

AB 1234 Ethics Training

El Dorado LAFCO

PRESENTED BY

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Why Is This Training Important?



- Comply with the law
- Learn best practices
- Promote positive public perceptions
- Avoid legal problems

Part 1: Personal Financial Gain

- Bribery
- Conflicts of Interest under the Political Reform Act
- Contractual Conflicts of Interest
- Conflicts of Interest and Campaign Contributions
- Conflicts of Interest When Leaving Office

Bribery

Bribe: Anything of value or advantage, present or prospective

Bribery: Governmental official requests, takes, or agrees to take bribe AND represents that the bribe would unlawfully influence vote, decision, or opinion



Conflict of Interest Laws: Political Reform Act

Basic Rule: Public officials have a disqualifying conflict of interest under the Political Reform Act of 1974 when the decision would have:

- Reasonably foreseeable
- Material financial effect
- On an economic interest
- Different from the public generally



Conflicts of Interest: Political Reform Act Four-Step Test

- ❖ Step 1: Is the financial effect “reasonably foreseeable?”
- ❖ Step 2: Is it “material?”
- ❖ Step 3: Is the effect on the official the same as on the “public generally?”
- ❖ Step 4: If no, then absent an exception, official may not make or participate in the decision

Conflicts of Interest: Political Reform Act's Economic Interests

- Business investments: \geq \$2,000
- Business management position- director, official, partner, trustee, management
- Donor of Gift(s) over \$470 (\$500 1/1/19)
- Real property: \geq \$2,000
- Sources of income: \geq \$500 w/in 12 mo
- Personal finances: increase or decrease w/in 12 months

Conflicts of interest: Political Reform Act Key Steps

- Materiality Standards: determine type of economic interest and determine how it would affect official's financial interest
 - Different standards for different economic interests
- Public Generally: generally any decision that affects 25% of jurisdiction's residents, properties, or businesses

QUIZ #1

A council member owns a home 510 feet from a proposed project.

- Can the council member vote on the project?
- **TWIST:** What if the project is a landfill with odor impacts at the home?

Conflict of Interest: Political Reform Act's Recusal Steps

What if a Conflict Exists?

- **Do Not** discuss, give opinions, or influence
- **Publicly identify interest** on the record
- **Recuse** self from discussions or action on the matter
- **Leave the room** until the item has concluded
 - **Exception:** consent item
 - **Exception:** if item involves one's own personal interest

Conflict of Interest in Contracts: Government Code Section 1090

If:

- A Public Official
- Who Has a Financial Interest
- Makes A Contract

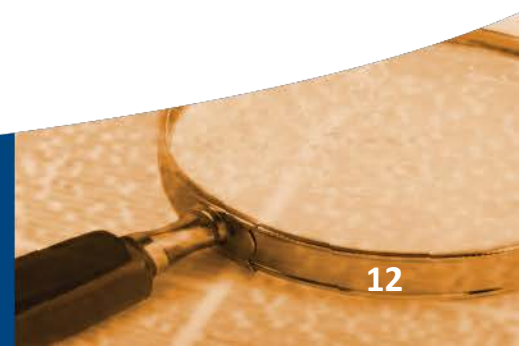
Then:

- Contract is VOID
- Penalties Apply



Conflict of Interest in Contracts

- Applies broadly to renewals, extensions, oral contracts & grants of funds
- Financial interests are broadly construed



Conflicts of Interest in Contracts

- **Legislative body** deemed to make all contracts unless an exception
- **Employees** may avoid strict prohibition by not participating in the “making” of the contract



Conflicts of Interest in Contracts: “Making” the Contract

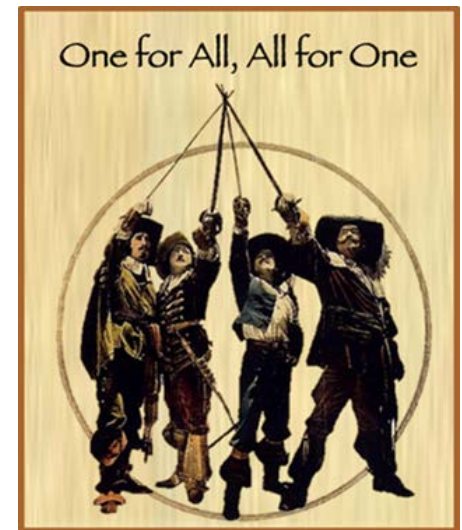
“Making” includes:



- Negotiations,
- Discussions,
- Reasoning,
- Planning, and
- The “give and take which goes beforehand in the making of the decision to commit oneself”

Conflicts of Interest in Contracts: Members of Legislative Bodies

- Legislative body member may not alleviate a conflict problem under Section 1090 by recusal from the discussion and vote.
- The contract is considered void if it's "made."



Conflicts of Interest in Contracts: Employees

An employee, however, may have a financial interest in a contract but may not participate in any way in the agency's involvement in making the contract.

The employee must disclose the financial interest and completely disqualify him or herself from influencing the decision-making process



Financial Interest in Contracts: Consultants

1090 applies to outside consultants who are considered “employees” under the law, in particular when the consultant acts in an advisory role and has the ability to exert “considerable influence” over the public agency’s contracting decisions

Financial Interest in Contracts: Consultants

Phil Mickelson acted as a consultant for the City of San Diego to revamp and improve the Torrey Pines Golf Course. The City adopted a highly modified version of his plan, but the FPPC said he couldn't bid on the actual project.



Financial Interest in Contracts: Remote Interest Exceptions

- Public official doesn't have a financial interest if the interest is "remote," and if the remote interest is disclosed to the legislative body and noted in official records
- Examples: Employee of non-profit, landlord or tenant of a contracting party

Financial Interest in Contracts: “Non-Interest” Exceptions - § 1091.5

- Public official is deemed not to have an interest and may participate in the making of a contract despite the financial interest
- **14 Exceptions**, including:
 - Corporate ownership
 - Less than 3% of shares, and
 - Income of less than 5% of total
 - Expense reimbursements
 - Recipient of public services



WARNING!

THESE ARE FACT-SPECIFIC - CHECK WITH YOUR ATTORNEY

Financial Interest in Contracts: Limited Rule of Necessity

Permits a public body, that has a duty to act upon a matter before it, to do so despite a conflict of interest when the public agency is the only entity capable to act on the matter (where one or more of the board members has a personal financial interest).

Example: Public official owns the only mortuary within 500 miles and the public agency needs to contract with a mortuary

Remote Interests allows Board member to disclose and disqualify



Financial Interest in Contracts: Ramifications



Ramifications

- **Criminal**
 - Willful Violation = Felony
 - Lifetime bar to public office
- **Civil**
 - Contract = Void and unenforceable
 - Disgorgement of all money
 - Civil Penalties
- **Administrative Fines**

Campaign Finances

Basic Rule

- Public officials are disqualified from making a decision involving a license, permit, or entitlement for use if official has accepted a campaign contribution exceeding \$250 in preceding 12 months
- “Directly elected” exception
- Official may not accept a campaign contribution exceeding \$250 while an application is pending and for 3 months after the decision is made



Conflicts of Interest in Leaving Office - “Revolving Door”



AFTER LEAVING OFFICE:

Elected Official & Agency Head/CEO

- One Year Ban
- Prohibited from appearing before, or communicating with, agency on behalf any other person for compensation

Conflicts of Interest in Leaving Office - “Feathering Your Nest”

Influencing Prospective Employment:

No Public Official Shall:

- Participate in decision making process when it relates to any prospective employer.
- UNLESS: An exception applies.



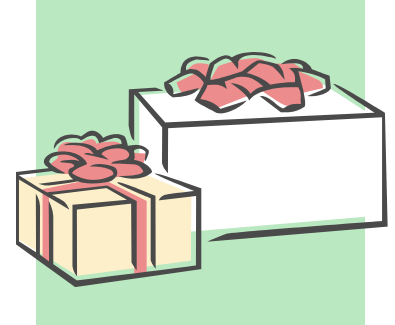
QUIZ #2

- A planning commissioner runs unsuccessfully for supervisor. One of her large campaign donors submits an application for a conditional use permit.
 - May the commissioner vote on the permit?
 - **TWIST:** What if she won, now sits on the board, and the donor/applicant needs BOS approval?

Part 2: Personal Advantages & Perks

- Gifts
- Honoraria
- Misuse of Public Funds
- Gifts of Public Funds
- Mass Mailing Prohibition
- Acceptance of Free or Discounted Travel

Gifts



- **Basic Rules**

- **Gift Limit Prohibition**

- Public officials and employees may not accept gifts from a single source during a calendar year in excess of \$470
- Gifts in excess of limit from a single source during a 12 month period are disqualifying
- Gifts in excess of \$50 from a single source must be reported



Gifts:

Common Exceptions

- Gifts to public agency
- Gifts returned unused or donor reimbursed within 30 days
- Gifts from family members
- Gifts of hospitality
- Reciprocal exchanges
- Tickets/passes to certain fundraisers
- New personal gifts





Gifts

- Limitations on Receipt of Gifts
 - Special Exceptions for Travel Payments
 - Some payments are not subject to limits and not reportable
 - Payments by government agency or non-profit
 - Others are not subject to limits but are reportable
 - Travel rules are very specific; check with legal counsel if your travel will be paid for by a third party



Gift Limit Ramifications



- FPPC civil action
- Penalty: 3 times the amount of the gift
- \$5,000 fine
- 6 months jail
- Bribery/Extortion – Felony – Prison

Honoraria Ban

- Basic Rule
 - Elected officials, city managers, city attorneys, and city treasurers may not accept any payment for:
 - Giving a speech
 - Publishing an article or
 - Attending a public or private conference, convention, meeting, social event, meal or similar gathering



Honoraria Ban

- Exceptions
 - Bona fide business (teaching, practicing law, medicine)
 - Returned honorarium
 - Donated to agency general fund
 - Made directly to a bona fide non-profit
 - Campaign contributions (but must be reported)



Misuse of Public Funds

- Basic Rule
 - Public officials and employees may not use public resources for private gain (whether financial or political)
 - Government cannot expend resources to promote a partisan position in an election campaign, but it can educate about ballot measures
 - State law permits minimal/incidental use of agency resources



Gifts of Public Funds

- Constitutional Prohibition
 - Public agencies may not make gifts of public funds
 - An expenditure is not a gift if it serves a public purpose, even if it benefits a private party
 - Legislative body's determination of a public purpose is given great deference



Mass Mailing Prohibition

- Basic Rule: May not be sent at public expense
 - A “mass mailing” is:
 - A tangible item sent or delivered to 200 or more people within a calendar month that “features” an elected officer by:
 - Including the photograph or signature, or
 - Singling out the officer by the manner of display of name or office in the layout, such as by headlines, captions, type size, typeface, or type color
 - For which the costs of design, production and printing exceed \$50 and are paid with public moneys



Acceptance of Free or Discounted Travel

- From Travel Companies
 - Public officers (not all employees) may not accept free passes or discounts from a transportation company
 - One who accepts forfeits his/her office
 - Prohibition does not apply to discounts offered to the general public



QUIZ #3

A council member uses his city email address to send emails in support of a local tax measure.

- Is this permissible?
- **TWIST:** What if the council member makes 1,000 copies of an editorial in support of the measure from his construction company's office and distributes them by mail to local residents?



QUIZ #4

- A mayor is traveling on work, non-city related business to Zurich. A Lufthansa employee recognizes him and offers him a free, first-class upgrade under the airline's program that offers upgrades to prominent individuals. The mayor accepts a free first-class upgrade.
 - Is this proper? What are the consequences for the mayor?
 - **TWIST:** What if the employee at the ticket counter discovered that mayor and his new wife were on their honeymoon and accepted the upgrade pursuant to the airline's program for honeymooning couples?



Part 3: Transparency Laws

- Economic Interest Disclosure Under the Political Reform Act
- Brown Act
- Public Records Act

Government Transparency Laws

- Public Policy Considerations
 - Right to access - the people have a right to be informed about the conduct of their business, and for deliberations to be conducted and actions to be taken openly
 - Brown Act has broad applicability. It covers all local agencies and broadly defines “public meetings” and “legislative bodies”
 - Broad public notice/participation requirements



Economic Interest Disclosure

- Under the Political Reform Act
 - A Form 700 must be filed by enumerated public officials including those listed in an agency's Conflict of Interest Code
 - Filed upon taking office, leaving office, and on an annual basis
 - Requires disclosure of personal financial interests
 - Public document



Ralph M. Brown Act (Gov't Code §§ 54950 *et seq.*)

- Open Meeting Requirements
 - (1) Meetings of (2) legislative bodies shall be (3) open and public

Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016

PUBLIC COMMENT: The City Council values your comments; however, pursuant to the Brown Act, the Council cannot take action on items not listed on the posted agenda. The public comment period is limited to 20 minutes, with 2 minutes allotted for each speaker. This public comment period is to address the City Council on Current Calendar Items, other agenda items if the member of the public cannot be present at the time the item is considered) or items of general...



The Brown Act - Meetings

- Meeting: a congregation of a majority of members at the same time and place to hear, discuss, or deliberate on business w/in agency's subject matter jurisdiction
- Exceptions: community meetings, social or ceremonial occasions, others

The Brown Act – Serial Meetings

SERIAL MEETINGS

Use of:

- direct communication;
- intermediaries; or
- technology

to develop a collective concurrence outside of a meeting is expressly prohibited.

E-MAILS

When e-mailing:

- Don't "reply to all"
- Do not take a position or make a commitment
- E-mail board / council info only
- Take caution to ensure compliance with law

The Brown Act – Closed Sessions

Examples:

- Real estate negotiations
- Pending/threatened litigation
- Initiation of litigation
- Personnel
- Labor negotiations

Closed session discussions are confidential



Brown Act

- Public's Participation Rights
 - Regular meetings must provide an opportunity for the public to speak regarding any matters within the body's jurisdiction
 - Legislative body may briefly discuss these items and refer matters to staff, but cannot take action
 - Public can address the legislative body on agenda items before or during consideration of the item
 - Public has the right to make audio/video recordings



The Brown Act - Ramifications

- For violations, Court may:
 - Enjoin action,
 - Invalidate action, or
 - Mandate correction.
- Court costs & attorney fees are recoverable
- Individuals who intentionally violate may be guilty of a misdemeanor



“Secrecy is for losers”

-U.S. Senator Patrick Moynihan

California Public Records Act

All non-exempt agency records, in any form or medium, is subject to public inspection during office hours or copies may be made available upon payment of duplication costs



- Record is defined broadly

Public Records Act



- Duty to Assist Requestors
 - Agencies are required to
 - Assist the request to identify records and information that are responsive to the request or to the purpose of the request
 - Describe the information technology and physical location in which the records exist
 - Provide suggestions for overcoming any practical basis for denying access to the records or information sought



California Public Records Act Exemptions

- Preliminary drafts, notes or memos not kept in ordinary course of business
- Real estate appraisals
- Personnel, medical, similar files
- Records about pending litigation
- Deliberative process
- Records pertaining to an investigation
- Catch-all exemption



Public Records Act & Email

“Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act.”

City of San Jose v. Superior Court, 2 Cal. 5th 608 (2017).

QUIZ #5

- The district posted the agenda on Friday for its regular meeting the following Tuesday on the district's bulletin board. The district has seen an increase in crime lately so it has begun locking the gate to its parking lot during the weekend.
 - Is this a Brown Act violation?
 - **TWIST:** What if the district posts the agenda on its website and emails it out to interested persons?



QUIZ #6

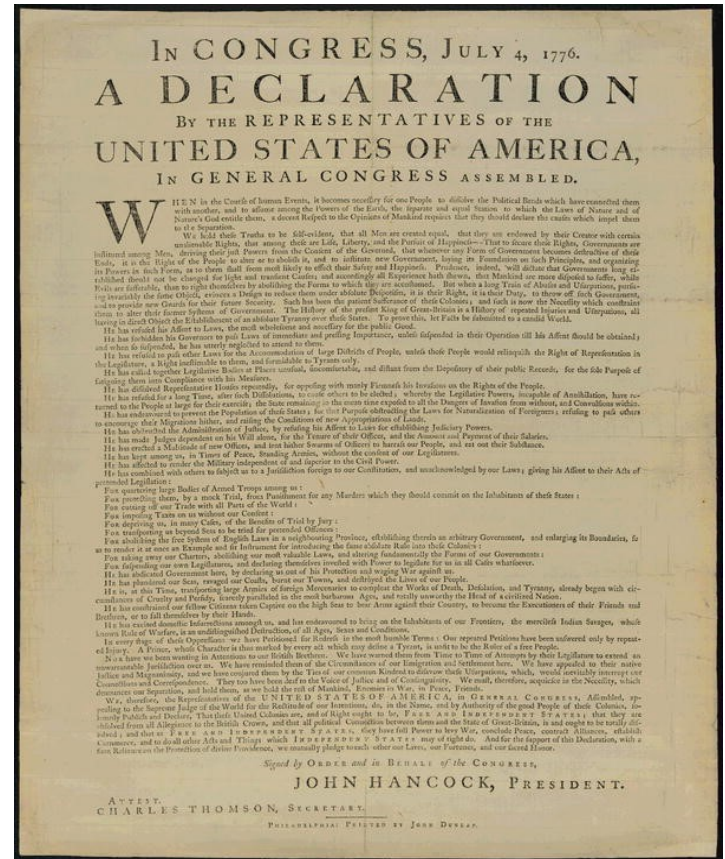
- During a particular contentious debate, a member of the public pulls out her iPhone and begins videotaping the meeting. While the commission is debating the item, she threatens to “email this to the media” and approaches the dais to get a better shot. In doing so, she blocks the view of the front row of the audience, which includes the designated ADA spot for attendees using wheelchairs.
 - Can the chair stop the videotaping?
 - If not, what may the chair do?



Part 4

Fair Process

- Common Law Bias
- Due Process
- Incompatible Offices
- Competitive Bidding
- Anti-Nepotism



Common Law Bias Prohibition

- *Elements:*
 - A public officer must exercise the powers conferred on him or her with disinterested skill, zeal and diligence, and primarily for the benefit of the public
 - One cannot be tempted by personal or pecuniary interest
 - Applies to non-financial interests
 - Disqualifies one from participating



Due Process Requirements

- Applies only to “quasi-judicial” matters (i.e. those involving the application of existing rules to a specific set of facts)
- “Procedural due process” gives those with a property interest a right to:
 - Notice and opportunity to be heard by a fair and impartial decision maker



Doctrine of Incompatible Offices

- Now codified at Gov. Code § 1099
- Elements
 - A person may not hold two public offices simultaneously
 - If the potential for conflict or overlap in the functions or responsibilities in the office exist
- Forfeiture of first office
- Common law rule often overridden by statute



Incompatible Activities

- Elements (Gov. Code § 1126):
 - Agency officers and employees shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his/her duties
 - Only applies if the local agency has adopted a statement of incompatible activities



Anti-Nepotism Laws and Policies

- Disqualification from participating in decisions affecting family members (anti-nepotism laws)
 - Political Reform Act requires recusal when decisions have a material impact on one's spouse or dependent children
 - Common law bias will require recusal in many cases
- Jurisdiction's own policies often limit participation in matter affecting family members



Competitive Bidding Requirements

- Public works projects must be awarded to lowest responsible bidder
 - Generally, applies only to construction projects
- Purpose (not to protect bidders)
 - Guards against favoritism, fraud and corruption
 - Prevents waste of public funds
 - Seeks to obtain best economic result for the public



Fair Process

Competitive Bidding

- Purposes
- General Rule
 - Only when required by statute or ordinance
 - Lowest, responsive, responsible bidder
 - Thresholds for Public Works
- Exceptions



QUIZ #7



- The City Council decides not to award a public works contract to the adult son of the mayor. The son was the lowest bidder, but the Council wants to avoid a nepotism problem.
 - Was this legal?
 - **TWIST:** Any additional information we need?



QUIZ #8

- An assistant city manager is approached to be appointed for a vacant seat on the local sewer district board. She accepts the appointment and a local resident claims that she has now forfeited her position with the city.
 - Is this true?
 - **TWIST:** What if the position was the police chief?



Fair Process

Best Practices for Decision-Makers

- If you can't be fair, don't participate
- Avoid statements before the close of a hearing
- Make decisions based on administrative record
- Avoid the appearance of bias
- Pay attention
- Above all, you will be judged by your fairness and integrity



Thank you for attending.

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