

Webinars for Cities

Nov. 4, 2022



LEAGUE OF
CALIFORNIA
CITIES

Strengthening California Cities
through Advocacy and Education

Essential Hour: Conflicts of Interest 101

City Attorneys Department

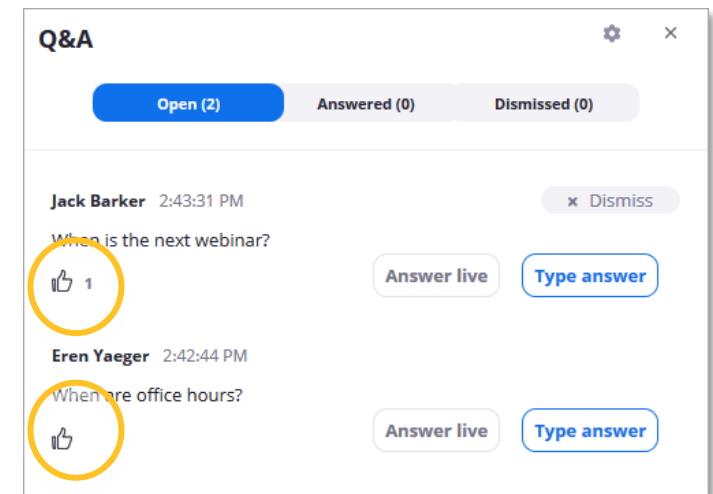
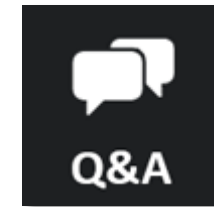
Morgan Foley
Markie Kersten
Rebecca Moon
Gregory Murphy
Teresa Stricker

Housekeeping Notes

- This session is being recorded.
- Attendees are muted.
- Question and Answer is available throughout the webinar.
- Following the presentation, the recording and slides will be shared with attendees.

How to Ask a Question

- To write in a question, select the Q&A button on your tool bar.
- You can “upvote” other attendees’ questions. This brings the most popular questions to the top of the Q&A screen.



Attorney Development and Succession Committee

- **Develop and enhance**
 - the legal, technical, practical, and interpersonal skills necessary to succeed as a city attorney or senior member of a City Attorney's Office
- **Provide opportunities**
 - for members to build and expand their knowledge of both substantive and essential skills integral to municipal law practice
- **Engage and connect**
 - experienced municipal practitioners with newer attorneys to encourage mentoring, effective knowledge transfer, and succession planning
- **Encourage**
 - municipal law practice in our law schools through panel discussions, internships, and mentorship

Attorney Development and Succession Committee

- **Subcommittees**

- Substantive Law
- Essential Skills
- Law School Outreach

- **Upcoming Events**

- 2023 Essential Hours: TBD

Panelists

- Morgan Foley, City Attorney, El Cajon, McDougal Love Boehmer Foley Lyon & Mitchell
- Markie Kersten, Assistant City Attorney, San Luis Obispo
- Rebecca Moon, Senior Assistant City Attorney, Sunnyvale
- Gregory Murphy, City Attorney, Buellton, Lawndale and Temple City, Burke, Williams & Sorensen
- Teresa L. Stricker, City Attorney, San Pablo

ESSENTIAL HOUR: CONFLICTS OF INTEREST 101

November 4, 2022



LEAGUE OF
**CALIFORNIA
CITIES**

Presented by:
City Attorneys Department
FPPC Committee

OVERVIEW

1. Disqualifying financial interests under the Political Reform Act
2. Prohibited financial interests in public contracts: Government Code section 1090
3. Common Law Conflicts Doctrine
4. Incompatible offices & activities
5. Mass mailing restrictions
6. Form 700 financial disclosure statements
7. California Rules of Professional Conduct

DISQUALIFYING FINANCIAL INTERESTS UNDER THE POLITICAL REFORM ACT



Political Reform Act Basics

- Under the PRA, **no public official shall make, participate in making or in any way attempt to use the official's position to influence a governmental decision** if the official **knows or has reason to know** that the official has a **disqualifying financial interest in the decision**.
- Fair Political Practices Commission (FPPC) adopts regulations and has enforcement authority.
- **Regulation 18700(a): The Basic Rule**: “A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or the official's immediate family, or on any [enumerated type] of financial interest.”



Who are “Public Officials” under the PRA?

- Every member, officer, employee and consultant of a state or local government agency, subject to exceptions.
- Common exceptions:
 - Members of bodies **without** decision-making authority unless recommendation is consistently accepted.
 - Many consultants
 - Under limited circumstances, includes nonprofit board members and officers.

What is a “financial effect”?

- “An effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value.”
- Practice Tip: “Adverse” or “negative” financial effects count!



What is a “Financial Interest” under the PRA?

- Business entity investment \geq \$2k direct or indirect
- Real property interest FMV \geq \$2k direct or indirect
 - Includes property located \leq 2 miles outside agency borders or from property agency owns/leases
 - Includes lease interests, unless month-month
- Source of income \geq \$500 promised/received in last 12 mo.
 - Includes noncommercial loans
 - Includes official's community property interest in spouse's income
- Source of gifts \geq \$520 (amount changes) in last 12 mo.
 - Many exceptions!
- For-profit business entity if official is a manager/employee
- Personal financial interest of official and immediate family

DISQUALIFYING FINANCIAL INTEREST: FOUR STEP ANALYSIS

Step 1: Is the Financial Effect “Reasonably Foreseeable”?

Financial Interest is explicitly involved in decision (Direct):

- Eg: Decision involves issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest.

Realistic possibility decision will have a financial effect on the financial interest (Indirect):

- If there exists a “realistic possibility and more than hypothetical or theoretical possibility.”
- FPPC looks at numerous factors in assessing

Step 2: Is the Financial Effect “Material”?

■ Business Interest:

- Explicitly involved in decision;
- Decision may impact revenues, assets or expenses at certain dollar thresholds (see regs); or
- Official is an officer or manager in business.

■ Real property interest:

- Explicitly involved in decision; or
- Property is close to a project’s boundaries:
 - Official owns: Rebuttable presumptions if project ≤ 500 ft or ≥ 1000 ft from property interest.
 - Official leases: Separate considerations (see regs)

Step 2 (cont'd): Is the Financial Effect “Material”?

- **Source of income:**

- Party/subject to decision; or
- Decision may impact income source at certain dollar thresholds (see regs)

- **Source of gifts over \$\$ threshold:**

- Party/subject to decision; or
- Meets other criteria (see regs)

- **Personal finances/personal financial effect:**

- Decision may result in financial benefit/loss \geq \$500 in any 12 mo. period
- Many exceptions!

Hypothetical

Your City's Planning Commission will consider whether to approve a conditional use permit for a proposed development project down the street from Planning Commissioner Garcia's home.

Must Commissioner Garcia recuse under the Act?

Analysis

It depends!

Does Commissioner Garcia (or her qualifying family) own the home? Is the Commissioner a renter?

- If she is a renter, is she month-month?
 - There are different rules for renters depending on the term of the lease.
- If she owns her home, exactly how far away is the project from her property?
 - Rebuttable presumptions if ≤ 500 ft or ≥ 1000 ft

Step 3: Does the Public Generally Exception Apply?

There is no disqualifying conflict if the financial effect on the official “is indistinguishable from its effect on the public generally.”

General Rule: Exception applies if you answer “yes” to both questions.

- 1) Is a significant segment of the public affected?
 - $\geq 25\%$ of all businesses, non-profit entities, real property or individuals within the jurisdiction.
 - $\geq 15\%$ of all residential real property in the jurisdiction if official’s only interest is the official’s primary residence.
- 2) Is the effect on the official’s interest not unique from the effect on the significant segment?

Step 4: Will the Official Be Making, Participating in Making, Using or Attempting to Use Their Official Position to Influence a Governmental Decision?

What is a “governmental decision”?

- “[A]ny action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision.”
- May include actions of certain nonprofits.

FPPC Reg. 18704.6 defines what actions constitute “making, participating in making, or in any way attempting to use the official’s position to influence” a governmental decision.

Recusal Requirements

If there is a disqualifying financial interest in a government decision, the public official must recuse from participation.

Special Recusal Rules for Code Filers (those listed in Gov. Code § 82700):

- The official must, prior to the agenda item being taken, make an oral disclosure of the official's financial interest in the agenda item and leave the dais.
 - Oral disclosure required if the official attends any part of the meeting.
 - No oral disclosure required if official misses entire meeting.
- Consent calendar: The official may remain at the dais after making oral disclosure and vote on the balance of the consent calendar.



Narrow Exception: Legally Required Participation/Rule of Necessity

If a vote is legally required and no alternative exists to vote on the matter, the public official may vote notwithstanding conflict.

Requirements:

- Conflict must be disclosed onto the record.
- Random selection of who may vote, if there are multiple conflicted members.
- Practice Tip: May not be used to establish a quorum (i.e., no cure for absences or vacancies).

Segmentation

Under certain circumstances, an agency may divide a decision so that a public official may vote on that portion of the decision in which the official does not have a conflict.

Common examples of decisions that can be segmented:

- Approval of development project involving multiple locations
- Budget approval
- Rezoning or General Plan Amendments

**FINANCIAL INTEREST
IN PUBLIC CONTRACTS:
GOVERNMENT CODE SECTION 1090**

Section 1090 Basics

If:

- Public official
- Who has a financial interest
- Makes a contract

Then:

- Contract is void
- Penalties apply

Application of Section 1090

- Public officials including “city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”
- Applies to consultants and independent contractors who have been entrusted to act on the government’s behalf.
- Inequities not required.

“Making” a Contract for Section 1990 Purposes

Construed broadly to include any act involving:

- Preliminary discussions
- Negotiations
- Compromises
- Planning
- Creating plans/specifications
- Soliciting bids
- Attempting to influence a related decision



Financial Interest

- Direct (contracting party) or indirect (related to contracting party)
- The possibility of gains or (maybe) losses
- Certainty not required
- “However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.”
(*People v. Deysher* (1934) 2 Cal. 2d 141, 146.)



Exceptions

Remote Interests (Gov. Code § 1091)

- Applicable to officers, employees, and consultants.
- Neither prevents the agency from entering into the contract nor prohibits the member, officer, or employee from participating. Disclosure may be required.

Ramifications for Violating Section 1090

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



Hypothetical

Councilmember Jones owns the construction company that has been awarded the contract to remodel City Hall. She recuses herself from participating or voting to approve the contract.

Is there a Section 1090 problem?



Analysis

Yes! The contract is void.

Councilmember Jones is financially interested in the contract. A councilmember's interest in the contract prohibits the city from entering into the proposed contract, even though the member does not participate in, and recuses from, the actual decision.



Hypothetical

A staff member wants to contract to sell a unique planning device that he invented to the city's planning department. The decision would be made by the city manager without any input from the employee.

May the contract be made?

Analysis

Yes, but only if the staff member:

- Discloses the financial interest and recuses from participating in or influencing the decision-making process.



COMMON LAW CONFLICTS OF INTEREST

Common Law Conflicts of Interest

The public deserves undivided loyalty from a decision-maker. (See Thomson v. Call (1985) 38 Cal.3d 633.)

- Watch for non-PRA issues with family, neighbors, constituents, friends, or foes.
 - Generally, only egregious facts will suffice for this group.
- Watch for uncompensated board members of nonprofits.
- Basically, this is an appearance issue – appearance of impropriety.

Hypothetical

Your city contracts for dial-a-ride transportation services. The contract was renewed in 2019 and is due to run for at least 5 years. A brand-new Council Member states that his cousin has experience in transportation, has started a short-distance company, and grew up in the City before moving 5 miles away. He would like to give his cousin a chance to compete for the work.

Can the city cancel the existing contract and put it out for proposals?

Analysis

No.

There's no financial impact to the Council Member. But this has a bad appearance. He's asking to cancel a contract and has actually told you that his cousin would benefit, even just by being able to bid. Do we think he has "undivided loyalty" to his public duties? Almost certainly not.

INCOMPATIBLE OFFICES AND ACTIVITIES

Incompatible Offices and Activities

Government Code 1099

- A public officer cannot hold two offices where:
 - There is a conflict of duties or loyalty; or
 - One office can supervise or overrule the other.
- Does not apply where a seat on one is based on being an officer of the other (council of governments; joint powers transportation agency; etc.).
- Does not apply to strictly advisory bodies.
- Does not apply to employment positions.

Government Code 1125 et seq.

- Outside activity that creates a conflict of duties or loyalty.
- Does not apply to elected officials .



Hypothetical

A senior planner, having 15 years of experience working for cities and 7 years in your city, begins an outside business. She consults with people who want to put up ADUs on their properties, marketing herself as an expert in dealing with building codes and city planning. As your city allows ADUs to bypass the Planning Department and go right to Building, she begins doing work for homeowners in your city.

Can she do this?

Analysis

No.

The outside activity does not directly involve the planner's duties at your city, but does utilize her experience and connections to benefit private parties who contract with her. While not a conflict of duties, she has created a conflict of loyalties because she is using her City Hall relationships to benefit her private business.

MASS MAILING RESTRICTIONS

Mass Mailings

- Public funds may not be used to mail 200 or more items featuring public officials.
 - Mail = delivery to addresses through the mail or via individual drops.
 - Featuring = photos or names.
- Not applicable to emails, social media, newspapers dropped in bundles at designated locations, press releases, materials included with a bill, legal notices, agendas, or letterhead.
- With so many exceptions, why do we keep seeing the problem? Sloppiness, intertwined community issues, unaware staff not asking for legal help.

FORM 700

Who, What, When?

- Who: Section 87200 Filers (includes: city council members, planning commissioners, mayors, city managers and chief administrative officers of cities, city attorneys, and more) & Designated Employees (local COI code).
- What: Reportable investments, business positions held, real property interests, income, and its sources that might cause a financial conflict of interest to arise in the filer's performance of duties for the local agency (more detail on next slide).
- When: Upon declaration of candidacy, assumption of office and annually thereafter (typically for January 1-December 31 period), and upon leaving office.

Disclosure Categories

- 1) Investments in a business entity doing/planning to do business in, or that has done business in previous 2 years in agency jurisdiction with a FMV \geq \$2,000.
- 2) Interest in real property located within the local agency's jurisdiction with a FMV \geq \$2,000.
- 3) Income, loans, and business positions \geq \$500 where the source is located in, doing/planning to do business in, or has done business in previous 2 years in agency jurisdiction.
- 4) Gift(s) from a single source \geq \$50 during the reporting period.
- 5) Travel payments.

Gifts

- A gift is anything of value for which you have not provided equal or greater consideration to the donor (e.g., tickets to sporting events, certain rebates/discounts not offered to public, hosted business dinners and accommodations at a conference).
- A gift with a FMV \geq \$50 must be reported (upon acceptance) on Form 700.
 - Differs from gift limit from single source: \$520 (adjusted every 2 years).
- Key Exceptions:
 - Return/Reimbursement/or Donation of Gift to Non-Profit
 - Deemed accepted if not returned (unused) to the donor or if not donated to non-profit or government agency within 30 days of receipt.
 - Gifts from Family/Long-time Friend/Existing Relationship
 - Ceremonial Role/Events Where Official Makes Speech
 - Campaign Contributions if Properly Reported

Travel Payments

- “Travel payment”: payments, advances, or reimbursements for travel, including transportation, parking, and related lodging and meals.
- Official must report travel payment (including reimbursement) as a reportable gift or source of income on the Form 700.
 - Key Exceptions:
 - Travel from Another Government Agency for Training
 - Certain Travel from a Government Agency or 501(c)(3)
 - Travel for Official Agency Business
 - Campaign Contributions if Properly Reported

Hypothetical

A council member from your agency attends a conference outside of your agency's jurisdiction. Your agency does not have a travel budget to pay for the council member's accommodation at the conference. Your council member's best friend since middle school is a council member in another city and invites your council member to stay in her hotel room. This council member will be reimbursed by her city for the cost of her travel and transportation, including the cost of the room. The cost of the room exceeds \$500.

Must your council member report the shared hotel room as a gift on her Form 700?



Analysis

It depends.

Gifts of travel, lodging and subsistence provided by a government agency are generally not subject to the gift limit. Here, even though your council member's friend's agency is paying for the hotel room, the friend is the donor of the gift, not the government agency.

However, because the gift is from your council member's long time best friend, this gift is likely not reportable on her Form 700 under the "Long-Time Friend" exception (unless there were facts indicating that the best friend was involved with business before your council member).



CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Conflicts

of Interest

Representation

Foundation of Ethical Standards – Conflicts of Interest

The Rules “are intended not only to establish ethical standards for members of our bar, but are also designed to protect the public.” (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917.)

Conflicts of interest under the Rules are distinct from those under the Political Reform Act and can sometimes be waived by the client’s informed written consent (“Consent”).

Rule 1.7 – Concurrent Representation

The most fundamental of our Rules, requiring Consent prior to representation where clients’ interests are directly adverse in a current matter or where there is a significant risk the lawyer’s representation of the client will be materially limited by responsibilities or relationships with another current/former client, third party, or personal interests.

Rule requires that a lawyer provide loyalty to all current clients.



Conflicts

of Interest

to represent

Duties to Clients; Former Government Officials & Employees;

Rule 1.9 – Duty to Former Clients

Prohibits a lawyer from representing a client in “the same or substantially related matter” as the lawyer represented a former client if the proposed client’s interests are “materially adverse” to the former client’s interests, unless the former client Consents.

Prohibits using or revealing information obtained from a former client in confidence.

Rule 1.11 – Duty of Former Public Officials/Employees

Requires Consent from public agency where lawyer participated “personally and substantially” in a matter as a public official/employee and seeks to represent a current adverse client in the same matter.

Precludes a lawyer who, as a public official/employee, acquired what the lawyer knew was “confidential government information about a person” from later representing a private client in a matter if the information “could be used to the material disadvantage of that person.”

Conflicts

of Interest

to

The Holy Grail: Public Agency is the Client

Rule 1.13 – Client is the Organization

Establishes that the public lawyer’s client is the agency, acting through its duly authorized elected and appointed officials, and not the agency’s officials/employees.

Imposes disclosure requirements where agency interests are adverse to official/employee.

Imposes duties where lawyer knows/reasonably should know that an official/employee “is acting, intends to act or refuses to act” in a manner that (1) is a violation of a legal obligation to the agency or a law reasonably imputable to the agency, and (2) the violation is “likely to result in substantial injury” to the agency.

Comment 6 to Rule 1.13 provides a general definition of government client. (See, also, *Ward v. Superior Court of Los Angeles County* (1977) 70 Cal.App.3d 23.)

Conflicts

of Interest

Responsibilities

Advocacy; Communications with Others' Clients; Responsibilities of Deputies

Rule 3.10 – Threats of Charges

Prohibits the lawyer from threatening criminal, administrative, or disciplinary charges to obtain advantage in a civil dispute. Usually arises where we might have prosecutorial powers.

No violation if statement is made in good faith.

Rule 4.2 – Communications with Represented Person

Prohibits communications with person the lawyer knows to be represented about the subject of the representation without other lawyer's consent.

Does not prohibit lawyer's communication with a "public official, board, committee, or body."

Exception does not apply to employees who are not "officials."

Rule 5.2 – Duties of Subordinate Lawyers

Requires junior lawyers to comply with the Rules.



Conflicts

of Interest

to

Greater Responsibilities Required of Government Lawyers

Public agency attorneys are held to a higher standard of conduct:

“A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.” (*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746)

Rule 4.1 – Truthfulness in Statements to Others

When representing a client, must not make a knowingly false statement of a material fact or law to a third person.

Rule 4.3 – Communications with Unrepresented Persons

Must not state or imply that the lawyer is disinterested when communicating with an unrepresented person on behalf of a client



Conflicts

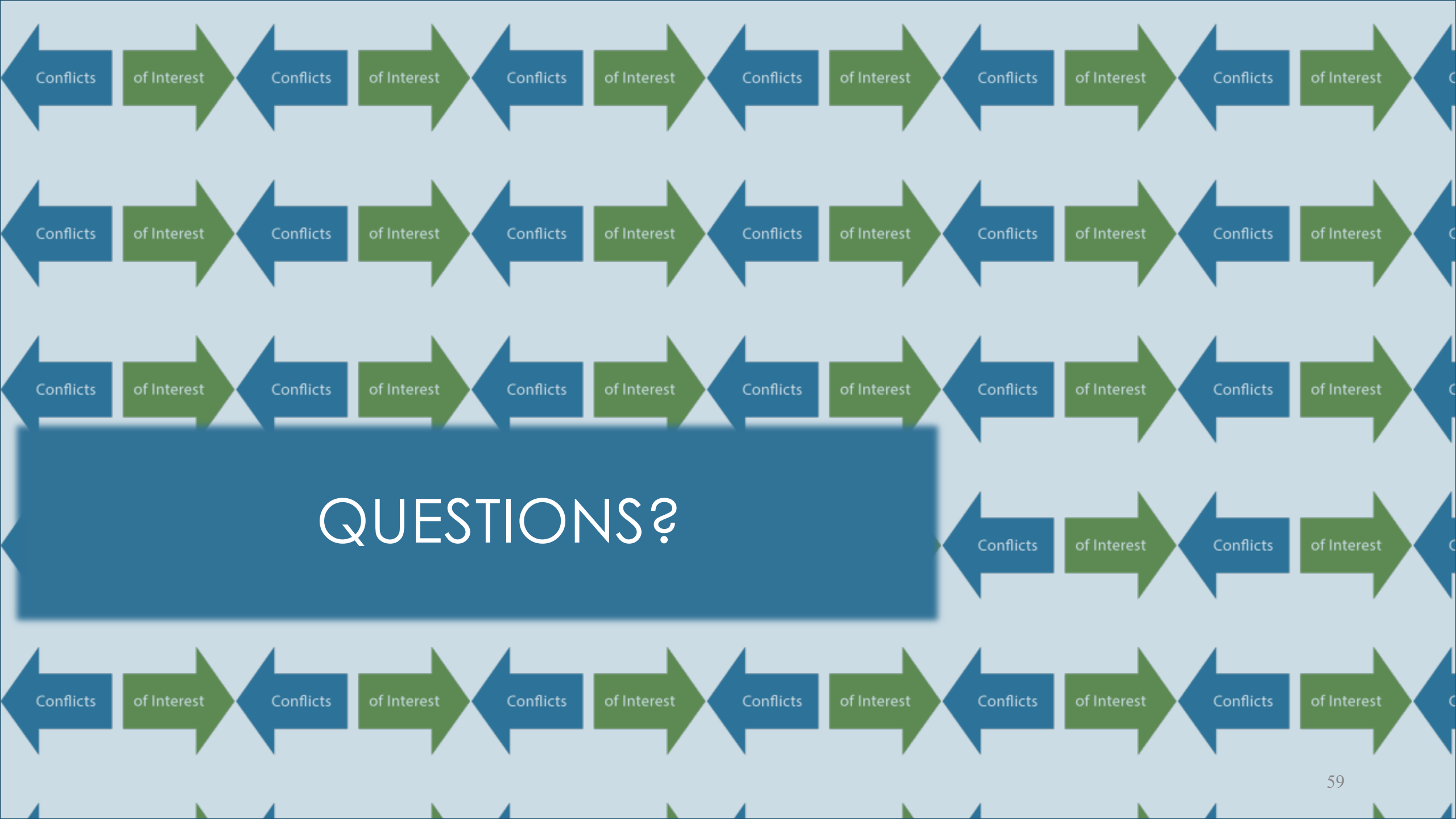
of Interest

Resources

2

Conflict of Interest Resources

- 1) League of California Cities – *A Guide for Local Agency Counsel: Providing Conflict of Interest Advice*:
https://www.calcities.org/docs/default-source/city-attorneys/conflict-of-interest-guide1240b84a-e02b-4ba3-9b4b-909ae4713742.pdf?sfvrsn=bb62333c_8
- 2) FPPC Regulation Index: <https://fppc.ca.gov/the-law/fppc-regulations/regulations-index.html>
- 3) FPPC Advice Letter Search: <https://fppc.ca.gov/advice/advice-opinion-search.html>
- 4) California Rules of Professional Conduct:
<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules>



QUESTIONS?

THANK YOU

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Strengthening California Cities
through Advocacy and Education

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