

Abstentions and Disqualifications - Conflicts of Interest and When One Must or Should Step-Aside

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2:00pm-3:00pm**

Speakers

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Moderator

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**Thank you to ILG Partners Liebert Cassidy
Whitmore and Burke, Williams & Sorensen for
making this webinar possible!**

How to ask a question during the webinar

- **Please type your questions into the question box at any time during the webinar.**
- **We will read your questions during the question period at the end of the webinar.**



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ILG Mission

- Promoting good government at the local level
- Practical, impartial and easy-to-use materials

Abstentions and Disqualifications - Conflicts of Interest and When One Must or Should Step-Aside



Agenda

- It can be difficult for public officials to determine when to abstain from the decision-making process. This webinar will discuss:
 - What financial interests and other conflicts of interest disqualify an official from participating in, or influencing, the decision-making process;
 - Guidelines for deciding when to abstain; and
 - What to do if you abstain or disqualify yourself from the process.

Legal Backdrop

- Government Code section 1090
- Political Reform Act - Government Code section 87100
- Conflicts and Campaign Contributions – Government Code section 84308
- Conflicts when leaving office – Government Code section 87407
- Conflicts and Gifts – Government Code sections 89503, 89506
- Common Law Bias Prohibitions

General Duties

- Duty to Avoid Conflicts, or Even the Appearance or Possibility of a Conflict
- Public Officials and Employees Must Perform Their Duties:
 - Impartially;
 - Free from Bias Caused by Own Financial Interests; or
 - Free from Bias Caused by Financial Interests of Supporters

Gov't Code §1090 - Contracts

General Rule

- A Public Officer or Employee May Not Make Contracts in Which He or She Is Financially Interested



Gov't Code §1090 Test

Is There a Gov't Code §1090 Issue?

1. Is the Person an Officer or Employee?
2. Is There a Contract?
3. Did the Person “Make” the Contract?
4. Do They Have a Financial Interest?



What is a “Financial Interest?”

- Financial Interest Is Not Defined by Statute
- General Inquiry:
 - Would Employee or Official Realize a Private Gain?
 - Would the Interest Cause the Employee’s or Official’s Loyalties to Be Divided?
- Can Be Direct or Indirect Financial Interest

Gov't Code §1090 Exceptions

If Gov't Code §1090 Is Triggered, It Is Not a Violation If One of the Following Applies:

1. The Financial Interest Is a Statutory “Non-Interest”
2. The Financial Interest Is a Statutory “Remote Interest”
3. The Narrow “Rule of Necessity” Exception Applies

Effect of Gov't Code §1090 Conflict

- The Legislative Body Is Barred from Making the Contract
- Abstaining Is Insufficient to Cure a Conflict
- Does Not Matter if Contract Is Fair or More Advantageous
- No “Good Faith” Defense
- If the Contract Is Already Made, It Is Void and Unenforceable

Political Reform Act

Gov't Code §87100

General Rule

- No Public Official May Make, Participate in Making or in Any Way Use or Attempt to Use His/Her Official Position to Influence a Governmental Decision in Which He/She Knows or Has Reason to Know He/She Has a Financial Interest

Political Reform Act Test

1. Are You a Public Official Making, Participating in Making, or Attempting to Use Your Position to Influence a Decision?
 - Do You Exercise Discretion or Judgment with Regard to the Decision?
2. If Yes, Do You Have an Economic Interest in the Decision?
3. If Yes, Is Your Interest Directly or Indirectly Involved in the Decision?
4. If Direct, Is Your Interest Material?

Political Reform Act Test (Cont'd)

5. If Material, Is It Reasonably Foreseeable that the Decision Will Have a Material Effect on Your Economic Interest?
6. If Foreseeable, Is the Effect Distinguishable from Effect on Public Generally?
7. If Not, Is Your Official Participation Nonetheless Required?

What Do You Do When a Conflict Exists?

- Member of Board, Council, or Commission Must:
 1. Publicly Identify, in Detail, the Financial Interest
 - Unless Closed Session Issue, Which Only Requires General Disclosure of a Conflict During a Public Meeting
 2. Leave the Room/Refrain from Participating
 3. Disqualified Officer May Speak During Time General Public Speaks on the Issue if the Conflicting Interest Is a Personal Economic Interest
 4. Disqualified Officer Not Counted in Quorum
 5. Employees/Officials-No Clear Requirements, But Should Advise Manager/City Attorney Immediately

Conflicts of Interest and Campaign Contributions – Govt. Code §84308

- Only Applies When Decision Relating to Licenses, Permits, or Entitlements for Use Pending Before Certain State and Local Boards and Agencies.
- An Officer of a “Public Agency” May Not Receive/Solicit Direct Campaign Contributions:
 - More than \$250 Within Preceding 12 Months;
 - From Parties/Other Financially Interested Persons;
 - During Proceeding Involving a License, Permit, or Other Entitlement for Use; **AND**
 - For Three (3) Months After a Final Decision Is Rendered
- **Note:** Does Not Cover Elected Officials Unless Also Serve in Capacity Other Than that for Which They Are Directly Elected

Conflicts of Interest When Leaving Office – Govt. Code §87407

- Before Leaving Office:
 - Public Official May Not Make, Participate in Making or Influence Government Decisions;
 - Directly Relating to Any Persons with Whom Public Official Is Negotiating or Has Any Arrangement Concerning Prospective Employment



Conflicts of Interest When Leaving Office – Govt. Code §87406.3

- For One Year After Leaving Office:
 - An Elected Official/City Manager/Chief Administrative Officer, or General Manager;
 - May Not Be Compensated as an Agent/Attorney/Representative of Another Person;
 - To Appear Before or Communicate with Their Former Agency for the Purpose of Influencing
 - Regarding an Administrative Action or a Legislative Action (Permits, Licenses, Grants, or Contracts Proceeding Sale or Purchase of Goods or Property, Adoption of Rules, etc.)

Limitations on the Receipt of Gifts – Gov't Code §§ 89503, 89506

- A “Gift” is:
 - Any Payment or Benefit
 - That Confers a Personal Benefit
 - For Which the Official/Employee/Recipient Does Not Provide Goods or Services of Equal or Greater Value (Including Rebates/Discounts Unless Made in the Regular Course of Business to Members of the Public)

Does the Gift Limit Apply to You?

- Elected State or Local Officers or Candidates;
- City Managers, City Attorneys, Public Officials Who Manage Public Investments (Gov't Code § 87200);
- “Designated Employees” Who Are Identified by an Agency’s Conflict of Interest Code

Limitations on the Receipt of Gifts

– Gov't Code §§89503, 89506

- Evaluate Each Gift to See if the Following Provisions Are Triggered:
 - Officials and Candidates:
 - 1) Cannot Accept Any Gift(s) from One Source Worth More Than \$470 in a **Single Calendar Year** if Required to Report Receiving Gifts from that Source;
 - 2) Are Disqualified from Participating in Decisions Involving the Source of Gift(s) of \$470 or More in Previous **12-Month Period**
 - Gifts Aggregating \$50 or More in a Calendar Year Must Be Reported on Form 700
 - Agency's Conflict of Interest Code May Provide Further Information Regarding Disclosure of Gifts

Limitations on the Receipt of Gifts

2 C.C.R. §18944

- Gifts Made to Official and Family Member = Gift to Official for Full Value
- Gift Given Directly to Family Member = Gift to Official if:
 - Gift Reduces Official's Normal Obligation to Financially Provide for Family Member;
 - Official Uses Gift;
 - Official Controls Who Will Use Gift; **OR**
 - Giver Involved in Government Decision Within Last 12 Months.

Exception: Official Can Show an Established Working/Social Relationship Between Donor and Family Members

Common Law Bias Prohibitions

- Common Law Bias Based on Personal Interest: Public Officials Cannot Use Their Position for Personal Gain
- Common Law Bias or Prejudice Based on Unofficial Source: Decision at a Hearing Should Be Based on the Record
- Common Law Prohibition on Prejudging: Public Official Should Not Be Committed to an Outcome Before the Hearing. Opinions Are Okay, But Should Not Approach a Hearing With a Closed Mind

Disqualification vs. Abstention

- **Disqualification-** When a public official is legally required to not participate in the decision-making process due to financial or other relationships.
- **Abstention-** When a public official voluntarily does not participate in the decision-making process based on his or her own concerns about an ability to make a fair decision.

Hypothetical #1

- Carla Council Member leases a restaurant at a strip mall. A new trolley stop is proposed at one end of the strip mall. May Carla be involved with the decision of whether to allow the trolley stop at the strip mall?



Hypothetical #1



- Probably not.

Hypothetical #2

- Peter Planning Commissioner owns a print shop in a neighboring town. The town is considering whether to build a new parking lot two buildings down from Peter's print shop. May Peter speak out about the parking lot?



Hypothetical #2

- Yes!



Hypothetical #3

- Sue Supervisor is on the Board of Supervisors in Suntown. Sue is the paid CEO of the Suntown Economic Development Association (SEDA). SEDA has proposed constructing a large multifamily housing project in the City. At tonight's Board meeting, may Sue suggest putting the proposed project on the November ballot?

Hypothetical #3



- No, Sue may not propose putting the project on the November ballot.

How Do I Disqualify Myself?

- Ask your City Attorney!
- Then:
 - Publicly identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public.
 - Recuse yourself from discussing or voting on the matter.
 - Leave the room until after the discussion, vote, or any other disposition of the matter (unless the matter is on the consent calendar). Gov't Code section 87105.

City Attorney 

What If The Disqualification Involves My Business Or Property?

- A public official may speak during public comment *if* the subject of the decision is:
- (A) Real property owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family;
- (B) A business entity owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family; or
- (C) A business entity over which the official, members of his or her immediate family, or the official and members of his or her immediate family solely or jointly exercise full direction and control.

Do I Need To Leave the Dais Or Room If I Voluntarily Abstain?

- There are no state law requirements that a public official leave the dais or leave the room if he or she voluntarily abstains.
- However rules specific to your jurisdiction may require you to leave the dais or room.
- In addition, public officials may wish to consider whether, as an ethical matter, they wish to follow the disqualification procedures.

Hypothetical #4

- A council member's home is across the street from a proposed multi-use project. May the board member write to the city council in support of the project?



Hypothetical #4

- Yes!



Questions?





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Nira Doherty is an experienced litigator in both state and federal courts. Her litigation and transactional practice emphasizes general municipal law, CEQA, land use, labor and employment law, and code enforcement issues. Additionally, Ms. Doherty serves as the Interim City Attorney for the city of South Lake Tahoe and the Assistant City Attorney for the cities of St. Helena and Pacifica.



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Christina Burrows is an associate attorney in the firm's Los Angeles office and is a member of the Public Law Practice Group. Ms. Burrows regularly advises cities and other public agencies on a variety of public law issues, including the Government Claims Act, the Public Contract Code, the Public Records Act, and the Brown Act. Ms. Burrows has served as counsel during City Council, Planning Commission and Board of Directors meetings. In addition, Ms. Burrows has successfully defended cities and other public agencies in breach of contract, tort, and employment lawsuits.



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Shelline Bennett has represented management in labor and employment-law matters for over 20 years. She has worked with both private and public employers, including cities, counties, special districts, housing authorities, and community colleges, as well as nonprofit organizations. She has an extensive litigation background in both federal and state courts. Shelline's practice also includes representation in disciplinary appeals, administrative hearings, arbitrations, mediations, investigations, and labor relations and negotiations, including serving as lead negotiator at bargaining tables. Shelline has served as a factfinding panel member in a number of factfindings under both the MMBA and EERA. She advises and counsels in all labor and employment-law matters, including the meet and confer process, wage and hour issues, disability and leave issues, and due process and disciplinary matters. Shelline represents employers not only in court but before the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, the Labor Commissioner, the Workers' Compensation Appeals Board, the California Unemployment Insurance Appeals Board, arbitrators, and Personnel and Civil Service Commissions.

As Managing Partner of the Fresno office, Shelline brings her extensive legal and management expertise to the numerous trainings and workshops she presents on topics including discrimination, harassment, retaliation, wage and hour, managing performance through evaluations, medical leave, discipline, hiring, firing, legal updates, Brown Act, ethics, and prevention of litigation.

ILG's Ethics and Transparency Resources

AB 1234 Training

Understanding Public Service Ethics Laws

The Brown Act and Open Meetings

Good Governance Checklist



Visit www.ca-ilg.org
to find out more!

Join us for the last webinar in our ethics series!

- **The Brown Act (November 1st, 10am)**
- **Completing Your Statement of Economic Interest - Form 700 (November 16th, 10am)**
- **Tips to Promote an Ethical and Transparent Culture (December 5th, 2pm)**

Find out more here:

www.ca-ilg.org/post/upcoming-ilg-webinars

Thank You!

**And thank you to ILG Partners Liebert
Cassidy Whitmore and Burke Williams &
Sorensen**

**The webinar recording and PowerPoint slides
will be available on ILG's website shortly.**

**If you have additional questions please
contact Melissa at mkuehne@ca-ilg.org**