

Providing Conflicts of Interest Advice

**An Overview of the
2022 Edition Updates**
May 5, 2022

Presented by

- Outgoing FPPC Committee Chair
Teresa Stricker, San Pablo City Attorney
- Incoming FPPC Committee Chair
Rebecca Moon, Sunnyvale Senior
Assistant City Attorney

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What is
*Providing
Conflicts of
Interest
Advice?*

- A Cal Cities' guide to providing public officials with conflicts of interest advice.
- Exceptional go-to-guide for California local agency lawyers
 - ✓ **Worthy of a bookmark!**

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Thank You, 2021 FPPC COMMITTEE

- Teresa Stricker, Chair
 - City Attorney, San Pablo
 - Martin de los Angeles
 - Best Best & Krieger
 - Asst. City Atty, Milpitas & St. Helena
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 - Christina Cameron
 - Devaney Pate Morris & Cameron
 - Morgan Foley
 - McDougal, Love, Boehmer, Foley, Lyon & Canlas
 - Eric Casher
 - Meyers Nave
 - City Atty, Pinole
- And Special Thanks to Corrie Manning, Harveen Gill, Alison Leary, Janet Leonard and the rest of our fabulous Cal Cities staff!* ³

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Why an Update?



Last edition was in 2016



Need to reflect new law



Make it even more user friendly



Presentation highlights the most significant substantive changes.

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Terminology: “Public Official”

The Committee replaced the term “**public servant**” throughout the publication with the more familiar term “**public official.**”

- CAVEAT: As with the prior edition, practitioners should keep in mind that application of conflicts of interest rules varies from statute to statute.
 - *Local agency counsel should review each law to determine how it applies to the unique circumstances.*

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Revised Rules of Professional Conduct



The Rules of Professional Conduct were revised and renumbered in 2018.

Changes made to *Providing Conflicts of Interest Advice* to reflect these modifications.

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Rule 1.13 – “Organization As Client”

- Rule 1.13 clarifies that the local agency – and not any individual public official – is the client of local agency counsel.
- When advising a public official, agency counsel must:
 - Inform the official that counsel represents the agency and not the official,
 - if counsel knows or reasonably should know that the official’s interests are adverse to the agency’s interests.
- The attorney client privilege is held by the full governing board of the agency, and not any individual official, even as to conflicts of interest advice.

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Does the 1988 A.G. Opinion Still Apply?

In 71 Ops.Cal.Atty.Gen. 255 (1988), the AG opined that a city attorney is barred from prosecuting an official for violations of the Political Reform Act when the attorney:

- Obtained information in confidence from the public official,
- under circumstances leading the official to believe that a confidential relationship existed between the city attorney and the official.

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Does the 1988 A.G. Opinion Still Apply?

Because the opinion was issued long before Rule 1.13 clarified that the agency, not the official, is the city attorney's client, the AG might not reach the same conclusion today.

- See in depth discussion in Cal Cities publication *Practicing Ethics: A Handbook for Municipal Lawyers*, Revised 2nd Ed. (2020 Cal Cities). Available at www.cacities.org/practicingethics

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More on Rule 1.13

What if a public official refuses to follow agency counsel's advice?

- The attorney *must* take the issue up the chain of command *if* the lawyer knows or reasonably should know the official's action/inaction is *both*:
 1. A violation of the official's duty to the agency, or a violation of law reasonably imputable to the agency;

AND

 2. Likely to result substantial injury to the agency.

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SB 45: Mass Mailing Restrictions



- Legislature incorporated the FPPC's mass mailing restrictions (now repealed Reg. 18901) into Gov. Code Sec. 89002.
- Clarifies which mailings may be paid for with public funds and which may not.
- Gov. Code Sec. 89003 also now prohibits certain mass mailings by or on behalf of a candidate whose name is on the ballot within 60 days of the election.

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Gov. Code Section 1090

Latest Developments

- In 2017, the Calif. Supreme Court held that 1090 applies to certain independent contractors: *People v. Superior Court* (2017) 3 Cal.5th 230 (Sahlolbei)
 - Independent contractor/physician receiving payments for recruiting new doctors to public hospital is subject to section 1090.

(more next slide)

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Section 1090 - Taxpayer Actions

- Gov. Code Sec. 1090 does not, by itself, grant a cause of action to any taxpayer.
- Only taxpayers with standing under CCP Sec. 526a may assert that a contract violates 1090.

➤ *San Diegans for Open Gov't v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 736, 746.

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Section 1090 - Taxpayer Actions

San Diegans for Open Government holds that a taxpayer with standing may sue for a 1090 violation generally only after first making a demand that the public agency act.

- See *Gilbane Bldg. Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, 1532, finding no demand required where:
- demand would be “unavailing” because taxpayer alleged illegal expenditure of funds for unlawful purpose
 - and “its management is in the hands of the persons accused of the wrongdoing”

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Financial Interests



- “Making a Decision”
- Oral Disclosure Requirements
- Gifts of Travel
- Prizes and Awards
- Materiality Standards
 - Personal Finances
 - Sources of Income
 - Real Property

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“Making A Decision”

- Clarified handbook re: FPPC Reg. 18704 (not new)
- An official participates in a “governmental decision” if the official:
 - provides information, opinion, or recommendation
 - for the purpose of affecting any action, obligation, or commitment as to the official's agency including entering into any contractual agreement on behalf of the official's agency.
- **“Public official” has a technical meaning under the PRA**
 - Every member, officer, public official, or consultant of a state or local government agency, with certain exceptions. (18700(c))

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Oral Disclosure Requirement for Code Filers

- “Code Filers” hold offices described in Gov. Code Sec. 82700.
 - Examples: city council members, planning commissioners, mayors, city managers, city attorneys, city treasurers, chief administrative officers, other public officials who manage public investments, and candidates for any of these offices.
- Reg. 18707 requires Code Filers to make an oral disclosure of the official’s economic interest in an item on the agenda in which the official has a disqualifying conflict of interest. (This is not new.)

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New Oral Disclosure Requirement: Code Filers Absent from Part of the Meeting

- Amended Reg. 18707(a)(3) imposes new disclosure requirements on Code Filers who are absent from *part* of a meeting.
- *New*: If a Code Filer attends *any portion* of a meeting which includes an item for which the official is disqualified, the official must make the oral disclosure *even if the official is absent during the item*.
 - If the Code Filer leaves *before* the item is heard, the disclosure must be made before leaving.
 - If the Code Filer arrives *after* the item is heard, the disclosure must be made “immediately upon joining the meeting.”
- No disclosure required if the Code Filer misses the *entire* meeting.

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Gifts of Travel Exceeding Gift Limit

- Confusing topic - clarified discussion in the handbook (not new).
- Payments for travel, lodging, and food reasonably related to a governmental purpose are not prohibited or limited by the “gift” regulations if (Gov. Code 89506; Regs. 18942(b)(1), 18950):
 1. Travel is paid by a government entity, bona fide educational institution, or tax-exempt non-profit organization; or
 2. Travel is in connection with a speech given by the official within the U.S., lodging is limited to the day preceding, of, and after the speech.
- All other gifts of travel are subject to the annual gift limit.
- For recusal rules, see Reg. 18702.4.

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Gifts of Travel – Form 801 Alternative

Travel payments may be treated as a gift to the public agency, not to the official (Reg. 18950.1), if:

- Payments are made directly to, or coordinated with, the public agency employer for official agency business
- Employer determines which public official will use the payment
- Duration is limited to the purpose of the travel
- Agency reports the travel on Form 801
 - Official does not report the travel on Form 700

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Prizes and Awards

- Clarification in the handbook (not new law) re Reg. 18942(a)(14)
- A prize or award received in manner not related to public official's status, in a bona fide contest or game of chance, is not a gift.
- *However, if not reported as a gift, a prize or award is considered income (except for winnings from the California State Lottery).*

➤ Practice Tip: If it's not a "gift" it may be "income" and visa versa.

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Materiality: Personal Finances



- Reg. 18702.5 amended to provide a bright-line materiality rule in favor of the more difficult to define "measurable financial benefit".
- New Standard: Effect on personal finances is material *if the decision may result in the official or immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period.*

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Personal Finances- Exceptions

- Legal counsel should consult Reg. 18702.5 to make sure the circumstances meet the requirements of the exceptions.
 - Certain salary, retirement or other benefits, and expense reimbursements under narrow circumstances
 - Certain types of appointments
 - Certain types of incidental use of agency provided equipment
 - Rewards from certain types of reward programs.
- If financial effect is on the official's business entity or real property, materiality is analyzed under those rules.

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Materiality: Sources of Income

Reg. 18702.3 was substantially revised in 2019 related to materiality of financial impacts on an official's sources of income.

- **Eliminated distinctions** between income from sale of goods/services versus sale of personal or real property.
- **New bright-line rules** with monetary thresholds for income received from individuals or nonprofit entities.
- **Spouses included in "nexus test"** (financial effect on a source of income is material if the official or official's spouse received or was promised income to achieve a purpose or goal of the payor).

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Income – Exclusions from Definitions

- Gov. Code 82030(b) contains a list of exclusions from the definition of “income”.
- Not new law, but important to be aware of these exclusions when advising officials.
- Two common exclusions:
 - Salary received from another government agency
 - Reportable campaign contributions

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Nonprofit Entities

- Nonprofits are not “business entities” (Gov. Code 82005)
- Financial interest in a **nonprofit** means receipt of compensation >\$500 in previous 12 months (salary, stipend or meeting fees).
- Practice Tips:
 - **Compensation is the key!** An uncompensated management position in a nonprofit is not a financial interest.
 - **But** the official may nevertheless have a common law conflict of interest that requires recusal in that situation.

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Materiality: Nonprofits

A decision has a material financial effect on the official's financial interest in receipt of income from a nonprofit if the decision will (Reg. 18702.3):

- ↑↓ nonprofit's annual gross receipts, or value of nonprofit's assets/liabilities, in amount \geq \$1M or 5% of nonprofit's annual gross receipts if at least \$10k; or
- ↑↓ nonprofit's expenses in amount \geq \$250k or 1% of the nonprofit's annual gross receipts if at least \$2.5k; or
- Official knows, or has reason to know, that the nonprofit has an interest in real property that is affected by the decision in ways outlined in the regulation.

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Business Entities: Small Shareholders

- General rule: \$2,000 investment is the threshold for a conflict.
- Small Shareholder Exception (Reg. 18702.1(b)):
 - Official's only interest is an investment worth \$25,000 or less
 - And the investment is less than 1% of the entity's shares.
- This exception cannot be used if:
 - Entity's real property is a named party or subject to the decision,
 - Or the decision will materially impact (as defined in the reg) the entity's gross revenues, assets, liabilities, or expenses,
 - Or if the official is an employee of the entity (see Reg. 18702.3)

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Small Shareholder Exception - What Is It Good For?

The exception may apply when:

- The business entity owns real property that will be substantially affected by a decision (e.g. a nearby project) but the entity's property *is not* a named party or subject to the decision;
- Or the business entity is "explicitly involved" in a decision not involving its real property,*

AND

- The decision *will not* materially impact (as defined in the reg) the entity's gross revenue, assets, liabilities, or expenses.

**If a contract is involved, separately analyze potential G.C. 1090 issues!*

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Real Property



- **Major changes** to Reg. 18702.2 in 2019.
- **Re-established bright-line tests** based on the official's distance from a project.
 - 500' or less
 - More than 500' but less than 1,000'
 - 1,000' or more
- The distance rules apply to **ownership interests**. If the official's interest is a leasehold, different rules apply (See 18702.2(c))

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Real Property Outside the Jurisdiction

- Clarification in the handbook (Gov. Code 82035) – not new
- Where regulations refers to real property located “within the jurisdiction” of the agency, this includes property:
 - Within the agency’s jurisdictional boundaries; or
 - Not more than two miles outside the boundaries of the jurisdiction; or
 - Within two miles of any land owned or used by the local government agency.

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Effects Presumed To Be Material

- The official’s parcel is directly affected or subject to a decision
 - E.g., official’s parcel is being rezoned, within a plan area, etc.
- Or the decision involves property located 500’ or less from the official’s parcel unless:
 - There is “clear and convincing evidence” that the decision will have “no measurable impact” on the official’s property.
 - Extremely high bar! The official should not participate without an FPPC letter allowing participation unless the public generally exception clearly applies.

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Gray Area: Between 500'-1,000'

- Decision involves property >500' but <1,000' from the official's parcel, effect is material if decision would change the parcel's:
 - Development potential;
 - Income producing potential;
 - Highest and best use;
 - Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality;
 - Market value.
- Prudent to get an FPPC letter unless the project is very small, or public generally exception clearly applies.

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Rebuttably Presumed Not To Be Material

- The decision involves property located 1,000' or more from the official's parcel,
- Unless there is "clear and convincing evidence" that the governmental decision would have a "substantial effect" on the official's parcel.
- May be prudent to get an FPPC letter if the project is very large, unless public generally exception clearly applies.

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“Public Generally” Exception

Reg. 18703 – the financial effect of a decision on a public official is “indistinguishable from its effect on the public generally” if a “**significant segment**” of the public is affected and effect on the official is “**not unique.**”

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“Public Generally” Exception – 15% Threshold for Personal Residence

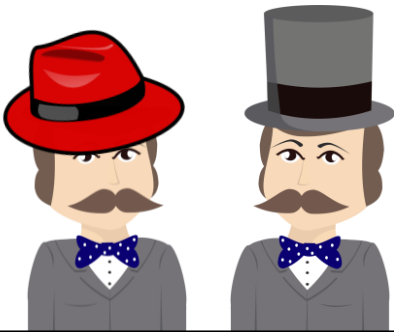
- “Significant segment” means:
 - **25%** of all businesses, non-profit entities, real property, commercial real property, residential real property, or individuals within the jurisdiction.
 - **New rule: 15% of residential real property in the jurisdiction if official’s only interest is their personal residence**
- If an official is elected or appointed to represent a geographic district, “jurisdiction” means that district, not the whole city.

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Incompatible Offices

Re-organized
this section of the
handbook (not new)



- Two sources of law:
 - Common law
 - Gov. Code Section 1099
- Violation results in forfeiture of the first office
- Common situations:
 - Official filling two roles
 - Bodies with overlapping authority
- Exceptions:
 - Purely advisory boards
 - City rep. on a regional board or JPA
 - Lower-level employment position in a different agency (not an “office”)

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Questions



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