

WALKING THE LINE:

What to Do When You Suspect an Ethics Problem





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What to Do When You Suspect an Ethics Problem

The vast majority of public servants are selfless, well-intended and community-minded individuals. However, occasionally an agency will find itself dealing with individuals who are either unfamiliar with or disregard the norms and laws governing public service.

What is a conscientious fellow public servant to do if he or she suspects wrongdoing? While it's difficult to give advice that addresses every situation, the following eight-step process provides an analytical framework. In addition, this article offers a number of resources to help local officials achieve the difficult balance between not turning a blind eye to potential wrongdoing while avoiding unjustly accusing someone of it.

The first thing you should do in any situation is consult your agency counsel. Dealing with possible wrongdoing can be a very lengthy and personally demanding process, and it's essential to seek legal counsel before planning your course of action. Once you have the advice of counsel, there are eight steps to take in addressing a public servant's suspected or potential wrongdoing. These are explored in detail, step by step, in the following pages.

Step 1. Stop. Examine Your Motivations.

Ethics is about promoting fidelity to universal values (for example, trustworthiness, respect, responsibility and fairness). In public service, it's also about fostering the public's confidence in its governing institutions, their employees and public

servants. A key goal is assuring the public that governmental decisions are made based on the public's interests — not narrow private or self-serving ones.

When considering what you should do about someone else's perceived ethical or legal lapse, reflect on your motivations. Ask yourself whether your goal is truly to promote more ethical conduct in public service and increase public confidence in government. If the issue is a violation of the law, is it a technical "gotcha" viola-

tion or does the violation truly represent a betrayal of the public's trust? Even if you are confident about the technical aspects, the laws that address these issues are very complicated, and you should consult your agency's counsel before moving forward.

There can be at least four motivations for calling a perceived transgression to light:

1. **Organizational Loyalty** – Individuals in this category are truly loyal to the

Suggested Steps to Take When You Suspect a Colleague Has Crossed Over the Ethical Line

1. Stop. Examine your motivations.
2. Figure out what the "wrong" might be.
3. Determine the potential consequences of letting the situation go unaddressed.
4. Speak with others to see if they share your concerns.
5. Discuss the issue with the individual (or have a trusted confidant do so).
6. Determine whether an internal investigation is appropriate.
7. Determine whether external enforcement authorities should be contacted.
8. Consider steps to prevent the situation from recurring.

In public service, ethics is also about fostering the public's confidence in its governing institutions, their employees and public servants.

organization and report concerns in order to remedy problems that could ultimately harm the organization. In addition, many people are strongly committed to simply doing the right thing.

2. **Disillusionment** – Some people may be motivated to speak out against perceived transgressions because their expectations exceed organizational realities. An important question to ask is whether these expectations reflect a full analysis of ethical considerations, including the fact that some ethical dilemmas reflect a conflict between competing legitimate ethical values. An example of such conflict is the tension between absolute fidelity to being honest (related to the value of trustworthiness) and avoiding unnecessarily hurting someone's feelings (related to the value of compassion).
3. **Defensiveness** – Some people believe “the best defense is a good offense.” They could be employees who anticipate disciplinary proceedings for poor performance or perhaps an elected official who fears that a transgression of his or her own is about to be revealed. The goal is not to vindicate ethical or legal principles but to lay a foundation for claiming retaliation when fault is found with their own conduct.
4. **Desire to Harm** – Some individuals reveal or claim wrongdoing either to hurt or embarrass rivals or an organization or as a form of retribution for perceived mistreatment.

If your motivations fall into the latter two categories, carefully consider whether you are making an unethical use of ethics. The practice of co-opting ethics for personal or political advantage has come to be known

as “vigilante ethics.” Vigilante ethics is a destructive dynamic that ultimately damages the public trust by impugning the motivations of public servants or would-be public servants for personal reasons that have nothing to do with creating a more ethical environment.

Vigilante ethics can also be an inherently short-term strategy. People reap what they sow. Ultimately, an environment characterized by ethical charges and counter-charges ends up reflecting badly on everyone.

Step 2. Figure Out What The “Wrong” Might Be.

Ethics Versus the Law

As you contemplate the nature of the “wrong” you observed, it can be helpful to keep in mind the distinction between the law and ethics. Following the law is what people *must* do; there are penalties and other consequences associated with violating the law. The chart on the following pages explains some of the ways local officials can find themselves at odds with the laws governing public service.

Ethics tends to be what people *ought* to do based on commonly held values: trustworthiness, respect, fairness, compassion, loyalty and responsibility (including public servants' responsibility to act in the best interests of the community as a whole). While there are many laws that reflect these values (for example, laws making it illegal to lie in government documents),

Vigilante ethics is a destructive dynamic that ultimately damages the public trust.



conduct can be technically within the law but nevertheless unethical. If you believe a colleague's conduct may be unethical — even if it's not unlawful — you need to carefully consider *why* you think it's unethical.

The Nature of an Ethical Dilemma

Some kinds of actions are clearly unethical, while others involve a more searching analysis. There are two kinds of ethical dilemmas. One involves conflicts between two “right” sets of values. The other involves situations in which doing the right thing comes at a personal cost. Think critically about the kind of ethical dilemma your colleague faced and the kinds of competing considerations that had to be weighed.

Does Your Agency Have a Code of Ethics?

Referring to an agency code of ethics can be helpful in such an analysis. A code of ethics highlights the kind of values that are important for those who serve the agency and how those values apply in the public service context. Furthermore, because there can be room for disagreement about what kind of conduct violates the letter or spirit of the code, it's useful if the code provides practical examples of the kind of conduct that is consistent with its provisions (and, by negative implication, what kind of conduct is not). For more information about local ethics codes, visit www.ca-ilg.org/ethicscodes.

To What Extent is Ethics an Important Part of the Organizational Culture?

Even if the agency doesn't have a formal ethics code, the community or the organization's leadership may have communicated in other ways their expectations about the importance of ethics and values in decision-making and behavior. If your agency has a strong culture of ethics, it is easier to identify actions that are out of step with the organization's norms. In such a culture, leaders “walk the ethics talk” and there is a history of making difficult choices based on ethical considerations.

For further information about the kinds of organizational behaviors that foster a culture of ethics, visit www.ca-ilg.org/culturechecks.



Step 2. Figuring Out What the “Wrong” Might Be

Links to all publications referenced under “For More Information” are available in the electronic version of this article online at www.ca-ilg.org/whattodo.

Issue: Does the situation involve an official ...	Law Potentially Violated	Enforcement Mechanism(s)	For More Information <i>Remember, your agency's attorney is an excellent resource. Seek their counsel in these situations too.</i>
P E R S O N A L F I N A N C I A L G A I N			
Incompletely disclosing their financial interests?	Political Reform Act ¹	Local agency attorney, Fair Political Practices Commission (FPPC), district attorney or private lawsuit ²	Attorney General publication, <i>Conflicts of Interest (2004)</i> ; FPPC publication, <i>Your Duty to File: A Basic Overview of State Economic Disclosure Law</i> ; Institute for Local Government (ILG) publication, <i>A Local Official's Reference on Ethics Laws</i>
Participating in or influencing decisions in which they have a disqualifying financial interest?			Attorney General publication, <i>Conflicts of Interest (2004)</i> ; FPPC publication, <i>Can I Vote? Conflicts of Interest Overview</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Influencing agency decisions relating to prospective employees?			Attorney General publication, <i>Conflicts of Interest (2004)</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Having an interest in a contract to which the official's agency is a party?	Prohibition against interests in contracts ³	Local agency attorney, district attorney or private lawsuit	Attorney General publication, <i>Conflicts of Interest (2004)</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Receiving advantages or anything of value in exchange for their decisions (bribery)?	State and federal criminal bribery laws ⁴	District attorney or U.S. Attorney	ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Acquiring property interests within their agency's redevelopment area?	Redevelopment law ⁵	Grand jury	ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
P E R K S			
Not disclosing gifts from a single source aggregating to \$50 or more in a year?	Political Reform Act ⁶	Local agency attorney, FPPC, district attorney or private lawsuit ⁷	FPPC publications, <i>Limitations on Gifts, Travel and Loans for Local Officials and Receiving Gifts as a Public Official</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Receiving gifts aggregating to more than \$360 from one source in the past 12 months?			FPPC publications, <i>Limitations on Gifts, Travel and Loans for Local Officials and Receiving Gifts as a Public Official</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Not disqualifying themselves from participating in decisions involving someone who gave them a gift worth more than \$360 during the preceding 12 months?			FPPC publications, <i>Limitations on Gifts, Travel and Loans for Local Officials and Receiving Gifts as a Public Official</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Receiving loans over \$250 from those within the agency or who do business with the agency?			FPPC publications, <i>Limitations on Gifts, Travel and Loans for Local Officials and Receiving Gifts as a Public Official</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Receiving compensation for speaking, writing an article or attending a conference?			FPPC publications, <i>Limitations on Gifts, Travel and Loans for Local Officials and Receiving Gifts as a Public Official</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Participating in decisions that affect personal interests?			Attorney General publication, <i>Conflicts of Interest (2004)</i> ; FPPC publication, <i>Can I Vote? Conflicts of Interest Overview</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Sending mass mailings at public expense?			ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Using public agency resources for personal or political purposes?	Government Code and Penal Code ⁸	Grand jury, district attorney, private lawsuit	ILG publications, <i>A Local Official's Reference on Ethics Laws</i> and <i>Of Cookie Jars and Fishbowls: A Public Official's Guide to Use of Public Resources</i>
Making gifts of public resources or funds?	California Constitution ⁹	Private lawsuit	ILG publication, <i>Of Cookie Jars and Fishbowls: A Public Official's Guide to Use of Public Resources</i>
Accepting free transportation from transportation companies?	California Constitution ¹⁰	Removal from office through a lawsuit known as a quo warranto action, involving the attorney general ¹¹	Attorney General publication, <i>Conflicts of Interest (2004)</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>

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FAIRNESS			
Participating in decisions that will benefit their immediate family (spouse and dependent children)?	Political Reform Act ¹²	Local agency attorney, FPPC, district attorney or private lawsuit	Attorney General publication, <i>Conflicts of Interest</i> (2004); FPPC publication, <i>Can I Vote? Conflicts of Interest Overview</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Soliciting campaign contributions as an appointed official from permit applicants while the application is pending and for three months afterward?		Local agency attorney, FPPC, district attorney or private lawsuit	Attorney General publication, <i>Conflicts of Interest</i> (2004); FPPC publication, <i>Campaign Contributions May Cause Conflicts for Appointees and Commissioners</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Participating in quasi-judicial proceedings in which they have a strong bias with respect to the parties or the facts?	Common law ¹³	Local agency attorney, private lawsuit	Attorney General publication, <i>Conflicts of Interest</i> (2004); ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Holding multiple public offices that involve potentially conflicting loyalties?	Government Code ¹⁴	Removal from office through a lawsuit known as a quo warranto action, involving the attorney general ¹⁵	Attorney General publication, <i>Conflicts of Interest</i> (2004); ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Circumventing the agency's competitive bidding processes?	Public Contract Code, ¹⁶ local charters ¹⁷ or ordinances	Private lawsuit ¹⁸	<i>Western City</i> article, “Let’s Make a Deal: Securing Goods and Services for Your Agency,” October 2004
GOVERNMENTAL TRANSPARENCY			
Conducting the public's business outside open and publicized meetings, except for the limited circumstances in which closed sessions are allowed?	Ralph M. Brown Act ¹⁹	Local agency attorney, district attorney or private lawsuit	League of California Cities publication, <i>Open & Public 3: A Guide to the Ralph M. Brown Act</i> ; Attorney General publication, <i>The Brown Act</i> ; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Refusing to allow public inspection of documents and other written records or electronic data except when the law allows nondisclosure?	Public Records Act ²⁰	Local agency attorney, district attorney or private lawsuit	Attorney General publication, <i>Public Records Act Summary</i> (2004); ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
Not disclosing significant (\$5,000 or more) fund-raising activities for legislative, governmental or charitable purposes?	Political Reform Act ²¹	Local agency attorney, FPPC, district attorney or private lawsuit	<i>Western City</i> article, “Fund-Raising Ethics: Brother, Can You Spare a Dime?” February 2004; ILG publication, <i>A Local Official's Reference on Ethics Laws</i>
STAFF - RELATED ISSUES			
Giving direction to staff instead of the city manager?	Local ordinance ²²	Local agency attorney, district attorney	See www.ca-ilg.org/staffrelations .
Discrimination based on protected characteristics (gender, race, religion, sexual orientation) or speech?	State and federal civil rights laws ²³	State Department of Fair Employment and Housing, private lawsuit	California Department of Fair Employment and Housing website (www.dfeh.ca.gov)
Violation of a professional code of ethics for a certain profession?	Professional association	Professional association	See www.ca-ilg.org/staffrelations for a list of professional codes of ethics.
An agency prohibiting whistle-blowing or retaliating against an employee for whistle-blowing?	Labor Code ²⁴	District attorney, ²⁵ private lawsuit ²⁶	<i>Western City</i> article, “For Whom the Whistle Blows,” April 2005

Step 2. Figuring Out What the “Wrong” Might Be, continued

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Issue: Does the situation involve ...	Law Potentially Violated	Enforcement Mechanism(s)	For More Information <i>Remember, your agency's attorney is an excellent resource. Seek their counsel in these situations too.</i>
ELECTION LAW			
Qualifications or requirements for holding office (for example, residency)?	State law, ²⁷ local charters ²⁸	Election contest, removal from office through a lawsuit known as a quo warranto action, involving the attorney general ²⁹	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Misconduct or errors by a precinct board member?	State elections law ³⁰	Election contest	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Giving bribes or rewards for voting (or other offenses against the election franchise)?		Election contest	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Illegal voting (votes cast by those not eligible or votes cast in an unlawful manner)?		Election contest	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Eligible voters turned away from voting?		Election contest	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Errors in counting ballots?		Election contest	California Secretary of State publication, <i>Voter Fraud Protection Handbook</i>
Failure to disclose in a timely manner campaign contribution amounts and sources?	Political Reform Act ³¹	Local agency attorney, FPPC, district attorney or private lawsuit ³²	<i>Win the Right Way</i> , Chapter 8, Complying with the Law; FPPC publications, <i>Candidates: Important Things to Remember</i> and <i>Campaign Disclosure Manual 2: Information for Local Candidates</i>
Failure to identify the source of campaign advertising?		Local agency attorney, FPPC, district attorney or private lawsuit	<i>Win the Right Way</i> , Chapter 8, Complying with the Law; FPPC publications, <i>Candidates: Important Things to Remember</i> and <i>Campaign Disclosure Manual 2: Information for Local Candidates</i>

Step 3. Determine the Potential Consequences Of Letting the Situation Go Unaddressed.

Keep in mind that the consequences listed here are only the potential legal consequences. Just being *accused* of violating the law can have unpleasant results, including embarrassment (to the extent that some officials have even moved out of their community), losing a good reputation and the community’s respect, financial costs (hiring an attorney and the potential loss of one’s job or professional license) and being recalled or losing the next election before the legal process has concluded. The chart on pages 8–9 explains the consequences of violating ethics laws.

A Note About Violations of Local Agency Ethics Codes

If the conduct in question involves a violation of an agency ethics code, the code may provide accountability mechanisms. The availability and application of such mechanisms vary based on whether the individual in question is an employee or an elected official.

For employees, feedback on ethical behaviors (or lapses in ethical behaviors) can be incorporated in the usual processes for providing input to employees and the employee review process.

For elected officials, the voters are the ultimate source of feedback and review. The ethics code section of the ILG website (www.ca-ilg.org/ethicscodes) has a white paper by Dr. Tom Shanks of the Markkula Center for Applied Ethics on

accountability mechanisms for elected officials that may be helpful.

Step 4. Speak With Others To See if They Share Your Concerns.

If you are an elected official, talk with a trusted colleague, your agency administrator or counsel about your concerns.

If you are an employee, talk with your supervisor or the next person up in the chain of command. The agency’s Human Resources Department may also be able to serve as a sounding board.

Frequently, such consultation will give you a more complete picture of what is going on and whether indeed the situation involves truly inappropriate conduct. This minimizes the likelihood of

you misperceiving the situation based on speculation, conjecture or inaccurate or incomplete information. Such a consultation will also widen the range of thinking about the best way to proceed in terms of achieving an overall positive result for the agency.

Communications Tips

Ethicist Michael Josephson offers the following tips on how to bring whistleblowing concerns about a particular situation to others' attention.

1. Be prepared. Be sure you have your facts correct and you are speaking with the right person.
2. Be respectful. Watch your tone. Be earnest but not self-righteous or accusatory. Don't raise your voice or make threats. Be willing to listen as well as talk.
3. Be fair. Don't assume bad motives; be open to new facts and explanations. Don't equate not agreeing with you with not listening, not caring or being stupid.
4. Be honest. Don't exaggerate or omit important facts.
5. Stick to the point; stay focused.³³

The Agency Attorney's Role

Agency counsel may be in a particularly sticky situation if he or she has given advice that has not been followed. State law imposes a duty on all attorneys to keep client communications confidential.³⁴ Under the State Bar's Rules of Professional Responsibility, in such an instance, an attorney can only work his or her way up the agency's hierarchy, sharing concerns ultimately with the highest-level decision-makers (which usually, but not always, is the agency governing body).³⁵ If that decision-maker does not heed these concerns, an attorney's professional responsibilities preclude him or her from disclosing the problematic conduct *outside* the organization.³⁶ Repeated efforts to change this prohibition for public agency attorneys have been vetoed.³⁷

Step 5. Discuss the Issue With the Individual (or Have a Trusted Confidant Do So).

Once you have determined that someone is on a path to violate the law or the public's trust (or already has), the first goal is to get him or her to stop. But how?

Figure Out the Motivation

One strategy is to try to determine what the individual's motivations are. For many, it's about outcomes — for example, personal financial gain or political advantage. This is why sometimes it can be a challenge to motivate people to “do the right thing” in the abstract, since “the right thing” can involve forgoing a benefit like financial gain or perceived political advantage.

For other individuals, the motivation can be a sense of self-importance. Author T.S. Eliot observed that half the wrongs in this world are caused by people who want to feel important.

Identify the Gaps in Analysis

For some public officials who step over the line, the thought process also can involve rationalizations. A common one is that somehow the individual “deserves” what might be considered an improper benefit because of his or her otherwise selfless commitment to public service. Another is that the law doesn't make sense. Yet another is “the end justifies the means” — in other words, a worthy goal justifies taking legal/ethical shortcuts. The evidence is that neither the public nor the courts tend to buy these rationalizations.



Potential Consequences of Violating Federal or State Ethics Laws

Political Reform Act (includes disclosure and disqualification requirements, mass mailing prohibition, campaign regulation violations)

Violations of the Political Reform Act 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 can demonstrate.³⁸

Criminal Sanctions. A knowing or willful violation of the Political Reform Act's requirements is a misdemeanor.³⁹ A person convicted of a misdemeanor under these laws may not be a candidate for elective office for four years following the conviction.⁴⁰ Such a conviction may also create an immediate loss of office under the theory that the official violated his or her official duties,⁴¹ or create a basis for a grand jury to initiate proceedings for removal on the theory that failure to disclose constitutes willful or corrupt misconduct in office.⁴² Jail time is also a possibility.⁴³

In addition, the Fair Political Practices Commission (FPPC) may levy fines of up to \$10,000 per violation or more, depending on the circumstances.⁴⁴

Civil Sanctions. Violations prosecuted as a civil matter can also be punishable by civil fines.⁴⁵ Also, district attorneys, some city attorneys, the FPPC or a member of the public can bring an action to prevent the official from violating the law.⁴⁶ If the action is brought by a member of the public, the violator may have to reimburse the costs of the litigation, including reasonable attorneys' fees.⁴⁷

Administrative Fines. In addition to civil and criminal penalties, the FPPC may impose administrative penalties. The administrative penalty for violating the Political Reform Act is a fine of up to \$5,000 per violation.⁴⁸

Employment Consequences. Employees who do not comply with the Political Reform Act may be subject to discipline and possibly dismissal under an agency's personnel regulations.⁴⁹

Effect on the Agency and Those Affected by Agency's Decision. When a disqualified official participates in a decision, it can void the decision.⁵⁰ This can have serious consequences for those affected by the decision as well as the public agency. If someone is being encouraged to participate despite a disqualifying interest, point out to them the costs that would be incurred if the agency's decision has to be undone — not to mention the legal consequences.

Prohibition Against Interests In Contracts

Criminal Penalties. Willful violations are a felony and may be punished by fines of up to \$1,000, imprisonment and being disqualified from ever holding public office again.⁵¹

Effect on Contract. The contract also is void, which means the local agency does not have to pay for goods or services received under the contract.⁵² The agency may also seek repayment of amounts already paid.⁵³

Personal or Political Use of Public Resources

Public officials face both criminal and civil penalties for using public resources for personal benefit.⁵⁴ Criminal penalties include a two- to four-year state prison term and permanent disqualification from public office.⁵⁵ Civil penalties include a fine of up to \$1,000 for each day the violation occurs, plus three times the value of the resource used.⁵⁶

At some point, personal use of public resources becomes embezzlement — a form of theft.⁵⁷ Embezzlement may constitute "willful misconduct," which warrants removal from office, or it may be prosecuted as a felony violation. A public officer convicted of embezzlement is guilty of a felony punishable by imprisonment; in addition, that person is thereafter ineligible to hold public office in California.⁵⁸

Federal prosecutors have been known to treat the receipt of illegitimate expense reimbursements or advances as income to the official. Because the official has not typically reported these payments as such on personal tax returns, the official then becomes subject to an action for income tax evasion.

The Internal Revenue Code is notoriously complex and its penalty sections are no exception. The general penalty for willful income tax evasion is a fine of up to \$100,000 and up to five years in prison or both. Those convicted are also responsible for paying the costs of prosecution.⁵⁹ Failure to report information to the tax authorities is punishable by fines of up to \$25,000 and/or a year in federal prison, plus the costs of prosecution.⁶⁰

If the U.S. Postal Service was used in any way, such use can also be the basis for a charge of mail fraud.⁶¹ Mail fraud is punishable by up to five years in federal prison per violation and/or a fine of the greater of: 1) twice the gain to the violator; or 2) \$250,000 per violation.⁶²

If the program has any degree of federal funding, the federal criminal laws against corruption and embezzlement⁶³ also apply.

Violation of Ralph M. Brown Act And Open Meeting Laws

Nullification of Decision. As a general matter, decisions that are not made according to open meeting laws are voidable.⁶⁴ After asking the agency to correct the violation, either the district attorney or any interested person may sue to have the action declared invalid.⁶⁵ Costs and attorneys' fees may be awarded to those who successfully challenge Brown Act violations.⁶⁶

Criminal Sanctions. Additionally, governing body members who intentionally violate the open meeting laws may be guilty of a misdemeanor.⁶⁷ The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to \$1,000 or both.⁶⁸

Other Measures. Either the district attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.⁶⁹ Another remedy, under certain circumstances, is for a court to order that all closed sessions be tape recorded.⁷⁰ Costs and attorneys' fees may be awarded too.⁷¹

Potential Consequences of Violating Federal or State Ethics Laws

Public Records Act	Anyone can sue a public agency to enforce his or her right to access public records subject to disclosure. ⁷² If the agency loses or otherwise produces the records as the result of the lawsuit, it must pay costs and attorneys' fees. ⁷³
State and Federal Criminal Bribery Laws	<p>State Law Penalties for Bribery. Receiving or agreeing to receive a bribe is a criminal act punishable by a combination of prison time, fines, losing one's office and being forever disqualified from holding public office.⁷⁴ The specified prison sentence is two to four years in state prison. The fines vary according to whether the bribe was actually received. If it was, the fine is a minimum of \$2,000 up to either \$10,000 or double the amount of the bribe, whichever is greater. If a bribe was not actually received, there is still a fine of between \$2,000 and \$10,000.</p> <p>State Law Penalties for Extortion. Extortion by public officials is a misdemeanor.⁷⁵ Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.⁷⁶ Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.⁷⁷</p> <p>State Law Penalties for Appointing Someone to Office. An official who receives payment or favors for an appointment faces the following punishments: forfeiture of office; disqualification from ever holding public office again; and a fine of up to \$10,000.⁷⁸</p> <p>Federal Penalties. If an agency receives more than \$10,000 in federal monies (which many agencies do), an official could be subject to federal prosecution if the amount at stake (for example, a bribe) exceeds \$5,000.⁷⁹ The penalty for bribery under federal law is a fine of up to three times the amount of the bribe or \$250,000 (whichever is more), up to 10 years imprisonment or both.⁸⁰</p> <p>Restitution. The official may be ordered to pay restitution to the agency in the amount of the profit or advantage received (or loss to the agency) as the result of the misuse of the official's position.⁸¹</p>
Misconduct in Office	Willful or corrupt official misconduct can create a basis for a grand jury to initiate proceedings for removing an official from office. ⁸²
Election Law Violations	<p>Election Contest. An election result may be challenged in an election contest, the primary purpose of which is to ascertain the will of the people and to make certain that mistake or fraud has not frustrated the public's exercise of its will.⁸³ Any elector of any county, city or of any political subdivision of either may contest any election held in the jurisdiction.⁸⁴</p> <p>Quo Warranto. The entitlement of a public officer to hold office may be contested in quo warranto proceedings.⁸⁵ In rare instances, the attorney general may pursue such actions; more often the attorney general's role is one of granting or denying permission to private individuals to bring such actions on behalf of the public.⁸⁶ Private individuals cannot bring such actions without first obtaining the attorney general's permission. For more information, visit http://caag.state.ca.us/opinions/quo.htm.</p>
Whistle-Blower Protections	Any employer who violates this law is guilty of a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine not to exceed \$1,000 or both and, in the case of a corporation, by a fine not to exceed \$5,000. ⁸⁷ A private lawsuit for damages is also possible. ⁸⁸

Another thought process can involve an incomplete assessment of the overall costs and benefits of a particular course of action. If an individual is on a path to violate either the law or the public's trust (or both), this cost-benefit assessment needs to include not only the anticipated benefits of this path but the political, legal, financial and emotional costs as well. These include loss of one's respected standing in the community (again, pride and feelings of importance can be powerful motivators), loss of office and even the loss of one's freedom if the offense potentially involves jail time.

Be aware too that there is a strong human tendency to underestimate these

likely costs ("The law isn't really clear," "I'll never get caught," "They won't be able to prove it" or even "After all I've done for the community, the public or the judge would surely go easy on me"). The objective reality is that prosecutors can offer strong incentives for people to testify against one another and no one is particularly sympathetic to politicians and public employees who violate the public's trust.

Appeal to Enlightened Self-Interest

Both the rationalization and underestimation thought processes tend to be fundamentally self-deluding. Because many people in this situation are motivated

by outcomes, the task becomes one of diplomatically demonstrating the flawed nature of such reasoning and appealing to a person's sense of enlightened self-interest by helping him or her to appreciate the full range of potential consequences. The chart on pages 8–9 may be a useful tool in this kind of conversation.

Assess the Results of the Conversation

Again, the goal is to get the individual in question to voluntarily stop the problematic behavior and take whatever remedial steps are appropriate. If the individual denies the conduct or contends that there's no problem with it, and the agency still

has concerns, the next step may be either an internal investigation or referral of the matter to an external enforcement agency.

Step 6. Determine Whether An Internal Investigation Is Appropriate.

An internal investigation may help an agency resolve the controversy over whether the

conduct in question occurred and whether it was improper. This enables an agency to proactively respond to allegations of misconduct. The scope of the investigation will likely turn on whether the issue involves violations of internal procedures/standards or violations of the law. If it's the latter, consultation with your agency counsel will determine whether and to what extent an internal investigation will be a constructive and helpful approach.

The Nuts and Bolts of Internal Investigations

The fundamental goals of an internal investigation are to determine the truth and demonstrate the agency's commitment to adhering both to the law and its internal procedures. Using a fair investigation process is part and parcel of achieving these goals.

Tips for Conducting an Effective Internal Investigation

Select an appropriate investigator. Issues to consider include credibility, impartiality and discretion, interviewing skills, ability to understand the purpose of the investigation and diligence in terms of recording the information collected. If the investigation involves a high-level individual in an organization or is otherwise particularly sensitive or complex, the agency may be well served by using an outside investigator. If the agency chooses to do so, the outside investigator must be an attorney or a licensed private investigator.

Have an investigation strategy. Identify potential witnesses (those who would have information that would either prove or disprove the conduct occurred) and documentation relevant to the claims under investigation. Develop an investigation strategy, including a timeline for completing the investigation — a timely completion reinforces perceptions of fairness.

Encourage cooperation. Those asked for information should be assured that the agency encourages their full and truthful participation in the investigation. The agency should make it clear that it will not take adverse action against those who participate in good faith in the investigation and who have done nothing wrong. The agency may also want to have a policy stating that any adverse consequences that may flow from any wrongdoing discovered in the investigation will be influenced by the degree of cooperation demonstrated.

Engage in careful and documented fact-finding. Take steps to ensure that relevant documents are preserved (and not destroyed). This can include e-mails and telephone records. Interview questions should be probing and open-ended and, to preserve confidentiality, focus only on the details that particular person should know. The tone of each interview should be professional. The investigator should be as impartial as possible and not comment on any aspect of the investigation. Conversations should be recorded if possible and it may be helpful to secure signed statements if it appears that witnesses may not be available in the future.

Prepare a detailed report of findings. Once the investigation is completed, prepare a detailed report that describes:

1. The allegations;
2. The facts that were ascertained during the investigation (particularly where the facts are not clear); and
3. The investigator's tentative conclusions on whether procedures, policies or laws were violated.

If appropriate, provide the accused an opportunity to respond before finalizing the report and determine whether the response indicates that additional investigation is warranted.

Determine remedial action. Actions taken to remedy existing problems and prevent future problems can include:

1. Reprimanding, disciplining or censuring the accused;
2. Adopting new policies or procedures;
3. Notifying external enforcement authorities; and/or
4. Public disclosure.

Having an established investigation protocol can be helpful in this regard. Such a protocol enables the agency to explain the investigative process and its purpose (generally to discover the facts necessary to make a decision about a particular alleged behavior or action). It also communicates what to expect from the process and emphasizes its fairness and objectiveness. Issues that a protocol can cover include:

- Steps for initiating the process;
- The process to be used in the investigation (for example, fact-finding, interviewing witnesses and assembling documentation);
- The final decision process; and
- How (including how widely) the results will be communicated.

Step 7. Determine Whether External Enforcement Authorities Should Be Contacted.

There are numerous types of external enforcement entities and mechanisms, including the following.

District Attorney. District attorneys prosecute violations of state criminal laws.⁸⁹ For

a roster of district attorneys in California, see www.cdaa.org/daroster.htm.

U.S. Attorney. These attorneys prosecute violations of federal law. For more information and a list of links to offices, see www.usdoj.gov/usao.

Grand Jury. Grand juries have the authority to investigate public official misconduct.⁹⁰ For grand jury contact information, see www.nvo.com/cgja/links/. For more general information, see “How a Civil Grand Jury Works” at www.sanmateocourt.org/director.php?filename=./grandjury/cgjihow.html.

Fair Political Practices Commission (FPPC). The FPPC investigates alleged violations of the Political Reform Act, imposes penalties when appropriate, and assists state and local agencies in developing and enforcing conflict-of-interest codes. The FPPC interprets the laws relating to:

- Campaign financing and spending;
- Financial conflicts of interest;
- Lobbyist registration and reporting at the state level;
- Post-governmental employment;
- Mass mailings at public expense; and
- Gifts and honoraria (speaking and

writing fees) given to public officials and candidates.

For more information on the FPPC, visit www.fppc.ca.gov or call toll-free: (866) 275-3772. Two useful publications are *What Happens After I File a Complaint with the FPPC?* (online at www.fppc.ca.gov/pdf/enforce.pdf) and *How Do I Get Advice from the FPPC?* (www.fppc.ca.gov/pdf/advice.pdf). Note that advice-giving is limited to those who have duties under the Political Reform Act or their designated representatives.

Attorney General. State law requires the attorney general to provide a whistleblower hotline to respond to concerns about potentially unlawful conduct,⁹¹ which is handled through the Public Inquiry Unit at (800) 952-5225. The attorney general also weighs in on the issue of whether an individual is unlawfully holding public office; typically the attorney general’s role is one of granting or denying permission to private individuals to bring such actions (known as quo warranto actions) on behalf of the public, although the attorney general has authority to bring these actions him- or herself.⁹² The attorney general also issues opinions on general questions of law, upon request by a state officer, legislator,

Ethics Tools For Self-Assessment

The Institute for Local Government has produced two tools designed to help local agencies evaluate their ethics programs. One is called “Ethics Law Compliance Best Practices” (online at www.ca-ilg.org/best-practices). The other is “Assessing Your Agency’s Ethics Culture: Questions to Ask” (online at www.ca-ilg.org/culturechecks).



county counsel, district attorney, sheriff or city prosecutor (for the latter, only on questions of criminal law). For more about the Attorney General's Office, visit <http://caag.state.ca.us/index.htm>.

Private Right of Action. Under certain circumstances, an individual can bring a lawsuit to challenge unlawful behavior. The League offers Munilink (www.cacities.org/munilink), an online directory of service and product providers (including attorneys) that specialize in municipal law, including ethics laws. The California Political Attorneys Association is another possible source of counsel (www.cpaonline.com/members.php); this group of lawyers specializes in the Political Reform Act and state and federal election laws. The State Bar website also has advice on locating and selecting lawyers at www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10180&id=1396.

What About Going to the Media?

Generally, the media should *not* be an early contact when a person believes an agency or someone within an agency has engaged in misconduct. Although there are many skilled investigative journalists, there are a number of reasons for this view:

- Approaching the media in the first instance calls the accuser's motivations into question.
- The media is unlikely to be able to conduct as thorough an investigation as a well-intended agency.
- Media attention may hinder an internal or external investigation.
- Allowing the accused and then the agency to take corrective action is more conducive to promoting public confidence.

Motivations. In evaluating whether to contact the media, once again you have to examine your motivations. Is the motivation for taking action organizational loyalty? Disillusionment? Defensiveness? Or a desire to harm?

If the motivation is organizational loyalty, then a key objective of any actions taken will be to determine whether a bona fide transgression has occurred and, if so, pursue appropriate redress. The most likely

way to achieve this objective is to first go through an organization's internal mechanisms and then, if those prove unavailing, to external law enforcement authorities. This is because the media typically will not have the expertise (specifically legal expertise) to truly evaluate whether a transgression has indeed occurred. The media may interview attorneys, but those interviewed are not likely to have the kind of in-depth information necessary to responsibly opine definitively whether a transgression occurred.

Media Capacity. Furthermore, as one ethics website notes, there are studies that indicate reporters can pursue whistleblowing claims in a way that actually impedes efforts to rectify a situation (see www.onlineethics.org).⁹³ For these reasons, going to the media should generally be a last resort, perhaps only after law enforcement agencies have refused to act and there is a sound basis for believing a transgression damaging to the organization — and the public's trust in the organization — has occurred.

Going to the media earlier on generally suggests that one's motivations are less ethical: for example, out of a desire to harm; or to secure strategic advantage, should one's own conduct be subject to question (defensiveness). Responsible members of the media adhere to their own code of ethics, whose central tenets include being fair and honest in reporting information.⁹⁴ This code also encourages journalists to avoid allowing themselves to be manipulated by testing the accuracy of information from all sources and questioning sources' motives before promising anonymity.

This is not to say that media coverage of transgressions, perhaps as the result of investigative reporting, is in any way unethical. The media has an important role to play in fairly and factually reporting on transgressions. This notion is also part of journalists' ethics code: that public enlightenment is the forerunner of justice and the foundation of democracy.

What Best Promotes Public Trust? One of the questions you should always ask yourself when confronted with an ethical

dilemma is: "What course of action will most promote public confidence in my leadership and my agency?" The reality is that the media is not likely to report on an ethical transgression in a way that's likely to promote public confidence. The only exception might be if the agency had been given an opportunity and took advantage of it to deal decisively with a claimed transgression. Even in this latter situation, there is no guarantee that the media would report favorably on the agency's actions.

Step 8. Consider Steps To Prevent The Situation From Recurring.

Education is often the best preventive measure. The Institute for Local Government offers a number of resources to help local agencies address and educate their staff about ethics issues. They include:

- Identifying best practices for complying with ethics laws, online at www.ca-ilg.org/bestpractices;
- Fostering an ethical culture, at www.ca-ilg.org/culturechecks;
- Promoting ethics through codes of ethics, at www.ca-ilg.org/ethicscodes;
- Promoting campaign ethics, at www.ca-ilg.org/campaignethics; and
- Providing training and conducting workshops.

For More Information

The following entities have published a number of resources that describe some of the issues identified above in more detail. These resources are available without charge from their respective websites:

- **The Institute for Local Government:** www.ca-ilg.org/trust;
- **The State Attorney General:** <http://caag.state.ca.us/publications>; and
- **The State Fair Political Practices Commission:** www.fppc.ca.gov/index.html?id=9. ■

- ¹ Cal. Gov't Code § 81000 and following.
- ² See Cal. Gov't Code § 91000 and following.
- ³ Cal. Gov't Code § 1090 and following.
- ⁴ Cal. Penal Code § 68(a); 18 U.S.C. § 201; see also Cal. Penal Code § 74 (receiving rewards for appointments to public office or letting someone perform the duties of public office), 518 (obtaining property by wrongful use of public position).
- ⁵ Cal. Health & Safety Code § 33130.
- ⁶ Cal. Gov't Code § 81000 and following.
- ⁷ See Cal. Gov't Code § 91000 and following.
- ⁸ Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- ⁹ Cal. Const. art. XVI, § 6.
- ¹⁰ Cal. Const. art. XII, § 7.
- ¹¹ See, for example, 79 Cal. Op. Att'y Gen. 21 (1996).
- ¹² Cal. Gov't Code § 81000 and following.
- ¹³ *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n. 23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (common law bias); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (common law bias); *Desert Turf Club v. Board of Sup'rs of Riverside County*, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 887-8 (1956) (evidence must be produced at the hearing and subject to some degree of cross-examination).
- ¹⁴ Cal. Gov't Code § 1126.
- ¹⁵ See, for example, 79 Cal. Op. Att'y Gen. 21 (1996).
- ¹⁶ See generally Cal. Pub. Cont. Code § 20100 and following.
- ¹⁷ *R&A Vending Services v. City of Los Angeles*, 172 Cal. App. 3d 1188, 218 Cal. Rptr. 667 (1985) (state general competitive bidding statutes do not bind charter cities when subject of the bid constitutes a municipal affair).
- ¹⁸ See Cal. Civ. Proc. Code § 1085; *Marshall v. Pasadena Unified School Dist.*, 119 Cal. App. 4th 1241, 1251-53, 120 Cal. App. 4th 881C, 15 Cal. Rptr. 3d 344, 352-54 (2d Dist. 2004) (finding public entity's failure to comply with the competitive bidding statutes may be challenged by a mandate action to set aside award of contract; also upholding citizen standing under case's circumstances). See also Cal. Pub. Cont. Code § 20104.70 (action for damages by second lowest bidder if low bidder violates workers compensation or unemployment insurance laws; costs and attorneys fees may be awarded to prevailing party).
- ¹⁹ Cal. Gov't Code § 54950 and following (for cities, counties, schools and special districts); Cal. Educ. Code § 72121 and following (for community college districts).
- ²⁰ Cal. Gov't Code § 6250 and following.
- ²¹ Cal. Gov't Code § 81000 and following.
- ²² Cal. Gov't Code § 34851 and following.
- ²³ See, for example, 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 621 and following (Age Discrimination in Employment Act); 42 U.S.C. §§ 1981, 1983, 1985 (Civil Rights Act); Cal. Const. art. I, § 8, Cal. Gov't Code § 12920 and following (Fair Employment and Housing); Cal. Lab. Code § 1197.5 (equal pay); Cal. Civ. Code §§ 51, 52.
- ²⁴ Cal. Lab. Code § 1102.5.
- ²⁵ Cal. Lab. Code § 1103 (violation is a misdemeanor).
- ²⁶ Cal. Lab. Code § 1105 (allowing damage recovery).
- ²⁷ See, for example, Cal. Elec. Code § 321 (defining elector); Cal. Gov't Code §§ 34882, 36502(a) (city council), 25041 (county supervisor); Cal. Educ. Code § 35107 (school board).
- ²⁸ For links to city charters, see www.cacities.org/charters.
- ²⁹ See, for example, 79 Cal. Op. Att'y Gen. 21 (1996).
- ³⁰ Cal. Elec. Code §§ 16100, 18000 and following.
- ³¹ Cal. Gov't Code § 81000 and following.
- ³² See Cal. Gov't Code § 91000 and following.
- ³³ Michael Josephson Commentaries, *Being an Effective Critic* 350.1 (March 26, 2004) (www.josephsoninstitute.org).
- ³⁴ Cal. Bus. & Prof. Code § 6068.
- ³⁵ California Rules of Professional Conduct, Rule 3-600(B).
- ³⁶ See 71 Cal. Op. Att'y Gen. 255 (1988) (finding whistle-blowing statutes do not override the attorney-client privilege).
- ³⁷ See, for example, AB 363 (Steinberg) (introduced in 2002 and vetoed by Governor Davis) and AB 2713 (Pavley) (introduced in 2004 and vetoed by Governor Schwarzenegger).
- ³⁸ See generally Cal. Gov't Code § 91000 and following.
- ³⁹ See Cal. Gov't Code § 91000(a).
- ⁴⁰ See Cal. Gov't Code § 91002.
- ⁴¹ 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).
- ⁴² Cal. Gov't Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- ⁴³ 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).
- ⁴⁴ Cal. Gov't Code § 91000(b).
- ⁴⁵ Cal. Gov't Code § 91004.
- ⁴⁶ Cal. Gov't Code §§ 83116, 91001(b), 91001.5, 91004, 91005, 91007.
- ⁴⁷ Cal. Gov't Code § 91012.
- ⁴⁸ Cal. Gov't Code § 83116.
- ⁴⁹ See Cal. Gov't Code § 91003.5.
- ⁵⁰ See Cal. Gov't Code § 91003(b).
- ⁵¹ See Cal. Gov't Code § 1097.
- ⁵² *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal. Rptr. 139 (1985).
- ⁵³ See Cal. Gov't Code § 1092.
- ⁵⁴ See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- ⁵⁵ Cal. Penal Code § 424.
- ⁵⁶ Cal. Gov't Code § 8314(c)(1).
- ⁵⁷ Cal. Penal Code § 504.
- ⁵⁸ Cal. Penal Code § 514.
- ⁵⁹ See 26 U.S.C. § 7201.
- ⁶⁰ See 26 U.S.C. § 7203.
- ⁶¹ See generally 18 U.S.C. § 1341 and following.
- ⁶² See generally 18 U.S.C. § 3571(b) and (d).
- ⁶³ See, for example, 18 U.S.C. §§ 641 (crime of embezzlement against the United States), 648 (misuse of public funds).
- ⁶⁴ Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).
- ⁶⁵ *Id.*
- ⁶⁶ Cal. Gov't Code § 54960.5.
- ⁶⁷ Cal. Gov't Code § 54959.
- ⁶⁸ See Cal. Penal Code § 19.
- ⁶⁹ Cal. Gov't Code § 54960.
- ⁷⁰ *Id.*
- ⁷¹ Cal. Gov't Code § 54960.5.
- ⁷² Cal. Gov't Code § 6258.
- ⁷³ Cal. Gov't Code § 6259(d).
- ⁷⁴ See generally Cal. Penal Code § 68(a).
- ⁷⁵ Cal. Penal Code § 521.
- ⁷⁶ Cal. Penal Code § 19.
- ⁷⁷ Cal. Gov't Code §§ 3060-3074.
- ⁷⁸ Cal. Penal Code § 74.
- ⁷⁹ 18 U.S.C. § 666.
- ⁸⁰ See 18 U.S.C. §§ 666 (specifying maximum 10 year prison term and fine "under this title"), 3571 (general fine for violating federal criminal laws).
- ⁸¹ *U.S. v. Gaytan*, 342 F.3d 1010 (9th Cir. 2003).
- ⁸² Cal. Gov't Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- ⁸³ See generally Cal. Elec. Code § 16000 and following. *Hardeman v. Thomas*, 208 Cal. App. 3d 153, 256 Cal. Rptr. 158 (1989).
- ⁸⁴ See Cal. Elec. Code § 16100.
- ⁸⁵ See Cal. Civ. Proc. Code § 803 and following. See also *Nicolopoulos v. City of Lawndale*, 91 Cal. App. 4th 1221, 1225, 111 Cal. Rptr. 2d 420, 428 (2d Dist. 2001).
- ⁸⁶ See, for example, 79 Cal. Op. Att'y Gen. 21 (1996).
- ⁸⁷ See Cal. Lab. Code § 1103.
- ⁸⁸ See Cal. Lab. Code § 1105.
- ⁸⁹ Cal. Gov't Code § 26500 and following.
- ⁹⁰ Cal. Gov't Code §§ 3060-3074 (providing for proceedings to be brought by the grand jury for removal from office).
- ⁹¹ See Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).
- ⁹² See, for example, 79 Cal. Op. Att'y Gen. 21 (1996).
- ⁹³ See www.onlineethics.org (a website developed by Case Western Reserve University and dedicated to engineering ethics); see specifically <http://onlineethics.org/moral/boisjoly/RB1-3-a7.html> (noting that whistleblowing case histories indicated that going to the media can be counterproductive vis-à-vis engineering safety issues).
- ⁹⁴ See Society of Professional Journalists Code of Ethics, http://www.spj.org/ethics_code.asp.

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