

Public Agency Ethics Laws

San Diego Community Power
Community Advisory Committee

PRESENTED BY
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ATTORNEYS AT LAW

Why Is This Training Important

- Understand the basics of the law
- Learn best practices
- Promote positive public perceptions
- Avoid legal problems



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Conflict Laws Focus on Personal Financial Interests

- **Political Reform Act**
 - Decisions of Government Officers and Employees
- **Gov. Code § 1090**
 - Contracts “Made” by Government Entities



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What's the Difference between the PRA and GC 1090?

- All contracts made by a government agency involve a governmental decision *but* not all governmental decisions involve a contract
- When a decision involves a contract, both the PRA and GC 1090 apply



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What's the Difference between the PRA and GC 1090?

The PRA is a simple statutory law, but construed and applied through a series of complex regulations and decisions of the Fair Political Practice Commission (FPPC)



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What's the Difference between the PRA and GC 1090?

GC 1090 is a simple conflict statute with complex statutory exceptions all of which have been construed by the courts and California Attorney General over the last nearly 100 years and the FPPC over the past few years



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Personal Financial Interests

Political Reform Act of 1974

General Rule

Public officials shall not:

- make, participate in making, or attempt to influence
- a governmental decision
- in which they have a financial interest.



Personal Financial Interests

Political Reform Act of 1974

WHO IS A PUBLIC OFFICIAL?

- A Public Official is every:
 - Member
 - Officer
 - Employee
 - and certain Consultants
- of a State or Local Agency
- Includes CAC members



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Personal Financial Interests

Political Reform Act of 1974

- Officials should perform duties solely in the public's interest, not for their own financial interests.

How is this done?

**Disclosure
(Form 700)**

Disqualification



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Personal Financial Interests

Political Reform Act of 1974

Four steps:

- Is it reasonably foreseeable that decision will have a financial effect on your economic interest?
- Will financial effect be material?
- Is the financial effect indistinguishable from its effect on the public generally?
- If no, absent an exception, you may not make or participate in the decision.



Personal Financial Interests

Political Reform Act of 1974

Types of Economic Interests:

- Business Investment
- Source of Income
- Business Position or Employment
- Real Property
- Source of Gifts
- Personal Finances

- Including spouse and dependents!



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Personal Financial Interests

Source of Gifts in Depth

- For CAC members, you have a financial interest in a source of gifts exceeding \$500 received or promised in the previous 12 months
- Bottom Line:
 - Estimate
 - Track
 - If gifts from a source exceed \$500, consider it a financial interest
- Note: Board members and certain employees are subject to additional rules requiring disclosure and a limit on gifts



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Personal Financial Interests

Political Reform Act of 1974

- Identify each economic interest that will be financially affected by the decision.
- An effect is “reasonably foreseeable” if there is a “realistic possibility” of an effect.
- Effect can be negative or positive.



Personal Financial Interests

Political Reform Act of 1974

For each economic interest identified, determine if the financial effect will be “material.”



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Personal Financial Interests *Political Reform Act of 1974*

**Determine if financial effect
will be “indistinguishable”
from effect on the “public
generally.”**



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Personal Financial Interests *Political Reform Act of 1974*

If the financial effect on economic interest is not indistinguishable from effect on the public generally, you may not make, participate in making or influence the making of the governmental decision, unless an exception can be applied.



Personal Financial Interests Political Reform Act of 1974

HYPO:

- The CAC is providing input on a contract with a particular consultant. The consultant employs a CAC member's sister in a top executive position.
- Can the CAC member vote and participate in the discussion about the contract?



Personal Financial Interests

Political Reform Act of 1974

Answer: Yes.

- An official has an economic interest in his or her own finances and those of his or her immediate family (spouse and dependent children). A mere sibling relationship is not enough to create a conflict.



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Personal Financial Interests

Political Reform Act of 1974

HYPO:

- SDCP is considering development of a renewable energy project across the street from a property owned by a CAC member.
- Can the CAC member who owns the property participate in discussions and decisions about the project?



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Personal Financial Interests

Political Reform Act of 1974

Answer: No.

- An official who has an financial interest of \$2,000 or more in real property may not vote on a matter affecting real property located within 500 feet of the property line of the official's property.



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Personal Financial Interests

Political Reform Act of 1974

HYPO:

- The CAC is providing input on a matter that may affect electricity rates for residents within SDCP's boundaries, including CAC members and their employers. Is this a conflict of interest?



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Personal Financial Interests

Political Reform Act of 1974

Answer: No.

- Even though the CAC members and their employers will be affected by changes in utility rates, the rates apply equally and proportionally to all other businesses, properties and individuals subject to the rate.



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Personal Financial Interests

Political Reform Act of 1974

- What do we do when a conflict exists?
 - **DO NOT** PARTICIPATE IN THE DECISION
 - **DO NOT** DISCUSS, GIVE OPINION OR INFLUENCE
 - DISCLOSE
 - DISQUALIFY



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Government Code Section 1090: Interest in Public Contracts



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Financial Interest in Public Contracts

Government Code § 1090

If:

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

Then:

- Contract is VOID
- Penalties Apply



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Financial Interest in Public Contracts

Two Scenarios

- Member of multi-member board approving contract
- Advisory body member or employee of agency approving contract



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Financial Interest in Public Contracts

CAC Member Scenario

Facts: A CAC member works for a construction company that has submitted a bid to work on SDCP's office. She recuses herself from participating in discussions about the contract or the work. Can SDCP award the contract to her employer?



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Financial Interest in Public Contracts

CAC Member Scenario

Holding: This is OK as long as the CAC member recuses and does not participate in any way in the development of the contract, including initial discussions about the need for the work.

(Note: Result might be different for Board members.)



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Financial Interest in Public Contracts

Contract Defined



- Use general contract principles
- Examples:
 - Construction contracts
 - Purchases
 - Development agreements
 - Civil service appointments
 - Grants and donations



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Financial Interest in Public 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”



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Financial Interest in Public Contracts

Types of Financial Interests

- **Financial Interest**
 - Direct (contracting party)
 - Indirect (related to contracting party)
- **Effect**
 - Positive or negative
- **Certainty not required**



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Financial Interest in Public Contracts

Remote Interest Exceptions - § 1091(b)

Requirements:

- Public disclosure noted on records
- No attempt to influence
- Board acts in good faith

16 Exceptions, including:

- Employees, in certain cases
- Suppliers, in certain cases (e.g., at least 5 years before election/appointment to office)



WARNING! THESE ARE FACT-SPECIFIC - CHECK WITH ATTORNEY



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

- **Requirements**
 - Some do not require disclosure or disqualification
- **14 Exceptions**, including:
 - Corporate ownership
 - Less than 3% of shares, and
 - Income of less than 5% of total
 - Expense reimbursements
 - Recipient of public services

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Personal Financial Interests

Interest in Public Contracts

Ramifications

- **Criminal**
 - Willful Violation is a Felony
 - Lifetime bar to public office
- **Civil**
 - Contract is void and unenforceable
 - Disgorgement of all money
 - Civil penalties
- **Administrative Fines**



Common Law Conflict of Interest

Pre-dates the financial conflicts of interest in the Political Reform Act and Government Code section 1090

AND

Those laws now supplant common law conflicts of interest based on financial interests

SO

What's left is a mere vestige of the common law doctrine



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Common Law Conflict of Interest

"The common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties."



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Common Law Conflict of Interest

Avoiding the Conflict

- The conflict "may usually be avoided by complete abstention from any official action with respect to or attempt to influence the transaction." (64 Ops.Cal.Atty.Gen. 795, 797 (1981)).



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Ethics Laws

- California's ethics laws set the minimum standards for public service



In civilized life, law floats in a sea of ethics
(US Supreme Court Justice Earl Warren 1964)

“We are what we repeatedly do.
Excellence, then,
is not an act, but
a habit.”



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Questions?

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