

UNDERSTANDING THE BASICS OF

PUBLIC SERVICE ETHICS

Fair Process Laws and Merit-Based Decision-Making

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All final decisions about the content, tone and formatting of this publication were made by the Institute for Local Government.

UNDERSTANDING THE BASICS OF PUBLIC SERVICE ETHICS: Fair Process Laws and Merit-Based Decision-Making

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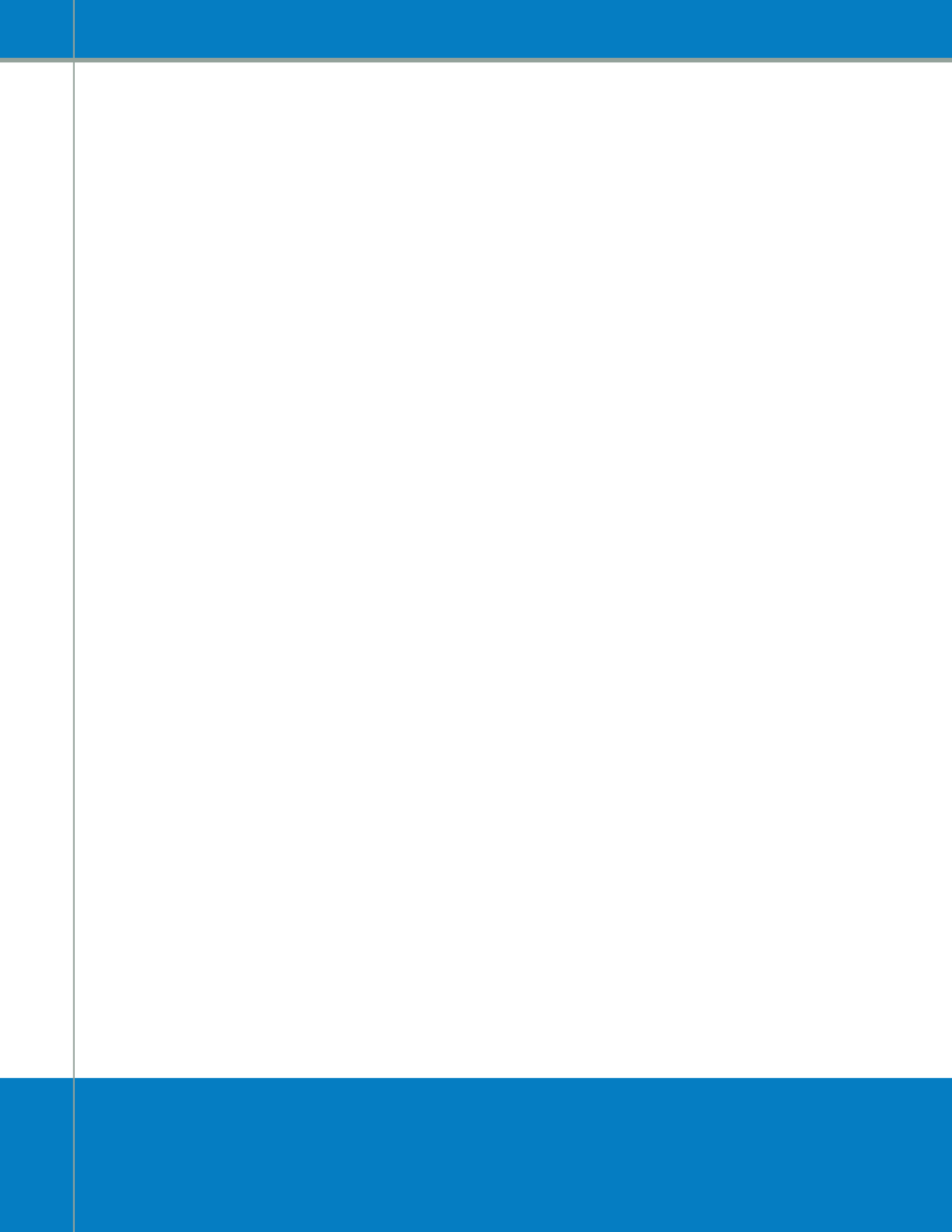
UNDERSTANDING THE BASICS OF PUBLIC SERVICE ETHICS

Fair Process Laws and Merit-Based Decision-Making

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About This Guide

What Is an “Ethics” Law?

Defining the subgroup of laws that constitute “ethics” laws is an imprecise undertaking. For those involved in public service, “ethics laws” tend to be those laws whose central purpose is to protect the public’s *trust* in its public institutions and those who serve in them. Trustworthiness is a key ethical value.¹

Many of these ethics laws are *prohibitions*: they forbid certain actions that would undermine the public’s trust that decisions are being made to benefit the public’s interests (as opposed to the personal or political interests of the decision-maker). Making decisions in the public’s interest is also a key *responsibility* of public service (responsibility is another key ethical value).² Prohibitions deter betrayals of the public’s trust by creating penalties for such betrayal.

Laws against misusing public resources are a form of prohibitory law, as are laws that prevent a decision-maker from being involved in a decision if the decision-maker has a real or perceived conflict of interest. Laws against bribery or other forms of “pay to play” are another important ethics law prohibition.

Other ethics laws simply require *transparency*: they provide the public and the media with information on how the public’s business is being conducted, who is receiving campaign contributions and gifts from whom, and what kinds of financial interests a public official has. With transparency laws, the public judges whether a public official or group of public officials is acting in a trustworthy fashion—typically as part of the elections process. Transparency laws also encourage trustworthy behavior by reminding public officials that their actions will likely be scrutinized and judged.

A key goal of this guide is to alert local officials to when to ask for legal advice on how these laws apply in a particular situation.

Other ethics laws require that public agency decision-making processes meet minimum standards of *fairness*. Fairness is another key ethical value.³

Because public trust and confidence is vital to the strength of a democratic system, ethics laws sometimes set very high standards for public official conduct. Even so, it is important to keep in mind that these standards are only *minimum* standards: it is simply not possible or practical to write laws that prevent all actions that might diminish the public's trust. For this reason, the laws should be viewed as a floor for conduct, not a ceiling. Just because a given course of conduct is legal does not mean that it is ethical (or the public will perceive it as such).

Understanding Ethics Laws

California has a complex set of ethics laws to guide local officials in their service to their communities. How does the well-intentioned local official keep track of them all?

Keeping four core principles in mind helps:

- Public officials may not use their offices for personal financial gain.
- Holding public office does not entitle one to personal **advantages and perks**.
- **Transparency** is an important element of public service.
- Merit-based decision-making based on **fair processes** produces the best results for the public.

This guide focuses on laws relating to public officials and **fair processes**. These laws are both complex and sometimes counter-intuitive. A key goal of this guide is to alert local officials to when to ask for legal advice on how these laws apply in a particular situation.

▶ A COMPLETE LIBRARY ON PUBLIC SERVICE ETHICS ISSUES

As part of its *Understanding the Basics of Public Service Ethics*, the Institute for Local Government offers California local officials a series of resources designed to help them meet both the law's and the public's expectations for public service:

- *Personal Financial Gain Laws*
- *Perk Issues, Including Compensation, Use of Public Resources and Gift Laws*
- *Transparency Laws*
- *Fair Process Laws and Merit-Based Decision-Making*
- *Promoting Personal and Organizational Ethics*

In addition, as part of its “Everyday Ethics” series, the Institute regularly analyzes situations local officials face from both a legal and ethical perspective.

To access these resources, visit www.ca-ilg.org/trust.

The Right to Fair and Unbiased Decision-Makers

Basic Rules

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law (judge-made law) and some constitutional principles still require a public official to exercise his or her powers free from personal bias—including biases that have nothing to do with financial gain or losses.

Under the common law doctrine, an elected official has a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interests.⁴

Local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.

In addition, constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a “quasi-judicial” capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions, and licenses. Quasi-judicial proceedings tend to involve the application of generally adopted standards to specific situations, much as a judge applies the law to a particular set of facts.

The kinds of impermissible bias⁵ include:

- **Personal Interest in the Decision’s Outcome.** For example, one court found a council member was biased and should not participate in a decision on a proposed addition to a home in his neighborhood when the addition would block the council member’s view of the ocean from the council member’s apartment.⁶

- **Personal Bias.**
 - **People.** An example would be a strong animosity about a permit applicant based on conduct that occurred outside the hearing. Conversely, a strong personal loyalty toward a party could bias an official as well.⁷
 - **Belief/Ideology.** An example would be a strong ideological reaction to a proposed Planned Parenthood clinic or community center for a particular ethnic or religious group.
- **Factual Bias.** An example is information an official might receive outside the public hearing that causes the official to have a closed mind to any factual information that may be presented in a hearing. This is a variation of the “*ex parte* communications” doctrine, which suggests that, in quasi-judicial matters, all communications to decision-makers about the merits (or demerits) of an issue should occur in the context of the noticed hearing (as opposed to private meetings with either side of an issue, for example).⁸

When an official sits in a quasi-judicial capacity, that official’s personal interest or involvement, either in a decision’s outcome or with any participants, can create a risk that the agency’s decision will be set aside by a court if the decision is challenged. Typically, having the official disqualify himself or herself removes the risk.⁹

Decision-makers are also well advised to step aside on participation in a quasi-judicial matter when the decision-maker has pre-judged the matter. Attributes of having “pre-judged the matter” include having a closed mind or a preconceived and unalterable view of the proper outcome without regard to the evidence.¹⁰

This rule does not preclude holding opinions, philosophies or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign.¹¹ Also, local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.

RESOURCES FOR FURTHER INFORMATION

For more information, see the Everyday Ethics for Local Officials column on bias (see www.ca-ilg.org/bias).

See also *An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions* (see www.ca-ilg.org/ounce) Chapter 7.

EFFECT OF VIOLATIONS

Effect on Decision

An administrative decision tainted by bias will be set aside. The agency will have to conduct new proceedings free of the influence of the biased decision-maker.¹²

Effect on Decision-Maker

Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office.¹³

Due Process Violations

If the violation rises to the level of a denial of due process under constitutional law, the affected individual(s) may seek damages, costs and attorney's fees.¹⁴

Vote-Trading

Basic Rules

The state law that prohibits public officials from asking for, receiving, or agreeing to receive bribes in exchange for their votes or other official actions also forbids them from giving, or offering or promising to give, “any official vote” in exchange for another public official’s vote on the “same or another question.”¹⁵

Like bribery, vote-trading is a form of “you-do-this-for-me,-I-will-do-this-for-you” practice. In Latin, this is known as a *quid pro quo* (“this for that”). *Quid pro quos* are always legally risky and fall short of ethical standards for public officials. Any time a public official stops making decisions based on what’s best for the public, the policy-making process is compromised.

Note that the Attorney General has concluded that the prohibition against vote-trading applies to exchanges of votes between *public officials* and not to commitments made by *jurisdictions* in an inter-agency agreement.¹⁶

Penalties

Penalties include “imprisonment in the state prison for two, three, or four years and . . . by a restitution fine of not less than two thousand dollars (\$2,000) or not more than ten thousand dollars (\$10,000)”¹⁷ A conviction for vote-trading will also lead to an immediate loss of office.¹⁸

RESOURCES FOR FURTHER INFORMATION

For more information, see the Everyday Ethics for Local Officials column “Let’s Not Make a Deal: Vote-Trading and Similar Practices Raise Legal and Ethical Issues” (see www.ca-ilg.org/votetrading).



▶ THE IMPORTANCE OF CIVILITY

Thoughtful people can reasonably disagree about the best way to solve difficult problems. Disagreement is not a bad thing in itself. It can be a healthy element of the decision-making process.

The issue is how disagreement is expressed. The best approach is to focus on the strengths and weaknesses of various approaches. Issues that come before elected bodies to decide upon are rarely simple and without controversy. Figuring out how to resolve those issues in a way that best serves the public involves considering a range of options and perspectives.

The crucial part of civil discourse is to keep the focus on the *merits* of a given proposal. Another way of putting it is to criticize ideas, *not* the person advancing the idea.

Civility is closely linked to the ethical value of respect. For more ideas and information about civility in public discourse, visit www.ca-ilg.org/civility.

Personal Loans

Basic Rules

Elected officials and others may not receive a personal loan from any officer, employee, member or consultant of the official's respective agency while in office.¹⁹ There also are limits on elected officials' and others' ability to receive loans from those with contracts with the agency (except for bank or credit card indebtedness made in the regular course of the company's business).²⁰ Personal loans over \$500 from others must meet certain requirements (for example, be in writing, clearly state the date, amounts and interest payable).²¹

Penalties

These restrictions are part of the Political Reform Act. Violations of these laws are punishable by a variety of sanctions, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.²²



POLITICAL REFORM ACT PENALTIES

Criminal Sanctions

A knowing or willful violation of these requirements is a misdemeanor.²³ A person convicted of a misdemeanor under the Political Reform Act may not be a candidate for elective office for four years following the conviction.²⁴ Such a conviction may also create an immediate loss of office under the theory the official violated his or her official duties²⁵ or create a basis for a grand jury to initiate proceedings for removal on the theory failure to disclose constitutes willful or corrupt misconduct in office.²⁶ Jail time is also a possibility.²⁷

Civil Sanctions

District attorneys, some city attorneys, the Fair Political Practices Commission or a member of the public can bring an action to prevent the official from violating the law.²⁸

If the action is brought by a member of the public, the violator may have to reimburse the costs of the litigation, including reasonable attorney's fees.²⁹

Administrative Fines

Violations may result in civil and criminal penalties. In addition, the Fair Political Practices Commission may impose administrative penalties. The administrative penalty for violation of the Political Reform Act is a fine of up to \$5,000 per violation.³⁰

Decisions May Not Benefit Family

Basic Rules

An important part of a fair process is that everyone, irrespective of their personal relationship to decision-makers, will have the same access to government benefits and approvals.

An outgrowth of this principle is the rule that public officials must disclose their interests and disqualify themselves under the Political Reform Act and other laws (for example Government Code section 1090's prescription against interests in contracts) from participating in decisions that will have the result of their immediate family's expenses, income, assets or liabilities increasing or decreasing.³¹ "Immediate family" includes one's spouse or domestic partner and dependent children.³²

Some jurisdictions have also adopted additional policies to prevent nepotism in hiring, promotions and appointments.

Penalties

The disqualification requirements relating to family members are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of sanctions, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.³³

EFFECT ON AGENCY AND THOSE AFFECTED BY AGENCY'S DECISION

When a disqualified official participates in a decision, it can also void the decision.³⁴ This can have serious consequences for those affected by the decision as well as the public agency.

If the family members' interest relates to an interest in a contract, penalties for violating Government Code section 1090 apply (for example, felony prosecution or refunds of amounts paid under the contract).³⁵ For more information about Government Code section 1090, see the *Understanding the Basics of Public Service Ethics* booklet *Personal Financial Gain Laws*, page 21.



POLITICAL REFORM ACT PENALTIES

Criminal Sanctions

A knowing or willful violation of these requirements is a misdemeanor.³⁶ A person convicted of a misdemeanor under the Political Reform Act may not be a candidate for elective office for four years following the conviction.³⁷ Such a conviction may also create an immediate loss of office under the theory the official violated his or her official duties³⁸ or create a basis for a grand jury to initiate proceedings for removal on the theory failure to disclose constitutes willful or corrupt misconduct in office.³⁹ Jail time is also a possibility.⁴⁰

Civil Sanctions

District attorneys, some city attorneys, the Fair Political Practices Commission or a member of the public can bring an action to prevent the official from violating the law.⁴¹

If the action is brought by a member of the public, the violator may have to reimburse the costs of the litigation, including reasonable attorney's fees.⁴²

Administrative Fines

Violations may result in civil and criminal penalties. In addition, the Fair Political Practices Commission may impose administrative penalties. The administrative penalty for violation of the Political Reform Act is a fine of up to \$5,000 per violation.⁴³

Disqualification Based on Receipt of Campaign Contributions

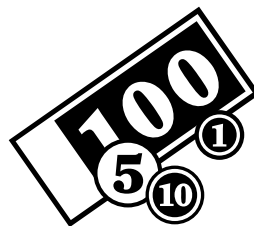
Basic Rules

Generally, the ethics laws with respect to campaign contributions emphasize disclosure rather than disqualification.⁴⁴ The emphasis on disclosure enables the public to assess for itself the degree an official could be influenced by campaign contributors who appear before the agency. Both financial and in-kind support must be disclosed.⁴⁵

Moreover, the courts have held the receipt of campaign contributions does not generally give rise to a duty to disqualify oneself based on bias issues. For example, a court determined a city council member who received a campaign contribution from a developer is not automatically barred from acting on the developer's land use permit application.⁴⁶ The court did leave open the possibility this scenario could, under certain circumstances, create a problem.

However, under limited (and sometimes counterintuitive) circumstances, certain local agency officials must disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements for use if the official has received campaign contributions of more than \$250 during the previous twelve months from any party or participant.⁴⁷ Note campaign contributions may be both monetary (dollars) and "in-kind" (goods or services) contributions.⁴⁸

In addition, these officials are prohibited from receiving, soliciting or directing a campaign contribution of more than \$250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for three months after the contribution.⁴⁹



Affected Officials

Generally speaking, this requirement does not apply to officials directly elected to the board of local agencies while acting in the scope of the office for which they were elected. *However, elected officials are covered by this prohibition when they sit as members of other boards to which they were not elected (such as joint powers agencies, regional government entities or local agency formation commissions).*⁵⁰

Other covered officials include appointed board or commission members who become or have been candidates for elective office.⁵¹

These prohibitions apply only with respect to campaign contributions from persons who are financially interested in the outcome of the specified proceedings. Those interested persons include:

- Parties to the proceeding (such as applicants for the permit, license or entitlement); and
- Participants.⁵²

A participant is a person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit or other entitlement for use and who has a financial interest in the outcome of the decision. A person qualifies as a “participant” if he or she attempts to

EXTORTION

Conditioning favorable decisions on receipt of campaign contributions is chargeable as a violation of several federal laws.

One is the federal fraud laws. Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.⁵³ The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.⁵⁴ That duty is violated when a public official makes a decision that is not motivated by his or her constituents’ interests but instead by his or her personal interests.⁵⁵

The potential penalties for federal fraud are steep. The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.⁵⁶

A demand for campaign contributions can also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.⁵⁷ To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.⁵⁸

influence the officers or employees of the agency with respect to the decision or testifies in person before the agency with respect to the decision.⁵⁹

Kinds of Proceedings Affected

The general rule applies to all proceedings involving licenses and permits, including use permits. This includes:

- Business, professional, trade and land use licenses and permits;
- Land use permits;
- Franchises; and
- Contracts, other than competitively bid, labor or personal employment contracts.⁶⁰

Examples of land use permits include conditional use permits,⁶¹ zoning variances,⁶² and tentative subdivision and parcel maps.⁶³ Examples of covered contracts include consulting contracts, whether engineering, architectural or legal.⁶⁴

Actions That Must Be Taken

Disclosure

When someone files a permit or license application, that individual must publicly report all covered officials to whom the individual made contributions of more than \$250 during the previous twelve

months.⁶⁵ Likewise, a covered official must publicly disclose on the record of the proceeding any party or participant who has contributed more than \$250 during the previous twelve months to that official. The disclosure must be made prior to the agency making any decision in the proceeding (without the covered official's participation).⁶⁶

Disqualification

If, prior to making a decision in the proceeding, a covered official knowingly receives more than \$250 in campaign contributions from a party during the previous twelve months, that official must disqualify himself or herself from participating in the proceeding. Likewise, with respect to contributions received from a participant, the covered official must disqualify himself or herself if he or she has reason to know, prior to making a decision in the proceeding, that the participant is financially interested in the outcome of the proceeding.⁶⁷

(Note the disqualification requirement is triggered by actual receipt of campaign contributions, not simply solicitation of campaign contributions if none are received. Of course, there are significant ethical issues associated with soliciting campaign contributions from either parties or participants while a decision is pending.)

Disqualification means the official may not participate in making any decision in the proceeding, and may not in any way attempt to use his or her official position to influence the decision.

Avoiding Disqualification

A covered official may avoid disqualification if he or she returns the contribution, or that portion which is over \$250, within 30 days from the time the official knows or has reason to know of the contribution and the proceeding.⁶⁸

No Contributions During the Proceeding

While the permit or license proceeding is pending and for three months after the decision, covered officials are prohibited from soliciting or receiving campaign contributions from either parties or participants (persons who actively support or oppose a particular decision and are financially interested in the outcome). This prohibition includes a prohibition against soliciting, receiving or directing contributions on behalf of another person or on behalf of a campaign committee.⁶⁹

GOOD ETHICS IS GOOD POLITICS

Even when the law does not constrain an official's political fund-raising activities (other than requiring disclosure of donors), it is important to be extraordinarily judicious in choosing those one will ask for campaign contributions. If an individual or company has matters pending with one's agency, they (and others, including the media and one's fellow candidates) are going to perceive a relationship between the decision and whether they contribute to one's campaign. The unkind characterization for this dynamic is "shake-down."

Two important points to remember:

- The legal restrictions on campaign fund-raising are minimum standards.
- Public officials who indicate their actions on a matter will be influenced by whether they receive a campaign contribution put themselves at risk of being accused of soliciting a bribe or extortion.

RESOURCES FOR FURTHER INFORMATION

For more information, the Fair Political Practices Commission has produced "Campaign Contributions May Cause Conflicts for Appointees and Commissioners," which is available online at www.fppc.ca.gov. For specific questions, please contact the Fair Political Practices Commission or agency counsel.

Likewise, all parties and participants are prohibited during this period of time from making contributions of more than \$250 to any officials involved in the proceedings.⁷⁰

Penalties

The disqualification requirements are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of sanctions,

depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.⁷¹

RESOURCES FOR FURTHER INFORMATION

For more information, see the Every-day Ethics for Local Officials column on fund-raising ethics (see www.ca-ilg.org/fundraising).

POLITICAL REFORM ACT PENALTIES

Criminal Sanctions

A knowing or willful violation of these requirements is a misdemeanor.⁷² A person convicted of a misdemeanor under the Political Reform Act may not be a candidate for elective office for four years following the conviction.⁷³ Such a conviction may also create an immediate loss of office under the theory the official violated his or her official duties⁷⁴ or create a basis for a grand jury to initiate proceedings for removal on the theory failure to disclose constitutes willful or corrupt misconduct in office.⁷⁵ Jail time is also a possibility.⁷⁶

Civil Sanctions

District attorneys, some city attorneys, the Fair Political Practices Commission or a member of the public can bring an action to prevent the official from violating the law.⁷⁷

If the action is brought by a member of the public, the violator may have to reimburse the costs of the litigation, including reasonable attorney's fees.⁷⁸

Administrative Fines

Violations may result in civil and criminal penalties. In addition, the Fair Political Practices Commission may impose administrative penalties. The administrative penalty for violation of the Political Reform Act is a fine of up to \$5,000 per violation.⁷⁹

Campaign Support from Agency Staff

Basic Rules

California law has a strong tradition of separating the electoral process from decisions relating to public employment. There are a number of laws designed to insulate public employees from having to participate in the campaign activities of candidates for their agency's governing board.

State law forbids candidates and officials from conditioning employment decisions on support of a person's candidacy.⁸⁰ Compensation decisions may not be tied to political support either.⁸¹ Soliciting campaign funds from agency officers or employees is also unlawful.⁸² (The exception is if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.⁸³)

Penalties

No penalties are specified in the code sections creating these prohibitions. Presumably violations would fall into the catchall penalty for misconduct in office, which is loss of office.⁸⁴ Note too members of the International City/County Management Association and the City Attorneys Department of the League of California Cities place a high value on these positions' independence from the political process. As a result, both organizations encourage their members not to make campaign contributions to local officials.⁸⁵



Holding Multiple Public Offices

There is such a thing as too much public service; the law limits the degree to which public officials can hold multiple offices. The reason is that, when one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies, that job becomes more complicated, both legally and ethically. Potential legal issues include:

- Political Reform Act issues when the official is in the position of making decisions that affect the official's economic interests. This issue is covered in *Understanding the Basics of Public Service Ethics: Personal Financial Gain Laws*;
- Section 1090 issues when the official's position is such that the official has an interest in a contract in which the agency is involved. This issue is also covered in

Understanding the Basics of Public Service Ethics: Personal Financial Gain Laws; and

- Incompatibility of office issues (for example, membership on the city council and serving on the board of another local agency) when the official's offices are such that the official may be subjected to conflicting loyalties.⁸⁶

The dual-office holding problem differs from a conflict of interest that involves a potential clash between one's private interest and one's public duties. Incompatibility of offices normally refers to the "public-public" situation where no personal conflict of interest is involved. Instead there is a potential clash between one's responsibility to two sets of constituents.



Basic Rules

State law prohibits public officers from simultaneously holding multiple offices that are “incompatible” with one another.⁸⁷ Offices are incompatible when:

- Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
- Based on the powers and jurisdiction of the offices, there is a possibility of significant clashes of duties or loyalties between the offices;
- Public policy considerations make it improper for one person to hold both offices.⁸⁸

The notion underlying the prohibition is that it can be unfair and unwise to have decision-makers who are supposed to have just one agency’s (and one agency’s constituents’) interests at heart assume multiple decision-making roles. As the Attorney General observed, the public is entitled to utmost loyalty from those who occupy offices.⁸⁹

This restriction on holding multiple public offices only applies to positions that are considered to be *offices*—including appointed or elected members of a governmental board, commission, committee, or other body.⁹⁰ The restriction does not apply to positions of employment in an agency, although employees may be prohibited from serving on the governing bodies of agencies in which they are employed.⁹¹

Note there can be specific legislative exceptions to this rule.⁹² Under some circumstances, local agencies may allow simultaneous occupancy of what would otherwise be incompatible offices.⁹³

When one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies, that job becomes more complicated...

Penalties

Acceptance of a second office, which is incompatible with an office previously entered into, automatically vacates the prior office.⁹⁴

Special Issues

Employees Who Run for the Governing Board of Their Public Agency Employers

Generally, an individual may not serve as an elected or appointed member of a local agency's governing board if he or she is an employee of the local agency.⁹⁵ If the employee does not resign, the individual's employment automatically terminates upon being sworn into office. Volunteer firefighters are exempt from these provisions if the firefighter receives no salary.⁹⁶

Individual Agency Guidelines

Local agencies must adopt rules regarding incompatible activities.⁹⁷

RESOURCES FOR FURTHER INFORMATION

For more information, the Fair Political Practices Commission has produced "Holding Two Positions," which is available online at www.fppc.ca.gov. For specific questions, please contact either the Fair Political Practices Commission or agency counsel.

Competitive Bidding Processes for Public Contracts

Basic Rules

Public contracting laws — including those adopted at the local level — are designed to give all interested parties the opportunity to do business with the government on an equal basis.

This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors. It also assures that the public receives the best value for its money by promoting competition among businesses so the public can receive the best deal.

Many competitive bidding requirements are locally imposed, for example by charter cities as part of their municipal affairs authority. State law also authorizes local agencies to adopt procedures for acquisition

of supplies and equipment. Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, state law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects over \$5,000 are subject to the state's competitive bidding requirements.⁹⁸ For county projects, the threshold is based on population: \$6,500 (counties with populations of 500,000 or over),⁹⁹ \$50,000 (counties with populations of 2 million or over)¹⁰⁰ and \$4,000 (all other counties).¹⁰¹ Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.¹⁰²



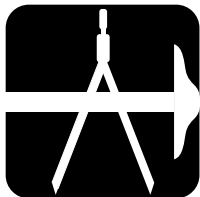
Exceptions

Emergency

Contracts may be awarded without competitive bidding if the legislative body makes a finding by a four-fifths vote that an emergency exists.¹⁰³

Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms need not be competitively bid, but must be awarded on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.¹⁰⁴ However, if the professional services are too closely akin to the work typically performed by public works construction contractors (for example, some services performed by construction managers), then competitive bidding may be required.¹⁰⁵



Special Services

The legislative body of any public agency may contract with and employ persons for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.¹⁰⁶ The test as to whether services are special services depends on the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources.¹⁰⁷

Design-Build

Design-build is a method of project delivery in which the design and construction functions are combined and contracted to a single entity, called the “design-builder.” Cities, with approval of the city council, may use design-build contracting for building construction projects over one million dollars.¹⁰⁸ Counties, with approval of the board of supervisors, may use design-build contracting for building construction projects over \$2.5 million.¹⁰⁹ Cities and counties may award design-build projects using either the lowest responsible bidder or best value.¹¹⁰

Penalties

The contracts for competitively bid public projects must be awarded to the lowest responsible bidder.¹¹¹ A responsible bidder is one who is able to perform the contract if awarded.¹¹² An agency that improperly awards a bid to any bidder other than the lowest responsible bidder may be liable for reimbursing the low bidder's actual cost in submitting the bid, but will not be liable for the low bidder's lost profits.¹¹³

RESOURCES FOR FURTHER INFORMATION

For more information, see the Everyday Ethics for Local Officials columns:

- “Securing Goods and Services: Contracting Issues” (see www.ca-ilg.org/procurement)
- “Making a Federal Case Out of Corruption” (see www.ca-ilg.org/fedcase)

HONEST SERVICES, FRAUD AND EXTORTION

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.¹¹⁴ The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.¹¹⁵ That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.¹¹⁶

“Kickbacks” (for example, receiving money back from proceeds paid to a company that does business with a public entity) in exchange for favorable contracting decisions is one area in which prosecutors have been particularly active.

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.¹¹⁷

An official's refusal to award a contract unless the individual receives benefits can also be prosecuted as extortion.¹¹⁸ To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.¹¹⁹

Whistle-Blowing Protections

Basic Rules

State whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.¹²⁰ Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for “legitimate, independent reasons” even if the employee had not been a whistle-blower.¹²¹ These protections apply specifically to local agency employees.¹²²



State law requires employers to post the state attorney general’s whistle-blower hotline number at the workplace.¹²³ Any employee or member of the public can call the hotline at (800) 952-5225 to register their concerns about potentially unlawful practices.¹²⁴

Penalties

Violations of the whistle-blowing laws are subject to a \$10,000 civil penalty. Such actions carry the prospect of damages and attorneys fee awards.

RESOURCES FOR FURTHER INFORMATION

For more information, see the *Everyday Ethics for Local Officials* column “For Whom the Whistle Blows” (see www.ca-ilg.org/whistle).

Endnotes

- 1 Rushworth M. Kidder, *How Good People Make Tough Choices* (Simon and Schuster, 1995).
- 2 *Id.*
- 3 *Id.*
- 4 *See Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1597-98, 263 Cal. Rptr. 360, 365-66 (4th Dist. 1989).
- 5 *See Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n.23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (finding no common law bias).
- 6 *See Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (finding common law bias).
- 7 *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470, 22 Cal. Rptr.3d 772 (2004).
- 8 *See, for example, Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 89, 133 Cal. Rptr. 2d 234, 241 (2d Dist. 2003).
- 9 *See Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *Mennig v. City Council*, 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (2d Dist. 1978).
- 10 *See Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994) (where local ordinance called for “person” appealing planning commission decision to city council to show cause why the commission’s action should be overturned, city council’s decision to appeal the action to itself was an appearance of conflict of interest and was part of overall violation of developer’s substantive and procedural due process rights).
- 11 *Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975).
- 12 *See generally* Cal. Civ. Proc. Code § 1094.5. *See Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (requiring the council to rehear an appeal from the planning commission’s decision and provide a fair hearing).
- 13 *See Nussbaum*, 214 Cal. App. 3d at 1597-98, 263 Cal. Rptr. at 365-66.
- 14 *See* 42 U.S.C. §§ 1983, 1988.
- 15 Cal. Penal Code § 86.
- 16 91 Cal. Op. Att’y Gen. 46 (2008).
- 17 Cal. Penal Code § 86.
- 18 *See* Cal. Gov’t Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 19 Cal. Gov’t Code § 87460(a), (b).
- 20 *See* Cal. Gov’t Code § 87460(c), (d).
- 21 *See* Cal. Gov’t Code § 87461.
- 22 *See generally* Cal. Gov’t Code §§ 91000 and following.
- 23 *See* Cal. Gov’t Code § 91000(a).
- 24 *See* Cal. Gov’t Code § 91002.

- 25 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 26 Cal. Gov't Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- 27 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$2,000, or both).
- 28 Cal. Gov't Code §§ 83116, 91001(b), 91001.5, 91004, 91005.
- 29 Cal. Gov't Code § 91012.
- 30 Cal. Gov't Code § 83116.
- 31 2 Cal. Code Regs. § 18703.5.
- 32 See Cal. Gov't Code § 82029.
- 33 See generally Cal. Gov't Code §§ 91000 and following.
- 34 See Cal. Gov't Code § 91003(b).
- 35 See for example, *People v. Honig*, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555 (1996).
- 36 See Cal. Gov't Code § 91000(a).
- 37 See Cal. Gov't Code § 91002.
- 38 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 39 Cal. Gov't Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- 40 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$2,000, or both).
- 41 Cal. Gov't Code §§ 83116, 91001(b), 91001.5, 91004, 91005.
- 42 Cal. Gov't Code § 91012.
- 43 Cal. Gov't Code § 83116.
- 44 This is a requirement of the Political Reform Act. See generally Cal. Gov't Code §§ 87200 and following.
- 45 Cal. Gov't Code § 87202.
- 46 *Woodland Hills Residents Association v. City Council*, 26 Cal. 3d 938, 164 Cal. Rptr. 255 (1980). But see Cal. Gov't Code § 84308 and 2 Cal. Code Regs. §§ 18438-18438.8 (defining who is disqualified from acting on a land use entitlement application after receipt of a campaign contribution).
- 47 Cal. Gov't Code § 84308.
- 48 See Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215.
- 49 See Cal. Gov't Code § 84308(b).
- 50 See Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.
- 51 See Cal. Gov't Code § 84308(a)(4); 2 Cal. Code Regs. § 18438.1.
- 52 See Cal. Gov't Code § 84308(b) and (c); 2 Cal. Code Regs. § 18438.4.
- 53 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

- 54 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 55 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 56 18 U.S.C. § § 1341 (“...shall be fined under this title or imprisoned not more than 20 years, or both.”), 1343 (“shall be fined under this title or imprisoned not more than 20 years, or both.”).
- 57 18 U.S.C. § 1951.
- 58 18 U.S.C. § 1951(a).
- 59 *See* Cal. Gov’t Code § 84308(a)(2).
- 60 *See* Cal. Gov’t Code § 84308(a)(5); 2 Cal. Code Regs. § 18438.2.
- 61 Cal. Gov’t Code § 65901.
- 62 Cal. Gov’t Code § 65906.
- 63 Cal. Gov’t Code §§ 66411 and following.
- 64 Cal. Gov’t Code §§ 4526, 37103, 53060.
- 65 Cal. Gov’t Code § 84308(d); 2 Cal. Code Regs. § 18438.8.
- 66 Cal. Gov’t Code § 84308(c).
- 67 *Id.*
- 68 *Id.*
- 69 Cal. Gov’t Code § 84308(b).
- 70 Cal. Gov’t Code § 84308(d).
- 71 *See generally* Cal. Gov’t Code §§ 91000 and following.
- 72 *See* Cal. Gov’t Code § 91000(a).
- 73 *See* Cal. Gov’t Code § 91002.
- 74 *See* Cal. Gov’t Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 75 Cal. Gov’t Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- 76 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$2,000, or both).
- 77 Cal. Gov’t Code §§ 83116, 91001(b), 91001.5, 91004, 91005.
- 78 Cal. Gov’t Code § 91012.
- 79 Cal. Gov’t Code § 83116.
- 80 *See* Cal. Gov’t Code § 3204, which reads as follows:
- No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position,

nomination, confirmation, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.

81 See Cal. Gov't Code § 3205.5, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.

82 See Cal. Gov't Code § 3205 (except for those communications to a significant segment of the public that happens to include fellow public officials and employees).

83 See Cal. Gov't Code § 3205(c).

84 See *Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1597-98, 263 Cal. Rptr. 360, 365-66 (1989).

85 The ICMA Code is available from the ICMA website at: <http://icma.org/codeofethics>.

86 See Cal. Gov't Code § 1126.

87 Cal. Gov't Code § 1099(a).

88 Cal. Gov't Code § 1099(a)(1)-(3).

89 91 Cal. Op. Att'y Gen. 25 (2008)

90 Cal. Gov't Code § 1099(c).

91 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1) and 72103(b)(1).

92 See, for example, Cal. Health & Safety Code § 6480(b) (relating to city officials serving on sanitary districts) See also 85 Cal. Op. Att'y Gen. 239 (2002) (noting the Legislature can create exceptions to the incompatibility doctrine).

93 See 66 Cal. Op. Att'y Gen. 293 (1983) (offices of city and county planning commission are incompatible but county and charter city may adopt legislation specifying otherwise).

94 Cal. Gov't Code § 1099(b) (noting that this position is enforceable through Civil Procedure Code section 803). *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 107 P.2d 388 (1940). See also Cal. Gov't Code § 1126.

95 See Cal. Gov't Code § 53227 (for cities, counties and special districts); Cal. Educ. Code §§ 35107(b)(1) (school districts), 72103(b)(1) (community college districts). See also 84 Cal. Op. Att'y Gen. 126 (2001) (community college board member may not become part-time instructor for district).

96 See 85 Cal. Op. Att'y Gen. 230 (2002) ("salary" does not include per-call and equipment stipends).

97 Cal. Gov't Code § 1126.

98 Cal. Pub. Cont. Code § 20162.

99 Cal. Pub. Cont. Code § 20122.

100 Cal. Pub. Cont. Code § 20123.

101 Cal. Pub. Cont. Code § 20121.

102 Cal. Pub. Cont. Code § 20163.

- 103 Cal. Pub. Cont. Code §§ 1102, 20168, 22050.
- 104 Cal. Gov't Code § 4526.
- 105 *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).
- 106 Cal. Gov't Code § 53060.
- 107 *California School Employees Association v. Sunnyvale Elementary School District*, 36 Cal. App. 3d 46, 60, 111 Cal. Rptr. 433 (1st Dist. 1973).
- 108 Cal. Pub. Cont. Code § 20175.2.
- 109 Cal. Pub. Cont. Code § 20133.
- 110 Cal. Pub. Cont. Code §§ 20175.2, 20133.
- 111 Cal. Pub. Cont. Code § 20162.
- 112 *See* Cal. Pub. Cont. Code § 1103.
- 113 *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 23 Cal. 4th 305, 315-16, 96 Cal. Rptr. 2d 747 (2000).
- 114 Now 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 115 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 116 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 117 18 U.S.C. § § 1341 (“... shall be fined under this title or imprisoned not more than 20 years, or both.”). 1343 (“shall be fined under this title or imprisoned not more than 20 years, or both.”).
- 118 18 U.S.C. § 1951.
- 119 18 U.S.C. § 1951(a).
- 120 *See* Cal. Lab. Code § 1102.5(c) (“An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.”).
- 121 Cal. Lab. Code § 1102.6.
- 122 *See* Cal. Lab. Code § 1106.
- 123 *See* Cal. Lab. Code § 1102.8 (requiring employers to post employees’ rights and responsibilities under the whistle-blower laws, including the telephone number for the Attorney General’s hotline).
- 124 *See* Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).

References for Further Information

General Websites

Fair Political Practices Commission

www.fppc.ca.gov/

Institute for Local Government

www.ca-ilg.org

Office of the Attorney General

<http://ag.ca.gov/>



Publications

Campaign Contributions

Fair Political Practices Commission

“Campaign Contributions May Cause Conflicts for Appointees and Commissioners” (June 1999) (www.fppc.ca.gov)

Campaign Disclosure Manual 2: Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates (May 2007) (www.fppc.ca.gov)

Decision-Making

Institute for Local Government

Understanding the Basics of Local Agency Decision-Making (2009) (www.ca-ilg.org/decisionmaking)

An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions (2006) (www.ca-ilg.org/ounce)

General

Institute for Local Government

Understanding the Basics of Public Service Ethics: Promoting Personal and Organizational Ethics (2009). Explains the role that values and public perception play in public service ethics (www.ca-ilg.org/ppoe).

Ethics Law Compliance Best Practices (2005). Enables agencies to engage in a self-assessment of ethics law compliance practices (www.ca-ilg.org/bestpractices).

Walking the Line: What to Do if You Suspect an Ethics Problem (2005). Answers a frequently-posed question with an eight-step process (www.ca-ilg.org/whattodo).

Ethics Culture Assessment (2006). Enables local agencies and their leaders to assess and reflect on the agency’s ethics culture (www.ca-ilg.org/culturechecks).



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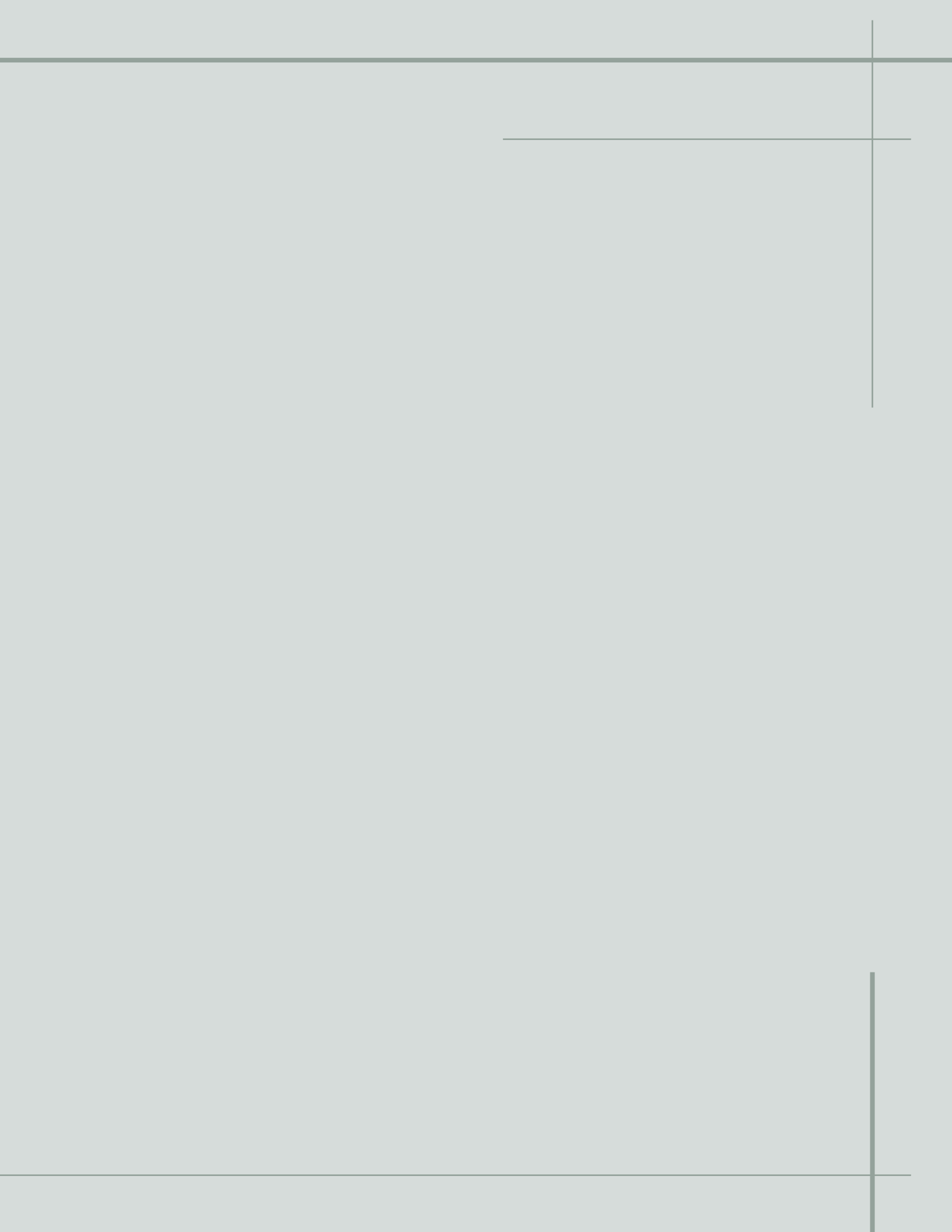
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SKU: 1937 Price: \$10