

Government Code Section 1090: What You Don't Know Could Hurt You

Presented by:

Sarah Carrillo, County Counsel, Tuolumne County

Dave Bainbridge, General Counsel, FPPC

Steve Churchwell, Churchwell White LLP (Moderator)



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1

Goals for This Presentation.

1. This is designed for **non-attorneys**.
2. This should help you **spot potential problems early**.
3. If you spot a problem, consult your **legal counsel** first.
 - This will ensure that attorney-client privilege is maintained.



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2

Three Conflict of Interest Laws Apply to Public Officials in California.

1. The Political Reform Act.

- Any decision.
- Financial conflicts only.
- Recusal required if a foreseeable, material conflict and no exception.



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3

Three Conflict of Interest Laws Apply to Public Officials in California.

2. Government Code section 1090.

- Contracts only
- Financial conflicts only
- Recusal required, **but ...**
 - Multi-member board may *not* execute the contract if one member has a conflict.
 - Unless: Remote Interest or Non-Interest Exception Applies (see below).



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4

Three Conflict of Interest Laws Apply to Public Officials in California.

3. Common law conflicts of interest.
 - Financial and non-financial conflicts.
 - Primary application is bias in quasi-judicial decisions.



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We are only covering Government Code Section 1090 today. Why?

- The penalties, including criminal prosecution, are severe.
- A court may void the contract.
- Unlike the Political Reform Act, there are no FPPC regulations.
- Must depend on court decisions, AG opinions and FPPC advice.
- Section 1090 is covered in your AB 1234 training, but very briefly.



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Section 1090 – Prohibits Self-Dealing

Section 1090 prohibits public officers, employees, and consultants who act on behalf of the agency, from making contracts in which they have a financial interest, unless an exception applies.



Section 1090 – The Basic Rule

Section 1090 is concerned with personal financial interests, other than the remote or non-interests listed in the law, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract made in violation of Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)



Government Code Section 1090: The 4 Elements of a Violation

1. *Is the individual covered by Section 1090?*
 - All state and local officers, employees and board members, whether elected or appointed. Also covers some consultants and independent contractors if they act on behalf of the agency.
2. *Is there a contract?*
 - Includes leases, grants and development agreements.
3. *Did the individual make, or participating in making, the contract?*
4. *Does the public official have a financial interest in the contract?*
 - Any direct or indirect impact on the official's personal finances is enough.



Review the Elements (cont'd)

5. *If the official is a board member, does a "remote interest" exception apply?*
 - Recusal by an officer, employee or consultant/contractor from any participation in the making of a contract will prevent a Section 1090 violation. However, Board members are *conclusively presumed* to have made any contract executed by the board—or the agency under its jurisdiction—even if the board member has avoided any participation in the making of the contract and recuses before the Board votes.
 - If one of the remote interest exceptions listed in Gov. Code § 1091 applies (see list below), a board member with a financial interest may recuse and allow the other board members to vote on the contract.



Review the Elements (cont'd)

6. *For all public officials and consultants/contractors, does a “non-interest” exception apply?*
 - The financial interests listed in Gov. Code § 1091.5 are deemed “non-interests” that usually must be disclosed, but do not require recusal (see list below).
7. *Does the “rule of necessity” apply?*
 - If the contract is for “essential services,” and no other contractor is available, or the official with a financial interest is the only one authorized to authorize the contract, this narrow exception may apply.



The term “contract” includes:

- Leases
- Grants
- Development agreements
- Payments to employees (e.g., travel reimbursements)
- Some employment contracts and benefits



Covers: All State and Local Public Officials

- Board members*
- Officers
- Employees
- Some consultants/independent contractors**

*Special rules

** Rapidly evolving area (will discuss using hypotheticals)



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Anyone Involved in “Making” a Contract

- Any involvement from the beginning to the final vote
 - Preliminary discussions
 - Negotiations
 - Planning
 - Preparing RFQ, RFP or IFB
 - Giving advice to the Board or Executive Officer



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What is a Financial Interest?

- Any amount could create a conflict.
- No materiality thresholds like the Political Reform Act.
 - “However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.” — Cal. Supreme Court (1934)



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Multi-Member Boards and Commissions

- If one member has a conflict, the contract may not be made.
- Recusal not allowed unless a “remote interest” or non-interest exception applies.
- Resigning from the board may not resolve the issue.



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Multi-Member Boards and Commissions (cont'd)

- Remote interest exceptions.
 - Apply only to boards and commissions.
- Allow the official with the financial interest **to recuse**.



The Remote Interest Exceptions for Board Members (§ 1091)

- If a board member has one of the remote interests listed in the statute (see list below), the board member may disqualify himself or herself from any participation in the making of the contract and permit the remainder of the board to enter into the contract.
- If one of them applies, the board member must:
 1. Disclose the financial interest;
 2. Have the interest noted in the official records of that body; and
 3. Must not attempt to influence the other board members.



The Remote Interests

1. Officer or Employee of a Nonprofit Corporation.
2. Employee of a Private Contracting Party.
3. Employees of Contracting Party; Special Exception – counties with a population of 4,000,000 or less.



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The Remote Interests (cont'd)

4. Parent – Parents have only a remote interest in the earnings of their minor children for personal services.
5. Landlord or Tenant of a contracting party.
6. Attorney, Stockbroker, Insurance, or Real Estate Broker/Agent.



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The Remote Interests (cont'd)

7. Corporation Formed to Sell Agricultural Products or to Supply Water.
8. Supplier of Goods and Services for at least five years prior to the official's election or appointment to office.
9. Employee of Consulting, Engineering or Architectural Firm.
10. Salary or Payments from Another Government Entity.



Non-Interest Exceptions (§ 1091.5)

- Apply to all public officials
- Listed in Gov. Code § 1091.5
- Allow the official with the financial interest **to vote**



The Non-Interests

1. **Corporations: Stock and Income** – if own < 3% of the company's stock, income from dividends < 5% annual income, and any other income from the corporation < 5% annual income. The official who fails any of the three parts does not qualify for the non-interest exception with regard to that corporation.
2. **Reimbursement of Expenses** – actual and necessary expenses incurred in the performance of his or her official duties.
3. **Public Services from Own Agency** – broadly available and received like any other person served by the agency.



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The Non-Interests (cont'd)

4. **Landlords and Tenants of Government** – exception: the contract involves the specific land for which the official is either the landlord or tenant. In the latter case, a board member may qualify for a remote interest exception.
5. **Spouses** – A non-interest exists when both spouses are public officials.
6. **Unsalaries Members of Nonprofit Corporations** – the Attorney General has interpreted “member” to include only members of a nonprofit, and not its board members.
7. **Non-compensated Officers of Tax-Exempt Corporations**



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The Non-Interests (cont'd)

8. **Contracts between Government Agencies** – unless the contract involves the department that provides the compensation to the officer or employee in question. Then, a remote interest exception could apply.
9. **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent** – if the public official: (1) does not receive any remuneration, consideration or commission as a result of the contract; and (2) has an ownership interest < 10%. Attorneys and real estate agents/brokers who are board members and have > 10% ownership are covered by a remote interest exception.
10. **Nonprofit Organization Supporting Public Resources.**



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What the Courts Have Said Recently

1. You may be involved in a contract that affects your own compensation, as long as there is *no special deal* for you.
 - Salary, benefits and retirement.
 - Must remain a part of “the herd” covered by the new contract.
 - If any special benefits for one person or a small group – watch out!



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What the Courts Have Said Recently

2. Impact on your employer is irrelevant, *unless, it also impacts your compensation.*
 - This is different from the Political Reform Act
 - There, a mere financial impact on a Source of Income (e.g., employer) to the official may be disqualifying.
 - This does *not* mean that *indirect* benefits are not covered by Section 1090.
 - Official is a subcontractor of the contracting party.



What the courts have said recently

3. Some Consultants and Independent Contractors are covered.
 - But only if they have **been entrusted with the district's power** to engage in, or advise on, public contracting **on the government's behalf**.
 - The critical question is whether the independent contractor "was in the position to influence how a public entity spends the public's money."
 - Individuals, as well as **consulting firms**, may be covered. Business entities were not previously thought to fall within the scope of Section 1090.



Consultants

- Consultants obviously are allowed to negotiate their own contract with the district.
 - Must be “arms length,” however.
 - Cannot be acting for the district *and* themselves.
 - Smart district consultants hire *someone else* to negotiate their contract.



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Consultants (cont'd)

- **A single contract may anticipate additional services in the future,** but the contract must anticipate, and detail payment for, those future services.
 - Design-Build contracts are ok, because there is only one contract.
 - Future payments in the contract may be contingent.
 - If a consultant helped draft a contract, s/he should not bid on that contract!



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Consultants (cont'd)

1. The consultant does not benefit financially from the second contract;
2. The second contract is *completely separate* (i.e., it receives independent review from district employees and the board from start to finish); or
3. The consultant had **very limited involvement** on the first contract.
 - Technical advice and “needs assessments” are probably ok.
 - But how much involvement is too much?



Consultants (cont'd)

- The consultant may also advise the district regarding third-party contracts.
 - **Caveat:** consultants should **not** be involved in any third-party contracts that could, even remotely, result in **future** compensation to the consultant.
 - **Pay them now for those services, and not later** for securing a third-party contract.



Consultants (Cont'd)

- **The Problem of Additional Consulting Work**

- The FPPC has advised that a consulting firm that previously provided only *technical advice* or a *needs assessment* would *not* violate Section 1090 if it later contracted to do the construction work.
- The FPPC also advised that a consultant that provided engineering services during the design phase of a project could later provide the same services during the construction phase, since the later services were requested by the prime contractor, and not included in the initial design contract.



Penalties

- Criminal penalties if intentional violation and special benefits to official.
- Ban on ever holding public office.
- Official's good faith irrelevant.
- Court may void the contract.
- Contractor may have to return all funds received.



Working with the FPPC



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FPPC Resources

- FPPC provides advice, information, and training on conflict and 1090
- Formal advice letters and informal assistance via email and telephone
- Commission opinions
- Resources on website <http://www.fppc.ca.gov/learn.html>



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Formal Advice

- Formal advice is provided to officials with duties under the PRA and 1090 upon request (Gov't Code §§ 83114(b) and 1097.1(c)(2))
- Can provide immunity from administrative enforcement action
- 21 working day response time for PRA, not applicable to 1090
- Must provide notice of 1090 advice request to DA and AG
- Issued by Legal Division without formal Commission action
- CA Code of Regulation, title II, section 18329(a) and Gov't 1097.1(c)(2)



Formal Advice Requirements

- Request from official or authorized representative concerning official's duties
- Provide all relevant facts
- Provide accurate facts
- Not prior conduct or subject of an enforcement action
- Specific question, not broad or hypothetical



Informal Assistance

- Email advice - quick, in writing, not available for some complicated questions advice@fppc.ca.gov
- Telephone advice is available for simple issues. 866-ASK-FPPC (1-866-275-3772)
- See <http://www.fppc.ca.gov/advice/get-advice.html> for more



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Commission Opinions

- Can be requested for interpretations of the Act
- Adopted by formal Commission action
- Requires substantial question of interpretation, not routine or covered by reg
- Act violations: Provides immunity in administrative proceedings for Act violations, and evidence of good faith in civil and criminal proceedings
- 1090 violations: Provides immunity in administrative, may be admissible in civil or criminal proceeding for requestor
- See Gov't Code § § 83114(a), 1097.1(c)(5) and Regs 18320-18324



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Training and Resources

- FPPC provides training on 1090, and many other topics.
- Go to <http://www.fppc.ca.gov/learn/training-and-outreach.html>
- Coming soon: 1090 page on website



Court Decisions



Court Decision #1

- A county supervisor's business sold and leased heavy equipment. The Board of Supervisors contracted with one of the business's longtime customers to build a road. When the contract was executed, there was no financial relationship between the customer and the Supervisor's business. But soon thereafter, the corporation rented heavy equipment from the Supervisor's business to build the road. The court held that because the Supervisor's private business had an *ongoing* business relationship with the customer, there was an *implied contract* for the equipment rental when the county contract was made. This indirect financial interest violated Section 1090.



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Court Decision #2

A County Supervisor sold his printing business to his son and took a secured promissory note. Later, the son was awarded printing contracts by the Board of Supervisors. The court held that this violated Section 1090, because the Supervisor had retained a financial interest in the business due to the secured note.



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Court Decision #3

The courts have held that campaign contributions generally do not trigger financial conflicts of interests for elected officials. However, if it can be shown that governmental decision was made *because of* a campaign contribution, made either before or after the vote, there may be a prohibited financial interest. A court held that a contractor hired to do a public works project for a city violated Section 1090 when he illegally used campaign donations as a “quid pro quo” to secure the votes of multiple council members on the award of his contract.



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45

Court Decision #4

During a recession, trustees of a city retirement system voted to allow the City to limit funding the retirement system in exchange for agreeing to provide increased pension benefits to City employees, including the trustees. The District Attorney charged the trustees with criminal violations of Section 1090. The court held that the “public services” non-interest exception in Section 1091.5(a)(3) applied. Financial interests *shared with a large group* of public employees did not present the dangers the state's conflict of interest laws were designed to eradicate.



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Court Decision #4 (cont'd)

However, the court held that 1 of the 6 trustees had gotten a *unique, personalized* pension benefit as a result of voting to approve the retirement board's contract with the City. Such *individually tailored benefits* pose genuine conflict problems and do not fall under any statutory exception. Accordingly, it did not reverse his conviction.



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Court Decision #5

A surgeon was hired as an independent contractor at a public hospital district. He recruited another doctor and negotiated a contract with him for \$36,000 per month and a relocation fee of \$10,000. The surgeon then pressured the Board to hire the doctor for \$48,000 per month and a relocation fee of \$40,000, as well as a directorship position of \$3,000 per month. The doctor's paychecks went to the surgeon, who then paid the lesser amounts to the doctor. The Board was not aware that the surgeon was profiting from the doctor's contract. The court held that independent contractors are not categorically excluded from Section 1090. Liability under the statute may extend to independent contractors whose duties include advising a public agency on contracting matters.



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Hypotheticals



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Hypo #1

Kerry Burnley, a lawyer at Fresno Hospital District (FHD), announces her retirement from FHD on Jan. 1, but decides to use her accrued 3 months of vacation with an official termination date of March April 1. During that 90 day period, FHD issues an RFP for law firms to act as outside general counsel. Steel, Stone, Hardrock & Flynt ("SSH&F") submits a proposal that includes Kerry, and SSH&F is selected to be outside General Counsel. 1090 issue? What if the RFP were issued on April 1? What if the RFP were sent out before Kerry starts her vacation, but she is not part of the development of the RFP?



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Hypo #2

The Pulaski Reclamation District board votes to have a community member, Ross Jensen, to fill a board vacancy until the next election. Ross is a small business owner who has supplied tools to the district periodically over the past few decades but not within the past three years. Ross has always given the district a discount for being a repeat customer, certainly the best rate the district has ever paid. A few months after Ross's appointment, the district opens bids for tools, and Ross's Tools is the lowest bidder. Can the district avoid a Section 1090 conflict?



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Hypo #3

Marks, Inc., a contractor, assisted a design professional in determining the needs of a district with respect to audio-visual equipment. Marks prepared a list of available microphones, amplifiers, projectors and other A-V equipment based upon information provided to it by the design professional. Marks now wants to respond to an RFP to supply and install the audio-visual equipment? Does Mark's prior involvement bar it from contracting based upon an application of Section 1090?



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Hypo #4

Under a contract, Paramount Technologies, a consulting firm, assisted Greene County Transportation District in finding an IT services vendor to install a new computer system and convert data from the previous system into the new one. The district initially had contemplated having Paramount perform project management services as part of the first contract, but decided to wait to have a better idea of what services were needed. May the district now enter into a project management services contract with Paramount under Section 1090?



Hypo #5

A consultant, Moe, provided a needs assessment to a design firm for the construction of a municipal golf course. Another consultant, Larry, also provided technical data concerning available groundwater, but had no direct contact with any city personnel. Consultant Curly and the architect attended community meetings, advised city staff, coordinated design team and City interaction, prepared cost estimates, and prepared visual simulations of the proposed course changes. The City now intends to issue an RFP for construction of the golf course. May the design firm respond to the RFP? Is Moe, Larry or Curly barred from participating in a response to the RFP based upon their prior involvement? Could any of them be a sub-consultant to the construction firm ?



Hypo #6

A levee failed and required immediate attention in Northern California. The vast majority of available contractors were working in Southern California due to seasonal flooding. District Manager Biff Garfunkel offered, and the district accepted, to use his personal machinery to work on the break until a contractor could be hired. Is there a Section 1090 violation?



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Hypo #7

Gotham Architects were hired by Polk County to design a series of complicated bridges that only 3 firms in the U.S. have the capability of constructing. The bridge design is later incorporated into the Capital Outlay Plan for Gotham City which sends out an RFP for a company to construct the bridge. Gotham is the lowest responsive and responsible bidder. May Polk County award the construction contract to Gotham?



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Hypo #8

North Coast Healthcare District sued under Section 1090 to void a contract it had entered into with a large, nonprofit healthcare provider, to build a hospital in the district. The district alleged that its own board member was a doctor at the hospital and, therefore, had a financial interest in the contract that violated Section 1090. However, the board member did not receive any increase or decrease in compensation as result of the contract. What did the court rule?



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Hypo #9

In 2015, the district's board delegated to the district manager its authority to choose an auditing firm for the district's annual audit. Holly was elected to the Board in 2020. Her brother Josh is a partner at Audits-R-Us, the firm selected by the district manager to conduct this year's audit. Does this present a conflict of interest under Section 1090?



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Hypo #10

In 2019, district board member Kerry was the subject of a recall petition. In response, she formed a PAC oppose the recall. The largest contributor to the committee was Helton Construction, who submitted a proposal to the district after receiving an RFP in 2020. The lowest bid was non-responsive. Kerry votes to award the bid to Helton, the second-lowest bidder. Is there a 1090 violation?



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Hypo #11

The district seeks to hire a public information officer part-time to handle media requests and public information campaigns. The strongest candidate is one of the district's field engineers who has a popular blog. Is this a financial conflict under Section 1090? What if the candidate is the district manager? A board member?



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The End



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