The criminal action or proceeding is brought on account of an act or omission in the official's service to the public entity;
2. Such defense would be in the best interests of the public entity; and
3. The individual's actions were in good faith, without actual malice and in the apparent interests of the public entity.<sup>14</sup>

If the issue is whether a public official misused his or her office for personal gain, it may be particularly difficult for the agency to make the third finding, which is that the actions were in the apparent interests of the public entity. Moreover, even if the agency could make these findings, it is not required to. Indeed, there may be strong political pressures not to.

Similarly, an agency may refuse to provide a defense in a civil action if it finds the actions in question related to corruption or fraud.<sup>15</sup> Also, public agencies are not responsible for damage awards designed to punish or make an example of someone (known as "punitive" or "exemplary" damages).<sup>16</sup>

Note that, in these situations, the agency's attorney is not the public official's personal attorney, with attendant protections for attorney-client confidences. The agency attorney's legal and ethical obligations are to the agency itself- not to any one official in that agency.<sup>17</sup>

## FEDERAL PENALTIES

If an agency receives more than \$10,000 in federal funding, an official of that agency could find him or herself subject to federal prosecution if the amount involved in an ethical violation (for example, a bribe) exceeds \$5,000.<sup>18</sup> The penalty for bribery under federal law is a fine of up to twice the amount of the bribe or \$250,000 (whichever is greater), up to 10 years imprisonment, or both.<sup>19</sup>

Bribery, extortion, or embezzlement can also be basis of a federal income tax evasion charge. Federal prosecutors may treat money that an official receives through illicit means as income to the official. If the official fails to report this income at tax time (which of course, most don't), the official becomes subject to an action for income tax evasion.

Income tax evasion carries with it a possible five-year prison term and a fine of up to \$100,000.<sup>20</sup> In addition, prosecutors can require the defendant to pay for the costs of prosecution (in addition to one's own defense costs).<sup>21</sup>

The sometimes-related crime of filing a false tax return is punishable by a maximum three-year prison term and a fine of up to \$100,000 (along with the costs of prosecution).<sup>22</sup>

A court can also order a convicted official to pay restitution to the agency in the amount of the money or advantage received (or lost to the agency) as the result of criminal misuse of the official's position.<sup>23</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## MAKING A FEDERAL CASE OUT OF CORRUPTION

### Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.<sup>24</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>25</sup> That duty is violated when a public official makes a decision that is not motivated by the public’s interests but instead by his or her personal interests.<sup>26</sup>

A clear example is when an official receives a personal financial gain as the result of his or her public service. Examples include bribes and kickbacks (for example, receiving money back from proceeds paid to a company that does business with a public entity).<sup>27</sup>

Sometimes violation of a state law is the basis of an “honest services” fraud claim (in addition to other charges, like income tax evasion). However, the courts have also held that such claims can also be based on common or judge-made law concepts relating to a public official’s fiduciary duties to his or her constituents.

The potential penalties for federal fraud are steep. The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>28</sup>

**For more information,** see “Making a Federal Case Out of Corruption,” available at [www.ca-ilg.org/fedcase](http://www.ca-ilg.org/fedcase).

# Disqualification Based on Financial Interests Under the Political Reform Act

## BASIC RULES

In the statewide general election of 1974, voters passed the Political Reform Act, creating an independent authority, the Fair Political Practices Commission (FPPC), to, among other things, administer and enforce an across-the-board, bright line rule: public officials may not participate in governmental decisions affecting their financial interests.

The rule is designed to have public officials avoid putting themselves in the position of choosing between advancing the public's interest or their own financial interests. That would be a potential conflict of interest.

This does not mean there is anything corrupt or dishonest about having a disqualifying conflict of interest; nor is it against the law to have a disqualifying conflict of interest. It typically means that a public official has a personal life, with all the financial realities that life can involve. The key is to be aware when one's economic interests are implicated by a public agency decision, so one can stay clear of and avoid the decision-making process. This way, there is no question about whether one's personal interests affected the decision-making process in any way.

The rule is that a public official may not make, participate in, or influence a governmental decision that will have a reasonably foreseeable and material financial effect on the official, the official's immediate family, or any of the official's economic interests.<sup>29</sup>

Economic interests include real property, sources of income, business entities in which a public official has an investment or holds a management position, and donors of gifts.



*Note the breadth of the disqualification requirement: one must not only step aside from voting, but the entire process leading up to a governmental decision....*

Note the breadth of the disqualification requirement: one must not only step aside from voting, but the entire process leading up to a governmental decision, whether a vote of a legislative body or an action or decision by an employee vested with the authority to act on behalf of the agency. This means conversations with fellow officials and staff are also against the law if one has a conflict of interest. Also, there may be even more restrictive local requirements.

Note that disqualified officials do not count toward the establishment of a quorum.<sup>30</sup>

### Updates to the Political Reform Act Conflict of Interest Regulations

The FPPC has updated conflict of interest regulations under the Political Reform Act. These changes are significant and have changed several key parts of the conflict of interest analysis, including: material business interests, what is "reasonably foreseeable," the 500 foot real property rule, the public generally exception and overall streamlining of the 8-step conflict of interest analysis.

For more information on these updates to the conflict of interest regulations, see the FPPC webpage for newly adopted, amended or repealed regulations at: [www.fppc.ca.gov/the-law/fppc-regulations/newly-adopted-amended-or-repealed-regulations.html](http://www.fppc.ca.gov/the-law/fppc-regulations/newly-adopted-amended-or-repealed-regulations.html). Also seek professional guidance when facing a potential conflict of interest issue as the rules and regulations can be complicated.

## Imprecise Terminology: Abstentions, and Disqualifications

The terms “abstention,” and “disqualification” are sometimes used interchangeably when describing an official's decision to step aside from the decision-making process, and the applicable laws do not necessarily mandate the use of any particular term. The important thing is to be clear on *why* a decision-maker is stepping aside.

### **Voluntary Abstention**

There are instances in which a public official voluntarily chooses not to participate in a decision by “abstaining” from the vote. The official may know it will be difficult to put personal interests aside and make a decision based solely on the public's interest. Or, the official may worry the public will perceive the official cannot put personal interests aside even if the official knows the he or she can.

The decision to voluntarily refrain from participating in the decision-making process can involve two conflicting values:

1. One's responsibility to perform the duties of his or her office; and
2. One's responsibility to honor one's own ethical standards or the public's trust in the decision-making process.

Both responsibilities are important, of course. Because of this, deciding not to participate should not be viewed as a way of avoiding difficult decisions.

### **Mandatory Disqualification**

By contrast, when someone has a disqualifying conflict of interest, there is no choice. The law prohibits that individual from participating in or seeking to influence a decision—even if the official believes he or she can be fair. The law presumes the public will doubt a person's ability to be fair. This is an example of avoiding the appearance of impropriety as well as the potential for actual impropriety.

# Political Reform Act – The Four Step Conflict of Interest Test

The process of determining when an official is disqualified from participating in a decision can be a very complex one, depending on the interests involved and the governmental decision contemplated. There are statutes, regulations, and interpretive opinions that flesh out each aspect of the basic prohibition.

To organize the analysis, the FPPC has adopted a new four-step procedure (trimmed down from an eight-step analysis that had been used for many years) for identifying when one must disqualify oneself from participating in a matter. Although it is useful to be aware of the general outlines of the process, the analysis is probably best undertaken with the assistance of agency attorneys and/or the FPPC staff—particularly since the rules are not necessarily logical or intuitive.

1. Is it reasonably foreseeable that a governmental decision will have a financial effect on any of the public official's financial interests?
2. Will the reasonably foreseeable financial effect be material?
3. Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?
4. If, after applying the three steps above the public official determines they have a conflict of interest, he or she may not make, participate in making, or in any way attempt to use his or her official position to influence the governmental decision, unless some exception applies.

Evaluating each of these four steps involves fact-specific inquiries that must be guided by the standards and definitions laid out in the regulations.<sup>31</sup>

## ETHICS CODE VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.<sup>32</sup> These codes supplement state law, by specifying which positions in the agency are subject to disclosure under the Act.

**For more information,** see "About Local Conflict of Interest Codes" (available at [www.ca-ilg.org/local-conflict-of-interest-codes](http://www.ca-ilg.org/local-conflict-of-interest-codes)) and the FPPC's materials on adopting local conflict of interest codes (see <http://www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html>).

## FOR MORE INFORMATION

See the following resources:

- » "Deciding When Not to Participate in an Agency Decision: Abstentions and Disqualifications," available at [www.ca-ilg.org/abstentions](http://www.ca-ilg.org/abstentions).
- » "Property Ownership in Your Jurisdiction," available at [www.ca-ilg.org/owningproperty](http://www.ca-ilg.org/owningproperty).

For specific questions, please contact agency counsel or the FPPC at 1-866-ASK-FPPC (866-275-3772 \*2) or [Advice@fppc.ca.gov](mailto:Advice@fppc.ca.gov).

## **GETTING ADVICE AND STAYING OUT OF TROUBLE ON POLITICAL REFORM ACT ISSUES**

Public officials should seek advice on how these laws apply as early in the process as possible — as soon as a disqualifying conflict of interest is even a possibility. This means taking an active and attentive role by asking questions when items are placed on an agency agenda or mentioned or discussed as part of an agency's business. For example, when a city manager or other executive previews items or programs during a report, or when staff responds to a question from a constituent, if it becomes evident that a governmental decision within the meaning of the law is contemplated, the public official should immediately ask themselves whether any of their financial interests might be affected, and, if so, seek advice about whether they have an actual conflict.

Early consultation allows an attorney to analyze all of the facts involved and the relevant law. Even though the analysis is laid out in four specific steps, each step has various rules and FPPC regulations associated with it, which can be complex. As one seasoned local agency attorney has observed, the later in the process the consultation occurs, the more likely the advice will be that disqualification must occur to make sure the official stays out of trouble.

Does advice from agency counsel protect an official against a FPPC enforcement action? No. Only a formal opinion or formal advice letter from the FPPC will protect a public official if someone argues that a violation of the Political Reform Act has occurred. Receiving such advice from the Commission takes time — another good reason to raise the conflict issue as early as possible.



# Identifying Economic Issues

## WHAT KINDS OF ECONOMIC INTERESTS ARE A CONCERN?

There are a number of ways to have a financial interest in a decision:

- » **Sources of Income.** Receiving \$500 or more in income from one source (including any income received from a business, nonprofit organization, government agency, or individual) within twelve months prior to the decision creates an economic interest. “Sources of income” includes a community property interest in a spouse or domestic partner’s<sup>33</sup> income, but not separate property income.<sup>34</sup> Additionally, if someone promises an official \$500 or more twelve months prior to the decision, the person or entity promising the money is a source of income, even if the income has yet to be received by the official, as long as the official has a legally-enforceable right to the promised income.<sup>35</sup>
- » **Investments.** An economic interest is created if the official, the official’s spouse or domestic partner<sup>41</sup> (even as separate property), or dependent children (or anyone acting on their behalf) has an investment worth \$2,000 or more in a business entity (even if the official does not receive income from the business).<sup>42</sup> Investments include stocks and corporate (though not government) bonds.
- » **Business Employment or Management.** If the official serves as a director, officer, partner, trustee, employee or otherwise serves in a management position in a company, an economic interest is created.<sup>43</sup> Note this does not apply to a member of the board of a nonprofit entity.
- » **Related Businesses.** The official has an economic interest in a business that is the parent, subsidiary or is otherwise related to a business where the official:
  - Has a direct or indirect investment worth \$2000 or more; or
  - Is a director, officer, partner, trustee, employee, or manager.<sup>44</sup>
- » **Personal Finances.** An official has an economic interest in their own expenses, income, assets, or liabilities and those of the official’s immediate family (spouse or domestic partner<sup>36</sup> and dependent children).<sup>37</sup>
- » **Real Property.** An interest in real property worth \$2,000 or more creates an economic interest.<sup>38</sup> The interest may be held by the official, the official’s spouse or domestic partner<sup>39</sup> (even as separate property) and children (or anyone acting on their behalf). Real property interests can also be created through leases, loans, mortgage, or security interests in property.<sup>40</sup>
- » **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another form of economic interest.<sup>45</sup>
- » **Loans.** A loan from someone (or guarantee on a loan) can create an economic interest unless the loan is from a commercial institution, made in the regular course of business and is on the same terms as are available to members of the public.<sup>46</sup>
- » **Gifts.** Receiving gifts totaling \$460 (2015-16) or more in a twelve-month period prior to the decision from any one person or organization may create an economic interest depending on the type of public official involved and whether the gift-giver is in the agency’s jurisdiction.<sup>47</sup> Being promised a gift of \$460 (2015-16) or more within a twelve-month period prior to the decision can also create a disqualifying financial interest.<sup>48</sup> The limit is adjusted every two years to reflect changes in the cost of living.<sup>49</sup> For more discussion of the gift issue, please see Chapter 3, and [www.ca-ilg.org/ GiftCenter](http://www.ca-ilg.org/GiftCenter).

The timeline for determining whether an official has a potentially disqualifying economic interest is **twelve months before the decision** in question—not the calendar year.<sup>50</sup>

If a public official thinks he or she has one of the economic interests described above, the next step is to consult with the agency attorney about the situation and how the FPPC’s four-step conflict of interest analysis applies. One of the key purposes of the disclosure requirements is to enable the public to assess whether an official’s financial interests may affect his or her decision-making. The disclosure requirements are discussed in further detail in Chapter 4.

## DISCLOSURE OF CONFIDENTIAL INFORMATION

California law also makes disclosure of certain kinds of confidential information for personal financial gain (as defined) a misdemeanor.<sup>51</sup> This restriction applies to public officers and employees.<sup>52</sup> Confidential information means information not subject to disclosure under the Public Records Act and information that may not be disclosed by statute, regulation, or rule.<sup>53</sup>

## REAL PROPERTY INTERESTS

The previous FPPC regulations analyzed real property conflicts in a two-step process. The first step was to determine if the official's property was "directly" or "indirectly" involved in the decision and then to determine if the decision would have a "material" effect on the official's property. The old regulations described a number of different types of decisions, and provided that if the official's property was the subject of one of those types of decisions, the property was deemed to be "directly" involved in the decision. In addition, there was a rule based upon the proximity of the official's property in relation to other property that was the subject of the decision. If the official's property was within 500 feet of the subject property, the official's property was deemed to be "directly" involved in the decision. If the official's property did not fall within any of the circumstances described in the old rule, the official's property was considered to be "indirectly" involved in the decision.

In 2014, the FPPC amended its regulations to simplify the property interests analysis by dispensing with the "directly" versus "indirectly involved" dichotomy. Now, a real property interest is examined in light of its "materiality" only.<sup>54</sup>

Before the change, if the official's property was located within 500 feet of property that was the subject of a governmental decision, the financial impacts of the decision on the official's property were **presumed** to be material. The presumption could be rebutted, however, by showing that the decision would not have **any** impact on the value of the official's property.

Now, the 500 foot rule is still a part of the new regulation but the presumption of materiality can only be rebutted by written advice from the FPPC finding that the decision will have no measureable impact on the value of the official's property.

## THE “PUBLIC GENERALLY” ANALYSIS

Additionally, the recent changes to the regulation ushered in a new “**Reasonably Prudent Person**” standard, which serves as a sort of “catch-all” exemption. Specifically, even if an official’s property is not the subject of the decision, or is located well beyond 500 feet from the subject property, the official must consider whether “...a reasonably prudent person, using due care and consideration under the circumstances, [would] believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.”

For interests in common areas, such as in a residential condominium complex or an industrial lease that includes areas in common with other tenants, the new regulations redefine “real property in which an official has an interest” to exclude an official’s undivided interest in common area, thus offering another simplification of the real property interest analysis.

For interests in business properties, under the updated regulations, the effects of the decision on the official’s real property interest do not have to be considered when the decision involves the issuance of a permit or entitlement, or when one is considering the impact of the decision on the income producing potential of the property. When applying those factors, only the impacts on the official’s business entity interest are to be considered.<sup>55</sup>

Under the FPPC’s Four-Step Test, if the effect of a decision on the public official’s interests is indistinguishable from the effect on the public generally, the public official may participate in the decision even if the decision would otherwise materially affect the official’s economic interests.

In 2015, the FPPC revised the analysis to simplify the previous general rule and various exceptions; the former nine separate regulations were consolidated into a single regulation,<sup>56</sup> which now provides that an official may participate in a decision “if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.” A “significant segment is defined as at least 25% of:

- » All businesses or nonprofit entities in the jurisdiction;
- » All real property (commercial or residential) in the jurisdiction; or
- » All individuals in the jurisdiction.

The effect of a decision on an official’s interest is considered unique if it results in a **disproportionate effect** on:

- » The development potential, use, or income-producing potential of real property or a business entity in which the public official has an interest;
- » The official’s business entity or real property because of how close business or the property is to the project that is the subject of the decision;
- » The official’s business entity or real property interests as a result of the cumulative effect of the official’s multiple interests in similar entities or properties that is substantially greater than the effect on a single interest;
- » The official’s business entity or real property interests as a result of the public official’s substantially greater business volume or larger real property the size when the decision will affect all interests by the same or similar rate or percentage;
- » A person’s income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official; or
- » The official’s personal finances or those of his or her immediate family.<sup>57</sup>

## WHAT HAPPENS IF AN OFFICIAL IS DISQUALIFIED?

### General Rule

If an official is disqualified from participating on a specific agenda item under the conflict of interest rules established by the Political Reform Act, the official must:

- » If the decision is being voted on at a public meeting, verbally identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public; and
- » Not attempt to influence the decision in any way, which includes talking with colleagues or staff about the matter at any time, including before, during, or after any meeting at which the item may be taken up.

At the meeting, elected and appointed officials, and top staff members who have conflicts of interest must leave the room when that matter is up for decision (unless the matter is on consent, in which case the official must declare the conflict and have the clerk record an abstention on that particular item).<sup>58</sup> This may be a good practice for comparable officials at other local agencies as well.

Officials subject to the leave-the-room requirement will also need to explain why they are disqualified from participating, based on the nature of the financial interest.<sup>59</sup> For example:

- » **Investment.** If the interest relates to an investment, provide the name of the business in which the investment is held.
- » **Business Position.** If the interest relates to a business position, give a general description of the activity in which the business is engaged as well as the name of the business.
- » **Real Property.** If the interest relates to real property, supply the address or another indication of the location of the property (unless the property is the public official's principal or personal residence, in which case explain the property is a residence and do not give the address or location).
- » **Income or Gifts.** If the interest relates to the receipt of income or gifts, then describe the source.
- » **Personal Finances.** If the interest relates to a personal financial interest in the decision, then describe the expense, liability, asset or income affected.

### Exceptions to the Leave-the-Room Requirement

There are limited exceptions that allow a disqualified official to remain in the room and provide input as a member of the public to represent himself or herself on matters related solely to the official's "personal interests."<sup>60</sup>

These include when the subject of the discussion is:

- » Interests in real property wholly owned by the official or his or her immediate family;<sup>61</sup>
- » Interests in a business entity wholly owned by the official or his or her immediate family;<sup>62</sup> and
- » Interests in a business entity over which the official (or the official and his or her spouse or domestic partner<sup>63</sup>) exercises sole direction and control.<sup>64</sup>

Even though the law allows the public official to remain in the room when these interests are at stake, the public official may still wish to balance that option with the potential that the public may nonetheless perceive the official is improperly trying to influence his or her colleagues. Many officials balance their rights as individuals with their responsibility to maintain the public's trust in both their leadership and the agency that they serve by leaving the room after having provided their input related to their personal interest.

### Note on Closed Sessions

If a decision will be made or discussed in a closed session, an official with a conflict may not be present. Nor may the official obtain non-public information about the closed session.<sup>65</sup>

### Effect of Disqualification

The general rule is a majority of the membership of a body must be present in order for the decision-making body to conduct business—a concept known as a quorum.<sup>66</sup>

For some kinds of agencies, a majority of the quorum is necessary for an item to pass, although there are special rules that apply to certain kinds of actions. Note, however, the rule is different for county boards of supervisors, community college boards and school boards, which generally require a majority vote of the entire membership of the board to act.<sup>67</sup>

Those who are disqualified from participating in the decision are not counted toward the quorum.<sup>68</sup>

However, those who abstain because of a pending question concerning a conflict of interest (for example, an elected official is waiting to receive an advice letter from the FPPC) may be counted toward the quorum. This is because they have not yet been disqualified (typically their agency attorneys will recommend they abstain pending resolution of the conflict issue).<sup>69</sup>

#### FOR MORE INFORMATION

See the following resources:

- » The FPPC has produced “Recognizing Conflicts of Interest: A Guide to the Conflict of Interest Rules of the Political Reform Act” (2015), available at [www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf).
- » “Using Public Office to Promote One’s Business Interests,” available at [www.ca-ilg.org/publicoffice](http://www.ca-ilg.org/publicoffice).
- » Conflicts of Interest (2010). Explains California’s conflict-of-interest laws available at <http://ag.ca.gov/publications/coi.pdf>.

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## PENALTIES

### Political Reform Act Penalties

A refusal to disqualify oneself is a violation of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal, and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>70</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>71</sup>
- » Prohibition from seeking elected office in the future;<sup>72</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>73</sup> and
- » Jail time of up to six months.<sup>74</sup>

### Effect on Agency and Those Affected by Agency’s Decision

When a disqualified official participates in a decision, a court can void the decision.<sup>75</sup> This can have serious consequences for those affected by the decision as well as the public agency itself. If someone is encouraging an official to participate in spite of a disqualifying interest, consider pointing out the costs that would occur if the agency’s decision has to be undone—not to mention the legal consequences for the official.

Typically it is wise to err on the side of caution when there is a question regarding the appropriateness of an official’s participation in a matter. When in doubt, sit a decision out.

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Interests in Agency Contracts Barred

## BASIC RULES

California law strictly forbids public officials from having an economic interest in their agencies' contracts. In essence, this is a prohibition against self-dealing. Now codified in section 1090 of the Government Code, this particular law has been traced back to the earliest days of California's statehood—to 1851.<sup>76</sup>

This prohibition applies to elected and appointed officials as well as public agency employees and consultants.<sup>77</sup>

*This means that, if an official has an interest in a contract being contemplated by their agency, the agency may not enter into the contract. If a staff member has an interest in the contract, the staff member may not participate in any way in the contract negotiations or in any part of the development of the contract. Contracts are broadly defined and include employment and a variety of other relationships, including independent contractors.<sup>78</sup>*

Key things to keep in mind include the following.

- » **Making a Contract.** The prohibition applies to preliminary discussions, negotiations, planning and solicitation of bids, as well as voting on the contract itself. This means the affected official can't be involved in those as well.
- » **Disqualification Doesn't Fix the Problem.** When the prohibition applies, the agency may not enter into the contract in question. Members of the governing board of a local agency (including a board of supervisors, board of directors, city council or school board members) are deemed to have made any contract executed by the board, or any person or agency under its jurisdiction, even if officials disqualify themselves from participating in the contract.

» **Financial Interest.** A "financial interest" in a contract includes a direct or indirect financial interest. A direct financial interest is present when the official is the party contracting with the agency. An indirect financial interest involves an official who has a financial relationship with the contracting party or will receive some benefit from the making of the contract with the contracting party. For example, the Attorney General has concluded that a trustee of a community college district cannot become employed in any capacity by the district because the trustee would have a financial interest in the employment contract. It does not matter if the official's financial interest is positively or negatively affected. This provision covers financial relationships that go beyond the official's immediate family.

Officials will sometimes hear their agency counsel refer to this issue as a "section 1090 problem," in reference to the Government Code section containing this prohibition. These restrictions on contracts are *in addition* to the restrictions of the Political Reform Act.

A key question to ask oneself in evaluating an agency's contracts is: "will this contract affect my economic interests in any way?" If the answer is "yes," speak with agency counsel immediately.



*A key question to ask in evaluating an agency's contracts is: "will this contract affect my economic interests in any way?" If the answer is "yes," speak with agency counsel immediately.*

## FPPC JURISDICTION OVER SECTION 1090 QUESTIONS

The Legislature empowered the FPPC in 2013 to enforce the provisions of section 1090 through either administrative proceedings similar to those it uses for violations of the Political Reform Act or civil actions imposing fines. Prior to commencing such an action, however, the FPPC must obtain permission from the district attorney of the county in which the alleged violation occurred, and the FPPC may not issue opinions related to past conduct. Further, before providing advice, the FPPC must send a copy of the request for advice to the Attorney General and the local district attorney.<sup>79</sup>

The FPPC has developed a six-step analysis to determine whether a violation of section 1090 might occur based on the facts and circumstances presented to the FPPC prior to the action being taken. Those steps are as follows:

- Step 1:** Is the public official in question subject to the provisions of section 1090?
- Step 2:** Does the decision at issue involve a contract?
- Step 3:** Is the official making or participating in making a contract?
- Step 4:** Does the official have a financial interest in the contract?
- Step 5:** Does either a remote interest or a noninterest exception apply?
- Step 6:** Does the “Rule of Necessity” apply?

### WHAT IS THE THEORY OF NOT ALLOWING DISQUALIFICATION?

When the prohibition against interests in contracts under section 1090 applies, the agency may not enter into the contract, even if the official with the interest recuses or disqualifies him- or herself. Why? The theory seems to be decision-makers may be favorably influenced to award a contract that benefits a colleague—perhaps with the expectation the favor may be returned in the future. The courts have made clear that the law will assume that undue influence was exerted, and that the risk to the public from self-dealing by public officials is too great to allow anything other than a bright-line, absolute prohibition. The absolute prohibition guards against such a tendency toward what might be described as “you-scratch-my-back-I’ll-scratch-yours” dynamics within the agency.

## EXCEPTIONS TO RULES

There are limited exceptions to the general prohibition against interests in contracts.

### Non-Interest Exception

Some potential interests in a contract are so small California law classifies them as “non-interests” in a contract. One is when an official receives public services provided by the official’s agency on the same terms that the services are provided to the general public. For example, a member of a water district board may receive water service. In such cases, the official and the official’s agency may participate in the contract. California law provides a full list of exceptions.<sup>80</sup>

### Remote Interest Exception

A local agency may enter into a contract when an official has a “remote” interest so long as the official does not attempt to influence another member of the board or council.<sup>81</sup> Government Code section 1091 lists more than a dozen types of remote interests, including:

- » Being an employee of the contracting party, if the contracting party has ten or more employees, the employee began his or her employment at least three years prior to initially assuming office, and certain other requirements are met;<sup>82</sup> or

- » Being a supplier of goods or services to the party contracting with the agency, when those goods or services have been supplied to the contracting party by the public official for at least five years prior to assuming office.<sup>83</sup>

Moreover, in 2015, the Legislature passed Senate Bill 704 which added a remote interest exception stating that an official is not financially interested in a contract if he or she is an owner or partner of a firm serving on an advisory board to the contracting agency and the owner or partner recuses himself or herself from reviewing a project that results from a contract between the firm and agency.<sup>84</sup>

If the decision-maker qualifies as having a remote interest, the agency must then take these steps to stay on the right side of the law:

- » The board or council member must disclose the financial interest to the board or council, and disqualify himself or herself from participating in all aspects of the decision;
- » The disclosure must be noted in the official records of the board or council; and
- » The board or council, after such disclosure, must approve, ratify or authorize the contract by a good faith vote of the remaining qualified members of the board or council.<sup>85</sup>

It is important to note that this exception applies only to members of multi-member bodies (not to individual decision-makers and employees).<sup>86</sup>



## LIMITED RULE OF NECESSITY

Even if there is not an exception from the prohibition, the agency may still enter into a contract if the rule of necessity applies.<sup>87</sup> In general, this allows an agency to acquire an essential supply or service. The rule also allows a public official to carry out essential duties of his or her office where he or she is the only one who may legally act. Consult with agency counsel whether the intricacies of this rule may apply in any given situation.

### Types of Ethics Laws

#### SPECIAL RULE FOR SCHOOL DISTRICT BOARDS

California's Education Code specifically allows school board members to vote on collective bargaining agreements and personnel matters that affect a class of employees to which a relative belongs.<sup>88</sup> Whether this rule also applies to domestic partners is not clear under the statute.

#### FOR MORE INFORMATION

See the following resources:

- » "How Your Agency Counsel Should Advise You When Agency Contracts Represent a Conflict of Interest," available at [www.ca-ilg.org/coi](http://www.ca-ilg.org/coi).
- » "Let's Make a Deal: Securing Goods and Services For Your Agency," available at [www.ca-ilg.org/procurement](http://www.ca-ilg.org/procurement).

For specific questions, please contact agency counsel.

## PENALTIES

The penalties for violating the prohibition against interests in contracts are severe.

#### Criminal Penalties

Willful violations are a felony and may be punished by fines of up to \$1,000, imprisonment, and being disqualified from ever holding public office again.<sup>91</sup>

#### Effect on Contract

The contract also is "void," which means the local agency does not have to pay for goods or services received under the contract.<sup>92</sup> The agency may also seek repayment of amounts already paid.<sup>93</sup>

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

### Types of Ethics Laws

#### GETTING ADVICE AND STAYING OUT OF TROUBLE ON CONTRACT ISSUES

As with issues under the Political Reform Act, advice of counsel *does not* provide a defense or immunity in a criminal prosecution relating to unlawful interests in contracts.<sup>89</sup>

As discussed above, the FPPC now has authority to issue advice and opinions on questions involving contracts under section 1090.

The Attorney General will also provide such advice, but only certain kinds of officials are entitled to request an Attorney General opinion.<sup>90</sup> In addition, the process can take months.

# Employment-Related Restrictions

## BASIC RULES

Another kind of “personal financial gain” law prohibits elected officials and top-level managers from trading on the relationships developed in public service for their own benefit.

For example, elected officials and chief executives who leave government service must not represent people for pay before their former agencies for one year after leaving their agency.<sup>94</sup> This is known as a “revolving door” restriction.

In addition, under California’s conflict of interest disqualification rules, a public official may not make or influence agency decisions when the interests of a prospective employer are at stake.<sup>95</sup> The situation arises when an official is negotiating or has “any arrangement” concerning prospective employment with someone with business before the agency.

### FOR MORE INFORMATION

On employment restrictions, see “Revolving Door Restrictions for Local Officials,” available at [www.ca-ilg.org/revolvingdoor](http://www.ca-ilg.org/revolvingdoor).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## WHEN AN EMPLOYEE RUNS FOR A SEAT ON THE GOVERNING BOARD

California law says that, with a few exceptions, local agency employees must resign their employment before taking a seat on the governing board of their local agency.<sup>96</sup> However, running for an office is not prohibited while employed by a local agency.

This restriction applies to cities, counties, special districts, and other public agencies and corporations.<sup>97</sup>

There are parallel restrictions for employees who run for school boards<sup>98</sup> and community college district governing boards.<sup>99</sup> All of the sections note that, if an employee refuses to resign, his or her position will automatically terminate upon being sworn into office on the governing board.<sup>100</sup>

These restrictions prevent the dual role conflicts associated with being both in the role of employee and employer.<sup>101</sup>

## PENALTIES

These employment-related restrictions are part of the Political Reform Act. As discussed above, violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>102</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>103</sup>
- » Prohibition from seeking elected office in the future;<sup>104</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>105</sup> and
- » Jail time of up to six months.<sup>106</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 Cal. Penal Code §§ 7 (definition number 6), 68(a).
- 2 See Cal. Penal Code §§ 68(a), 86.
- 3 *Id.*; See also *People v. Anderson*, 75 Cal. App. 365, 242 P.2d 906 (1925).
- 4 See 18 U.S.C. § 201.
- 5 See Cal. Penal Code § 518.
- 6 *In re Shepard*, 161 Cal. 171 (1911) (in the context of removal- from-office proceedings for misconduct).
- 7 Cal. Penal Code § 74.
- 8 See generally Cal. Penal Code § 68(a). See also Cal. Elect. Code § 20 (making those convicted of making or receiving a bribe ineligible for public office).
- 9 See Cal. Penal Code § 85.
- 10 Cal. Penal Code § 521.
- 11 Cal. Penal Code § 19.
- 12 Cal. Gov't Code §§ 3060-3074.
- 13 Cal. Penal Code § 74.
- 14 See Cal. Gov't Code § 995.8. See also *Los Angeles Police Protective League v. City of Los Angeles*, 27 Cal. App. 4th 168, 32 Cal. Rptr. 2d 574 (1994) (finding city was not required to provide the defense of police officers accused of vandalism and conspiracy to commit vandalism).
- 15 See Cal. Gov't Code § 995.2(a)(2) (public agency may refuse defense of civil action if, among other reasons, the agency finds the official acted because of "actual fraud, corruption or actual malice.") See also Cal. Gov't Code § 822.2 (immunity from liability for misrepresentation does not apply in instances of corruption).
- 16 See Cal. Gov't Code § 818.
- 17 California Rules of Professional Conduct for Lawyers, Rule 3-600(A); *Ward v. Superior Court*, 70 Cal. App. 3d 23, 138 Cal. Rptr. 532 (1977) (county counsel's client is county, not assessor in his individual capacity).
- 18 18 U.S.C. § 666.
- 19 See 18 U.S.C. §§ 666 (specifying maximum 10-year prison term and fine "under this title"), 3571 (general fine for violating federal criminal laws).
- 20 26 U.S.C. § 7201.
- 21 *Id.*
- 22 26 U.S.C. § 7206(1).
- 23 *U.S. v. Gaytan*, 342 F.3d 1010 (9th Cir. 2003).
- 24 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 25 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 26 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision- making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350, 362-63 (1987) (Justice Stevens, dissenting).
- 27 See *Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC § 1346 only criminalizes bribes and kick-back schemes).
- 28 18 U.S.C. §§ 1341 ("... shall be fined under this title or imprisoned not more than 20 years, or both."), 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both").
- 29 See Cal. Gov't Code §§ 87100-87105.
- 30 2 Cal. Code Regs. § 18707(a)(1)(C).
- 31 2 Cal. Code Regs. § 18700(d).
- 32 Cal. Gov't Code § 87300.
- 33 2 Cal. Code Regs. § 18229.
- 34 Cal. Gov't Code §§ 82030, 87103(c); 2 Cal. Code Regs. §§ 18700, 18700.1.
- 35 Cal. Gov't Code § 87103(c). See also *Larsen Advice Letter*, No. A-82-192 (1982).
- 36 2 Cal. Code Regs. § 18229 (referring to Cal. Gov't Code § 82029 defining "immediate family").
- 37 2 Cal. Code Regs. § 18700.
- 38 Cal. Gov't Code § 87103(b); 2 Cal. Code Regs. § 18700(c)(6)(B).
- 39 2 Cal. Code Regs. § 18229.
- 40 See Cal. Gov't Code §§ 82033, 87103(b).
- 41 2 Cal. Code Regs. § 18229.
- 42 Cal. Gov't Code §§ 82034, 87103(a); 2 Cal. Code Regs. § 18700(c)(6)(A).
- 43 Cal. Gov't Code § 87103(d); 2 Cal. Code Regs. § 18700(c)(6)(D).
- 44 2 Cal. Code Regs. §§ 18700(c)(6)(D), 18700.2(b).
- 45 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).
- 46 Cal. Gov't Code § 82030(b)(8), (10).
- 47 Cal. Gov't Code §§ 82028, 87103(e); 2 Cal. Code Regs. §§ 18940(c), 18940.2(a)..
- 48 Cal. Gov't Code § 87103(e); 2 Cal. Code Regs. §§ 18940(c), 18940.2(a).
- 49 Cal. Gov't Code § 89503(f).

- 50 See generally Cal. Gov't Code § 87103. See also 2 Cal. Code Regs. § 418700(c)(6)(C), (E).
- 51 See Cal. Gov't Code § 1098(a).
- 52 *Id.*
- 53 See Cal. Gov't Code § 1098(b)
- 54 See generally, 2 Cal. Code Regs. § 18702.2.
- 55 2 Cal. Code Regs. § 18702.2(a)(5).
- 56 2 Cal. Code Regs. § 18703.
- 57 2 Cal. Code Regs. § 18703(b),(c).
- 58 See 2 Cal. Code Regs. § 18707.
- 59 2 Cal. Code Regs. §18707(a)(1)(A).
- 60 2 Cal. Code Regs. §18707(a)(3)(C).
- 61 2 Cal. Code Regs. § 18704(d)(2)(A).
- 62 2 Cal. Code Regs. § 18704(d)(2)(B).
- 63 2 Cal. Code Regs. § 18229.
- 64 2 Cal. Code Regs. § 18704(d)(2)(C).
- 65 See 2 Cal. Code Regs. § 18707(a)(2). See also *Hamilton v. Town of Los Gatos*, 213 Cal. App. 3d 1050, 261 Cal. Rptr. 888 (1989).
- 66 See Cal. Gov't Code § 36810 (for general law cities). See also Cal. Civ. Code § 12; Cal. Civ. Proc. Code § 15.
- 67 See Cal. Gov't Code § 25005; Cal. Educ. Code §§ 35164 (K-12 districts), 72000(d)(3) (community college districts).
- 68 2 Cal. Code Regs. § 18707(a)(1)(C); *Farwell v. Town of Los Gatos*, 222 Cal. App. 3d 711, 271 Cal. Rptr. 825 (1990) (subsequently ordered not published). See also 62 Cal. Op. Att'y Gen. 698, 700 (1979).
- 69 *Farwell v. Town of Los Gatos*, 222 Cal. App. 3d 711, 271 Cal. Rptr. 825 (1990) (subsequently ordered not published). See also 62 Cal. Op. Att'y Gen. 698, 700 (1979).
- 70 See generally Cal. Gov't Code §§ 91000-14.
- 71 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 72 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 73 Cal. Gov't Code § 91000(b). See also Cal. Gov't Code § 83116(c) (providing that the FPPC may impose administrative penalties of up to \$5,000 per violation of the Political Reform Act).
- 74 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 75 See Cal. Gov't Code § 91003(b).
- 76 California Attorney General, Conflicts of Interest, 55 (2010), available at <http://ag.ca.gov/publications/coi.pdf>.
- 77 *Id.*
- 78 See *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.* (2007) 148 Cal.App.4th 682.
- 79 Cal. Gov't Code § 1097.1.
- 80 See Cal. Gov't Code § 1091.5.
- 81 See Cal. Gov't Code § 1091(a), (c).
- 82 See Cal. Gov't Code § 1091(b)(2).
- 83 See Cal. Gov't Code § 1091(b)(8).
- 84 2015 Cal. Stat. ch. 495, § 1 (amending Cal. Gov't Code § 1091).
- 85 See Cal. Gov't. Code § 1091.
- 86 California Attorney General, Conflicts of Interest, 67(2010), available at <http://ag.ca.gov/publications/coi.pdf>.
- 87 See 70 Cal. Op. Att'y Gen. 45 (1987).
- 88 See Cal. Educ. Code § 35107(e).
- 89 *People v. Chacon*, 40 Cal. 4th 558, 53 Cal. Rptr. 3d 876 (2007).
- 90 See Cal. Gov't Code § 12519.
- 91 See Cal. Gov't Code § 1097.
- 92 *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).
- 93 See Cal. Gov't Code § 1092.
- 94 Cal. Gov't Code § 87406.3; 2 Cal. Code Regs. § 18746.3.
- 95 Cal. Gov't Code § 87407.
- 96 Cal. Gov't Code § 53227(a).
- 97 Cal. Gov't Code § 53227.2(a).
- 98 Cal. Educ. Code § 35107(b)(1).
- 99 Cal. Educ. Code § 72103(b)(1).
- 100 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 101 *Bd. of Retirement of Kern County Employees' Retirement Ass'n v. Bellino*, 126 Cal. App. 4th 781, 24 Cal. Rptr. 3d 384 (2005).
- 102 See generally Cal. Gov't Code §§ 91000-14.
- 103 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 104 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 105 Cal. Gov't Code § 91000(b). See also Cal. Gov't Code § 83116(c) (providing that the FPPC may impose administrative penalties of up to \$5,000 per violation of the Political Reform Act).
- 106 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).

CHAPTER 3:

# Perk Issues, Including Compensation, Use of Public Resources, and Gift Laws



# Chapter 3: Perk Issues, Including Compensation, Use of Public Resources, and Gift Laws

## CONTENTS

Compensation Issues.....	29
Basic Rules.....	29
Counties.....	29
Special Districts.....	29
Cities.....	31
Charter Cities.....	31
General Law Cities.....	31
Local Agency Chief Executives and Staff.....	32
Special Issue: Speaking and Other Fees.....	33
Basic No-Honoraria Rule.....	33
Exceptions to No-Honoraria Rules.....	33
Penalties.....	33
Reimbursement of Expenses.....	34
Basic Rules.....	34
When May Expenses Be Reimbursed?.....	34
Process Requirements.....	34
Amounts.....	34
Penalties.....	35
California Law Penalties.....	35
Federal Law Penalties.....	35
Restrictions on Use of Public Resources.....	36
Basic Rules.....	36
No Personal or Political Use of Public Resources.....	36
No Use of Public Resources on Ballot Measure Related Activities.....	36
Prohibition Against Mass Mailings at Public Expense.....	36
Penalties.....	37
Gifts to Public Officials.....	38
Basic Rules.....	38
Questions for Public Officials to Ask About Nice Gestures.....	38
Exceptions/Gifts Subject to Special Rules.....	39
What to Do About Unwanted Gifts?.....	40
Penalties.....	41
California Law Penalties.....	41
Federal Law Penalties.....	41
Income Tax Violations.....	41
Use of Campaign Funds.....	42
Basic Rule.....	42
Penalties.....	42
Endnotes and Additional Information.....	43

# Compensation Issues

## BASIC RULES

Typically there is a legal limit on public official compensation levels, either in state or local statutes. Public officials, particularly elected ones, may only receive such compensation that the law allows.<sup>1</sup> Any extra compensation must be refunded.<sup>2</sup> Moreover, as protectors of the public purse, courts generally take a strict approach to public official compensation limits.<sup>3</sup>

## COUNTIES

County boards of supervisors set their salaries; supervisors' salaries are subject to referendum.<sup>5</sup>

## SPECIAL DISTRICTS

California law sets the salaries for members of special district governing boards—typically in the law that creates the particular kind of special district.<sup>6</sup> Salaries usually are tied to the days a public official spends participating in meetings or other district-related work, with a maximum number of compensated days per month. The chart on the next page contains examples from some of the numerous types of special districts throughout the state.

### WITH MONEY COMES EDUCATION

If a local agency provides any type of compensation or payment of expenses to members of a legislative body, then all of the members must have two hours of ethics training within one year of entering public service. Subsequent trainings must occur every two years after that.<sup>4</sup>

For more information on these requirements, see [www.ca-ilg.org/AB1234compliance](http://www.ca-ilg.org/AB1234compliance).

## Special Districts

Type of District	Per Day/Meeting Maximum	Maximums
Airport districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>7</sup>
Cemetery districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>8</sup>
Community Services districts	\$100 per day	Not to exceed six days of compensated service per month <sup>9</sup>
Fire Protection districts	\$100 for attending each board meeting	Not to exceed four meetings in a calendar month <sup>10</sup>
Harbor districts	No per day salary	\$600 per month <sup>11</sup>
Hospital districts	\$100 for attending each board meeting	Not to exceed five meetings in a calendar month <sup>12</sup>
Park and Recreation districts	\$100 for attending each board meeting	\$500 per month <sup>13</sup>
Sanitation districts	\$100 per day for board meetings or service provided at the request of the board	Not to exceed six days per month <sup>14</sup>
Utility districts	\$100 per day	\$600 per month <sup>15</sup>
Vector Control districts	Trustees serve without compensation	Trustees serve without compensation <sup>16</sup>

## Irrigation Districts

Irrigation districts of less than 500,000 acres	\$100 per day	Not to exceed six days of compensated service <sup>17</sup>
Irrigation districts of less than 500,000 acres that produce or deliver electricity	\$100 per day OR \$600 per month	An annual cap of \$15,000 <sup>18</sup>
Irrigation districts of 500,000 acres or more	No per day salary	Salary to be fixed by ordinance and subject to referendum but cannot exceed the salary of a member of the Imperial County Board of Supervisors <sup>19</sup>



## Water Districts

Type of District	Per Day Maximum	Maximums
Water district directors (as defined)	\$100 per day	Not to exceed 10 days of compensated service per month <sup>20</sup>
California water district officials (as defined)	\$100 per day	No maximum <sup>21</sup>
County water district directors (as defined)	\$100 per day	Not to exceed 6 days of compensated service per month <sup>22</sup>
Contra Costa County Water District directors (as defined)	\$100 per day	Not to exceed 10 days of compensated service per month <sup>23</sup>
Municipal water district directors (as defined)	\$100 per day	Not to exceed 6 days of compensated service per month <sup>24</sup>

What kinds of meetings and days of work may a district official be compensated for? Typically:

- » A meeting of any “legislative body” as defined by California’s open meeting laws;
- » A meeting of an advisory body; and
- » Conference attendance or educational activities, including ethics training.<sup>25</sup>

Agencies may compensate officials for attendance at other events as specified in a written policy adopted in a public meeting.<sup>26</sup> Note that these parameters don’t apply when the district does not pay compensation based on number of days doing district business, but instead pays a more salary-like form of compensation.<sup>27</sup>

## CITIES

### Charter Cities

For charter cities, elected official compensation is a matter of local concern which may be addressed in the city’s charter.<sup>28</sup>

### General Law Cities

Broadly speaking in general law cities, city council members’ baseline compensation is set by ordinance; such compensation is tied to parameters established in California law in the 1980s.<sup>29</sup> The starting points are:<sup>30</sup>

General Law Cities	
City Size by Population	Baseline Per Month Salary
Up to and Including 35,000	\$300
Over 35,000 Up to and Including 50,000	\$400
Over 50,000 Up to and Including 75,000	\$500
Over 75,000 Up to and Including 150,000	\$600
Over 150,000 Up to and Including 250,000	\$800
Over 250,000 Population	\$1000

General law cities may increase these amounts by up to five percent per year from the date of any prior adjustments.<sup>31</sup> When a city council votes to increase compensation, the increase takes effect in the future—not during the deciding council members’ current terms.<sup>32</sup>

Elected mayors may receive additional compensation.<sup>33</sup>

These amounts compensate city council members for their service on the council, including any commission, committee, board, authority, or similar body on which

the city council member serves, unless California law authorizes additional compensation.<sup>34</sup> If California law provides for additional council member compensation for serving on a commission—but that statute does not specify an amount of compensation—the compensation is \$150 per month.<sup>35</sup>

### DISCLOSURE REQUIREMENTS WHEN MAKING COMPENSATED APPOINTMENTS

From time to time, a decision-making body will be asked to appoint one or more of its members to certain positions. If that appointment involves additional compensation, the agency must make a special disclosure.<sup>36</sup>

The disclosure is on a form provided by the Fair Political Practices Commission and must be posted on the agency's website.<sup>37</sup>

## LOCAL AGENCY CHIEF EXECUTIVES AND STAFF

Governing bodies must approve all contracts with local agency chief executives (as defined) in open session, which must be reflected in the minutes.<sup>38</sup> In addition, salaries, salary schedules and fringe benefits must be approved at a regular (as opposed to a special) meeting of the body.<sup>39</sup> Senate Bill 1436, signed into law on August 22, 2016, also requires a governing body to orally report a summary of its recommendation for a final action regarding local agency executive compensation during the open meeting in which that final action is to be taken and prior to the body actually taking that final action.<sup>40</sup>

Copies of contracts are public documents that must be made available on request.<sup>41</sup> Moreover, local agencies must report the annual compensation of its elected officials, officers and employees to the State Controller and, if the agency maintains one, post such information on the agency's website.<sup>42</sup>

The California Constitution provides that “[a] local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been into and performed in whole or in part, or pay

a claim under an agreement made without authority of law.”<sup>43</sup> Thus, even if a public employee's compensation is later deemed to be inadequate, it is not legal for a local agency to compensate the employee over and above the amount fixed by contract or law.

Beginning in 2012, California law prohibits local agencies<sup>44</sup> from approving contracts for chief executives or department heads (as defined<sup>45</sup>) that contain automatic renewal clauses that provide for automatic compensation adjustments that exceed the cost of living.<sup>46</sup>

Contracts must also comply with California law restrictions on the amount of severance an agency pays if it becomes necessary to terminate a contract with a local agency employee.<sup>47</sup> Copies of severance agreements are public documents.<sup>48</sup>

If an employee is subsequently convicted of abuse of position (as defined<sup>49</sup>), the employee must reimburse:

- 1) any severance payments paid,<sup>50</sup> and
- 2) any paid leave provided pending charges.<sup>51</sup>

### FOR MORE INFORMATION

On executive compensation issues, see [www.ca-ilg.org/post/executive-compensation-issues](http://www.ca-ilg.org/post/executive-compensation-issues).

For specific questions, please contact agency counsel.

## SPECIAL ISSUE: SPEAKING AND OTHER FEES

### Basic No-Honoraria Rule

California law also regulates the degree to which public officials may receive payments for giving a speech, writing an article or attending a public or private conference, convention, meeting, social event, meal or similar gathering.<sup>52</sup> No local elected office holder, candidate for local elected office, or designated employee may accept such payments—which are known as honoraria.<sup>53</sup> The notion is such communications are part of a public official's service.

If one receives an honorarium from someone who is unaware of the rules, there is a 30-day time limit for returning it.<sup>54</sup>

### Exceptions to No-Honoraria Rules

Some gestures in connection with speaking or writing engagements are allowed. These include:

- » **Payments Voluntarily Made to Charitable and Similar Organizations.** An organization may recognize a public official's speech, article or meeting attendance by making a direct contribution to a bona fide charitable, educational, civic, religious, or similar tax-exempt nonprofit organization.<sup>55</sup> A public official may not make such donations a condition for the speech, article or meeting attendance.<sup>56</sup> In addition, the official may not claim the donation as a deduction for income tax purposes.<sup>57</sup> Nor may the donation have a reasonably foreseeable financial effect on the public official or on any member of the official's immediate family.<sup>58</sup> The official may not be identified to the nonprofit organization in connection with the donation.<sup>59</sup>
- » **Payments Deposited in Local Agency General Fund.** An honorarium given to an official that is unused may be deposited into the local agency's general fund within 30 days of receipt, so long as it is not claimed by an official as a deduction from income for income tax purposes.<sup>60</sup>
- » **Income from Bona Fide Occupation.** An official may be paid income for personal services if the services are provided in connection with a bona fide business, trade, or profession (such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting) and the services are routinely provided in connection with the trade, business or profession.<sup>61</sup> This exception does not apply, however, when the main activity of the business or profession is making speeches.<sup>62</sup>

- » **Some Gestures in Connection with a Speech or Panel Discussion.** An official may accept certain gestures when the official gives a speech, participates in a panel or seminar, or provides a similar service. These are exempt from the honoraria ban and are not considered "gifts" by the Political Reform Act. These include free admission to the event, refreshments and similar non-cash nominal benefits received at the event, necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or service, and transportation (within California) to the event.<sup>63</sup>

## PENALTIES

The restrictions against accepting fees are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>64</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>65</sup>
- » Prohibition from seeking elected office in the future;<sup>66</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>67</sup> and
- » Jail time of up to six months.<sup>68</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Reimbursement of Expenses

## BASIC RULES

California law contains certain requirements and restrictions on local agency practices relating to reimbursing local elected and appointed officials' expenses.

### When May Expenses Be Reimbursed?

The core test on whether an expense is reimbursable is whether the expense was "actual and necessary" in the official's performance of official duties.<sup>69</sup> Local agencies must adopt expense reimbursement policies that specify which kinds of activities are reimbursable for decision-making body members.<sup>70</sup> Many also have policies that govern employee reimbursements. Such policies are an opportunity for a local agency to make findings on why reimbursable activities are necessary to the individual's performance of their duties.<sup>71</sup>

Of course, if one has already received a cash advance or other form of payment for an expense, one may not request reimbursement. Double-charging a public agency for expenses misappropriates public resources and is a crime.<sup>72</sup>

### Process Requirements

For decision-making body member reimbursements, local agencies must:

- » Use expense report forms;<sup>73</sup>
- » Identify a "reasonable time" within which these forms must be submitted;<sup>74</sup> and
- » Require that all expenses be documented with receipts.<sup>75</sup>

Those requesting reimbursement must show their request falls within the agency's parameters for use of public resources.<sup>76</sup> Many local agencies have also adopted similar policies for employee reimbursements.

All expense reimbursement requests and supporting documentation are public records.<sup>77</sup>

### Amounts

Local reimbursement policies may specify what constitutes reasonable rates for travel, meals, lodging and other expenses. For decision-making body reimbursements, if a local policy does not specify reimbursement rates, then the reimbursable rates default to Internal Revenue Service guidelines.<sup>78</sup>

If a public official wants to seek reimbursement for levels of expenses not otherwise authorized under the agency's reimbursement policy, then the official may seek prior approval for such reimbursement from the governing body (before incurring the expense).<sup>79</sup>

Officials who spend more than allowed under their agencies' reimbursement policies have the option of simply paying the extra costs themselves.<sup>80</sup>

California law requirements relating to expense reimbursement policies and restrictions on reimbursement rates only apply to reimbursements of members of a legislative body.<sup>81</sup> Although charter cities may not be subject to this requirement given their home rule authority, many charter cities have such policies as a matter of good practice.<sup>82</sup>

Again, many local agencies have adopted policies that govern reimbursements for staff as well as elected and appointed officials. Another option is to have the policies address expenses other than those are, strictly speaking, "reimbursed" (for example, those expenses that are paid by the agency in the first instance).

## FOR MORE INFORMATION

See the following resources:

- » "Buying Meals for Others on the Public's Dime," available at [www.ca-ilg.org/dime](http://www.ca-ilg.org/dime).
- » "Expense Reimbursement Frequently Asked Questions," available at [www.ca-ilg.org/ExpenseReimbursementFAQs](http://www.ca-ilg.org/ExpenseReimbursementFAQs).
- » Sample reimbursement policies available at [www.ca-ilg.org/SampleReimbursementPolicies](http://www.ca-ilg.org/SampleReimbursementPolicies).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## PENALTIES

### California Law Penalties

Penalties for misuse of public resources or falsifying expense reports in violation of expense reporting policies include:

- » Loss of reimbursement privileges;<sup>83</sup>
- » Restitution to the local agency;<sup>84</sup>
- » Civil penalties of up to \$1,000 per day and three times the value of the resource used;<sup>85</sup> and
- » Criminal prosecution and a lifetime bar from public office.<sup>86</sup>

At some point, personal use of public resources becomes embezzlement—a form of theft.<sup>87</sup>

Embezzlement may constitute “willful misconduct” which warrants the removal from office of a public officer, or it may be prosecuted as a felony violation. A public officer convicted of embezzlement is guilty of a felony punishable by imprisonment; in addition, that person is ineligible thereafter to hold public office within California.<sup>88</sup>

### Federal Law Penalties

Federal prosecutors have been known to treat the receipt of illegitimate expense reimbursements or advances as income to the official. Because the official has not typically reported these payments as such on the official’s tax returns, the official then becomes subject to an action for income tax evasion.

The Internal Revenue Code is notoriously complex and its penalty sections are no exception. The general penalty for willful income tax evasion is a fine of up to \$100,000 and up to five years in prison, or both. Those convicted are also responsible for paying the costs of prosecution.<sup>89</sup> Failure to report information to the tax authorities is punishable by fines of up to \$25,000 and/or a year in federal prison, plus the costs of prosecution.<sup>90</sup>

If the postal service was used in any way, such use can also become the basis for a charge of mail fraud.<sup>91</sup> Mail fraud is punishable by up to five years in federal prison per violation and/or a fine of the greater of 1) twice the gain to the violator or 2) \$250,000 per violation.<sup>92</sup>

If the program has any degree of federal funding, the federal criminal laws against corruption and embezzlement will also apply.<sup>93</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Restrictions on Use of Public Resources

## BASIC RULES

### No Personal or Political Use of Public Resources

Under California law, using public resources for either personal or political purposes is illegal.<sup>94</sup> “Public resources” include such things as:

- » Money (for example, charges made on an agency credit card or account);<sup>95</sup>
- » Staff time;
- » Equipment (for example, machinery, vehicles, technology, tools, telephones, furniture and computers); and
- » Supplies (for example, items one would otherwise purchase at office supply or hardware stores).

“Use” means the use of public resources that is substantial enough to result in a gain in advantage for the user and a loss to the local agency that can be estimated as a monetary value.<sup>96</sup> Using a public agency vehicle for personal errands is an example, as is using office equipment and supplies for one’s political campaign, business or family purposes (for example, the office photocopier).

There are very narrow exceptions for “incidental and minimal” use of resources. The purpose of these exceptions appears to be more to prevent traps for the unwary; they do not constitute an affirmative authorization for personal use of public resources. An “occasional telephone call” is an example of an incidental and minimal use of public resources.<sup>97</sup>

In addition, subsequent reimbursement or payment for resources misused is not a defense.<sup>98</sup>

### No Use of Public Resources on Ballot Measure Related Activities

Local agencies may take positions on ballot measures, as long as they do so in an open meeting where all points of view can be heard.<sup>99</sup> They generally may not, however, use public resources to engage in campaign- type advocacy with respect to the agency’s position. Materials that urge voters to either “vote yes” or “vote no” on a measure constitute campaign advocacy,<sup>100</sup> so are materials whose style, tone and timing indicate that their purpose is advocacy as opposed to informational.<sup>101</sup>

#### FOR MORE INFORMATION

On ballot measure activities, see [www.ca-ilg.org/ballot-measure-activities](http://www.ca-ilg.org/ballot-measure-activities).

### Prohibition Against Mass Mailings at Public Expense

The law reflects the notion it is unfair for public officials to use public resources to enhance their visibility and name identification with potential voters. For this reason, California law forbids sending mass mailings at public expense.<sup>102</sup> The FPPC has defined “mass mailings” as sending more than 200 substantially similar pieces that contain the name, office or pictures of elected officials except as part of a standard letterhead using the official’s name and office.<sup>103</sup>

The rules on what constitute a mass mailing are quite complex. Make sure to consult with agency counsel whenever sending out materials that contain elected officials’ names, offices or pictures (for example, newsletters). Also, there are some exceptions to the prohibition (for example, legal notices and directories).

#### FOR MORE INFORMATION

On mass mailings, see the following resources:

- » “Career-Saving Tips on Mass Mailings,” available at [www.ca-ilg.org/massmailing](http://www.ca-ilg.org/massmailing).
- » The Fair Political Practices Commission fact sheet on prohibited mass mailings available at [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html).

## PENALTIES

Public officials face both criminal and civil penalties for using public resources for personal or political benefit.<sup>104</sup>

Criminal penalties include:

- » Two- to four-years in state prison;<sup>105</sup> and
- » Permanent disqualification from public office.<sup>106</sup>

Civil penalties include fines of up to:

- » \$1,000 for each day the violation occurs;
- » Three times the value of the resource used;<sup>107</sup> and
- » Possible reimbursement for the costs of any litigation initiated by private individuals, including reasonable attorney's fees.<sup>108</sup>

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

Additionally, the FPPC may impose an administrative fine of up to \$5,000 per violation.<sup>109</sup>

Misuse of public resources is also punishable under laws prohibiting misappropriation of public resources and embezzlement.<sup>110</sup>

Both intentional and negligent violations of the law are punishable.<sup>111</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

The Political Reform Act requires local agencies to adopt local conflict of interest codes.<sup>112</sup>

These codes supplement state law, by specifying which positions in the agency are subject to which ethics laws.

For more information, see "About Local Conflict of Interest Codes" (see <http://www.ca-ilg.org/local-conflict-of-interest-codes>) and the FPPC's materials on adopting local conflict of interest codes (see [www.fppc.ca.gov/index.php?id=228](http://www.fppc.ca.gov/index.php?id=228)).

# Gifts to Public Officials

## BASIC RULES

Receiving gifts can present a host of issues for public officials. Of course, making demands for gifts in exchange for official action violates California and federal laws prohibiting bribery and extortion.<sup>113</sup> Such demands also deprive the public of its right to honest services from public officials.<sup>114</sup>

Gifts that are not requested present other issues. California law puts an annual limit on the aggregate value of gifts a public official can receive from a single source; gifts over a certain amount also must be reported on a public official's Statement of Economic Interests.

Generally speaking, California public officials must:

- » Report gifts worth \$50 or more on their Statement of Economic Interests.<sup>115</sup> Gifts from a single source must be added up over the course of a calendar year. An official's reporting obligation is triggered when the combined value of a series of gestures from a single gift-giver reaches \$50 or more.
- » Not receive gifts that exceed \$460 (2015-16) from a single source per calendar year.<sup>116</sup> This limit can be exceeded by accepting a single large gesture or a series of gestures over the course of a calendar year from the same gift-giver that total more than \$460 (2015-16).<sup>117</sup>
- » Having accepted gifts may keep a public official from participating in the decision-making process. If a public official accepts gestures with a value of more than \$460 (2015-16) from a single gift-giver in the twelve months preceding the official's involvement in a decision affecting that gift giver, the official may have to disqualify himself from participating in that decision-making process.<sup>118</sup>

More detail on these rules is available at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter). These rules apply to elected officials, top level managers and others who are covered in the agency's local conflict of interest code or make governmental decisions.<sup>119</sup>

Putting aside what the rules allow, public officials are well-advised to look beyond what the law allows in any situation involving a nice gesture. This includes considering how residents will view a public official's actions.

## COMPLIANCE STRATEGY:

### Questions for Public Officials to Ask About Nice Gestures

One way to analyze one's likely obligations under California's gift rules is to ask:

1. Did I or my family receive something of value?
2. What's its value?
3. Who gave it to me?
4. Did I do something in exchange for what I received?
5. What kind of gift is it and do special rules apply as a result?
6. Which of the permitted courses of action do I want to take with respect to the gift?

Explanations of each of questions are available at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).

Unless one of the exceptions applies<sup>120</sup> (see the chart on the following page), a public official receives a gift for purposes of California's gift rules any time the official receives anything that:

- » Has a monetary value;
- » Provides the official with a personal benefit, and
- » For which the official doesn't pay full value.<sup>121</sup>



## EXCEPTIONS/GIFTS SUBJECT TO SPECIAL RULES

Certain kinds of gestures either are exempt from California's gift rules or are subject to special treatment. More information on each of these is available at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).

### Special Rules Relating to Who Receives the Gift

(Question 1 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Gifts to family members<sup>122</sup>

### Gifts Subject to Special Valuation Rules

(Question 2 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Air transportation<sup>123</sup>
- Nonprofit or political fundraiser tickets<sup>124</sup>
- Other tickets and passes<sup>125</sup>
- Invitation only events<sup>126</sup>

### Special Rules for Certain Sources of Gifts

(Question 3 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Someone who is an intermediary for another<sup>127</sup>
- Group gifts<sup>128</sup>
- Family gifts<sup>129</sup>
- Gestures received in the context of certain relationships:
  - Bona fide dating relationships<sup>130</sup>
  - Existing personal or business relationship<sup>131</sup>
  - Long term relationships<sup>132</sup>
- Acts of neighborliness<sup>133</sup>
- Agency gifts<sup>134</sup>
  - Gifts from public agencies to agency officials<sup>135</sup>
  - Agency provided tickets or passes<sup>136</sup>
  - Agency raffles or gift exchanges<sup>137</sup>

### Gestures that Are Part of An Exchange

(Question 4 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Gifts paid for (reimbursed) in full<sup>138</sup> or in part<sup>139</sup>
- Gifts exchanged on occasions like birthdays or holidays<sup>140</sup>
- Trading off who pays for meals or activities ("reciprocal exchanges")<sup>141</sup>
- Employee gift exchanges<sup>142</sup>
- Barter transactions<sup>143</sup>
- Presentations, event attendance and articles written<sup>144</sup>
- Ceremonial functions<sup>145</sup>
- Employment-related gestures<sup>146</sup>
- Business gestures<sup>147</sup>
- Gestures in connection with volunteer nonprofit service<sup>148</sup>
- Prizes in bona fide competitions<sup>149</sup>

### Additional Special Rules Based on Type of Gift

(Question 5 at [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter))

- Home hospitality<sup>150</sup>
- Informational material<sup>151</sup>
- Inheritances<sup>152</sup>
- Leave credits<sup>153</sup>
- Disaster relief payments<sup>154</sup>
- Personalized plaques or trophies<sup>155</sup>
- Wedding gifts<sup>156</sup>
- Travel<sup>157</sup> and free transportation from transportation companies<sup>158</sup>
- Tickets /free admissions<sup>159</sup>
- Payments to worthy causes made at an official's request (behested payments)<sup>160</sup>
- Wedding guest benefits<sup>161</sup>
- Bereavement offerings<sup>162</sup>
- Acts of compassion<sup>163</sup>
- Gift made because of existing personal or business relationship unrelated to the official's position where there is no evidence the official makes decisions that affect the gift giver.<sup>164</sup>

### Gifts can be:

- » Tangible or intangible
- » Real property or personal property
- » Goods or services<sup>165</sup>

Under some circumstances, gifts that an official's family receives are considered gifts to the official for purposes of California's gift rules.<sup>166</sup>

## TRAVEL PASSES FROM TRANSPORTATION COMPANIES

When an official is offered free or discounted transportation, the official is well-advised to ask, “Who is offering the travel?” Different rules may apply to gifts of travel depending on who is the source of the gift.

If the gift of travel is from a transportation carrier, a public official should be especially careful. California law forbids elected and appointed public officials from accepting free passes or discounted travel from transportation companies.<sup>167</sup>

This prohibition applies to any kind of travel — personal, business or on behalf of one’s public agency — to any location, near or far. The rule applies both to elected and appointed public officers but not to employees.<sup>168</sup>

However, sometimes the rule doesn’t apply. The chief exception is when the free or discounted travel is available to the general public and is given for reasons unrelated to the person’s status as a public official.<sup>169</sup>

For example, the prohibition against accepting free travel from transportation companies did not apply when:

- The elected official received a first-class airline upgrade because he was going on his honeymoon and the upgrade was given to all honeymooners.<sup>170</sup>
- An elected official received free airline travel because he was the spouse of a flight attendant.<sup>171</sup>
- An elected official exchanged frequent flier miles for an airline ticket because the earning of frequent-flier miles is done without regard to the person’s status as an officeholder.<sup>172</sup>

## FOR MORE INFORMATION

On gift laws, see the following resources:

- » The Institute Gift Resource Center, see [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).
- » The Fair Political Practices Commission fact sheet titled “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans,” available at [www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/LocalGiftFactSheet.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/LocalGiftFactSheet.pdf).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## WHAT TO DO ABOUT UNWANTED GIFTS?

Some officials have a no-gifts policy or may be concerned about the public perceptions associated with receiving gifts from certain sources (or certain kinds of gifts). They may also just not want the gift.

Under such circumstances, an official has the following options:

- » Decline the gift in the first place or return the gift unused to the gift giver within 30 days of receiving it.<sup>173</sup> Documenting one’s actions (for example, with a thanks-but-no-thanks note), can be helpful.
- » If the item is a pass or ticket, simply not use the pass or ticket and not let anyone else do so.<sup>174</sup>
- » Donate the gift, unused, within thirty days of receipt to a 501(c)(3) tax-exempt nonprofit organization or to a government agency, without claiming a tax deduction for the donation. (Note the donation must be made within 30 days of the gift’s receipt and the gift must be unused. Note too that for gifts to nonprofits, the nonprofit must be one which neither the official nor a family member holds a position.)<sup>175</sup>
- » Reimburse the donor for the fair market value of the gift within 30 days of receiving it.<sup>176</sup> Keeping documentation (for example, a cancelled check) of the reimbursement is a good practice.

For gifts that are over the annual limit or would put the official over the annual limit for that gift giver, some officials also “buy down” the value of a gift (or the most recent gift in a series) to keep the value of the gift(s) from that gift giver below the annual limit.

The official then reports the fact that they received gift(s), what the gift(s) was/were, and the source of the gift(s) on their Statement of Economic Interests. Again, when paying down the gift, it is best to do so by check and then make sure the donor cashes the check.

## PENALTIES

### California Law Penalties

These gift limit and reporting requirements are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>177</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>178</sup>
- » Prohibition from seeking elected office in the future;<sup>179</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>180</sup> and
- » Jail time of up to six months.<sup>181</sup>

### Federal Law Penalties

#### *Honest Services Fraud*

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.<sup>182</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>183</sup> That duty is violated when a public official makes a decision that is not motivated by his or her constituents’ interests but instead by his or her personal interests.<sup>184</sup> Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.<sup>185</sup> In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by gifts.<sup>186</sup>

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>187</sup>

#### *Extortion*

A demand for gifts or other benefits in exchange for official action could also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.<sup>188</sup> To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.<sup>189</sup> A person convicted of a felony involving extortion is forever disqualified from seeking elected office in California.<sup>190</sup>

## INCOME TAX VIOLATIONS

Income tax problems arise when officials receive money and other kinds of valuable items and don’t report them on their income tax forms. Prosecutors don’t need to show that the money or gifts were received in exchange for improper purposes—only that they were not reported on the official’s income tax form.

Income tax evasion carries with it a possible five-year prison term and a fine of up to \$100,000.<sup>191</sup> In addition, prosecutors can require the defendant to pay for the costs of prosecution (in addition to one’s own costs associated with defending against the prosecution).<sup>192</sup>

The sometimes-related crime of filing a false tax return is punishable by a maximum three-year prison term and a fine of up to \$100,000 (along with the costs of prosecution).<sup>193</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Use of Campaign Funds

## BASIC RULE

In general, money raised to support a person’s election to office may only be used for political, legislative, or governmental purposes. It’s not okay to spend these monies in a way that confers a personal benefit on the candidate.<sup>194</sup> Any expenditure that confers a substantial personal benefit on an individual must be directly related to a political, legislative, or governmental purpose.<sup>195</sup> For example, using campaign funds to repair your car so you can travel to and from campaign events confers a personal benefit and is not a proper expenditure of those funds.

### FOR MORE INFORMATION

On the permissible use of campaign funds, see Campaign Disclosure Manual 2: Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates, 2007, available online at [www.fppc.ca.gov](http://www.fppc.ca.gov).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## PENALTIES

These restrictions are part of the Political Reform Act. Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>196</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>197</sup>
- » Prohibition from seeking elected office in the future;<sup>198</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>199</sup> and
- » Jail time of up to six months.<sup>200</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 For example, the salary of council members of general law cities is controlled by Government Code section 36516(a), which permits a city council to establish by ordinance a salary up to a ceiling determined by the city's population. The electorate may approve a higher salary. Cal. Gov't Code § 36516(b). A council member appointed or elected to fill a vacancy is compensated in the same amount as his or her predecessor. A directly-elected mayor may receive additional compensation with the consent of the electorate or by ordinance of the city council. Cal. Gov't Code § 36516.1.
- 2 *County of San Diego v. Milotz*, 46 Cal. 2d 761, 767, 300 P. 2d 1, 4 (1956) (action to recover fees from court reporter for faulty work).
- 3 *Id.*
- 4 Cal. Gov't Code §§ 53234-35. See [www.ca-ilg.org/ab1234compliance](http://www.ca-ilg.org/ab1234compliance).
- 5 Cal. Const. art. XI, § 1(b).
- 6 See, e.g., Cal. Pub. Res. Code § 5784.15(a), (b) (park and recreation district board members may be compensated a maximum of \$100 per day for board meetings and \$500 per month); Cal. Health & Safety Code § 6489 (sanitation district board members may receive \$100 per day for board meetings or service rendered at request of board, not to exceed six days per month); Cal. Water Code §§ 20201, 20202 (water district officials—as defined—may, by ordinance, provide for compensation of \$100 per day for each day's attendance at board meetings or each day's service rendered at the board's request; not to exceed 10 days service/ meetings per month); Cal. Water Code §§ 34740-41 (California water districts must adopt bylaws fixing compensation paid to officers, but may not exceed \$100 per day for attendance at board meetings and for each day's service at the request of the board); Cal. Water Code § 30507 (county water district directors receive compensation not to exceed \$100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed six days service/meetings per month); Cal. Water Code § 30507.1 (Contra Costa County Water District directors receive compensation not to exceed \$100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed 10 days service/ meetings per month); Cal. Water Code § 21166 (irrigation district directors in districts of less than 500,000 acres receive 1) compensation of up to \$100 per day, not to exceed six days, 2) irrigation district directors in districts that produce or deliver electricity receive one of the following: up to \$100 per day or \$600 per month, with an annual cap of \$15,000); Cal. Water Code § 22840 (irrigation districts of 500,000 acres or more receive a salary to be fixed by ordinance and subject to referendum but cannot exceed the salary of a member of the Imperial County Board of Supervisors);

- Cal. Water Code § 71255 (municipal water district directors receive compensation not to exceed \$100 per day for each day's attendance at board meetings or each day's service rendered at the board's request but not to exceed six days service/ meetings per month).
- 7 Cal. Pub. Util. Code § 22407.
- 8 Cal. Health & Safety Code § 9031(a).
- 9 Cal. Gov't Code § 61047(a).
- 10 Cal. Health & Safety Code § 13857(a).
- 11 Cal. Harb. & Nav. Code § 6060.
- 12 Cal. Health & Safety Code § 32103.
- 13 Cal. Pub. Res. Code §§ 5784.15(a), (b).
- 14 Cal. Health & Safety Code § 6489(a).
- 15 Cal. Pub. Util. Code § 11908.1(a).
- 16 Cal. Health & Safety Code § 2030(a).
- 17 Cal. Water Code § 21166.
- 18 *Id.*
- 19 Cal. Water Code § 22840.
- 20 Cal. Water Code §§ 20201, 20202.
- 21 Cal. Water Code §§ 34740-41.
- 22 Cal. Water Code § 30507.
- 23 Cal. Water Code § 30507.1.
- 24 Cal. Water Code § 71255.
- 25 Cal. Gov't Code § 53232.1(a).
- 26 Cal. Gov't Code § 53232.1(b).
- 27 Cal. Gov't Code § 53232.1(c).
- 28 Cal. Const. art. XI, § 5(b)(4).
- 29 See Cal. Gov't Code § 36516.
- 30 See Cal. Gov't Code § 36516(a).
- 31 Cal. Gov't Code § 36516(a)(4).
- 32 See Cal. Gov't Code § 36516.5 (providing a change of compensation does not apply during the same term but allowing adjustment when one or more members serving staggered terms begin new terms).
- 33 See Cal. Gov't Code § 36516.1.
- 34 See Cal. Gov't Code § 36516(c).
- 35 *Id.*
- 36 2 Cal. Code Regs. § 18702.5(b)(3).

- 37 *Id.* The form is called "Form 806." More information regarding Form 806 is available from the Fair Political Practices Commission website at: <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/agency-report-of-public-official-appointments-form-806.html>.
- 38 Cal. Gov't Code § 53262 (a) ("All contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, general manager, city manager, county administrator, or other similar chief administrative officer or chief executive officer of a local agency shall be ratified in an open session of the governing body which shall be reflected in the governing body's minutes.").
- 39 Cal. Gov't Code § 54956(b) ("Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget.").
- 40 2016 Cal. Stat. ch. 175, § 1 (amending Cal. Gov't Code § 54953).
- 41 Cal. Gov't Code § 53262(b) ("Copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.").
- 42 Cal. Gov't Code §§ 53891, 53892, 53908.
- 43 Cal. Const. art. XI, § 10(a).
- 44 Cal. Gov't Code § 3511.1(c) (defining local agency as "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency").
- 45 Cal. Gov't Code § 3511.1(d) (defining "local agency executive" as "any person employed by a local agency who is not subject to the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500)), Chapter 5 (commencing with Section 45100) of Part 25 of Division 3 of Title 2 of the Education Code, or Chapter 4 (commencing with Section 88000) of Part 51 of Division 7 of Title 3 of the Education Code, and who meets either of the following requirements: (1) the person is the chief executive officer of the local agency, or (2) the person is the head of a department of a local agency).
- 46 Cal. Gov't Code § 3511.2 ("On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following: (a) An automatic renewal of a contract that provides for an automatic increase in the level of compensation that exceeds a cost-of-living adjustment....").
- 47 Cal. Gov't Code § 3511.2 ("On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following:... (b) A maximum cash settlement that exceeds the amounts determined pursuant to Article 3.5 (commencing with Section 53260) of Chapter 2 of Part 1 of Division 2 of Title 5.") See also Cal. Gov't Code § 53260(a) ("All contracts of employment between an employee and a local agency employer shall include a provision that provides that regardless of the term of the contract, if the contract is terminated, the maximum cash settlement that an employee may receive shall be an amount equal to the monthly salary of the employee multiplied by the number of months left on the unexpired term of the contract...").
- 48 Cal. Gov't Code § 53262(b) ("Copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.").
- 49 Cal. Gov't Code § 53243.4 ("For purposes of this article, 'abuse of office or position' means either of the following:
- (a) An abuse of public authority, including, but not limited to, waste, fraud, and violation of the law under color of authority.
- (b) A crime against public justice, including, but not limited to, a crime described in Title 5 (commencing with Section 67), Title 6 (commencing with Section 85), or Title 7 (commencing with Section 92) of Part 1 of the Penal Code.").
- 50 Cal. Gov't Code §§ 53243.2 ("On or after January 1, 2012, any contract of employment between an employee and a local agency employer shall include a provision which provides that, regardless of the term of the contract, if the contract is terminated, any cash settlement related to the termination that an employee may receive from the local agency shall be fully reimbursed to the local agency if the employee is convicted of a crime involving an abuse of his or her office or position."), 53243.3 ("On or after January 1, 2012, if a local agency provides, in the absence of a contractual obligation, for any of the payments described in this article, then the employee or officer receiving any payments provided for those purposes shall fully reimburse the local agency that provided those payments in the event that the employee or officer is convicted of a crime involving the abuse of his or her office or position.").
- 51 Cal. Gov't Code §§ 53243 ("On or after January 1, 2012, any contract executed or renewed between a local agency and an officer or employee of a local agency that provides paid leave salary offered by the local agency to the officer or employee pending an investigation shall require that any salary provided for that purpose be fully reimbursed if the officer or employee is convicted of a crime involving an abuse of his or her office or position."), 53243.3 ("On or after January 1, 2012, if a local agency provides, in the absence of a contractual obligation, for any of the payments described in this article, then the employee or officer receiving any payments provided for those purposes shall fully reimburse the local agency that provided those payments in the event that the employee or officer is convicted of a crime involving the abuse of his or her office or position.").
- 52 See Cal. Gov't Code § 89501 (definition of honorarium).
- 53 See Cal. Gov't Code § 89502 (general prohibition).
- 54 See Cal. Gov't Code § 89501(b)(2).
- 55 See 2 Cal. Code Regs. §18932.5(a)(1) (direct charitable contributions excluded from honorarium definition).
- 56 See 2 Cal. Code Regs. §18932.5(a)(2).
- 57 See 2 Cal. Code Regs. §18932.5(a)(3).
- 58 See 2 Cal. Code Regs. §18932.5(a)(4).
- 59 See 2 Cal. Code Regs. §18932.5(a)(5).
- 60 See Cal. Gov't Code § 89501(b)(2).
- 61 See Cal. Gov't Code § 89501(b)(1).
- 62 *Id.*
- 63 2 Cal. Code Regs. § 18932.4(e).

- 64 See generally Cal. Gov't Code §§ 91000-14.
- 65 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 66 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 67 Cal. Gov't Code § 91000(b).
- 68 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 69 Cal. Gov't Code § 53232.2(a).
- 70 Cal. Gov't Code § 53232.2(b).
- 71 65 Cal. Op. Att'y Gen. 516, 522 (1982) (citing *Collins v. Riley*, 24 Cal. 2d 912, 918, 152 P.2d 169 (1944) and determining that the expenses of a handicapped council member met this standard); 61 Cal. Op. Att'y Gen. 303 (1978) (citing *Gibson v. Sacramento County*, 37 Cal. App. 523, 174 P. 935 (1918)); *Madden v. Riley*, 53 Cal. App. 2d 814, 823, 128 P.2d 602, 607 (1942) (propriety of conference expenses for networking purposes).
- 72 See *People v. Bradley*, 208 Cal. App. 4th 64 (2012), reh'g denied (2012), rev. denied (2012) (upholding the conviction of city manager and council member of misappropriating public funds Penal Code section 424-when they made charges on city credit card for expenses that they had also received cash advances for).
- 73 Cal. Gov't Code § 53232.3(a).
- 74 Cal. Gov't Code § 53232.3(c).
- 75 *Id.*
- 76 Cal. Gov't Code § 53232.3(b).
- 77 Cal. Gov't Code § 53232.3(e).
- 78 Cal. Gov't Code § 53232.2(c).
- 79 Cal. Gov't Code § 53232.2(f).
- 80 Cal. Gov't Code § 53232.2(g).
- 81 See Cal. Gov't Code § 53232.2(b).
- 82 See Cal. Const. art. XI, § 5. *County of Sonoma v. Comm'n on State Mandates*, 84 Cal. App. 4th 1264, 101 Cal. Rptr. 784 (2000).
- 83 Cal. Gov't Code § 53232.4(a).
- 84 Cal. Gov't Code § 53232.4(b).
- 85 Cal. Gov't Code § 53232.4(c). See also Cal. Gov't Code § 8314.
- 86 Cal. Gov't Code § 53232.4(d). See Cal. Penal Code § 424. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).
- 87 Cal. Penal Code § 504.
- 88 Cal. Penal Code § 514. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).
- 89 See 26 U.S.C. § 7201.
- 90 See 26 U.S.C. § 7203.
- 91 See generally 18 U.S.C. §§ 1341-46.
- 92 See generally 18 U.S.C. § 3571(b), (d).
- 93 See, e.g., 18 U.S.C. §§ 641 (crime of embezzlement against the United States), 648 (misuse of public funds).
- 94 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- 95 See *People v. Bradley*, 208 Cal. App. 4th 64 (2012) (upholding the conviction of city manager and council member of misappropriating public funds— Penal Code section 424— when they made personal charges on city credit card).
- 96 Cal. Gov't Code § 8314(b)(4).
- 97 Cal. Gov't Code § 8314(b)(1).
- 98 See *People v. Bradley*, 208 Cal. App. 4th at 81-82 (holding restitution was not a defense because misappropriation occurs as soon as credit card was used for personal purpose or unused cash advances were not promptly returned; this is particularly the case when restitution is prompted by a criminal investigation).
- 99 *Vargas v. City of Salinas*, 46 Cal. 4th 1, 35-37, 92 Cal. Rptr. 3d 286, (2009). See also *Choice-in-Education League v. Los Angeles Unified School Dist.*, 17 Cal. App. 4th 415, 429-431, 21 Cal. Rptr. 3d 303 (1993) (school district did not illegally expend public funds by holding and broadcasting school board meeting at which the board took position opposing a statewide ballot initiative); *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee*, 203 Cal. App. 3d 529, 560, 250 Cal. Rptr. 3d 161 (1988). See also Cal. Elect. Code § 9282.
- 100 Cal. Gov't Code § 54964(b)(3).
- 101 *Vargas*, 46 Cal. 4th at 40, citing *Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976).
- 102 See Cal. Gov't Code § 89001.
- 103 See 2 Cal. Code Regs. § 18901.
- 104 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- 105 Cal. Penal Code § 424
- 106 See Cal. Penal Code § 424. See also Cal. Elect. Code § 20 (making those convicted of embezzlement or theft of public money ineligible for public office).
- 107 Cal. Gov't Code § 8314(c)(1).
- 108 Cal. Gov't Code § 91012.
- 109 Cal. Gov't Code § 83116.

- 110 Cal. Penal Code § 424 (“(a) Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:
1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or,
  2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law . . .”).
- 111 Cal. Gov’t Code § 8314(c)(1).
- 112 Cal. Gov’t Code § 87300.
- 113 Cal. Penal Code §§ 68(a), 518; 18 U.S.C. §§ 201, 872-880.
- 114 Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials. 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services). The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary. *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law). That duty is violated when a public official makes a decision that is not motivated by his or her constituents’ interests but instead by his or her personal interests. *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 115 Cal. Gov’t Code § 87207(a)(1). For more information, see <http://www.ca-ilg.org/StatementofEconomicInterests>.
- 116 Cal. Gov’t Code § 89503; 2 Cal. Code Regs. § 18940.2 (the FPPC adjusts the limit biennially).
- 117 If the limit is exceeded one has several options, any of which must be exercised within 30 days of receiving the gift. One may return the gift unused to the donor, reimburse the donor for all or a portion of the value of the gift or donate the gift, without claiming a tax deduction, to a 501(c)(3) charitable organization or government agency. 2 Cal. Code Regs. § 18941(c).
- 118 Cal. Gov’t Code § 87103(e); 2 Cal. Code Regs. § 18700(c)(6) (E). This is because public officials may not make, participate in making, or influence governmental decisions which affect their personal financial interests. Cal. Gov’t Code § 87100. The law makes a judgment that one is financially self-interested in a decision when one accepts gifts exceeding the \$460 (2015-16) gift limit from someone affected by that decision. Cal. Gov’t Code § 89503; 2 Cal. Code Regs. § 18940.2(a).
- 119 2 Cal. Code Regs. §§ 18940(d), 18730(b)(8.1)(A) (application of the gift disclosure rules). See also 2 Cal. Code Regs. §§ 18701(a), 18730(b)(9) (application of the disqualification/conflict of interest rules). See also 2 Cal. Code Regs. § 18940.1(b) (definition of “official”).
- 120 See generally 2 Cal. Code Regs. § 18942 (list of exceptions in the regulations).
- 121 See generally 2 Cal. Code Regs. § 18940(a).
- 122 2 Cal. Code Regs. § 18943.
- 123 2 Cal. Code Regs. § 18946.5.
- 124 2 Cal. Code Regs. § 18946.4.
- 125 2 Cal. Code Regs. § 18946.1.
- 126 2 Cal. Code Regs. § 18946.2.
- 127 Cal. Gov’t Code §§ 87210, 87313; 2 Cal. Code Regs. § 18945(b) (the source of the payment is the source of the gift).
- 128 2 Cal. Code Regs. § 18945.2.
- 129 2 Cal. Code Regs. § 18942(a)(3).
- 130 2 Cal. Code Regs. § 18942(a)(18)(A).
- 131 2 Cal. Code Regs. § 18942(a)(19).
- 132 2 Cal. Code Regs. § 18942(a)(17)(C).
- 133 2 Cal. Code Regs. § 18942(a)(17).
- 134 2 Cal. Code Regs. § 18944.
- 135 2 Cal. Code Regs. § 18944.3.
- 136 2 Cal. Code Regs. § 18944.1.
- 137 2 Cal. Code Regs. § 18944.2.
- 138 See Cal. Gov’t Code § 82028(a).
- 139 2 Cal. Code Regs. § 18941(c)(3).
- 140 2 Cal. Code Regs. § 18942(a)(8)(A).
- 141 2 Cal. Code Regs. § 18942(a)(8)(B).
- 142 2 Cal. Code Regs. § 18944.2(d) (does not apply to tickets or passes that come from someone outside the agency).
- 143 See Cal. Gov’t Code § 82028(a).
- 144 Cal. Gov’t Code §§ 89501, 89502.
- 145 2 Cal. Code Regs. §§ 18942(a)(13), 18942.3.
- 146 See Cal. Gov’t Code §§ 82030, 82030.5, 87207.
- 147 See Cal. Gov’t Code §§ 82005, 87207, 87209.
- 148 See Cal. Gov’t Code § 82028(a); Institute for Local Government, Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder, at 7 (2008). Available at [www.ca-ilg.org/document/commitment-nonprofit-causes-and-public-service-some-issues-ponder](http://www.ca-ilg.org/document/commitment-nonprofit-causes-and-public-service-some-issues-ponder).
- 149 2 Cal. Code Regs. § 18942(a)(14).
- 150 2 Cal. Code Regs. § 18942(a)(7).
- 151 2 Cal. Code Regs. §§ 18942(a)(1), 18942.1.
- 152 2 Cal. Code Regs. § 18942(a)(5).
- 153 2 Cal. Code Regs. § 18942(a)(9).
- 154 2 Cal. Code Regs. § 18942(a)(10).
- 155 2 Cal. Code Regs. § 18942(a)(6).
- 156 2 Cal. Code Regs. §§ 18946.3, 18942(b)(2).
- 157 2 Cal. Code Regs. §§ 18950-18950.3.



- 158 See Cal. Const. art. XII, § 7 (“A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .”).
- 159 2 Cal. Code Regs. §§ 18492(a)(13), 18942.1(c), 18946.1, 18946.2, 18946.4.
- 160 See Cal. Gov’t Code § 82015 (note the behested payment reporting requirement also applies to candidates). For more information, see [www.ca-ilg.org/BehestedPayments](http://www.ca-ilg.org/BehestedPayments).
- 161 2 Cal. Code Regs. § 18942(a)(15).
- 162 2 Cal. Code Regs. § 18942(a)(16).
- 163 2 Cal. Code Regs. § 18942(a)(18)(B).
- 164 2 Cal. Code Regs. § 18942(a)(19).
- 165 2 Cal. Code Regs. § 18940(a).
- 166 See generally 2 Cal. Code Regs. § 18943.
- 167 See Cal. Const. art. XII, § 7 (“A transportation company may not grant free passes or discounts to anyone holding an office in this state . . .”).
- 168 See 3 Cal. Op. Att’y Gen. 318 (1944).
- 169 74 Cal. Op. Att’y Gen. 26 (1991).
- 170 *Id.*
- 171 67 Cal. Op. Att’y Gen. 81 (1984).
- 172 80 Cal. Op. Att’y Gen. 146 (1997).
- 173 2 Cal. Code Regs. § 18941(c)(1).
- 174 2 Cal. Code Regs. § 18946.1 (b)(3) (“A pass or ticket has no reportable value unless it is ultimately used or transferred to another person.”).
- 175 2 Cal. Code Regs. § 18941(c)(2).
- 176 2 Cal. Code Regs. § 18941(c)(3).
- 177 See generally Cal. Gov’t Code §§ 91000-14.
- 178 See Cal. Gov’t Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 179 See Cal. Gov’t Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 180 Cal. Gov’t Code § 91000(b).
- 181 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 182 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 183 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 184 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 185 See *Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC §1346, defining “scheme or artifice to defraud,” only criminalizes bribes and kick-back schemes).
- 186 *U.S. v. Kemp*, 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005).
- 187 18 U.S.C. §§ 1341 (“...shall be fined under this title or imprisoned not more than 20 years, or both.”). 1343 (“shall be fined under this title or imprisoned not more than 20 years, or both.”). See generally 18 U.S.C. § 3571(b), (d).
- 188 18 U.S.C. § 1951.
- 189 18 U.S.C. § 1951(a). See generally 18 U.S.C. § 3571(b).
- 190 See Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office).
- 191 26 U.S.C. § 7201.
- 192 *Id.*
- 193 26 U.S.C. § 7206(1).
- 194 See Cal. Gov’t Code §§ 89510-22. Campaign funds include “any contributions, cash, cash equivalents, and other assets received or possessed” by a campaign committee. Cal. Gov’t Code § 89511(b)(1).
- 195 Cal. Gov’t Code § 89512 (an expenditure of campaign funds must be reasonably related to a legislative or governmental purpose, unless the expenditure confers a substantial personal benefit, in which case such expenditures must be directly related to a political, legislative or governmental purpose). “Substantial personal benefit” means a campaign expenditure which results in a direct personal benefit with a value of more than \$200. Cal. Gov’t Code § 89511(b)(3).
- 196 See generally Cal. Gov’t Code §§ 91000-14.
- 197 See Cal. Gov’t Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 198 See Cal. Gov’t Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 199 Cal. Gov’t Code § 91000(b).
- 200 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).

Blank Page

CHAPTER 4:  
**Transparency Laws**



# Chapter 4: Transparency Laws

## CONTENTS

- Economic Interest Disclosure ..... 51
  - Basic Rules..... 51
  - Penalties.....53
- Campaign Contribution Disclosure ..... 54
  - Basic Rules..... 54
  - Penalties.....55
- Charitable Fundraising Disclosure .....56
  - Basic Rules.....56
  - Penalties.....57
    - Penalties for Extortion under State and Federal Law .....57
    - Honest Services Fraud.....57
- The Public’s Right to Access Records..... 58
  - Basic Rules..... 58
  - Penalties.....59
- Conducting the Public’s Business in Public ..... 60
  - Basic Rules..... 60
  - Good Ethics Equals Good Politics..... 61
  - Typical Closed Session Issues ..... 62
  - Penalties.....63
    - Nullification of Decision .....63
    - Criminal Sanctions .....63
    - Other Consequences .....63
- The Public’s Right to Participate in Meetings..... 64
  - Basic Rules..... 64
    - Posting and Following the Agenda..... 64
    - The Public’s Right to Materials Not Included in the Agenda Packet ..... 64
  - Special Issues..... 64
    - Electronic Recording of Meetings is Allowed..... 64
    - Sign-In Must Be Voluntary..... 64
    - The Public’s Right to be Heard..... 64
  - Penalties..... 66
    - Nullification of Decision ..... 66
    - Criminal Sanctions ..... 66
    - Other Measures..... 66
    - Potential Civil Rights Violations ..... 66
- Endnotes and Additional Information .....67

# Economic Interest Disclosure

## BASIC RULES

There is an adage about one's life being an open book. Nowhere is this truer than for public officials and their financial situations. When people become public servants, the public gets to learn a great deal about their financial lives. California voters established some of these disclosure requirements when they approved the Political Reform Act (PRA) in 1974.<sup>1</sup> Those entering public service sacrifice a degree of their privacy.

The disclosure requirements of the PRA apply to all "designated employees" of an agency.<sup>2</sup> "Designated employees" is broadly defined to include local elected officials (e.g., members of city councils, county boards of supervisors, and district boards), executive level agency employees (e.g., General Managers and Superintendents), and consultants and appointed members of councils, commissions, boards, committees and other local agency bodies with significant decision-making authority that exceeds a solely advisory function. "Designated employees" also includes persons in staff positions required to disclose their economic interests under the agency's local conflict of interest code because the position entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest of the employee.

This disclosure is made on a form called a "Statement of Economic Interests." It may also be referred to by the acronym "SEI" or its number, "Form 700." A web-based version of the form is available from the Fair Political Practices Commission (FPPC) website: [www.fppc.ca.gov](http://www.fppc.ca.gov). Local agencies may adopt electronic filing procedures with FPPC oversight.<sup>3</sup> One's local agency usually provides paper copies of the form as well.

This form is filed upon assuming office, on an annual basis while in office and upon leaving office.<sup>4</sup> Local rules may impose more stringent requirements.

The following kinds of economic interests must be disclosed if they meet certain minimum thresholds:

- » Sources of income;
- » Interests in real property;
- » Investments;
- » Business positions; and
- » Sources of gifts. See the table on the following page.

### ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

The PRA requires local agencies to adopt local conflict of interest codes, which supplement California law by specifying which positions in the agency are subject to which ethics laws.<sup>5</sup>

**For more information**, see "About Local Conflict of Interest Codes" (available at [www.ca-ilg.org/sites/main/files/file-attachments/about\\_local\\_conflict\\_of\\_interest\\_codes.pdf](http://www.ca-ilg.org/sites/main/files/file-attachments/about_local_conflict_of_interest_codes.pdf)) and FPPC materials on adopting local conflict of interest codes (see [www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html](http://www.fppc.ca.gov/learn/rules-on-conflict-of-interest-codes/local-government-agencies-adopting-amending-coi.html)).

## TYPES OF ECONOMIC INTERESTS THAT MUST BE DISCLOSED

- » **Sources of Income.** Disclosure is required for income of \$500 or more provided or promised to an official from one source (including any income received from a business, nonprofit organization, government agency, or individual) for the previous calendar year (for annual disclosures) or the previous 12 months (for assuming office statements).<sup>6</sup> “Income” includes a community property interest in a spouse or domestic partner’s income.<sup>8</sup>
- » **Personal Finances.** An official has an economic interest in that official’s expenses, income, assets or liabilities and those of his or her immediate family (spouse or domestic partner<sup>9</sup> or dependent children).<sup>10</sup>
- » **Real Property.** An interest in real property must be disclosed where the interest is worth \$2,000 or more. The interest may be held by the official, the official’s spouse or domestic partner<sup>11</sup> (even as separate property) or children, or anyone acting on their behalf. Real property interests can also be created through leaseholds, options and security or mortgage interests in property.<sup>12</sup>
- » **Investments.** Another disclosable interest is created when the official, the official’s spouse or domestic partner<sup>13</sup> (even as separate property), or dependent children or anyone acting on their behalf, has an investment worth \$2,000 or more in a business entity that has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior, even if the official does not receive income from the business.<sup>14</sup>
- » **Business Employment or Management.** If the official serves in a director, officer, partner, trustee, employee, or other management position in a business entity, an economic interest is created.<sup>15</sup> Note that this does not apply to a member of the board of a nonprofit entity.<sup>16</sup>
- » **Related Businesses.** The official must disclose an interest in a business that is the parent, subsidiary or is otherwise related to a business in which the official:
  - Has a direct or indirect investment worth \$2000 or more; or
  - Is a director, officer, partner, trustee, employee, or manager.<sup>17</sup>
- » **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another disclosable interest.<sup>18</sup>
- » **Loans.** Another type of potentially disclosable interest is created by the receipt of a loan, unless the loan is from a commercial lending Institution or indebtedness created as part of a retail installment or credit card transaction, issued on the same terms as available to anyone in the public.<sup>19</sup>
- » **Gifts.** Gifts from a single source must be totaled up over the course of a calendar year. An official’s reporting obligation is triggered when the combined value of gifts from one source totals \$50 or more.<sup>20</sup> For more information about gifts, please see Chapter 3, and [www.ca-ilg.org/GiftCenter](http://www.ca-ilg.org/GiftCenter).<sup>23</sup>

## PENALTIES

Economic interest disclosure requirements are part of the PRA. Failure to report or incomplete reporting are punishable by a variety of civil, criminal and administrative penalties depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>21</sup>

Penalties for violation of the PRA can include one or more of the following:

- » Immediate loss of office;<sup>22</sup>
- » Prohibition from seeking elected office in the future;<sup>23</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>24</sup> and
- » Jail time of up to six months.<sup>25</sup>

In addition to the above penalties, failure to file a Statement of Economic Interests on time will result in late fees of \$10 per day, up to a maximum of \$100.<sup>26</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Campaign Contribution Disclosure

## BASIC RULES

California has an extensive framework for transparency with respect to campaign contributions.<sup>27</sup> The basic reasoning behind these laws is that the public has a right to know who gives money and other forms of support to candidates for public office. Another stated justification is that the prospect of public disclosure will discourage improper influences.<sup>28</sup>

These transparency requirements apply not only to candidates, but also to groups which organize to participate in the election process (known as “committees”).<sup>29</sup> Transparency requirements also apply to those who make large contributions, ten thousand dollars (\$10,000) or more in a calendar year, to influence elections.<sup>30</sup> Those who participate in campaigns to pass or defeat ballot measures are also subject to these requirements.<sup>31</sup>

Cities and counties may have additional campaign finance disclosure laws for candidates for offices within their jurisdiction or committees focused on local ballot measures.<sup>32</sup> Copies of these local ordinances must be filed with the FPPC.<sup>33</sup>

In addition, certain categories of local officials are subject to restrictions on campaign contributions received from people with business pending before the agency. Chapter 5 (pages \_-\_) explains these restrictions.

Chapter 3 explains the restrictions on how campaign funds may be spent.

## FOR MORE INFORMATION

On campaign contribution disclosure, see the following resources:

- » The FPPC has extensive information to guide candidates and ballot measure committees on these requirements. Visit the FPPC website at [www.fppc.ca.gov](http://www.fppc.ca.gov) or call the FPPC’s toll-free number: 1-866-ASK-FPPC (1-866-275-3772).
- » The Political Reform Division of the California Secretary of State’s office issues identification numbers to campaigns and committees, provides technical assistance to filers, and maintains disclosure reports for public access. Visit the Secretary of State’s website at [www.sos.ca.gov/prd](http://www.sos.ca.gov/prd) or call 916-653-6224.
- » For federal elections (Presidential, U.S. Senate, House of Representatives), consult the Federal Election Commission at 1-800-424-9530 or on the web at [www.fec.gov](http://www.fec.gov).

For specific questions, please contact the Fair Political Practices Commission.



## PENALTIES

The PRA includes campaign contribution disclosure requirements. Violations of the PRA are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>34</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>35</sup>
- » Prohibition from seeking elected office in the future;<sup>36</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>37</sup> and
- » Jail time of up to six months.<sup>38</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## OTHER DISCLOSURE REQUIREMENTS

The California Public Records Act is the main source of authority providing public access to documents in the possession of public agencies in California. There are specific disclosure requirements that are useful to note that are discussed in more detail online and in other chapters of this guide:

- » General gifts to public agencies must be disclosed on a special form and posted on the agency website. For more information, see [www.ca-ilg.org/GiftsQuestion3](http://www.ca-ilg.org/GiftsQuestion3) and [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/gifts-and-honoraria.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/gifts-and-honoraria.html).
- » Gifts of event tickets to public agencies must be disclosed on a special form and submitted to the FPPC for posting on its website. For more information, see [www.ca-ilg.org/GiftsQuestion3](http://www.ca-ilg.org/GiftsQuestion3) and [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/reporting-ceremonial-role-events-and-ticket-admission.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/reporting-ceremonial-role-events-and-ticket-admission.html).
- » Campaign contributions in excess of \$250 received during the preceding 12 months from any party or participant in a pending permit or license application are discussed on chapter 5.

There are of course other disclosure and notice requirements that are not listed here; these are just some that often raise issues concerning public confidence and ethics.

# Charitable Fundraising Disclosure

## BASIC RULES

A frequently overlooked disclosure obligation relates to an official or candidate's charitable or other fundraising activities. This obligation is referred to as the "behested payments" requirement. The reasoning behind these laws is that the public has a right to know who is contributing to an elected official's favorite charities and other causes.

The disclosure requirement is triggered when:

- » A person or entity donates \$5,000 or more in a calendar year;
- » The donation is for a legislative, governmental or charitable purpose; and
- » The donation is made at the behest of the a public official. This means the official or candidate (or their employee or agent):
  - Has requested or suggested the donation;
  - Controls or directs the donation; or
  - Plays a cooperating, consulting, or coordinating role with respect to the donation.<sup>39</sup>

The report must contain the following information:

- » The contributor's name and address;
- » The dollar amount or fair market value of the contribution;
- » The date or dates on which the contributions were made;
- » The name and address of the recipient of the contribution;
- » If goods or services were contributed, a description of those goods and services; and
- » A description of the purpose or event for which the contribution was used.<sup>40</sup>

The official must make this report once contributions from a single donor (whether an individual or an organization) have reached the \$5,000 aggregate threshold for any calendar year. Once this occurs, all contributions the donor makes or made for the calendar year must be disclosed within 30 days after: 1) the date the \$5,000 threshold was reached, or 2) the date the payment was made, whichever occurs later.<sup>41</sup>

Within 30 days of the donor reaching the \$5,000 threshold, the elected official must file a report with his or her agency (typically through the agency's filing officer)<sup>42</sup>. The FPPC's "Form 803 - Behested Payments Report" should be used to make this disclosure.<sup>43</sup>

What is a "legislative, governmental or charitable" purpose? The law does not define these words, but charitable causes typically involve Internal Revenue Code section 501(c)(3) organizations. A "governmental" cause might include such things as fundraising for a new public library. The reference to a "legislative" cause apparently has its roots in a 1996 FPPC advice letter which addressed a situation in which a State Senator asked a private party to pay the airfare and expenses for a witness to come testify at a legislative hearing.<sup>44</sup>

Of course, when a public servant conditions his or her official actions on a contribution to a worthy cause it is criminal extortion under both state and federal law.<sup>45</sup>

See discussion in the next section.

### FOR MORE INFORMATION

On charitable fundraising, see the following resources:

- » "Raising Funds for Favorite Causes," available at [www.ca-ilg.org/fundraising](http://www.ca-ilg.org/fundraising).
- » "Using Public Resources for Gifts and Charitable Purposes," available at [www.ca-ilg.org/PublicResourcesforGifts](http://www.ca-ilg.org/PublicResourcesforGifts).
- » "Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder," available at [www.ca-ilg.org/nonprofits](http://www.ca-ilg.org/nonprofits).
- » "Understanding the 'Behested Payments' Issue," available at [www.ca-ilg.org/BehestedPayments](http://www.ca-ilg.org/BehestedPayments).

For specific questions, contact the FPPC or agency counsel.

## PENALTIES

These disclosure requirements are part of the PRA. PRA violations are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>46</sup>

### Penalties for Extortion under State and Federal Law

#### *California Law*

If an official demands, solicits, or otherwise compels a contribution to a charitable organization in exchange for performing an official act favorable to the person making the contribution, the official's act of compelling the contribution could be prosecuted as extortion. Extortion under color of official right is a misdemeanor under California law.<sup>47</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000, or both.<sup>48</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.<sup>49</sup>

#### *Federal Law*

If the official's extortion affects interstate commerce, it is chargeable as a federal offense, which, under federal law, has a maximum penalty of 20 years in prison and a \$250,000 fine.<sup>50</sup>

### Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.<sup>51</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to that owed by a trustee or fiduciary.<sup>52</sup> That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.<sup>53</sup>

In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by whether the firm contributed to political and charitable causes favored by the treasurer.<sup>54</sup>

The maximum penalty for wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>55</sup>

## FOR MORE INFORMATION

On penalties for violations of ethics laws, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# The Public's Right to Access Records

## BASIC RULES

There are two sets of laws and regulations that govern public records in California. One set governs the public's right to access public records.<sup>56</sup> The other set governs which records an agency must retain and for how long.<sup>57</sup>

Pursuant to the California Public Records Act ("CPRA"), the public has the right to access materials that are created in the course of conducting the people's business.<sup>58</sup> These materials include any writing prepared, owned, used or retained by a public agency, with some exceptions.<sup>59</sup> "Writings" include, among other things, documents, computer data, e-mails, facsimiles and photographs.<sup>60</sup>

Public agency records are generally subject to public disclosure unless a specific exemption applies.<sup>61</sup> A few of the exemptions worth noting are:

- » The "pending litigation" exemption, which exempts from disclosure documents prepared in support of ongoing litigation (but for this protection, lawyers suing an agency could obtain all documents containing the agency's legal strategy just by asking for them).<sup>62</sup>
- » The "drafts" exemption, which exempts from disclosure preliminary drafts, notes or other interagency or intra-agency memoranda not retained in the agency's ordinary course of business. The public agency also must be able to demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure.<sup>63</sup>
- » The "personal privacy" exemption, which exempts from disclosure personnel files, medical records or other such files, the disclosure of which would constitute an unwarranted invasion of personal privacy.<sup>64</sup>

Despite these exceptions, the safe assumption is that most materials used, prepared, or simply maintained by a public agency—including e-mails—are records subject to disclosure.

A person may make a request for records in any manner, whether orally in person or over the phone, or in a writing mailed, emailed, faxed or personally delivered to the agency.<sup>65</sup> There are two ways for a person to gain access to requested records, and the requester may choose either or both: 1) inspecting the records at the local agency's

office during regular business hours; and 2) receiving copies of the requested records.<sup>66</sup>

A request for records must be specific and clear enough for the local agency to be able to determine what records the requester seeks.<sup>67</sup> However, if the request is overly broad or unclear, the local agency must assist the requester with revising the request so that it seeks more easily identifiable records; for instance, the local agency can describe the kind of records it possesses that may be relevant given the purpose of the request and how those records are maintained.<sup>68</sup>

Within ten calendar days of receiving a CPRA request, a local agency must respond to the requester notifying them of whether there are records responsive to the request that the agency will disclose.<sup>69</sup> If the agency is withholding any records pursuant to one or more applicable exemptions, the response must be in writing and identify the exemption(s) invoked to justify the nondisclosure.<sup>70</sup> Sometimes records will contain both nonexempt and exempt information, and the agency must redact a writing to conceal the portions that are exempt before disclosing the writing.<sup>71</sup> Although the CPRA sets a specific deadline for *responding* to a records request, the CPRA simply states that the nonexempt records must be actually *disclosed* to the requester "promptly."<sup>72</sup>

## RECORDS RETENTION

Counties and cities generally must retain public records for a minimum of two years, but for special districts, the duration of time varies based on the type of records sought to be destroyed.<sup>73</sup> Most local agencies adopt record retention schedules as part of their records management system. These define which records must be retained and for how long. The California Secretary of State provides local agencies with record management guidelines.<sup>74</sup>



*A safe assumption is that most materials involved in one's public service are public records subject to disclosure.*

## FOR MORE INFORMATION

On Public Records, see the following resources:

- » *The People's Business: A Guide to the California Public Records Act*, 2008. Available at the League of California Cities website at [www.cacities.org/PRAGuide](http://www.cacities.org/PRAGuide) or in hardcopy form from [www.cacities.org/publications](http://www.cacities.org/publications) or by calling (916) 658-8217.
- » *The People's Business December 2014 Guide Supplement*, 2014. Available at the League of California Cities website at [www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications](http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications).
- » *The People's Business: 2014 Chart of Frequently Requested Information and Records*, 2014. Available at the League of California Cities website at [www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications](http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications).
- » *Summary of the California Public Records Act*, 2004. Available on the California Attorney General's website at [http://ag.ca.gov/publications/summary\\_public\\_records\\_act.pdf](http://ag.ca.gov/publications/summary_public_records_act.pdf).

For specific questions, please contact agency counsel.

## PENALTIES

Anyone can sue the agency to enforce the right to access public records which are subject to disclosure.<sup>75</sup> If the agency loses, it must pay costs and attorney's fees.<sup>76</sup>

## FOR MORE INFORMATION

On penalties for violations of ethics laws, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Conducting the Public's Business in Public

## BASIC RULES

The underlying philosophy of California's open government laws is that public agency processes should be as transparent as possible. Such transparency is vital in promoting public trust in government.

The Ralph M. Brown Act (Brown Act) is California's open meeting law for the governing bodies of nearly all local agencies.<sup>77</sup> The Brown Act provides minimum legal requirements for local agency transparency in decision-making.<sup>78</sup> (Please note that community college boards are subject to less stringent requirements than are other local agencies. Check the endnotes for specific references to open meeting laws pertaining to community college districts.)<sup>79</sup>

Under the Brown Act, elected and most appointed local agency decision-making bodies, including many advisory committees, must conduct their business in open and public meetings to assure that the local decision-making process is observable by the public.<sup>80</sup> The issue of what kinds of bodies are subject to open meeting laws may require careful legal analysis. For purposes of clarity, this guide uses the term "decision-making body" and "decision-makers," but the reader should be aware that this term is imprecise.

A "meeting" is any congregation of a majority of the members of a decision-making body to discuss, hear, deliberate, or make a decision on any item within the agency's jurisdiction. In other words, a majority of a decision-making body cannot hear a presentation or talk privately about an issue within its subject matter jurisdiction, no matter how the conversation occurs, whether by telephone or e-mail, on a private blog, or at a local coffee shop.<sup>81</sup>

The following are some key things to keep in mind:

» **Committees and Advisory Bodies.** Advisory groups or committees formally created by a governing body are subject to the open meeting laws. Standing committees are subject to the open meeting laws if they have a continuing subject-matter jurisdiction or have a meeting schedule fixed by charter or formal action of the governing body.<sup>82</sup>

» **Serial Meetings.** Avoid unintentionally creating a "serial" meeting—a series of communications that result in a majority of decision-makers conferring on an issue. For example, if two members of a five-member decision-making body consult with each other outside of a public meeting (which is not in and of itself a violation) about a matter of agency business, and then one or both of those individuals consults with a third member on the same issue, a majority of the body has consulted on the same issue and a violation of the open meeting law has occurred. Note the communication does not need to be in person and can occur through a third party. For example, sending or forwarding e-mail can be sufficient to create a serial meeting, as can a staff member polling decision-makers members in a way that reveals the members' positions to one another.<sup>83</sup>

However, separate communications of an employee or official of a local agency with individual decision-makers to answer questions or provide information are permissible, as long as those communications do not communicate information about other decision-makers' comments or positions.<sup>84</sup> For example, the General Manager of a special district may have an individual meeting with Board Member A to answer questions or provide information about a proposal, and then the General Manager may have a similar meeting with Board Member B, as long as the General Manager does not communicate Board Member A's comments or position on the proposal to Board Member B.

## GOOD ETHICS EQUALS GOOD POLITICS



*The media is highly vigilant in monitoring compliance with open government requirements—and quick to report on perceived violations.*

- » **Posting and Following the Agenda.** The Brown Act requires that at least 72-hours before a regular meeting, and 24-hours before a special meeting, a local agency must post an agenda for the meeting, including on the agency's website, if the agency maintains one.<sup>85</sup> In general, public officials may only discuss and act on items included on the posted agenda for that meeting.<sup>86</sup> However, decision-makers or staff may briefly respond to questions or statements during the public comments section of the meeting even if the questions or statements are unrelated to any agenda items. Officials can also request staff to look into a matter or place a matter on the agenda of a subsequent meeting.<sup>87</sup> Action may be taken on a matter not on the agenda only when the decision-making body determines by a majority vote that an emergency situation exists or the decision-making body determines by a two-thirds vote of those officials present at the meeting that there is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda being posted.<sup>88</sup>
- » **Permissible Gatherings.** Not every gathering of members of a decision-making body outside of a noticed meeting violates the law. For example, an open meeting violation would not occur if a majority of a decision-making body attends the same educational conference or a meeting not organized by the local agency as long as certain requirements are met.<sup>89</sup> Neither is attendance at a social or ceremonial event in and of itself a violation.<sup>90</sup> The basic rule to keep in mind is a majority of members of a decision-making body cannot discuss agency business (including at conferences or social events) except at an open and properly noticed meeting.
- » **Closed Sessions.** The open meeting laws allow for closed discussions only under very limited circumstances.<sup>91</sup> For example, a governing body may generally meet in a closed session to receive advice from its legal counsel regarding pending or reasonably anticipated litigation.<sup>92</sup> However, the reasons for holding the closed session must be noted on the

agenda and different disclosure requirements apply to different types of closed sessions.<sup>93</sup> See the table on the next page for information on what kinds of closed sessions are permissible.

Because of the complexity of the open meeting laws, close consultation with the agency's legal advisor is necessary to ensure that all requirements are met.

### FOR MORE INFORMATION

On open meeting laws, see the following resources:

- » Open and Public V: A Guide to the Ralph M. Brown Act, 2016. Available on the League of California Cities website at [www.cacities.org/OpenandPublicV](http://www.cacities.org/OpenandPublicV) or in hardcopy form by visiting [www.cacities.org/publications](http://www.cacities.org/publications) or by calling (916) 658-8217.
- » The Brown Act: Open Meetings for Local Legislative Bodies, 2003. Available on the California Attorney General's website at <http://oag.ca.gov/open-meetings>.
- » "Closed Session Leaks: Discretion is the Better Part of Valor - and Ethics," available at [www.ca-ilg.org/closed-session-leaks](http://www.ca-ilg.org/closed-session-leaks).
- » The use of technology and public meetings is discussed in Meetings and Technology: Finding the Right Balance, 2013. Available at [www.ca-ilg.org/technology-and-meetings](http://www.ca-ilg.org/technology-and-meetings).

For specific questions, please contact agency counsel.

## TYPICAL CLOSED SESSION ISSUES

Local agency open meetings laws vary in terms of what kinds of closed sessions are allowed. Below is a list of matters that generally may be addressed in closed session. The list is illustrative, but not comprehensive, and in many cases, there are statutory limitations and requirements that must be considered. Consult with agency counsel concerning 1) whether a particular type of closed session is permissible and 2) under what circumstances.

- **Personnel.** To consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints against an employee; however, where the body will be hearing complaints against an employee, at least 24-hours before the time for holding the session, the employee must receive a written notice of his or her right to require that the hearing be in open session.<sup>94</sup>
- **Pending Litigation.** To confer with or receive advice from the agency's legal counsel with respect to existing, threatened or potential litigation.<sup>95</sup>
- **Real Estate Negotiations.** To grant authority to the agency's negotiator regarding the price and terms for the purchase, sale, exchange, or lease of real property on the agency's behalf.<sup>96</sup>
- **Labor Negotiations.** To meet with the agency's labor negotiator regarding salaries, benefits, and other matters within the scope of labor negotiations.<sup>97</sup>
- **Student Disciplinary Issues (for School Districts and Community College Districts).** To consider discipline of a student if a public hearing would result in the prohibited disclosure of private information, after notifying the student (and his or her parents in the case of minor students) and not receiving in response a request for a public hearing.<sup>98</sup>
- **Grand Jury Proceedings.** To allow testimony in private before a grand jury (either individually or collectively).<sup>99</sup>
- **License Applicants with Criminal Records.** To allow an agency to determine whether an applicant for a license or license renewal with a criminal record is sufficiently rehabilitated to obtain the license.<sup>100</sup>
- **Public Security.** To confer with designated law enforcement officials regarding threats to public facilities or services, or the public's right of access to those facilities or services.<sup>101</sup>
- **Multi-jurisdictional Law Enforcement Agency.** To discuss ongoing multi-jurisdictional criminal investigations.<sup>102</sup>
- **Hospital Peer Review and Trade Secrets.** To discuss issues related to medical quality assurance or involving hospital trade secrets.<sup>103</sup>

Just because a topic may be discussed in closed session does not mean that it always must be discussed in closed session. However, sometimes there are reasons for discussing a matter during a permissible closed session. For example, the governing body should discuss an employee disciplinary matter in a closed session meeting to protect the privacy interests of the employee, unless the affected employee gives permission for the governing body to discuss the matter in open session. Other times, the governing body may decide that an open session is in the public's best interest, even if not required (for example, in determining negotiating positions for the agency). Keep in mind that the decision of whether a meeting should be open or closed (where the governing body has authority to decide) is a collective one, not an individual one. However, also keep in mind that a closed session is permissible only where a statute specifically allows it. Otherwise, the matter must be discussed in open session.



## PENALTIES

### Nullification of Decision

Many decisions that are not made according to the open meeting laws are voidable.<sup>104</sup> After asking the agency to cure the violation, either the District Attorney or any interested person may sue to have the action declared void.<sup>105</sup>

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.<sup>106</sup> The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to \$1,000 or both.<sup>107</sup>

### Other Consequences

Either the District Attorney or any interested person may sue to remedy past, and prevent future, violations of the open meeting laws.<sup>108</sup> Another remedy, under certain circumstances, is for a court to order all closed sessions be electronically recorded.<sup>109</sup> Costs and attorney fees may be awarded to those who successfully challenge open meeting law violations.<sup>110</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## A NOTE ABOUT BLOGGING AND SOCIAL NETWORKING SITES

Decision-makers who are covered by open meeting laws must avoid situations in which the majority of a decision-making body uses the Internet to communicate with each other about a matter of agency business. For this reason, decision-makers must take special care when responding to each other's emails, blogs, or posts on social networking sites (such as Facebook or LinkedIn).

The so-called "Web 2.0" creates opportunities for people to present information on websites in the form of a journal. These sites also allow visitors to make comments or ask questions (called "posts" or "postings") in response to the others' comments.

For many decision-makers, blogging offers an effective way to share information with and communicate with constituents. For example, rather than having to respond to 10 e-mails asking the same question, an official can simply post a response on his or her blog and refer folks to the answer. Blogging can also be a good way to keep the public informed, especially as fewer people turn to traditional media for information.

However, a majority of decision-makers participating in a blog or other web-based conversation could constitute a "meeting" within the meaning of the open meeting laws. This means that the meeting must be held in accordance with all open meeting requirements, in an appropriate (accessible to those with disabilities) location, with prior notice and an agenda.

What is the reasoning underlying these restrictions? One is that the public has a right to know about discussions and decision-making on any issue that may affect them. There is also an underlying belief that decision-makers should deliberate on issues in front of, and facing, their constituents. Another proposed justification is that officials should hear the thoughts of the full range of constituents (not just those on the Internet), should constituents choose to offer them. Further, public discussions and decision-making prevents fears of secret backroom deals made without public knowledge.

For more information, see "Legal Issues Associated with Social Media" (available at [www.ca-ilg.org/SocialMediaLegalIssues](http://www.ca-ilg.org/SocialMediaLegalIssues)) and "Taking the Bite Out of Blogs: Ethics in Cyberspace" (available at [www.ca-ilg.org/blogs](http://www.ca-ilg.org/blogs)).

# The Public's Right to Participate in Meetings

## BASIC RULES

Another element of open meeting laws is the public's right to address the governing body at any open meeting. An elected official's duty is to both hear and evaluate these communications. There are a number of basic rules that govern this right. (Again, check the endnotes for specific references to requirements for community college boards.)<sup>111</sup>

### Posting and Following the Agenda

The open meeting laws provide requirements for informing the public of the date, time, and location of meetings, and the items of business to be addressed at the meetings.<sup>112</sup> The agenda must be posted at least 72-hours in advance of a regular meeting.<sup>113</sup>

Members of the public may request that a copy of the agenda packet be mailed to them at the time the agenda is posted or upon distribution to the governing body.<sup>114</sup> Local agencies must post these materials on their website, if the agency has a website.<sup>115</sup>

There are a few exceptions to the 72-hour requirement that relate to unexpected circumstances.<sup>116</sup> These exceptions, where applicable, also permit an agency to take action on or discuss items not on the agenda.<sup>117</sup> The agency may also hold special meetings on 24-hours' notice<sup>118</sup> or on less than 24-hours' notice if a true emergency exists.<sup>119</sup>

### The Public's Right to Materials Not Included in the Agenda Packet

Any documents or other materials relating to an agenda item for an open session of a regular meeting of a governing body distributed less than 72 hours before the meeting must be made available to the public. This must occur when the materials are distributed to the members of the governing body at a public office or location that the agency designates for this purpose. Local agencies must list the address of this office or location on the agendas for all meetings of their governing body.<sup>120</sup>

Any documents distributed during a public meeting must also be made available to the public. This must occur at the meeting if the document is prepared by the agency, or after the meeting if the document is prepared by someone else, such as a member of the public.<sup>121</sup>

## SPECIAL ISSUES

### Electronic Recording of Meetings is Allowed

Anyone attending a meeting may photograph or record it with an audio or video recorder unless the governing body reasonably finds that the noise, illumination, or obstruction of view would disrupt the meeting.<sup>122</sup>

Any audio or video recording of a meeting made by the local agency becomes a public record that must be made available to the public for at least 30 days.<sup>123</sup>

### Sign-In Must Be Voluntary

Members of the public cannot be required to register their name or fulfill any other condition for attendance at a meeting. If an attendance list is used, it must clearly state that signing the list is voluntary.<sup>124</sup>

### The Public's Right to be Heard

Generally, every agenda must include an opportunity for the public to address the governing body on any item of interest to the public within the body's jurisdiction.<sup>125</sup> If the issue of concern is one pending before the governing body, the opportunity must be provided before or during the body's consideration of that issue.<sup>126</sup>

### Reasonable Time Limits May Be Imposed

Local agencies may adopt reasonable regulations to ensure everyone has an opportunity to be heard in an orderly manner.<sup>127</sup>

When many people wish to comment on an issue, for example, an agency may assign a time limit to each speaker to ensure that everyone has a chance to be heard and the agency can complete its business (individuals using a translator must be allotted at least twice the amount of time of a English speaker). However, every effort should be made to avoid artificially short time limits; this gives the public a reasonable chance to share their views and demonstrates the agency's commitment to considering the public's perspectives.

### *Handling Disruptions*

If an individual or group willfully interrupts a meeting and order cannot be restored, the room may be cleared.<sup>128</sup> Members of the media must be allowed to remain (except those participating in the disturbance) and only matters on the agenda can be discussed.<sup>129</sup>

The chair may encourage everyone to be civil and mutually respectful during the meeting and have disruptive individuals removed from the room.<sup>130</sup> However, speakers may not be prevented from criticizing the governing body.<sup>131</sup>

Finally, note that other California laws may provide additional, subject-specific notice requirements.

## **GOOD ETHICS EQUALS GOOD POLITICS**

Community relations—and the public's opinion of an official's responsiveness—are seriously undermined when it appears an official is not listening to input provided by the public. There can be even more damage if an official expresses disagreement in a hostile or disrespectful way with a position that is being advocated.

Even if one disagrees with the views being offered, the statesperson-like approach is to treat all speakers with the same respect one would like to be treated with if the roles were reversed. This is an application of the value of respect.

## **FOR MORE INFORMATION**

On public participation in meetings, see the following resources:

- » The Brown Act: Open Meetings for Local Legislative Bodies, 2003. Available on the California Attorney General's website at <http://oag.ca.gov/open-meetings>.
- » Institute resources on civility, see [www.ca-ilg.org/civility](http://www.ca-ilg.org/civility).

For specific questions, please contact agency counsel.

## PENALTIES

### Nullification of Decision

As a general matter, decisions that are not made according to the open meeting laws are voidable.<sup>132</sup> After asking the agency to cure the violation, either the District Attorney or any interested person may sue to have the action declared void.<sup>133</sup>

### Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.<sup>134</sup> The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months, a fine of up to \$1,000, or both.<sup>135</sup>

### Other Measures

Either the District Attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.<sup>136</sup> Another remedy, under certain circumstances, is for a court to order that all closed sessions be electronically recorded.<sup>137</sup> Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.<sup>138</sup>

### Potential Civil Rights Violations

By implementing policies or taking actions to regulate or limit the public's right to participate in meetings, other than those regulations and limitations specifically allowed under California law and constitutional law principles, the governing board exposes the local agency to liability for violations of individuals' civil rights<sup>139</sup> including liability for attorney fees.<sup>140</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

### VOTERS SUPPORT OPEN GOVERNMENT

In 2004, California voters made public agency transparency a state constitutional and statutory requirement. The California Constitution now provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."<sup>141</sup>

# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 Political Reform Act. Cal. Gov't Code §§ 87200-10.
- 2 Cal. Gov't Code § 82019.
- 3 See Cal. Gov't Code § 87500.2.
- 4 Cal. Gov't Code §§ 87202-04, 87302. See 2 Cal. Code Regs. § 18722.
- 5 Cal. Gov't Code § 87300.
- 6 See Cal. Gov't Code § 87103(c).
- 7 2 Cal. Code Regs. § 18229.
- 8 Cal. Gov't Code §§ 82030, 87103(c).
- 9 2 Cal. Code Regs. § 18229.
- 10 Cal. Gov't. Code § 82029.
- 11 2 Cal. Code Regs. § 18229.
- 12 See Cal. Gov't Code §§ 82033, 87103(b).
- 13 2 Cal. Code Regs. § 18229.
- 14 Cal. Gov't Code §§ 82034, 87103(a) .
- 15 Cal. Gov't Code § 87103(d).
- 16 See Cal. Gov't Code § 82005.
- 17 Cal. Gov't Code §§ 82034, 87103(a), (d).
- 18 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).
- 19 Cal. Gov't Code § 82030(a),(b)(8), (10).
- 20 Cal. Gov't Code § 87207(a)(1).
- 21 See *generally* Cal. Gov't Code §§ 91000-14.
- 22 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 23 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 24 Cal. Gov't Code § 91000(b).
- 25 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 26 Cal. Gov't Code § 91013.
- 27 See *generally* Cal. Gov't Code §§ 84100-511.
- 28 See Cal. Gov't Code § 81002(a).
- 29 See, e.g., Cal. Gov't Code §§ 82013, 84101.
- 30 See Cal. Gov't Code § 82013(c).
- 31 See Cal. Gov't Code § 84202.3.
- 32 See Cal. Gov't Code §§ 81013, 81009.5.
- 33 Cal. Gov't Code § 81009.5(a). Local disclosure requirements can be found on the Fair Political Practices Commission's website, available at <http://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html>.
- 34 See *generally* Cal. Gov't Code §§ 91000-14.
- 35 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 36 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 37 Cal. Gov't Code § 91000(b).
- 38 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 39 See Cal. Gov't Code § 82015(b)(2)(B)(iii); 2 Cal. Code Regs. § 18215.3(a). See also Cal. Fair Political Practices Commission, *Limitations and Restrictions on Gifts, Honoraria, Travel and Loans*, at 8 (2015), available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/StateGiftFactSheet.pdf>.
- 40 See Cal. Gov't Code § 82015(b)(2)(B)(iii). See also Fair Political Practices Commission, California Form 803 - Behested Payments Report Instructions, available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 41 Cal. Gov't Code § 82015(b)(2)(B)(iii).
- 42 Cal. Gov't Code § 82015(b)(2)(B)(iii); Fair Political Practices Commission, California Form 803 - Behested Payments Report Instructions, available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 43 Fair Political Practices Commission, California Form 803 - Behested Payments Report, available at <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/Form803.pdf>.
- 44 See *Schmidt Advice Letter*, No. A-96-098 (March 26, 1996); S. Rules. Comm., S.B. 124 S. Floor Analysis, 1997-1998 Sess., (Cal. Sept. 2, 1997).
- 45 Cal. Penal Code § 518; *In re Shepard*, 161 Cal. 171 (1911). See also 18 U.S.C. § 666(a)(1)(B) .

- 46 See generally Cal. Gov't Code §§ 91000-14.
- 47 Cal. Penal Code § 521.
- 48 Cal. Penal Code § 19.
- 49 Cal. Gov't Code §§ 3060-3074.
- 50 18 U.S.C. §§ 1951(a), 3571(b).
- 51 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 52 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 53 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 54 *U.S. v. Kemp*, 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005). In *Skilling v. U.S.*, 130 S.Ct. 2896, 2931 (2010), the U.S. Supreme Court held that in order to avoid unconstitutional vagueness 18 USC §1346 (honest services fraud) only criminalizes bribes and kick-back schemes.
- 55 18 U.S.C. §1341 (“... shall be fined under this title or imprisoned not more than 20 years, or both.”).
- 56 See Cal. Gov't Code §§ 6250-70.
- 57 See Cal. Gov't Code §§ 34090-34090.8.
- 58 See generally Cal. Gov't Code §§ 6250-70.5. See also Cal. Const. art. I, § 3(b)(1).
- 59 See Cal. Gov't Code §§ 6252-53.
- 60 Cal. Gov't Code § 6252(g) (“‘Writing’ means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”)
- 61 *State ex rel. Division of Industrial Safety v. Superior Court*, 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (1974); *Cook v. Craig*, 55 Cal. App. 3d 773, 127 Cal. Rptr. 712 (1976).
- 62 Cal. Gov't Code § 6254(b).
- 63 Cal. Gov't Code § 6254(a).
- 64 Cal. Gov't Code § 6254(c).
- 65 League of California Cities, *The People's Business: A Guide to the California Public Records Act*, 11 (2008), available at <http://www.cacities.org/PRAGuide> (citing *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381).
- 66 *Id.* at 10.
- 67 *Id.* at 11 (citing *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159).
- 68 *Id.* at 12 (citing Cal. Gov. Code § 6253.1; *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177).
- 69 *Id.* at 11 (citing Cal. Gov't Code § 6253(c)).
- 70 *Id.* at 13 (citing Cal. Gov't Code § 6255).
- 71 *Id.* (citing Cal. Gov. Code § 6253(a); *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d. 440).
- 72 *Id.* (citing Cal. Gov. Code § 6253(b); 88 Ops.Cal.Atty.Gen. 153 (2005); 89 Ops.Cal.Atty.Gen. 39 (2006)).
- 73 Cal. Gov't Code §§ 26202 (counties), 34090(d) (cities), 60201 (special districts). Note that in California, the Public Records Act is not a records retention statute. See *Los Angeles Police Dept. v. Superior Court*, 65 Cal. App. 3d 661 (1977).
- 74 The Secretary of State's Local Government Records Management Guidelines may be viewed at <http://www.sos.ca.gov/archives/admin-programs/local-gov-program>.
- 75 Cal. Gov't Code § 6258.
- 76 Cal. Gov't Code § 6259(d).
- 77 See generally Cal. Gov't Code §§ 54950-63 (for cities, counties, special districts and school districts).
- 78 See Cal. Gov't Code § 54953.7.
- 79 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).
- 80 See Cal. Gov't Code § 54952.2(a).
- 81 Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.
- 82 Cal. Gov't Code § 54952(b).
- 83 Cal. Gov't Code § 54952.2.
- 84 Cal. Gov't Code §§ 54954.2; 54956.
- 85 Cal. Gov't Code § 54952.2(b)(2).
- 86 *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 50 Cal. Rptr. 3d 524 (2006); see also S.B. 1732, 2007-2008 Leg., Reg. Sess. (Cal. 2008) (clarifying Cal. Gov't Code § 54952.2 to include both communications that result in a collective concurrence and those that are part of the process of developing collective concurrence).
- 87 Cal. Gov't Code § 54954.2; Cal. Educ. Code § 72121.5.
- 88 Cal. Gov't Code § 54954.2(a)(2), See Cal. Educ. Code § 72121.5.
- 89 Cal. Gov't Code § 54954.2(b).
- 90 Cal. Gov't Code § 54952.2(c)(2).
- 91 Cal. Gov't Code § 54952.2(c)(5).
- 92 See, e.g., Cal. Gov't. Code §§ 54956.5-54957, 54957.6, 54957.10, 54962; Cal. Educ. Code § 72122.
- 93 Cal. Gov't Code § 54956.9.
- 94 Cal. Gov't Code §§ 54957(b)(1), (2).
- 95 Cal. Gov't Code § 54956.9.
- 96 Cal. Gov't Code § 54956.8.
- 97 Cal. Gov't Code §§ 3549.1 (school and community college districts), 54957.6 (other local agencies).

- 98 Cal. Educ. Code §§ 35146, 72122.
- 99 Cal. Gov't Code § 54953.1.
- 100 Cal. Gov't Code § 54956.7.
- 101 Cal. Gov't Code § 54957(a).
- 102 Cal. Gov't Code § 54957.8.
- 103 Cal. Gov't Code §§ 37606, 37624.3; Cal. Health & Safety Code §§ 1461, 1462, 32106, 32155.
- 104 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).
- 105 *Id.*
- 106 Cal. Gov't Code § 54959.
- 107 See Cal. Penal Code § 19.
- 108 Cal. Gov't Code § 54960(a).
- 109 Cal. Gov't Code § 54960(b).
- 110 Cal. Gov't Code § 54960.5.
- 111 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).
- 112 Cal. Gov't Code § 54954.2(a); Cal. Educ. Code § 72121.
- 113 *Id.*
- 114 Cal. Gov't Code § 54954.1.
- 115 See Cal. Gov't Code § 54954.2. This requirement currently only applies to:
- » The governing body of a local agency or any other local body created by state or federal statute; or
  - » A commission, committee, board, or other body of a local agency, created by charter, ordinance, resolution, or formal action of a legislative body, if the members are compensated for their appearance, and at least one member is also the member of a governing body created by state or federal statute.
- However, per 2016 Cal. Stat. ch. 265, § 1 (amending Cal. Gov't Code § 54954.2), beginning January 1, 2019, the agenda for a meeting of a legislative body of a city, county, city and county, special district, school district, or political subdivision established by the state must be posted on the local agency's "primary Internet Web site homepage" if the local agency has a webpage.
- 116 Cal. Gov't Code § 54954.2(b).
- 117 Cal. Gov't Code § 54954.2(b)(2).
- 118 Cal. Gov't Code § 54956.
- 119 Cal. Gov't Code § 54956.5.
- 120 Cal. Gov't Code § 54957.5.
- 121 Cal. Gov't Code § 54957.5(c).
- 122 Cal. Gov't Code § 54953.5(a).
- 123 Cal. Gov't Code § 54953.5(b).
- 124 Cal. Gov't Code § 54953.3.
- 125 Cal. Gov't Code § 54954.3(a); Cal. Educ. Code § 72121.5.
- 126 Cal. Gov't Code § 54954.3(a).
- 127 Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).
- 128 Cal. Gov't Code § 54957.9.
- 129 *Id.*
- 130 Cal. Gov't Code § 54957.9; *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010).
- 131 Cal. Gov't Code § 54954.3(c); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983); *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013).
- 132 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).
- 133 *Id.*
- 134 Cal. Gov't Code § 54959.
- 135 See Cal. Penal Code § 19.
- 136 Cal. Gov't Code § 54960(a).
- 137 Cal. Gov't Code § 54960(b).
- 138 Cal. Gov't Code § 54960.5.
- 139 See 42 U.S.C. § 1983.
- 140 See 42 U.S.C. § 1988.
- 141 Cal. Const. art. I, § 3(b)(1).





CHAPTER 5:

# Fair Process Laws and Merit-Based Decision-Making



# Chapter 5: Fair Process Laws and Merit-Based Decision-Making

## CONTENTS

- The Right to Fair and Unbiased Decision-Makers .....74
  - Basic Rules.....74
- Effect of Violations .....75
  - Effect on Decision .....75
  - Due Process Violations.....75
- Vote-Trading .....75
  - Basic Rules.....75
  - Penalties.....76
- Personal Loans.....76
  - Basic Rules.....76
  - Penalties.....76
- Decisions May Not Benefit Family .....77
  - Basic Rules.....77
  - Penalties.....77
- Restrictions and Disqualification Requirements Relating to Campaign Contributions .....79
  - Basic Rules.....
    - Affected Officials .....80
    - Extortion under California and Federal Law .....81
    - Kinds of Proceedings Affected .....81
    - Actions That Must Be Taken.....81
  - Penalties.....82
- Agency Staff and Political Activities.....83
  - Basic Rules.....83
    - Employment Decisions, Soliciting Support and Campaign Contributions.....83
    - Engaging in Political Activities During Work Hours or While in Uniform .....83
  - Penalties.....83

Holding Multiple Public Offices.....	83
Basic Rules.....	83
Special Issues.....	84
Employees Who Run for the Governing Board of Their Public Agency Employers .....	84
Individual Agency Guidelines .....	84
Penalties.....	84
Competitive Bidding Processes for Public Contracts.....	85
Basic Rules.....	85
Exceptions .....	85
Emergency .....	85
Professional Services.....	85
Special Services .....	85
Design-Build.....	86
Penalties.....	86
Whistle-Blowing Protections.....	87
Basic Rules.....	87
Penalties.....	87
Endnotes and Additional Information .....	88

# The Right to Fair and Unbiased Decision-Makers

## BASIC RULES

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law (judge-made law) and some constitutional principles still require a public official to exercise his or her powers free from personal bias—including biases that have nothing to do with financial gain or losses.

Under the common law doctrine, an elected official has a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interests. It should be noted that the interest need not be financial.<sup>1</sup>

*Local officials are much less constrained when the body is acting in a legislative, as compared to a quasi-judicial capacity.*

In addition, constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a “quasi-judicial” capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions and licenses. Quasi-judicial proceedings tend to involve the application of common requirements or principles to specific situations, much as a judge applies the law to a particular set of facts.

The kinds of impermissible bias<sup>2</sup> include:

### » **Personal Interest in the Decision's Outcome.**

For example, one court found an elected official was biased and should not participate in a decision on a proposed addition to a home in his neighborhood when the addition would block the elected official's view of the ocean from the official's apartment.<sup>3</sup> Personal interest bias can also arise when hearing officers are selected and paid on an ad hoc basis, making their future work dependent on the public agency's goodwill.<sup>4</sup>

### » **Personal Bias.**

- **People.** Strong animosity about a permit applicant based on conduct that occurred outside the hearing is one example. Conversely, a strong personal loyalty toward a party could bias an official as well.<sup>5</sup>
- **Belief/Ideology.** Examples include strong ideological reactions to a proposed Planned Parenthood clinic or community center for a particular ethnic or religious group.

» **Factual Bias.** For example, information an official might receive outside the public hearing that causes the official to have a closed mind to any factual information that may be presented in a hearing. This is a variation of the “ex parte communications” doctrine, which suggests that, in quasi-judicial matters, all communications to decision-makers about the merits (or demerits) of an issue should occur in the context of the noticed hearing (as opposed to private meetings with either side of an issue, for example).<sup>6</sup>

» **Dual Role Influence.** Another example is when someone plays multiple roles in a decision making process. A court concluded that a business owner's fair hearing rights were violated when a public agency attorney made the initial decision to deny the renewal of the business's regulatory permit then acted as a legal adviser to a hearing officer reviewing that denial.<sup>7</sup>

When an official sits in a quasi-judicial capacity, that official's personal interest or involvement, either in a decision's outcome or with any participants, can create a risk that the agency's decision will be set aside by a court if the decision is challenged. Typically, having the official disqualify himself or herself removes the risk.<sup>8</sup>

Decision-makers are also well advised to step aside on participation in a quasi-judicial matter when the decision-maker has pre-judged the matter. Attributes of having “pre-judged the matter” include having a closed mind or a preconceived and unalterable view of the proper outcome without regard to the evidence.<sup>9</sup>

This rule does not preclude holding opinions, philosophies or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign.<sup>10</sup> Nevertheless, if an official has made very strident and unequivocal statements for or against a pending project or issue, a court could find that the official could not participate as an unbiased decision-maker when the project or issue comes before the agency.<sup>11</sup> Also, local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.

#### FOR MORE INFORMATION

On fair decision-making and bias, see the following resources:

- » When an Elected Official Feels Passionately About an Issue: Fair Process Requirements in Adjudicative Decision-Making,” available at [www.ca-ilg.org/bias](http://www.ca-ilg.org/bias).
- » “When Your Decision Will Affect a Friend or Supporter,” available at [www.ca-ilg.org/resource/when-your-decision-will-affect-friend-or-supporter](http://www.ca-ilg.org/resource/when-your-decision-will-affect-friend-or-supporter).
- » Understanding the Basics of Local Agency Decision- Making, 2009, available at [www.ca-ilg.org/decisionmaking](http://www.ca-ilg.org/decisionmaking).
- » An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions, 2006, available at [www.ca-ilg.org/ounce](http://www.ca-ilg.org/ounce).

For specific questions, please contact agency counsel.

## Effect of Violations

### EFFECT ON DECISION

An administrative decision tainted by bias will be set aside. The agency will have to conduct new proceedings free of the influence of the biased decision-maker.<sup>12</sup>

### DUE PROCESS VIOLATIONS

If the violation rises to the level of a denial of due process under constitutional law, the affected individual(s) may seek damages, costs and attorney’s fees.<sup>13</sup>

#### FOR MORE INFORMATION

On the effect of ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Vote-Trading

### BASIC RULES

The California law that prohibits public officials from asking for, receiving, or agreeing to receive bribes in exchange for their votes or other official actions also forbids them from giving, or offering or promising to give, “any official vote” in exchange for another public official’s vote on the “same or another question.”<sup>14</sup>

Like bribery, vote-trading is a form of “you-do-this-for-me,-I-will-do-this-for-you” practice. In Latin, this is known as a quid pro quo (“this for that”). Quid pro quos are legally risky. Any time a public official stops making decisions based on what’s best for the public, the transparency and integrity of the policy-making process is compromised.

Note that the California Attorney General has concluded that the prohibition against vote-trading applies to exchanges of votes between public officials and not to commitments made by jurisdictions in an inter-agency agreement.<sup>15</sup>

#### FOR MORE INFORMATION

On vote trading, see [www.ca-ilg.org/votetrading](http://www.ca-ilg.org/votetrading). For specific questions, please contact agency counsel.

## PENALTIES

Penalties for vote trading include “imprisonment in the state prison for two, three, or four years and . . . by a restitution fine of not less than two thousand dollars (\$2,000) or not more than ten thousand dollars (\$10,000) . . .”<sup>16</sup> A conviction for vote-trading will also lead to an immediate loss of office and permanent disqualification from holding any office in the state.<sup>17</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Personal Loans

### BASIC RULES

Elected officials and others may not receive a personal loan from any officer, employee, member or consultant of the official’s respective agency while in office.<sup>18</sup>

There also are limits on elected officials’ and others’ ability to receive loans from those with contracts with the agency (except for bank or credit card loans made in the regular course of the company’s business).<sup>19</sup> Personal loans over \$500 from others must meet certain requirements (for example, be in writing, clearly state the date, amounts and interest payable).<sup>20</sup> For further discussion of ethics laws related to personal loans and other economic interests, see Chapter 2.

### PENALTIES

These restrictions are part of the Political Reform Act.

Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>21</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>22</sup>
- » Prohibition from seeking elected office in the future;<sup>23</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>24</sup> and
- » Jail time of up to six months.<sup>25</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Decisions May Not Benefit Family

## BASIC RULES

An important part of a fair process is that everyone, irrespective of their personal relationship to decision-makers, will have the same access to public agency benefits and approvals.

An outgrowth of this principle is the rule that public officials must disclose their interests and disqualify themselves under the Political Reform Act and other laws (for example Government Code section 1090's proscription against interests in contracts) from participating in decisions that will have the result of their immediate family's expenses, income, assets or liabilities increasing or decreasing.<sup>26</sup> "Immediate family" includes one's spouse or domestic partner and dependent children.<sup>27</sup> For further discussion of conflict of interest disclosure and disqualification, see Chapter 2.

Some jurisdictions have also adopted additional policies to prevent nepotism in hiring, promotions and appointments. For example, marital status policies regarding supervisor/supervisee relationships, consensual workplace romance policies, and anti-fraternizations policies. For more information about hiring family members, see "Hiring: When a Relative Wants a Job," available at [www.ca-ilg.org/fair-processes](http://www.ca-ilg.org/fair-processes).

## PENALTIES

The disqualification requirements relating to family members are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>28</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>29</sup>
- » Prohibition from seeking elected office in the future;<sup>30</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>31</sup> and
- » Jail time of up to six months.<sup>32</sup>

If the family members' interest relates to an interest in a contract, penalties for violating Government Code section 1090 apply (for example, felony prosecution or refunds of amounts paid under the contract).<sup>33</sup> For more information about Government Code section 1090, see Chapter 2.

### EFFECT ON AGENCY AND THOSE AFFECTED BY AGENCY'S DECISION

When a disqualified official participates in a decision, it can also void the decision.<sup>34</sup> This can have serious consequences for those affected by the decision as well as the public agency.

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Restrictions and Disqualification Requirements Relating to Campaign Contributions

## BASIC RULES

Generally, the ethics laws with respect to campaign contributions emphasize disclosure rather than disqualification.<sup>35</sup> Disclosure enables voters to assess the degree an official could be influenced by campaign contributors who appear before the agency. Both financial and in-kind (goods and services) support must be disclosed.<sup>36</sup> These requirements are discussed on Chapter 4.

Moreover, the courts have held the receipt of campaign contributions does not generally give rise to a duty to disqualify for bias. For example, a court determined an elected official who received a campaign contribution from a developer is not automatically barred from acting on the developer's land use permit application.<sup>37</sup> The court left open the possibility this scenario could, under certain circumstances, create a problem.

However, under limited (and sometimes counterintuitive) circumstances, certain local agency officials must disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements for use if the official has received campaign contributions of more than \$250 during the previous twelve months from any party or participant.<sup>38</sup> Campaign contributions may be both monetary (dollars) and "in-kind" (goods or services) contributions.<sup>39</sup>

In addition, these officials are prohibited from receiving, soliciting or directing a campaign contribution of more than \$250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for three months after the proceeding.<sup>40</sup>

### Affected Officials

Generally speaking, this requirement does not apply to officials directly elected to the board of local agencies while acting in the scope of the office for which they were elected. However, elected officials are covered by this prohibition when they sit as members of other boards to which they were not elected (such as joint powers agencies, regional government entities or local agency formation commissions).<sup>41</sup>

Other covered officials include appointed board or commission members who become or have been candidates for elective office.<sup>42</sup>

These prohibitions apply only with respect to campaign contributions from persons who are financially interested in the outcome of the specified proceedings. Those interested persons include:

- » Parties to the proceeding (such as applicants for the permit, license or entitlement); and
- » Participants.<sup>43</sup>

A participant is a person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit or other entitlement for use and who has a financial interest in the outcome of the decision.<sup>44</sup> A person qualifies as a "participant" if he or she attempts to influence the officers or employees of the agency with respect to the decision or testifies in person before the agency with respect to the decision.<sup>45</sup>



## Extortion under California and Federal Law

A demand for campaign contributions can also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.<sup>46</sup>

- » **California Law.** Extortion under California law is a misdemeanor.<sup>47</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.<sup>48</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.<sup>49</sup>
- » **Federal Law.** To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.<sup>50</sup>

## Kinds of Proceedings Affected

The general rule applies to all proceedings involving licenses and permits, including use permits. This includes:

- » Business, professional, trade and land use licenses and permits;
- » Land use permits;
- » Franchises; and
- » Contracts, other than competitively bid, labor or personal employment contracts.<sup>51</sup>

Examples of land use permits include conditional use permits,<sup>52</sup> zoning variances,<sup>53</sup> and tentative subdivision and parcel maps.<sup>54</sup> Examples of covered contracts include consulting contracts, whether engineering, architectural or legal.<sup>55</sup>

## Actions That Must Be Taken

### Disclosure

When someone files a permit or license application, that individual must publicly report all covered officials to whom the individual made contributions of more than \$250 during the previous twelve months.<sup>56</sup> Likewise, a covered official must publicly disclose on the record of the proceeding any party or participant who has contributed more than \$250 during the previous twelve months to that official.<sup>57</sup>

The disclosure must be made prior to the agency making any decision in the proceeding (without the covered official's participation).<sup>58</sup>

### Disqualification

If prior to making a decision in the proceeding, a covered official knowingly receives more than \$250 in campaign contributions from a party during the previous twelve months, that official must disqualify himself or herself from participating in the proceeding.<sup>59</sup> Likewise, with respect to contributions received from a participant, the covered official must disqualify himself or herself if he or she has reason to know, prior to making a decision in the proceeding, that the participant is financially interested in the outcome of the proceeding.<sup>60</sup>

(Note the disqualification requirement is triggered by actual receipt of campaign contributions, not simply asking for a contribution if the request is unsuccessful. Of course, there are significant ethical issues associated with soliciting campaign contributions from either parties or participants while a decision is pending).

Disqualification means the official may not participate in making any decision in the proceeding, and may not in any way attempt to use his or her official position to influence the decision.<sup>61</sup>

### Avoiding Disqualification

A covered official may avoid disqualification if he or she returns the contribution, or that portion which is over \$250, within 30 days from the time the official knows or has reason to know of the contribution and the proceeding.<sup>62</sup>

### No Contributions During the Proceeding

While the permit or license proceeding is pending and for three months after the decision, covered officials must not solicit or receive campaign contributions from either parties or participants (persons who actively support or oppose a particular decision and are financially interested in the outcome).<sup>63</sup> This prohibition includes a prohibition against soliciting, receiving or directing contributions on behalf of another person or on behalf of a campaign committee.<sup>64</sup>

Likewise, all parties and participants are prohibited during this period of time from making contributions of more than \$250 to any officials involved in the proceedings.<sup>65</sup>

## MORE ON FUNDRAISING

Even when the law does not constrain an official's political fund-raising activities (other than requiring disclosure of donors), it is important to be extraordinarily judicious in choosing those one will ask for campaign contributions.

If an individual or company has matters pending with one's agency, they (and others, including the media and one's fellow candidates) are going to perceive a relationship between the decision and whether they contribute to one's campaign. The unkind characterization for this dynamic is "shake-down."

Two important points to remember:

- Public officials who indicate their actions on a matter will be influenced by whether they receive a campaign contribution put themselves at risk of being accused of soliciting a bribe or extortion.
- The legal restrictions on campaign fund-raising are minimum standards.

## PENALTIES

The disqualification requirements are part of the Political Reform Act. A refusal to disqualify one-self is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>66</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>67</sup>
- » Prohibition from seeking elected office in the future;<sup>68</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>69</sup> and
- » Jail time of up to six months.<sup>70</sup>

## FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## FOR MORE INFORMATION

See the following resources:

- » "Raising Funds for Favorite Causes," available at [www.ca-ilg.org/fundraising](http://www.ca-ilg.org/fundraising).
- » Institute resources on ethics on the campaign trail, see [www.ca-ilg.org/campaigning-office](http://www.ca-ilg.org/campaigning-office).
- » "FPPC resources on campaign contribution limits, see [www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html](http://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html).
- » "Campaign Disclosure Manual 2 - Information for Local Candidates, Superior Court Judges, Their Controlled Committees, and Primarily Formed Committees for Local Candidates," 2016. Available at [www.fppc.ca.gov/learn/campaign-rules/campaign-disclosure-manuals.html](http://www.fppc.ca.gov/learn/campaign-rules/campaign-disclosure-manuals.html).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

# Agency Staff and Political Activities

## BASIC RULES

There are a number of laws designed to insulate public employees from having to participate in the campaign activities of candidates for their agency's governing board.

### **Employment Decisions, Soliciting Support and Campaign Contributions**

California law forbids candidates and officials from conditioning employment decisions on support of a person's candidacy.<sup>71</sup>

Soliciting campaign funds from agency officers or employees is also unlawful.<sup>72</sup> There is an exception if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.<sup>73</sup> Candidates also may not offer or arrange for an increase in salary for an agency employee in exchange for a political contribution.<sup>74</sup>

Note that members of the International City/County Management Association and the City Attorneys Department of the League of California Cities place a high value on maintaining their independence from the political process. As a result, both organizations encourage their members not to make campaign contributions to local officials.<sup>75</sup>

### **Engaging in Political Activities During Work Hours or While in Uniform**

Engaging in political activities during work hours violates prohibitions against the political use of public resources.<sup>76</sup> Local agencies and school districts may impose additional restrictions on the political activities of employees during working hours or while on agency property.<sup>77</sup> Such restrictions can include wearing political buttons during work hours and displaying political signs at one's workstation.<sup>78</sup>

Additionally, California law prohibits employees or officers of local agencies from engaging in political activities of any kind while in uniform.<sup>79</sup>

For more information about the use of public resources for political purposes, see Chapter 3.

## PENALTIES

Violation of the prohibition against soliciting campaign funds from agency staff is punishable as a misdemeanor.<sup>80</sup> Offering or arranging a raise for an agency employee in exchange for a contribution is punishable by up to a year in county jail, a fine of up to \$5,000 or both.<sup>81</sup>

No penalties are specified in the code sections creating the prohibitions against conditioning employment decisions on political support or against engaging in political activities while in uniform.<sup>82</sup> Presumably violations would fall into the catchall penalty for misconduct in office, which is loss of office.<sup>83</sup>

Public officials face both criminal and civil penalties for using public resources for political benefit.<sup>84</sup> See Chapter 3 for more details.

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Holding Multiple Public Offices

There is such a thing as too much public service; the law limits the degree to which public officials can simultaneously hold multiple offices. The reason is, when an official assumes a public office, he or she takes on responsibility to the constituents of that agency to put their interests first. When an official occupies multiple offices in multiple agencies, fulfilling that responsibility becomes more complicated, both legally and ethically.

Potential legal issues include:

- » Political Reform Act issues when the official is in the position of making decisions that affect the official's economic interests. This issue is covered in Chapter 2;
- » Section 1090 issues when the official's position is such that the official has an interest in a contract in which the agency is involved. This issue is also covered in Chapter 2; and
- » Incompatibility of office issues (for example, membership on the city council and serving on the board of another local agency) when the official's offices are such that the official may be subjected to conflicting loyalties.<sup>85</sup>

The incompatible office holding problem differs from a conflict of interest that involves a potential clash between one's private interest and one's public duties, incompatibility of offices normally refers to the "public-public" situation where no personal conflict of interest is involved. Instead there is a potential clash between one's responsibility to two sets of constituents.

A similar but different conflict can arise when a local agency officer engages in incompatible employment activities. Here, there is only one public office with the conflict arising from the outside employment activity.<sup>86</sup>

## BASIC RULES

California law prohibits public officers from simultaneously holding multiple offices that are "incompatible" with one another.<sup>87</sup> Offices are incompatible when:

- » Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
- » Based on the powers and jurisdiction of the offices, there is a possibility of significant clashes of duties or loyalties between the offices; or
- » Public policy considerations make it improper for the position of making decisions that affect the official's economic interests. This issue is covered in Chapter 2;

The notion underlying the prohibition is that it can be unfair and unwise to have decision-makers who are supposed to have just one agency's (and one agency's constituents) interests at heart assume multiple decision-making roles. As the Attorney General observed, the public is entitled to utmost loyalty from those who occupy offices.<sup>89</sup>

This restriction on holding multiple public offices only applies to positions that are considered to be offices—including appointed or elected members of a governmental board, commission, committee, or other body.<sup>90</sup> The restriction does not apply to positions of employment in an agency,<sup>91</sup> although employees may be prohibited from serving on the governing bodies of agencies in which they are employed.<sup>92</sup>

Note there can be specific legislative exceptions to this rule.<sup>93</sup> Under some circumstances, local agencies may allow simultaneous occupancy of what would otherwise be incompatible offices.<sup>94</sup>



*When one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies, that job becomes more complicated...*

## SPECIAL ISSUES

### Employees Who Run for the Governing Board of Their Public Agency Employers

Generally, an individual may not serve as an elected or appointed member of a local agency's governing board if he or she is an employee of the local agency.<sup>95</sup> If the employee does not resign, the individual's employment automatically terminates upon being sworn into office.<sup>96</sup> Volunteer firefighters are exempt from these provisions if the firefighter receives no salary.<sup>97</sup>

### Individual Agency Guidelines

Local agencies must adopt rules regarding incompatible employment activities.<sup>98</sup>

#### FOR MORE INFORMATION

On holding multiple offices see "Holding Two Positions" available online at [www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest/holding-two-positions.html](http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/conflict-of-interest/holding-two-positions.html).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## PENALTIES

If an official accepts a second office that is incompatible with an office he or she currently holds, the prior office automatically terminates when the official is sworn into the second office.<sup>99</sup>

#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

# Competitive Bidding Processes for Public Contracts

## BASIC RULES

Public contracting laws — including those adopted at the local level — are designed to give all interested parties the opportunity to do business with the government on an equal basis.<sup>100</sup>

This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors. It also assures that the public receives the best value for its money by promoting competition among businesses.<sup>101</sup>

Many competitive bidding requirements are locally imposed, for example by charter cities as part of their municipal affairs authority.<sup>102</sup> California law also authorizes local agencies to adopt procedures for acquisition of supplies and equipment.<sup>103</sup> Most purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, California law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects over \$5,000 are subject to the state's competitive bidding requirements.<sup>104</sup> For county projects, the threshold is based on population: \$6,500 (counties with populations of 500,000 or over),<sup>105</sup> \$50,000 (counties with populations of 2 million or over)<sup>106</sup> and \$4,000 (all other counties).<sup>107</sup> Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.<sup>108</sup>

The contract for a competitively bid public project must be awarded to the lowest responsible bidder.<sup>109</sup> A responsible bidder is one who is able to perform the contract if awarded.<sup>110</sup>

## EXCEPTIONS

### Emergency

Contracts may be awarded without competitive bidding if the legislative body makes a finding by a four-fifths vote that an emergency exists.<sup>111</sup>

### Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, and surveying, or construction management firms need not be competitively bid, but must be awarded on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.<sup>112</sup> However, if the professional services are too closely akin to the work typically performed by public works construction contractors (for example, some services performed by construction managers), then competitive bidding may be required.<sup>113</sup>

### Special Services

The legislative body of any public agency may contract with and employ persons for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.<sup>114</sup> The test as to whether services are special services depends on the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources.<sup>115</sup>

## Design-Build

Design-build is a method of project delivery in which the design and construction functions are combined and contracted to a single entity (called the “design builder”). Local agencies (defined to include cities, counties and special districts<sup>116</sup>), with approval of the agency’s governing body, may use design-build contracting for building construction projects over one million dollars.<sup>117</sup> Local agencies may award design-build projects using either the lowest responsible bidder or best value.<sup>118</sup>

### FOR MORE INFORMATION

On public agency procurement processes, see the Institute resources available at [www.ca-ilg.org/post/fair-procurement](http://www.ca-ilg.org/post/fair-procurement).

## PENALTIES

An agency that improperly awards a bid to any bidder other than the lowest responsible bidder may be liable for reimbursing the low bidder’s actual cost in submitting the bid, but will not be liable for the low bidder’s lost profits.<sup>119</sup>

### HONEST SERVICES, FRAUD AND EXTORTION

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.<sup>120</sup>

The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>121</sup> That duty is violated when a public official makes a decision that is not motivated by his or her constituents’ interests but instead by his or her personal interests.<sup>122</sup> Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.<sup>123</sup>

“Kickbacks” (for example, receiving money back from proceeds paid to a company that does business with a public entity) in exchange for favorable contracting decisions is one area in which prosecutors have been particularly active.

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>124</sup>

An official’s refusal to award a contract unless the individual receives benefits can also be prosecuted as extortion.<sup>125</sup> To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.<sup>126</sup>

**For more information** about honest services, fraud and extortion, see “Making a Federal Case Out of Corruption,” available at [www.ca-ilg.org/fedcase](http://www.ca-ilg.org/fedcase).

# Whistle-Blowing Protections

## BASIC RULES

California whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.<sup>127</sup> Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for “legitimate, independent reasons” even if the employee had not been a whistle-blower.<sup>128</sup> These protections apply specifically to local agency employees.<sup>129</sup>

California law requires employers to post the state attorney general’s whistle-blower hotline number at the workplace.<sup>130</sup> Any employee or member of the public can call the hotline at (800) 952-5225 to register their concerns about potentially unlawful practices.<sup>131</sup>

### FOR MORE INFORMATION

On whistle-blower protections, see the following resources:

- » “For Whom the Whistle Blows,” available at [www.ca-ilg.org/whistle](http://www.ca-ilg.org/whistle).
- » Walking the Line: What to do When You Suspect an Ethics Problem, 2005. Available at [www.ca-ilg.org/WhatToDo](http://www.ca-ilg.org/WhatToDo).

## PENALTIES

Violation of whistle-blower protection laws is a misdemeanor.<sup>132</sup> The maximum criminal penalty for an individual is a year of jail time, a fine of \$1,000 or both.<sup>133</sup> In the case of corporations, the criminal penalty is a fine of up to \$5,000.<sup>134</sup>

In addition, retaliation against an employee for whistle-blowing activities could result in a suit for violation of the employee’s civil rights.<sup>135</sup> Such actions carry the prospect of damages<sup>136</sup> and attorney’s fees awards.<sup>137</sup>

### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).



# Endnotes and Additional Information

**Note:** The California Codes are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html](http://www.fppc.ca.gov/the-law/fppc-regulations/regulations-index.html). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 See *Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1597-98, 263 Cal. Rptr. 360, 365-66 (4th Dist. 1989).
- 2 See *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n.23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (finding no common law bias).
- 3 See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (finding common law bias).
- 4 *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341 (2002).
- 5 See *Breakzone*, 81 Cal. App. 4th at 1234 n.23, 97 Cal. Rptr. 2d at 490.
- 6 See, e.g., *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 89, 133 Cal. Rptr. 2d 234, 241 (2d Dist. 2003).
- 7 *Nightlife Partners*, 108 Cal.App.4th at 97-98, 133 Cal. Rptr. 2d at 248.
- 8 See *Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *Mennig v. City Council*, 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (2d Dist. 1978).
- 9 See *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994) (where local ordinance called for "person" appealing planning commission decision to city council to show cause why the commission's action should be overturned, city council's decision to appeal the action to itself was an appearance of conflict of interest and was part of overall violation of developer's substantive and procedural due process rights).
- 10 *Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975).
- 11 *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470, 482, 22 Cal. Rptr. 3d 772 (2004).
- 12 See generally Cal. Civ. Proc. Code § 1094.5. See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (requiring the council to rehear an appeal from the planning commission's decision and provide a fair hearing).
- 13 See 42 U.S.C. §§ 1983, 1988.
- 14 Cal. Penal Code § 86.
- 15 91 Cal. Op. Att'y Gen. 46 (2008).
- 16 Cal. Penal Code § 86.
- 17 See Cal. Pen. Code § 88. See also Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office); Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 18 Cal. Gov't Code § 87460(a), (b).
- 19 See Cal. Gov't Code § 87460(c), (d).
- 20 See Cal. Gov't Code § 87461.
- 21 See generally Cal. Gov't Code §§ 91000-14.
- 22 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 23 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 24 Cal. Gov't Code § 91000(b).
- 25 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 26 2 Cal. Code Regs. § 18700.
- 27 See Cal. Gov't Code § 82029.
- 28 See generally Cal. Gov't Code §§ 91000-14.
- 29 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 30 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 31 Cal. Gov't Code § 91000(b).
- 32 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 33 See, e.g., *People v. Honig*, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555 (1996).
- 34 See Cal. Gov't Code § 91003(b).
- 35 This is a requirement of the Political Reform Act. See generally Cal. Gov't Code §§ 84100-511.
- 36 Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18421.1.
- 37 *Woodland Hills Residents Association v. City Council*, 26 Cal. 3d 938, 164 Cal. Rptr. 255 (1980). But see Cal. Gov't Code § 84308; 2 Cal. Code Regs. §§ 18438.1-.8 (defining who is disqualified from acting on a land use entitlement application after receipt of a campaign contribution).
- 38 Cal. Gov't Code § 84308(c).
- 39 See Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215.
- 40 See Cal. Gov't Code § 84308(b).
- 41 See Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.

- 42 See Cal. Gov't Code § 84308(a)(4); 2 Cal. Code Regs. § 18438.1. See also Davis Advice Letter No. A-02-344.
- 43 See Cal. Gov't Code § 84308(b), (c); 2 Cal. Code Regs. § 18438.4.
- 44 See Cal. Gov't Code § 84308(a)(2).
- 45 *Id.*
- 46 Cal. Pen. Code §§ 518; 18 U.S.C. § 1951.
- 47 Cal. Penal Code § 521.
- 48 Cal. Penal Code § 19.
- 49 Cal. Gov't Code §§ 3060-3074.
- 50 18 U.S.C. § 1951(a). See generally 18 U.S.C. § 3571(b).
- 51 See Cal. Gov't Code § 84308(a)(5); 2 Cal. Code Regs. § 18438.2.
- 52 Cal. Gov't Code § 65901.
- 53 Cal. Gov't Code § 65906.
- 54 Cal. Gov't Code §§ 66411-413.5.
- 55 Cal. Gov't Code §§ 4526, 37103, 53060.
- 56 Cal. Gov't Code § 84308(d); 2 Cal. Code Regs. § 18438.8.
- 57 Cal. Gov't Code § 84308(c).
- 58 *Id.*
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 Cal. Gov't Code § 84308(b).
- 64 *Id.*
- 65 Cal. Gov't Code § 84308(d).
- 66 See generally Cal. Gov't Code §§ 91000-14.
- 67 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 68 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 69 Cal. Gov't Code § 91000(b).
- 70 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 71 See Cal. Gov't Code § 3204, which reads as follows: No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.
- 72 See Cal. Gov't Code § 3205.
- 73 See Cal. Gov't Code § 3205(c).
- 74 See Cal. Gov't Code § 3205.5, which reads as follows: No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.
- 75 The ICMA Code is available on the ICMA website at: <http://icma.org/codeofethics>.
- 76 See Cal. Gov't Code § 8314.
- 77 See Cal. Gov't Code § 3207 (providing that any city, county or local agency may prohibit or restrict officers and employees engaging in political activity during working hours and political activities on agency premises); Cal. Educ. Code § 7055; 5 U.S.C. §§ 7321-26 (prohibiting employees of state and local executive agencies who work in connection with programs financed in whole or in part by federal loans or grants from engaging in political activities while on duty).
- 78 See *Cal. Teachers Ass'n v. Governing Bd.*, 45 Cal.App.4th 1383, 53 Cal.Rptr.2d 474 (1996); 5 C.F.R. § 734.306 example 16 (with limited exception, those employees working in connection with federally funded programs "may not wear partisan political buttons or display partisan political pictures, signs, stickers, or badges while he or she is on duty or at his or her place of work.").
- 79 Cal. Gov't Code § 3206. See also Cal. Gov't Code § 3302.
- 80 See Cal. Gov't Code § 3205.
- 81 See Cal. Gov't Code § 3205.5, which reads as follows: No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.
- 82 See Cal. Gov't Code §§ 3204, 3206.
- 83 See Gov't Code §§ 3060-75. See also *Steiner v. Superior Court*, 50 Cal.App.4th 1771, Cal. Rptr.2d 668 (1996) (discussing the types of misconduct warranting removal from office under section 3060).
- 84 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.

- 85 See Cal. Gov't Code § 1099.
- 86 See Cal. Gov't Code § 1126.
- 87 Cal. Gov't Code § 1099(a).
- 88 Cal. Gov't Code § 1099(a)(1)-(3).
- 89 91 Cal. Op. Att'y Gen. 25 (2008)
- 90 Cal. Gov't Code § 1099(a).
- 91 Cal. Gov't Code § 1099(c).
- 92 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 93 See, e.g., Cal. Health & Safety Code § 6480(b) (relating to city officials serving on sanitary districts) See also 85 Cal. Op. Att'y Gen. 239 (2002) (noting the Legislature can create exceptions to the incompatibility doctrine).
- 94 See 66 Cal. Op. Att'y Gen. 293 (1983) (offices of city and county planning commission are incompatible but county and charter city may adopt legislation specifying otherwise).
- 95 See Cal. Gov't Code § 53227 (for cities, counties and special districts); Cal. Educ. Code §§ 35107(b)(1) (school districts), 72103(b)(1) (community college districts). See also 84 Cal. Op. Att'y Gen. 126 (2001) (community college board member may not become part-time instructor for district).
- 96 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 97 See 85 Cal. Op. Att'y Gen. 230 (2002) ("salary" does not include per-call and equipment stipends).
- 98 Cal. Gov't Code § 1126(c).
- 99 Cal. Gov't Code § 1099(b) (noting that this position is enforceable through Civil Procedure Code section 803). *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 107 P.2d 388 (1940). See also Cal. Gov't Code § 1126.
- 100 See Cal. Pub. Cont. Code § 100.
- 101 *Id.*
- 102 *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 110 Cal. Rptr. 67 (4th Dist. 1973). See also Cal. Pub. Cont. Code § 1100.7.
- 103 Cal. Gov't Code §§ 54201-25.
- 104 Cal. Pub. Cont. Code § 20162.
- 105 Cal. Pub. Cont. Code § 20122.
- 106 Cal. Pub. Cont. Code § 20123.
- 107 Cal. Pub. Cont. Code § 20121.
- 108 Cal. Pub. Cont. Code § 20163.
- 109 Cal. Pub. Cont. Code § 20162.
- 110 See Cal. Pub. Cont. Code § 1103.
- 111 Cal. Pub. Cont. Code §§ 1102, 20168, 22050.
- 112 Cal. Gov't Code § 4526.
- 113 *City of Inglewood-Los Angeles County Civic Ctr. Auth. v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).
- 114 Cal. Gov't Code § 53060.
- 115 *Cal. School Employees Ass'n v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 60, 111 Cal. Rptr. 433, 442 (1st Dist. 1973).
- 116 Cal. Pub. Cont. Code § 22161(f).
- 117 Cal. Pub. Cont. Code § 22162.
- 118 Cal. Pub. Cont. Code § 22164.
- 119 *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 315-16, 96 Cal. Rptr. 2d 747 (2000).
- 120 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 121 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 122 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 123 See *Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC §1346, defining "scheme or artifice to defraud," only criminalizes bribes and kick-back schemes).
- 124 18 U.S.C. §§ 1341 ("... shall be fined under this title or imprisoned not more than 20 years, or both."), 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both.").
- 125 18 U.S.C. § 1951.
- 126 18 U.S.C. § 1951(a).
- 127 See Cal. Lab. Code § 1102.5(c) ("An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.").
- 128 Cal. Lab. Code § 1102.6.
- 129 See Cal. Lab. Code § 1106.
- 130 See Cal. Lab. Code § 1102.8 (requiring employers to post employees' rights and responsibilities under the whistle-blower laws, including the telephone number for the Attorney General's hotline).
- 131 See Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).
- 132 Cal. Lab. Code § 1103.
- 133 *Id.*
- 134 *Id.*
- 135 See, e.g., *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951(2006).
- 136 42 U.S.C. § 1983.
- 137 42 U.S.C. § 1988.



1400 K Street, Suite 205

Sacramento, California 95814

Telephone: 916.658.8208

Fax: 916.444.7535 [www.ca-ilg.org](http://www.ca-ilg.org)

Hard copies available for purchase.

Email [ethicsmailbox@ca-ilg.org](mailto:ethicsmailbox@ca-ilg.org) for more information.