

The Brown Act and AB 1234 Ethics Presentation

January 12, 2010

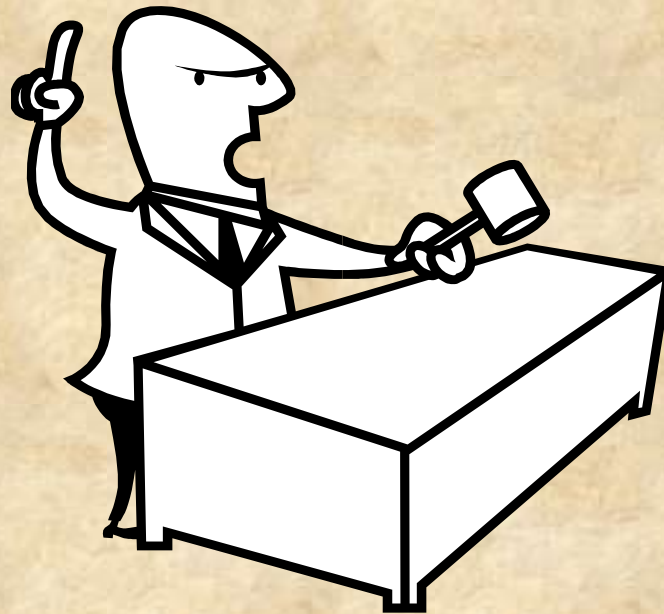
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Today's Program



- 📄 Brown Act: Fair, Open and Impartial Processes and Decision Making
- 📄 Personal Advantages and Perks of Office
- 📄 Personal Financial Gain

Part I: Fair, Open and Impartial Decision-Making



BASIC RULE



“All meetings of the Board of a local agency shall be **open and public**, and all persons shall be permitted to attend any meeting of the Board of a local agency.”
(§ 54953(a))

THE “LEGISLATIVE BODY OF A LOCAL AGENCY” INCLUDES:

The Board itself and,

Any commission, committee, or board, whether permanent or temporary, decision-making or advisory, created by a formal act of the District Board;

But Not: Advisory committees composed solely of Board members but less than a quorum of the Board, unless it is a standing committee that has continuing subject matter jurisdiction, or a meeting schedule fixed by formal action of the Board. (§54952(b))



WHAT IS A MEETING?

- ☞ "Meeting" includes any gathering of a majority of the Board to hear, discuss, or deliberate upon any item which is within its subject matter jurisdiction.
- ☞ A meeting also includes any use of direct communication, personal intermediaries, or technological devices which are employed by a majority of the Board to develop a collective concurrence on any a action to be taken on an item by the Board.

(§ 54952.2)



WHAT IS NOT A “MEETING”?

Non-member individual contacts with Board

Attendance by a majority of the Board at:



1. a conference;
2. an open and publicized meeting of another body of the District;
3. an open and publicized meeting of another organization; or
4. a social or ceremonial occasion;

PROVIDED that a majority of the Board do not discuss amongst themselves business of a specific nature that is within the subject matter jurisdiction of the Agency. (§ 54952.2)

TECHNOLOGICAL CONFERENCING

☞ Meetings may be conducted by teleconferencing (i.e., any electronic audio or video connection) only under the following conditions:



TECHNOLOGICAL CONFERENCING REQUIREMENTS

- Agendas must be posted in advance at all teleconferencing locations specifying all teleconference locations;
- public access to all teleconference locations is required;
- public must have the opportunity to speak at each teleconference location;
- votes must be taken by roll call.
- A majority of the Board must be present within the jurisdiction (§ 54953(b))



Serial Meetings

☞ If director A contacts director B, and B contacts director C, and C contacts director D, and so on, until a quorum of the MWD member agencies has been involved, a “serial meeting” may result, violating the Brown Act.



Special Considerations for MWD

- Member agencies have a different number of votes depending on the valuation of land within each public agency's jurisdiction.
- Some MWD member public agencies have multiple individual representatives, each of whom has the power to cast all the votes of that member agency
- Calculating a quorum can be tricky and surprising



Complexities

- ☞ A quorum of a Board exists when a majority of individuals whose public agency votes constitute a majority of the board are present



- ☞ MWD has 26 member agencies and 37 individual directors representing those 26 agencies

$$a^2 + b^2 = c^2$$

- ☞ It is critical to recognize that a quorum may exist among a very few Board members



For Example – Three Can Be a Crowd

Total MWD Votes = 206,461 Total Number of Agencies 26

☞ The City of Los Angeles, MWD of Orange County and the San Diego County Water Authority collectively have 112,147 votes among them and each has four representatives.

☞ Just one director meeting with one director of each of the other two agencies – three MWD directors altogether – can constitute a quorum of the Board.



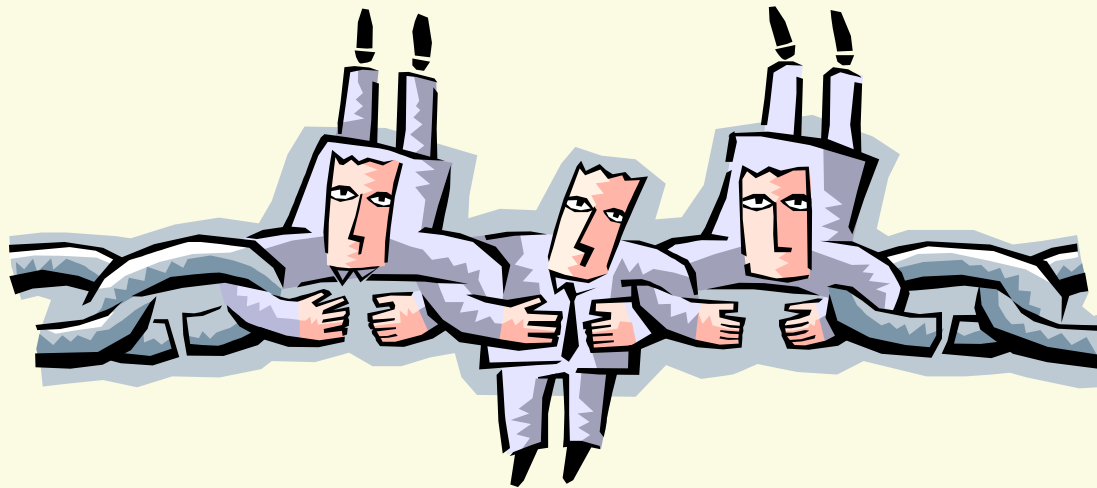
Numbers matter

📄 Representatives of the remaining 23 agencies hold only 94,314 votes and can meet together without violating the Brown Act!



Variable Links

- While individual representatives of as few as three public agency members may constitute a quorum and individual representatives of as many as 23 may not, there are numerous combinations beyond these scenarios that can link representatives together as a quorum



For Blackberry Addicts -

☰ Hitting “reply to all” is probably the most common Brown Act violation that occurs in public agencies

☰ All communications on matters of concern to Board members should be directed to executive staff and not to other Board members

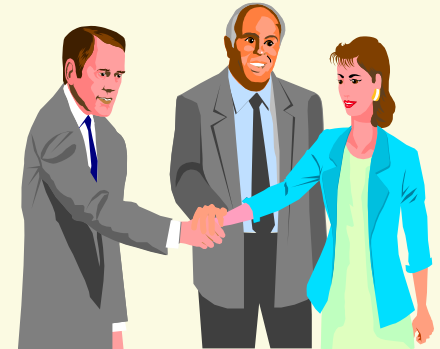


WHEN IS “ACTION TAKEN”?

 Action taken means:

1. A *collective decision* by a majority of the members of a Board; or
2. A *collective commitment* or promise by a majority of the members to make a positive or negative decision; or
3. An *actual vote* by a majority of the members of the Board sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

(§ 54952.6)



NON-AGENDA ITEMS

- 📄 Action or discussion on any item not appearing on the posted agenda is generally prohibited except that members may briefly respond to statements made or questions posed by the public during public comment.
- 📄 A member of the Board, or the body itself, may take action or direct staff to place a matter of business on a future agenda.(§ 54954.2)



STATUTORY EXCEPTIONS TO ACTION ON NON-AGENDA ITEMS

☞ A Board may take action on items of business not appearing on the agenda under the following conditions :

- a. *Emergency Situation:* When a majority decides that an emergency situation exists (i.e., work stoppage, crippling disaster, etc.).
- b. *Subsequent Need Item:* When two-thirds present (or all members if less than two-thirds are present) determine there is a need to take immediate action and that the need for action “came to the attention of the local agency subsequent to the agenda being posted.”
- c. *Hold Over Items:* When the item appeared on the agenda of, and was continued from, a meeting held not more than five (5) days earlier.
(§ 54954.2(b))



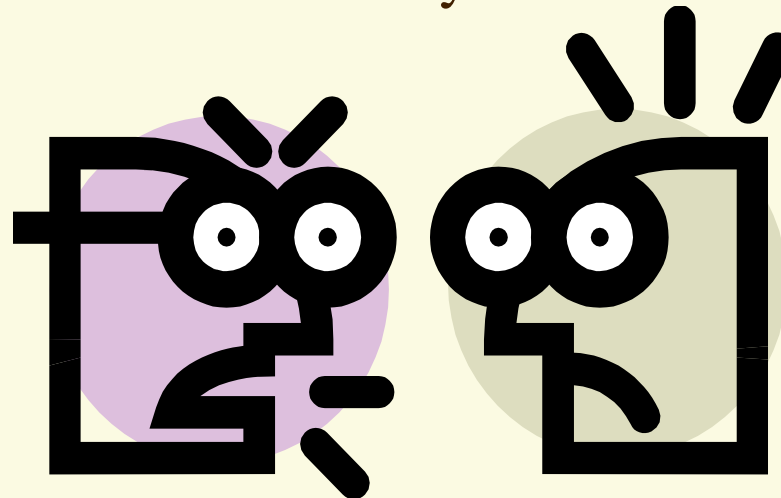
PUBLIC PARTICIPATION

- ☞ A regular meeting agenda must allow an opportunity for members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the Board.
- ☞ The public must be allowed to speak on a specific item of business before or during the Board's consideration of it.
- ☞ The Board may adopt reasonable regulations, including time limits, on public comments (e.g., three minutes).



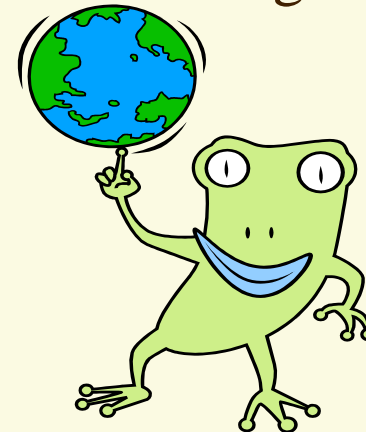
PUBLIC CONDUCT

- Expressions of support or opposition to matters before the agency (provided they are not overly disruptive) constitute protected speech.
- The Board cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the Board itself. On the other hand, the Brown Act provides no immunity for defamatory statements



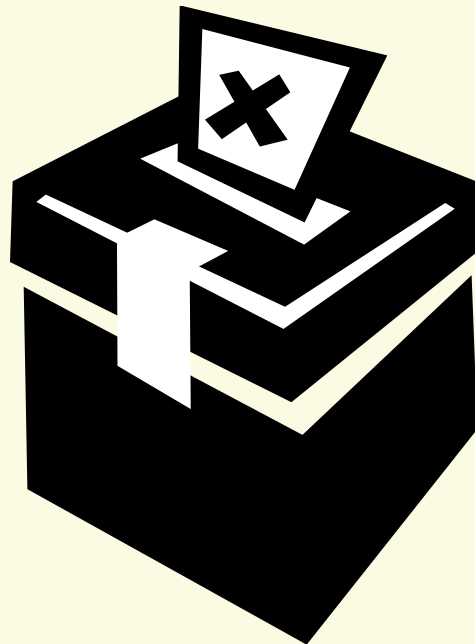
“...ALL PERSONS SHALL BE PERMITTED TO ATTEND...”

- Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise “fulfill any condition precedent” to attending a meeting.
- No meeting or any other function can be held in a facility that prohibits attendance based on race, religious creed, color, national origin, ancestry or sex, or which is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present. (§§ 54953.3; 54961)



No Secret Ballots

📄 Action by secret ballot, whether preliminary or final, is prohibited. (§54953(c))

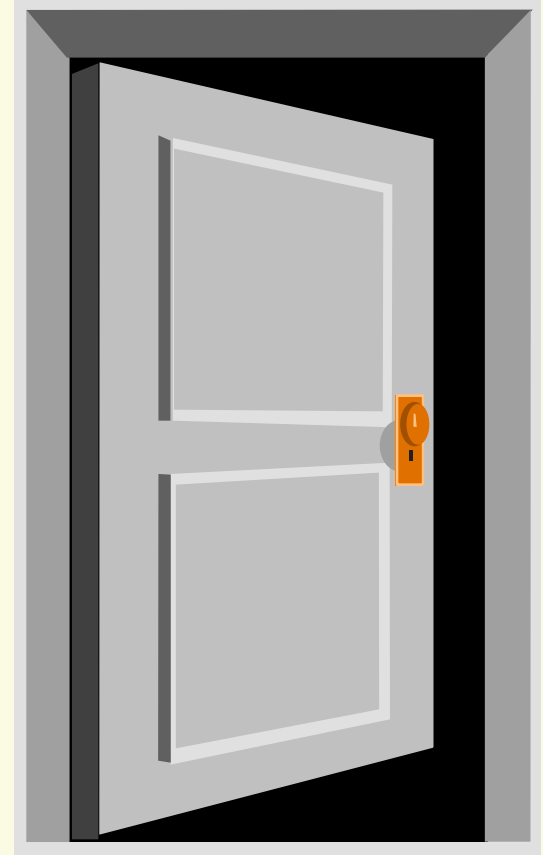


CLOSED SESSIONS

📄 The exceptions to the Brown Act's requirement that all meetings be open are termed "closed sessions" and include must be on agenda:

1. Personnel Matters
2. Pending Litigation
3. Real Estate Negotiations
4. Labor Negotiations
5. Grand Jury Testimony
6. License Applications
7. Security of Public Buildings

(§ 54957)



CLOSED SESSION REPORTING

- ☞ The Board must report (orally or in writing) any “action” taken in closed session. Action on a matter need be reported unless the action taken by the Board is the final act necessary to complete the transaction (e.g., an agreement to buy property, settlement of a lawsuit, acceptance of a resignation, etc.).
- ☞ Where a final signature is to be obtained from another party, no announcement is required when the Board votes to approve the matter.
- ☞ Copies of contracts, settlement agreements or other documents approved in closed session must be made available upon inquiry within 24 hours of completion the last necessary action.(§ 54957.1)



REMEDIES AND PENALTIES



Civil Action



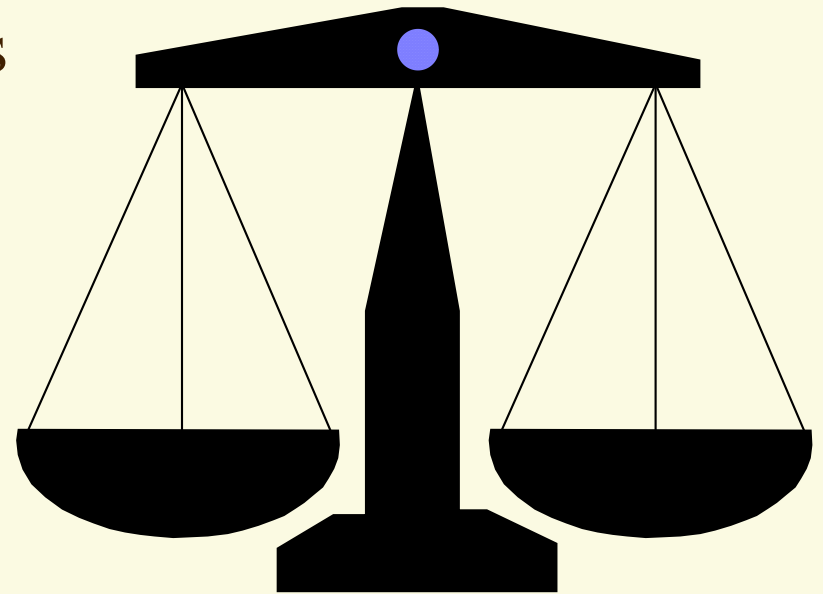
Overturing Actions




Costs and
Attorney's Fees



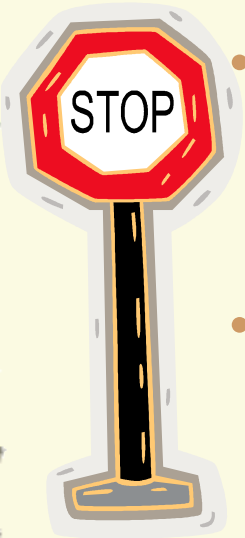
Criminal Charges



ACTION TO PREVENT VIOLATIONS

 The district attorney or any interested person may file a civil action asking the court to:

- Stop or prevent violations of the Brown Act by members of the Board;
- Determine the applicability of the Brown Act
- Determine the constitutionality of action by the Board to penalize or otherwise discourage the expression of one or more of its members
- Compel the Board to tape record its closed sessions. (§ 54960)

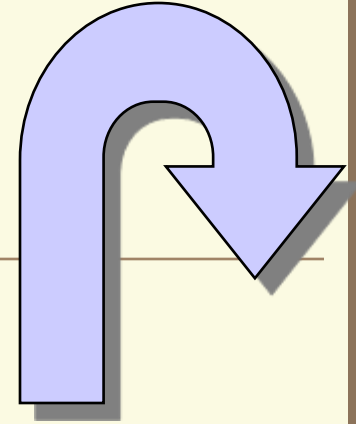


OPPORTUNITY TO CURE

- ❏ Before filing a court action, the aggrieved party must demand in writing that the Board “cure or correct” the problem.
- ❏ The demand must be sent within 90 days of the alleged violation. (However, the time limit is 30 days if the action was taken in open session but in violation of Section 54952.2, which defines “meetings.”)
- ❏ The Board then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days. (§ 54960.1)



OVERTURNING ACTIONS



- ☞ Only very specific actions can be overturned by legal action based on Brown Act violations.
- ☞ No challenge can succeed if there is substantial compliance with the Brown Act, or if the decision involves
 - the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements,
 - a contractual obligation upon which a party has in good faith relied to its detriment,
 - the collection of any tax
 - Situations where there was actual notice at least 72 hours prior to the meeting. Courts require that a challenger also show prejudice to his interests as a result of the alleged violation.

CRIMINAL CHARGES

📄 A violation of the Brown Act may result in a misdemeanor charge against a member where:

1. action is taken is violation of the Brown Act; and
2. the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled (§ 54959)



Part II: Personal Advantages & Perks

Legal Limitations on Official Benefits and Perks



Expense Reimbursement

General Rule: Actual and Necessary Expenses

AB 1234: Requires a written policy specifying reimbursable activities and rates

Reporting: Timely use of report forms (with receipts documenting the expenses); oral report at the next meeting of the agency of any meeting attended at the expense of the agency

Penalty: loss of reimbursement privilege; restitution; civil penalties and 3x value of misused resources; jail; ban from public office



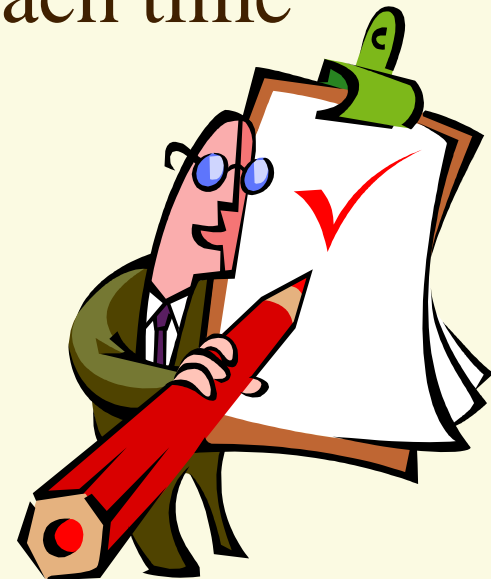
REMEMBER...

Your expense report forms are
PUBLIC RECORDS



Public Lists of Form 700s

- ☰ The FPPC prosecutes people who do not file Form 700s or file them late
- ☰ There are public lists of violators each month with many names each time



Gifts

What is a Gift?

- Anything of value you receive for which you do not provide monetary or other consideration of equal or greater value.



Report - \$50 or more in a year/source

Limit - \$420/year/source

Disclosure of Gifts



 Must report gifts on your Form 700 if:

- **Total value** of all gifts from a single source during the **calendar** year is at least \$50.


Tip: If the amount is unknown, you must make a good faith estimate of the item's fair market value.

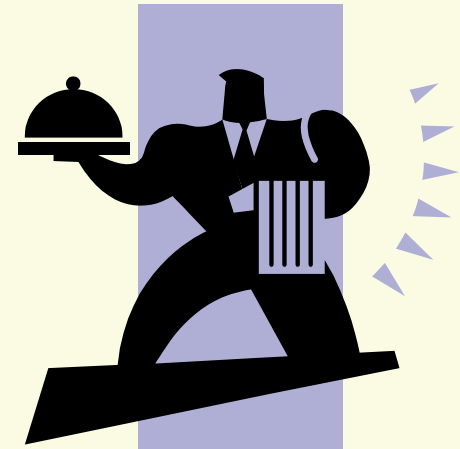
Gifts

Are Meals Gifts?

Yes. A meal is a gift unless:

- provided at an individual's home
- provided at an event at which you speak
- paid for by a governmental agency

 “Lunch swapping” does not automatically make a meal non-reportable



Gifts of Travel Expenses



- ☞ Gifts of travel expenses (airfare, lodging, meals) from non-transportation companies must be reported if over \$50. Such gifts are also subject to the maximum gift limit.

- ☞ Travel Expenses are Generally Exempt if
 - Expenses related to giving a speech or participation in a panel
 - For admission, refreshments, intrastate transportation for the event, necessary lodging and meals on the day of activity
 - Expenses paid by official's public agency

- ☞ Expenses paid for by another governmental or tax exempt non-profit entity for attendance at events that are reasonably related to legislative or governmental purposes are not subject to the Gift Limit

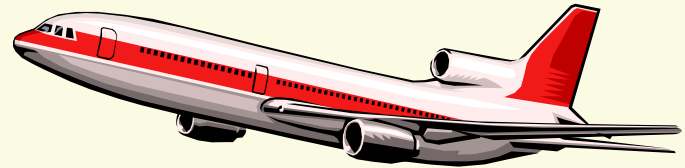
Gifts from Transportation Companies

Rule: Public officials are constitutionally prohibited from receiving free or discounted transportation from transportation companies (Cal. Cons. Article XII, section 7)

Applicability: Does not apply to discounts or rewards available to the general public

Penalty: Forfeiture of office.

Tip: Anytime you are traveling, make sure you understand how the travel is being paid for.



Prohibition on Gratuities or Rewards

It is a misdemeanor to receive any kind of gratuity or reward for performing one's duties.

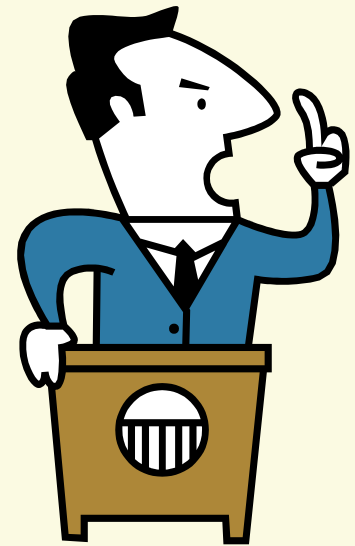


Honoraria

Receipt of honoraria (e.g., any payment for a speech, article, attendance at a conference, event or similar gathering) is **prohibited**

Exception: Speech or article in connection with private business

Tip: You can **return** or **donate** the honoraria within 30 days of receipt.





Misuse of Public Resources

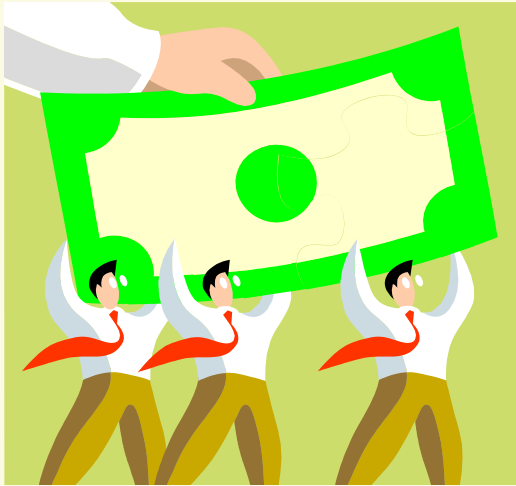
- 📄 **Rule:** No use of public funds or resources for personal, non-public purposes, including campaigns.
- 📄 **“Public Resources”** includes staff time, office equipment and supplies, but excludes incidental or minimal uses.



- 📄 **Penalties:** disqualification from office, jail, civil penalties up to \$1000/day plus 3x the value of the unlawful use.

Tip: Ensure that expense or use is consistent with adopted agency policy or practice.

Gifts of Public Funds



Local agencies are prohibited from making a “gift” of public money or anything of value.

Expenditures for *public purposes* are not considered gifts even if a private party incidentally benefits.

Mass Mailing Prohibition

📄 **Rule:** No newsletter or other mass mailing may be prepared or sent at public expense. Mass mailings include any distribution of actual physical materials.

📄 **Application:**

- 200+ items/month
- official may not be “featured” in public agency publication distributed at public expense

📄 **Penalties:** Criminal liability; restitution.



Restrictions on Loans

- 📄 Officials cannot receive loans:
- from anyone within the official’s agency or with whom the agency contracts; or
 - greater than \$500 (except in writing and with clear terms)



Exceptions: loans received by the official’s campaign committee; normal bank and credit indebtedness; and loans from family members

Solicitations of Political Support

- ☞ Soliciting campaign funds from **agency officers or employees** is unlawful (except when included as part of a communication to a significant segment of the community).
- ☞ Conditioning employment and compensation decisions on political support is also prohibited.



Campaign Contributions

- ❏ Elected officials have no conflict of interest as to campaign contributions while they are serving in their elected capacity
- ❏ Members of the MWD Board, however, serve in a representative capacity on behalf of the public entities where they serve as elected officials
- ❏ As a result, campaign donations in excess of \$250 are considered a source of income to Directors if a campaign contributor has a project before the MWD Board.



Part III: Personal Financial Gain



Bribery



Requesting, receiving, or agreeing to receive anything of value, including an “advantage,” in exchange for official action is a crime.



Penalties: criminal fines, forfeiture of office and disqualification from office.

Two Major Sources of Conflicts of Interest Rules

Political Reform Act

- Government Code § 87100 et seq. and the Regulations of the Fair Political Practices Commission (FPPC)

Contractual Conflicts

- Government Code § 1090



Purpose of Conflict Rules

- Public officials owe paramount loyalty to the public
- Personal or private financial should not be allowed to enter into the decision making process



Disclosure of Financial Interests

Statements of Economic Interests “Form 700”



Purpose:

- alert officials of personal interests that might be affected
- inform the public about potential conflicts

A sample of a completed Form 700, Statement of Economic Interests. The form is filled out with various entries, including names, addresses, and financial information. The form is titled "Statement of Economic Interests" and "Form 700". It includes sections for "Personal Information", "Employment Information", "Real Estate", "Securities", "Other Financial Interests", and "Conflicts of Interest". The form is a standard document used by public officials to disclose their financial interests.

Disclosure

- 📄 **Who?** All elected officials and advisory committee members.
- 📄 **What?** Interests in real property, investments, business positions, sources of income and gifts.
- 📄 **When?** Upon assuming office, annually thereafter (by 4/1), and upon leaving office.
- 📄 **Where?** File with local agency, which will send it, if required, to the FPPC.

Note: The documents are public records and late filers may face fines or penalties.



Can I Participate?

Conflict-of-Interest Rules Under the Political Reform Act



General Rule of Disqualification

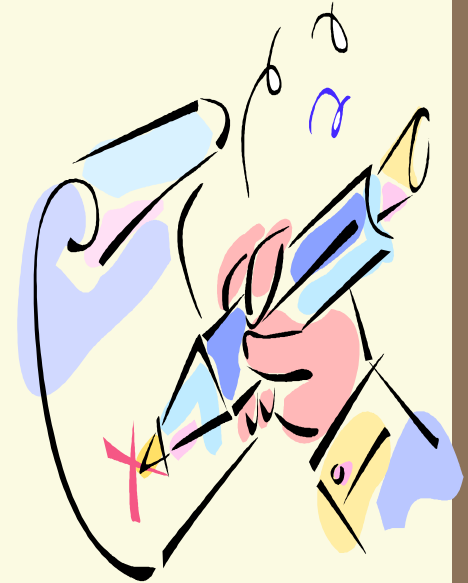
 A public official may not:

- make/participate/influence
- a governmental decision
- that will have a foreseeable and material financial effect on
- the official's economic interests



Eight-Step Test

- ☞ This is commonly referred to as the FPPC's "eight step test"
- ☞ But it can be compressed into these fewer elements for learning purposes



Recognizing and Seeking Advice

- ❏ The conflict rules and regulations are complex.
- ❏ **Recognizing** potential conflicts is essential.
- ❏ **Talk early on** with agency counsel and consider seeking advice from the FPPC when economic interests may be affected (positively or negatively) by a decision.



Potential Economic Interests

Sources of Income

Any source of income of \$500 or more during the prior 12 months for you or your spouse or domestic partner.



Potential Economic Interests

Business management, employment or investment

- Any business entity in which an official is a director, officer, partner, trustee, manager or employee.
- Any business entity in which an official has a direct or indirect investment of \$2,000 or more.




Potential Economic Interests

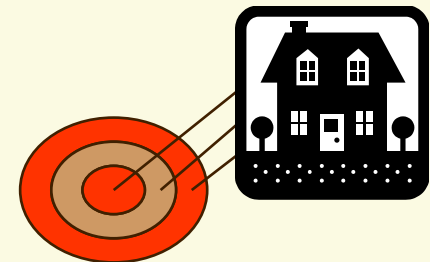
Real Property

Any real property interest worth **\$2,000** or more

- Includes leasehold interests in some instances





 **Tip:** Be alert for any projects or decisions that may have effects within **500 feet** of the subject property.



Potential Economic Interests



 **Gifts.** Any person or entity which has been a source of gifts (including promised gifts) of **\$420 or more** in the prior **12 months**.

 Remember: a gift is anything of value you receive for which you do not provide monetary or other consideration of equal or greater value.

Potential Economic Interests

Personal Finances.

Any economic interest in personal expenses, income, assets (other than real property or business entity interests), or liabilities of an official or the official's immediate family which are likely to **increase or decrease by at least \$250 or more in a 12 month period.**



Exceptions to Potential Economic Interest Conflicts

Two exceptions to potential financial conflicts:

- The “**public generally**”
- The “**legally required participation**”



General Public Interest Exception

☞ Decisions that affect a **broad range of persons** or interests may be exempted.

Examples: setting rates and charges, general plan amendments, zoning ordinances, etc.



Legally Required Participation Exception

☞ May apply if a conflict disqualifies so many officials that there is no longer a quorum to make a decision.



Note: Does not apply if (1) quorum could later be met; (2) to break a tie vote.

Conflicts Created By Future Employment



Delays on the revolving door...

- ☞ May not participate in decisions involving a **prospective** employer (includes interviews and negotiations).
- ☞ Officials and senior management may not represent parties before their former agency for **one year** after leaving office.

Common Law Conflict: Personal Interests or Bias

- ☞ Personal interests or biases (positive or negative) about the facts or the parties may cast doubt on your ability to make a fair decision.
- ☞ Bias is: “an inclination of temperament or outlook; a personal and sometimes unreasoned judgment”
- ☞ Exercise power with **disinterested** skill, zeal, and diligence.



How To Disclose an Interest

☞ If you have a conflict, state your financial interest and that you have a conflict



What Happens If Disqualified?

If disqualified:

- Step down from the dais and leave the room
- Refrain from any discussion or participation in the meeting.



Exception: You can participate as a member of public from the audience on matters affecting **personal** economic interests.

Contractual Conflicts of Interest Government Code § 1090

Prohibition on
“Self Dealing”



Contractual Conflicts of Interest Government Code §1090

☰ Section 1090 prohibits **officials** and **employees** from having **financial interests in contracts made by them in their official capacities** or any board of which they are members.



Contractual Conflicts of Interest

☞ If a public official or employee has a financial interest in a contract, **the contract is prohibited** regardless of whether the official participates in or abstains from the actual decision.



Contractual Conflicts of Interest

- ☞ Term “Contract” is liberally construed
- ☞ Financial gain not required



Limited Exceptions:

- Contract existed before assuming office -- if no modifications made during tenure
- Interest is terminated prior to participation

Contractual Conflicts of Interest

☰ There are also exceptions for:

- “Remote interests”
- “Non-interests”



Still must disclose your interest and disqualify yourself from voting

Violations of § 1090

- ☞ If contract is made in violation of § 1090, the contract will be deemed **void**.
- ☞ All **monies paid** under the contract **must be returned** to the local agency.
- ☞ Willful violations may be punished by fine, imprisonment and **disqualification** from public office.



Ethics Laws vs. Ethics



Law = minimum
standards - what we
must do

It is the floor - not the
ceiling

Thinking Beyond Ethics Laws

📄 Ethics is what we ought to do

- Above and beyond law's minimum requirements

📄 Just because it's legal, doesn't mean it is ethical (or public will perceive it to be so)



FINAL THOUGHTS

“Live so that you wouldn’t be ashamed to sell the family parrot to the town gossip.”

– Will Rogers



Resources

- Public Agency Legal Counsel
- FPPC: 1-866-ASK-FPPC and on the web at www.fppc.ca.gov
- Attorney General: www.caag.state.ca.us
- League of California Cities: www.cacities.org
- Institute for Local Government: www.ca-ilg.org

