

Providing Conflict of Interest Advice: From the Basic to the Advanced

League of California Cities

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Presented by:

Eric S. Vail – Partner Burke, Williams & Sorensen, LLP

Gregory P. Priamos – County Counsel, Riverside County

INTRODUCTION

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- **Presenters**
 - Gregory P. Priamos
 - Eric S. Vail

- **Presentation Overview**
 - Roll out of “A Guide for Local Agency Counsel: Providing Conflict of Interest Advice”
 - Pol. Reform Act – Basic Process & Advanced Issues
 - Specialty Issues (Newly Elected or Final Terms)
 - ✦ **Incompatibility of Office**
 - ✦ **Revolving Door & Expectation of Contract**
 - ✦ **Mass Mailings**

A Guide for Local Agency Counsel

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- Publication of City Attorney's Department of the League of California Cities
- Last Updated in 2008
- Dept. President Priamos makes it a priority to update the Guide
- Appoints Vail to Chair ad hoc committee to undertake the project
- Two subsequent presidents Tom Brown & Christi Hogin
- About 30 attorneys involved in researching, drafting, reviewing and editing content
- Peer review by FPPC and AG Office and others

A Guide for Local Agency Counsel

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- **Focus: Reference guide for practitioners**
- **Greater accessibility and restructured text, chapters and layout**
- **Citations to all statutes, regulations, cases and other decisional information**
- **Emphasis on common problems practitioners experience**
- **Major Problem: FPPC in middle of reviewing the Regs.**

A Guide for Local Agency Counsel

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- **Contents**
 - Introduction
 - Assessing a Conflict of Interest Question
 - AB 1234 Requirements
 - Disclosure, Identification and Reporting Forms
 - Common Problems and Issues
 - 1090: Prohibited Interest in Contracts in Depth
 - Disqualifying Conflicts Under the Pol. Ref. Act
 - Local Conflict of Interest Codes
 - Common Law Conflicts of Interest
 - Specialty Conflict Laws
 - Enforcement of Conflict Violations

Political Reform Act -- Basics

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- **Statutory Rules:**

1. 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.

(Gov't Code § 87100 / 2 CCR § 18700)

2. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, indistinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or any of the following: [See Next Slide]

(Gov't Code § 87103 / 2 CCR § 18700)

Political Reform Act -- Basics

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Type of Financial Interest

- Business Entity
- Business Interest / Investment
- ***Real Property***
- Source of Income
- Donor of Gift
- Personal Finances

(Gov't Code § 87103(a) – (f); 2 CCR
§ 18700(c)(6)(A) – (E))

Threshold for Financial Interest

- Director, officer, partner, trustee, employee, management power
- \$2000 ↑
- \$2000 ↑
- \$500 ↑ in prior 12 months
- \$470 ↑ in prior 12 months
- \$250 ↑

Political Reform Act -- Basics

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- **Statutory Rule**

- A public official who holds an office specified in Section 8700 who has a financial interest in a decision within the meaning of Section 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to consideration of the matter, do all of the following:
 - ✦ **Publicly identify the financial interest in “*detail sufficient to be understood by the public*”** {disclosure of residence address is not required.}
 - ✦ **Recusal** – Leave the room until after discussion or disposition of matter, except if matter is on consent agenda.
 - ✦ **Do not Participate** – Do **not** exert Influence.

Political Reform Act -- Basics

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- FPPC FOUR STEP PROCESS (2 CCR § 18700(d)(1)-(4))
 - STEP ONE: *Effect Reasonably Foreseeable*
 - ✦ Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?
 - ✦ If NO – There is NO conflict
 - ✦ If YES – Go to Step Two
 - STEP TWO: *Effect Material*
 - ✦ Will the reasonably foreseeable financial effect be material?
 - ✦ If NO – There is NO conflict
 - ✦ If YES – Go to Step Three
 - STEP THREE: *Effect Indistinguishable from Public Generally*
 - ✦ 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?
 - ✦ If YES – There is NO conflict
 - ✦ If NO – Go to Step Four (Official has a Conflict)
 - STEP FOUR: *Recusal / Non-Participation OR Exception*
 - ✦ If after applying Steps 1 through 3 the Public Official has a conflict of interest, then they must identify, recuse, and not participate UNLESS Public Official's participation is **Legally Required** (2 CCR § 18700(e) & § 18705) or local agency may properly apply **Segmentation** (2 CCR § 18700(f) & § 18706).

Political Reform Act – Advanced

Effect Reasonably Foreseeable

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Old Rule

Reasonably Foreseeable means
Substantial likelihood (more than
50% likely)

New Rule

Now Reasonably Foreseeable means
Realistic possibility (less than 50% likely)

The question is not whether the Public Official is certain to benefit from the decision, but whether the likelihood that he might benefit was so great that he might be subject to the temptation the statute seeks to avoid.

More than a remote likelihood must exist.
Thorner Opinion (FPPC Op. 75-089)

Political Reform Act – Advanced

EFFECT REASONABLY FORESEEABLE

FPPC Two Pronged Approach

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Explicitly Involved

- If the public official's financial interest is “explicitly involved” – a named party or the subject of the proceeding – then reasonable ***foreseeability*** is ***presumed***.
- 2 CCR § 18701

Indirectly Involved

- If not, then a financial effect is reasonably foreseeable if it can be recognized as a ***realistic possibility***, but more than “hypothetical or theoretical,” that a public official will be impacted financially by a governmental decision in which he or she is participating.

Political Reform Act – Advanced *Effect Reasonably Foreseeable*

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Indirectly Involved Factors

- Effect contingent on intervening events?
 - Using due care and diligence would you anticipate the effect?
 - Reasonable inference that the financial effect would compromise the official's ability to act in the best interest of the public?
- Does the decision provide opportunities or advantages to the official's financial interest?
 - Would a similarly situated person weigh the advantages and disadvantages of the decision to the final interest in formulating a position?

Political Reform Act – Advanced *Real Property*

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Different standards apply to real property, depending on whether the public servant's interest is located inside or outside a 500 foot radius from a project's boundaries.

(2 CCR § 18702.2(a)(11))

Political Reform Act – Advanced *Real Property*

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- Outside a 500 foot radius, the public servant must consider a number of factors to determine whether he or she can participate in a decision, such as whether the decision will impact the development potential or income-producing potential of his or her property, or whether the decision will impact the use of his or her property or the character of the neighborhood in which his or her property is located (e.g., noise, traffic, view, privacy, etc.)

(2 CCR §18702.2)

Political Reform Act – Advanced *Real Property*

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500 Foot Rule (Old Rule)

Official's property located < 500 feet = Direct involvement
Material Financial Effect = Disqualification

Official's property located > 500 feet = Indirect involvement
No Material Effect = No disqualification

Political Reform Act – Advanced *Real Property*

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500 Foot Rule (New Rule)

Official's property located < 500 feet = Disqualification
unless FPPC advice letter says otherwise

Official's property located > 500 feet = Disqualification if
reasonably foreseeable material effect

Political Reform Act – Advanced *Real Property*

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Real Property Materiality

- General or specific plan
- Zoning or rezoning
- De-/annexation, in-/exclusion in/from a jurisdictional boundary
- Taxes, fees or assessments
- Sale, purchase or lease
- License, permit or land use entitlement

Political Reform Act – Advanced *Real Property*

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- Streets, water, sewer or similar improvements
- Changes to development potential, income-producing potential or “higher and best use” of the parcel
- Changes to the character of the parcel by substantial alteration to traffic levels or intensity of use, including parking, views, privacy, noise levels, or air quality of property surrounding the parcel
- Catch-all: influences the market value of the parcel

Political Reform Act – Advanced Real Property

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FPPC Advice Letters

- 34 Advice Letters issued by FPPC over 12 months from October of 2015 – November of 2016
- Of the 17 letters that addressed property within 500 feet of the project: conflict (6) no conflict (11)
- Of the 11 letters that addressed property more than 500 feet from the project: conflict (6) no conflict (5)
- Conflicts were found as far away as 1.3 miles from the project site

Political Reform Act – Advanced *Gift Exceptions*

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ACTION REQUIRED

- Disclose / Report
- Disqualify
- Refuse, Return or Reimburse
- From same source

THRESHOLD

- \$50 and up
- \$470 in 12 months
- Over \$470 in 12 months

Political Reform Act – Advanced *Gift Exceptions – Social Relationship*

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- **Exceptions – Neither Gift nor Income (2 CCR § 18942)**
 - Weddings / Civil Unions
 - Bereavement
 - Reciprocal Exchanges
 - Dating Relationships
 - Long-term Close Personal Relationship
 - Family
 - Acts of Neighborliness
 - Acts of Human Compassion

Political Reform Act – Advanced *Gift Exceptions – Social Relationships*

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- **Wedding / Civil Union**
 - Received at the public official's wedding or civil union
 - ✦ Exempt from gift amount limitations
 - Received by the public official when a guest at another person's wedding or civil union
 - ✦ Must be substantially the same benefit as received by other persons attending the wedding
- **Bereavement**
 - Received by the public official in memory of, or concurrent with, the passing of official's spouse, child, or relative.

Political Reform Act – Advanced *Gift Exceptions – Social Relationships*

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- **Reciprocal Exchanges**
 - Based on holiday, birthday, mutually attended social events, meals, entertainment, rounds of golf, sporting events
 - Commonly exchanged with the individual
 - Not disproportionate in value
 - Each party pays approximately his or her share
 - Not apply if single payment is \$470 or more
- **Dating Relationships**
 - Must be “Bona Fide”
 - May exchange “personal benefits commonly exchanged between people on a date or in a dating relationship.”
 - Unless a lobbyist or contractor or prospective contractor, then benefits are considered a gift that is not reportable, but subject to the \$470 limit.
- **Long-term Close Personal Friendship**
 - Relationship must be unrelated to official’s position
- **Family**
 - Extended Family (parents, siblings, children (natural adopted and step), in-laws, grand aunts, uncles, nieces, nephews, first cousins, first cousin once removed, spouse or former spouse of such persons.
 - Not former in-laws.

Political Reform Act – Advanced *Gift Exceptions – Social Relationships*

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- **Acts of Neighborliness**
 - A service performed, item loaned or other acts of ordinary assistance given
 - Consistent with polite behavior of civilized society
 - Not normally part of economic transactions between like participants in similar circumstances
- **Acts of Human Kindness**
 - Payments to offset family medical or living expenses
 - Official cannot make because of illness, accident, job loss or similar, or adoption of an “orphaned” child
 - Donor must have preexisting social relationship of the type that would typically provide such assistance
- **Acts of Human Compassion**

Political Reform Act – Advanced *Gift Exceptions – Social Relationships*

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Preconditions

- Existing social or business relationship apart from public official's position
- Not disproportionate in value
- Not given because of public officials status or position

Exceptions – Donor may NOT be

- Lobbyist
- Existing contractor or prospective contractor
- Acting as an intermediary

Incompatible Offices

Government Code Section 1099

“Nothing in this act is intended to expand or contract the common law rule prohibiting an individual from holding incompatible public offices. It is intended that courts interpreting this act shall be guided by the judicial and administrative precedent concerning incompatible public offices developed under the common law.”

- Prohibits a “public officer” from simultaneously holding two public offices if the offices are incompatible.

- **Offices are incompatible when:**

1. **Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;**

2. **Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices; and**

3. **Public policy considerations make it improper for one person to hold both offices.**

When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second.

95 Ops.Cal.Atty.Gen. 67 (2012)

- **Inapplicable:**
 - **Where specifically authorized by statute;**
 - **To a position of employment, including a civil service position;**
 - **To a governmental body that has only advisory powers; and**
 - **Where a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.**

What is a public office?

“For the purpose of the doctrine of incompatible offices, a public office is a position in government (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state.”

68 Ops.Cal.Atty.Gen. 337 (1985)

In addition, the Attorney General has opined that employment is not an office. Since “employment” is not an “office,” the doctrine of incompatibility of office does not preclude an official from simultaneously holding an office and an employment position.

58 Ops.Cal.Atty.Gen. 109, 111 (1975)

However, the opinions have not produced clarity primarily because of the lack of precise delineation between “employment” and “office.” For example, statutorily created positions that are often held by “employees,” such as city manager, police chief, fire chief, and city attorney, have been deemed public offices subject to the incompatible offices doctrine. In another example, the Attorney General has opined that a deputy principal is not necessarily holding the same office as the principal for purpose of incompatible offices and only does so when he or she stands in the principal’s shoes as acting principal.

78 Ops.Cal.Atty.Gen. 362 (1995)

Situational Recusal is Not Enough

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- The rule does not wait for an actual clash to occur
- Rather, the rule intercedes to prevent it
- Only one potential significant clash of duties or loyalties is necessary – it is enough to simply say that it “may” occur
- It is not sufficient for an incumbent to omit to perform one of the incompatible roles
- The doctrine was designed to avoid the necessity for that choice

97 Ops.Cal.Atty.Gen 50 (2014)

Penalties and Enforcement

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- Under the common-law doctrine and Government Code section 1099(b), where a public servant is found to have accepted two public offices, the doctrine and statute provides for an automatic vacating of the first office.

95 Ops.Cal.Atty.Gen. 67 (2012);
66 Ops.Cal.Atty.Gen. 293, 295 (1985); and
66 Ops.Atty.Gen. 176, 178 (1983)

Penalties and Enforcement

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- The doctrine can be enforced in a suit for *quo warranto* under Section 803 of the California Code of Civil Procedure. Disqualification or abstention from those decisions where an actual clash of the two offices occurs is not an available remedy under the common-law doctrine or the statute.

66 Ops.Cal.Atty.Gen. 176,177-178 (1983)

- If a *quo warranto* action is filed, notwithstanding the “legal forfeiture language,” the person remains in the prior office as a de facto member until he or she actually resigns or is removed from office by the *quo warranto* or other lawsuit.

74 Ops.Cal.Atty.Gen. 116 (1981)

Penalties and Enforcement

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A willful omission to perform any duty imposed on the public servant under the law is also punishable as a misdemeanor.

Government Code, section 1222; see also 82
Ops.Cal.Atty.Gen. 248 (1999)

Special Provisions for Public Attorneys

Government Code section 1128 concerns the right of public attorneys to hold other elective or appointive office. The statute provides the following:

“Service on an appointed or elected governmental board, commission, committee, or body by an attorney employed by a local agency in a nonelected position shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with or inimical to the duties of the attorney as an officer or employee of the local agency and shall not result in the automatic vacation of either such office.”

The Attorney General has opined that this statutory provision modified the common law in several respects and allows a public attorney to hold the second appointive or elective office even where a potential conflict may arise. This would then require transactional disqualification rather than forfeiture if a conflict presents itself. Finally, the statute not only applies to a deputy who stands in the shoes of his or her principal, but the principal himself or herself.

78 Ops.Cal.Atty.Gen. 362 (1995)

Specific opinions have allowed a deputy district attorney to serve on a city council, an appointed city attorney to serve on an airport commission and a deputy county counsel to serve on a city council.

**85 Ops.Cal.Atty.Gen. 115 (2002);
74 Ops.Cal.Atty.Gen. 86 (1991);
67 Ops.Cal.Atty.Gen. 347 (1984)**

Mass Mailings

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- **Basic Rule**
 - No newsletter or other mass mailing shall be sent at public expense. (Gov't Code § 89001)
- **FPPC Rule to clarify scope (2 CCR § 18901)**
 - (a) specifies what mailings are prohibited
 - (b) provides exceptions
 - (c) provides definitions

Mass Mailings

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- **Four Part Test**
 - The local agency *delivers* the item to the recipient
 - The local agency's item *features* an elected official of the local agency
 - The local agency *uses public funds* to produce or deliver the item
 - More than 200 substantially similar items are sent in a single calendar month

Mass Mailings

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- **Delivery**
 - Item is mailed or delivered by any means
 - To person's home, place of business or post office box
 - Emails, texts, tweets, website postings and similar internet material is not considered "mailed or delivered." Not tangible objects.
 - See FPPC Advice Letters: Lacy A-06-17 and Rabenaldt A-08-131

Mass Mailings

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- **Featured**
 - Use of photograph or signature; OR
 - Singles out the elected official by name or office in the layout (e.g. headlines, captions, type size)
- **Use of Public Funds**
 - The cost of distribution of the mailing is paid with public money
 - More than \$50 of public money is used to pay the cost of design, or production of the item
 - Done with the intent of mailing the item

Mass Mailings

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- **Exceptions**
 - Internet communications
 - Agendas and Meeting Minutes
 - Requested (solicited) or subscription items
 - Agency letterhead
 - Rosters / Directories
 - Press Releases
 - Inter/Intra Agency Communication
 - Payment/Collection of funds (e.g. utility bills)
 - Essential Program Materials
 - ✦ Materials sent to program recipients which are essential, may include the elected officer's name, title or signature if necessary for the functioning of the program
 - Legal Notices

Questions?

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The End