



Deciding When to Step Aside from the Decision-Making Process: Abstentions and Disqualifications

www.ca-ilg.org/abstentions

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Related Resources

For more information, see the following resources:

- *Understanding the Basics of Public Service Ethics Laws* available at www.ca-ilg.org/ethicslaws.
- “Ethics Law Principles for Public Servants,” available at www.ca-ilg.org/EthicsPrinciples.
- “When an Elected Official Feels Passionately About an Issue: Fair Process Requirements in Adjudicative Decision-Making,” available at www.ca-ilg.org/bias.
- “How Your Agency Counsel Should Advise You When Agency Contracts Represent a Conflict of Interest,” available at www.ca-ilg.org/section1090.
- “Can I Vote? An Overview of the Conflicts Laws,” available from the FPPC’s website: www.fppc.ca.gov (click on Publications).

Question: *Our governing body is struggling with the issue of abstentions. When **must** one abstain; when is it up to the individual?*

Answer: The issue of when to refrain from participating in an agency decision can be a vexing one. As with many ethical issues, it is an area in which the law provides some – but not all – of the answers.

Abstention or Disqualification?

Defining the relevant terms is a useful starting point. When an official abstains from participating in a decision, he or she does so voluntarily. Abstaining involves the exercise of some degree of judgment or choice.

By contrast, in the case of disqualification, one does not have a choice. The law prohibits that individual from participating in a decision — even if the official believes he or she can put personal interests aside and/or be fair. The law focuses on the public’s possible perceptions about the integrity of the decision-making process — and in so doing, the law often avoids even the appearance of impropriety as well as the potential for actual impropriety.

It is important to keep in mind that being disqualified from participating in a particular matter does not imply any wrongdoing. It simply means that an official has a

financial or other relationship that precludes him or her from participating in the decision. (Having a disqualifying conflict of interest and insisting on participating in the decision is another matter. Such participation is a violation of the law and could subject a decision-maker to civil and criminal penalties.¹ It also could invalidate the action taken.²)

The following examples illustrate some situations involving these issues.

Financial Interests

The most common form of disqualification occurs under California's Political Reform Act. Under that law, a public official may not make, participate in or influence a governmental decision that will have a reasonably foreseeable and material financial effect on the official, the official's immediate family or any of the official's financial interests.³

The Fair Political Practices Commission (FPPC) has developed a multistep process for determining when an official must disqualify himself or herself from participating in a decision.⁴ The rules are not necessarily intuitive.

The disqualification analysis recognizes some of the practical considerations decision-makers face. This includes whether the effect of the decision on the public official's interest is the same as the effect on a significant segment of the public (this is known as the "public generally" exception to the disqualification requirement).⁵

Another step analyzes whether the otherwise-disqualified official's participation in the decision is legally required. The latter exception applies if an official's disqualification would prevent the agency from acting in a situation in which it legally must act. When analyzing this issue, local agency counsel may ask such questions as:

- Is the agency unable to convene a quorum? and
- Are there no alternative means of making the decision?

The Disqualification Analysis

The process of determining when an official is disqualified from participating in a decision is a very complex one. There are statutes, regulations and interpretive opinions that flesh out each aspect of the basic prohibitions.

At this writing, the Fair Political Practices Commission is in the process of streamlining the regulations associated with this analysis.⁶

The FPPC has redefined the phrase meaning of "reasonably foreseeable" in the context of determining whether a decision will have a material financial effect on the official,⁷ and amended the regulations regarding whether a financial effect on one's real property is material.⁸

Some of these changes have been adopted and made effective, while others are on hold while other regulatory changes made. For more information on the status of updates to the conflict of interest regulations, see the FPPC webpage for newly adopted, amended or repealed regulations at www.fppc.ca.gov/index.php?id=247#1.

Special Procedures for Appointments to Other Bodies Involving Compensation

Local agency officials often represent their agency or a group of agencies on regional and other bodies. Sometimes these positions involve a small stipend to compensate an official for the time involved. May an official participate in the decision related to his or her own appointment?

The FPPC allows local public officials to vote on their own appointments to compensated positions on such boards, as long as certain transparency measures occur.⁹ Information about the appointment must be posted on the local agency's website, including the name of the appointed official, the amount of compensation (stipend or salary) for the position and the position's term.¹⁰

A publication that answers frequently asked questions¹¹ and a form to assist local agencies in complying with this requirement¹² are available from the FPPC.

Other Interests and Bias Issues

Other reasons for being disqualified from participating in a decision include receipt of campaign contributions (under very limited circumstances),¹³ certain forms of bias based on a personal interest in the outcome of a decision, or strong feelings (positive or negative) about the parties whose interests will be affected by the decision.

Abstentions

In some situations an agency attorney or the FPPC says that no legal imperative exists to disqualify oneself from a particular matter. If you still have questions about your ability to put your personal situation aside and/or make a fair decision, then it is best to abstain.

What if you believe you can make a fair and public-minded decision, but others are questioning whether that is indeed so? As with many ethical dilemmas, this is an example of conflicting and important values.

One value is fulfilling your responsibility as an office-holder to make decisions — which, of course, is what your constituents elected you to do. Related to this value is the benefit of having as many decision-makers as possible participate in decisions to reflect the full range of community perspectives.

The other value is preserving the public's trust that the agency's actions are based on principles of fairness and what best promotes the public's interests — as opposed to decision-makers' self-interests or those of their friends and family.

In these instances, one strategy is to put yourself in the public's shoes. What would you think if you were a member of the public analyzing the situation? If you question the ability to put personal interests and loyalties aside, you may want to abstain.

This kind of assessment causes some officials to adopt the practice of avoiding even the appearance of impropriety with respect to their conduct as public officials. Such a practice places a high value on maintaining and improving the public's perception of government and those who govern. This value reflects a concern that the loss of public trust in government diminishes the community support necessary to address pressing community challenges.

Adopting this approach may mean not participating in an important decision. Perhaps even more difficult is the possibility that those who do participate in the decision-making process may make what you consider to be the "wrong" decision. The decision may affect the long-term interests of the community, and your constituents may disagree with the decision. In fact, some may feel disappointed and angry if one participant voluntarily steps aside and others make a decision with which they disagree.

Ultimately, the issue rests in the value you place on ethics in public service and how you want to be remembered by the community and your family. If integrity is part of that picture, then braving criticism for voluntarily refraining from participating in an important decision may be well worth it.

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Use Special Caution When a Public Official Has an Interest in an Agency Contract

Another disqualification and abstention issue arises when a public official has a financial interest in a contract that comes before the agency for approval.

State law prohibits public officials from having a financial interest in any contract made by their agencies.¹⁴ This is a prohibition against self-dealing. The prohibition is absolute and it applies even if the official abstains from voting on the contract and does not participate in any of the preliminary discussions, negotiations, planning or solicitation of bids.

The penalties for violating the contracting conflict-of-interest rules are severe. Violations are a felony, punishable by fines, imprisonment and disqualification from ever holding office again.¹⁵ The contract is also “void,” meaning the agency does not have to pay for goods or services received under the contract and may seek repayment of amounts already paid.¹⁶

There are limited exceptions to the rule, including when the interest is so small that it amounts to “noninterest” or a “remote interest.”¹⁷ There is also a limited rule of necessity.¹⁸ A wise approach is to consult agency counsel immediately if one believes one may have an interest in a contract being contemplated by one’s agency.

Disqualifications, Abstentions and the Ability to Take Action

The general rule is that a majority of a decision-making body must be present for it to conduct business — a concept known as a quorum.¹⁹ Having a quorum ensures that a legally specified minimum number of decision-makers participate in a decision.

Typically a quorum is necessary for an item to pass, although special rules apply to certain kinds of actions or bodies. For example, city council resolutions, orders to pay money and all ordinances require a majority to pass.²⁰ A majority vote of the entire membership of the board is required for acts by county boards of supervisors.²¹ The law also requires more than a majority of the body in order to take certain actions.²²

These special rules reflect a judgment that some agency actions are sufficiently important that the body may not act with just a small number of its members participating in the vote. How do abstentions and disqualifications affect the existence of a quorum?

The general rule is that elected officials who *abstain* are counted to determine whether a quorum exists. This includes those who abstain from voting because of a pending question concerning a conflict of interest (for example, an elected official who is waiting to receive an advice letter from the Fair Political Practices Commission may be counted toward the quorum). This is

because they have not yet been disqualified; typically their agency attorneys recommend that they abstain pending resolution of the conflict issue.²³

Conversely, those who are *disqualified* from participating in the decision are not counted toward the quorum.²⁴

What to Do If One Does Abstain or Disqualify Oneself

When you disqualify yourself or abstain, you should not participate in any aspect of the decision-making process. The theory is that if it is inappropriate to vote on a matter, it is also inappropriate to participate in the discussion or in any other activity that could influence a colleague's vote.

California law codifies this concept regarding disqualifications.²⁵ Typically a person with a disqualifying financial interest in a decision must take the following series of actions:

- Publicly identify the financial interest or potential conflict of interest in sufficient detail to be understood by the public; and
- Refrain from discussing or voting on the matter.

For certain officials, the rules require that one leave the room until after the discussion, vote and any other disposition of the matter are concluded unless the matter is on the consent calendar.²⁶ The law does allow a public official to speak on the issue at the same time as the public speaks on the issue if the subject of the decision is the official's business or property.²⁷

Local elected officials may wish to consider whether, as an ethical matter, they want to also follow these practices when they voluntarily abstain from participating in the decision.

The Duty to Decide

In an ideal world, all members of a governing body would be able to participate in any given decision. This underscores how important it is for all members of a governing body to attend every meeting, so decisions can reflect the views of every voting official who can participate in the decision.

Attending and being prepared for meetings is a major component of an elected official's responsibilities and ethical behavior — so is voting in general.

It may be tempting to abstain because of concerns about making an unpopular decision or simply not knowing which decision is best. Nevertheless, making decisions is what officials are elected to do. It is manifestly unfair — and unethical — to abstain or otherwise put one's colleagues in the position of taking the heat for a necessary but unpopular decision.

Concerns about Others' Participation

What should you do if you have reason to believe that a colleague is disqualified or ought to abstain? Discussing your concerns privately with the colleague is a good approach. If you believe that the colleague may be legally disqualified from participating, a key concern is the penalties for participating in a decision when one is forbidden from doing so.²⁸ Such participation can also harm the agency and those involved by making the decision subject to challenge.²⁹

If your colleague insists on participating, but you are still concerned that the colleague is legally disqualified from participating, the next step is to discuss the issue with the agency attorney and relevant law enforcement authorities.

Conclusion

Being aware of and alert to these issues is critically important. It enables officials to contact their local agency attorney or the Fair Political Practices Commission for help in determining whether they must step aside from the decision-making process.

Making sure that you are legally allowed to participate in a decision-making process is the first step. The second step is to analyze whether you *should* participate, given relationships and other factors. The question is whether these factors will cause the public to reasonably question if a decision-maker can put the public's interests and fairness ahead of more personal interests.

About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities. ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust.

The Institute welcomes feedback on this resource:

- Email: ethicsmailbox@ca-ilg.org
- Subject: *Deciding When to Step Aside from the Decision-Making Process Abstentions and Disqualifications*
- Mail: 1400 K Street, Suite 205 • Sacramento, CA • 95814

References and Resources

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

¹ See generally Cal. Gov't Code §§ 91000-14.

² See Cal. Gov't Code § 91003(b).

³ See Cal. Gov't Code §§ 87100-87105.

⁴ 2 Cal. Code Regs. §18700(b).

⁵ See 2 Cal. Code Regs. §§ 18707-18707.10.

⁶ The first of these revisions, effecting 2 Cal. Code Regs § 18700, was adopted in April 2013, however, at the time of publication the effective date for this change is not set.

⁷ In 2012, the FPPC revised the standard used to determine whether a financial effect is “reasonably foreseeable” in 2 Cal. Code Regs § 18706 from being “substantially likely” to being a “realistic probability,” effective May 31, 2014.

⁸ See 2 Cal. Code Regs. § 18705.2, effective May 31, 2014.

⁹ See 2 Cal. Code Regs. § 18705.5.

¹⁰ 2 Cal. Code Regs. § 18705.5(c).

¹¹ California Fair Political Practices Commission, Form 806 – Agency Report of Public Official Appointments Frequently Asked Questions, available at www.fppc.ca.gov/forms/806_Faq.pdf.

¹² California Fair Political Practices Commission, Form 806 – Agency Report of Public Official Appointments, available at www.fppc.ca.gov/forms/806.pdf.

¹³ See Cal. Gov't Code § 84308; 2 Cal Code Regs §§ 18438.1-.7; see also *All Towing Services, LLC v. City of Orange*, 220 Cal. App. 4th 946, 163 Cal. Rptr. 163 (2013).

¹⁴ Cal. Gov't Code § 1090.

¹⁵ See Cal. Gov't Code § 1097.

¹⁶ *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985); see Cal. Gov't Code § 1092.

¹⁷ See Cal. Gov't Code §§ 1091(a) and 1091.5.

¹⁸ See 70 Cal. Op. Att'y Gen. 45 (1987).

¹⁹ See Cal. Gov't Code § 36810 (for general law cities); see also Cal. Civ. Proc. Code §§ 12, 15.

²⁰ See Cal. Gov't Code § 36936.

²¹ See Cal. Gov't. Code § 25005.

²² For example, urgency ordinances (for the immediate preservation of the public peace, health or safety) require a four-fifths vote. See Cal. Gov't Code § 36937(b). Urgency interim zoning ordinances (moratoria) also require a four-fifths vote. See Cal. Gov't Code § 65858. Resolutions initiating eminent domain proceedings require a two-thirds vote (four votes in a general law city). See Cal. Civ. Proc. Code §§ 1245.220, 1245.240.

²³ *Farwell v. Town of Los Gatos*, 222 Cal. App. 3d 711, 271 Cal. Rptr. 828 (6th Dist. 1990) (subsequently ordered not published). See also 62 Cal. Op. Att'y Gen. 698, 700 (1979).

²⁴ *Id.*

²⁵ See Cal. Gov't Code § 87105.

²⁶ See Cal. Gov't Code § 87105(a)(3).

²⁷ See Cal. Gov't Code § 87105(a)(4); 2 Cal. Code Regs. § 18702.4.

²⁸ See generally Cal. Gov't Code §§ 91000-14.

²⁹ See Cal. Gov't Code § 91003.