



# AB 1234 - Ethics

Training Presentation for the City of Calabasas  
in Compliance with AB 1234  
January 8, 2021

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COLANTUONO  
HIGHSMITH  
WHATLEY, PC

# Virtual Refreshments – Enjoy!



2/8/2021

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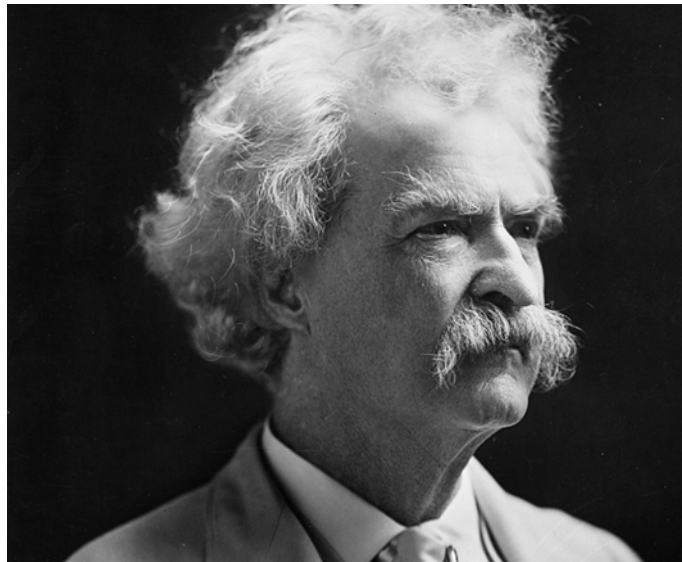
# Welcome

- Conflicts of Interest
- Political Reform Act
- Constitutional Issues
- Competitive Bidding Requirements
- Transparency Laws
- Fair Decision Making and Processes

# Conflict of Interest

“Always do right – this will gratify some and astonish the rest.”

- Mark Twain



# Conflict of Interest Outline

1. Government Code § 1090
2. Political Reform Act
3. Common Law Bias / Due Process Requirements
4. Nepotism
5. Incompatible Offices
6. Government Code § 1126

- [A Notorious Conflict of Interest](#)



# Government Code § 1090

Public officials “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”



# Government Code § 1090

- Absolute prohibition against a public official having a financial interests in contracts made by public official or the official's board and entity



Prohibition applicable, despite:

- Objectively fair and reasonable contracts
- Contracts let to lowest bidder
- Official abstains from participation



# Government Code § 1090

## What Constitutes “Making a Contract”?

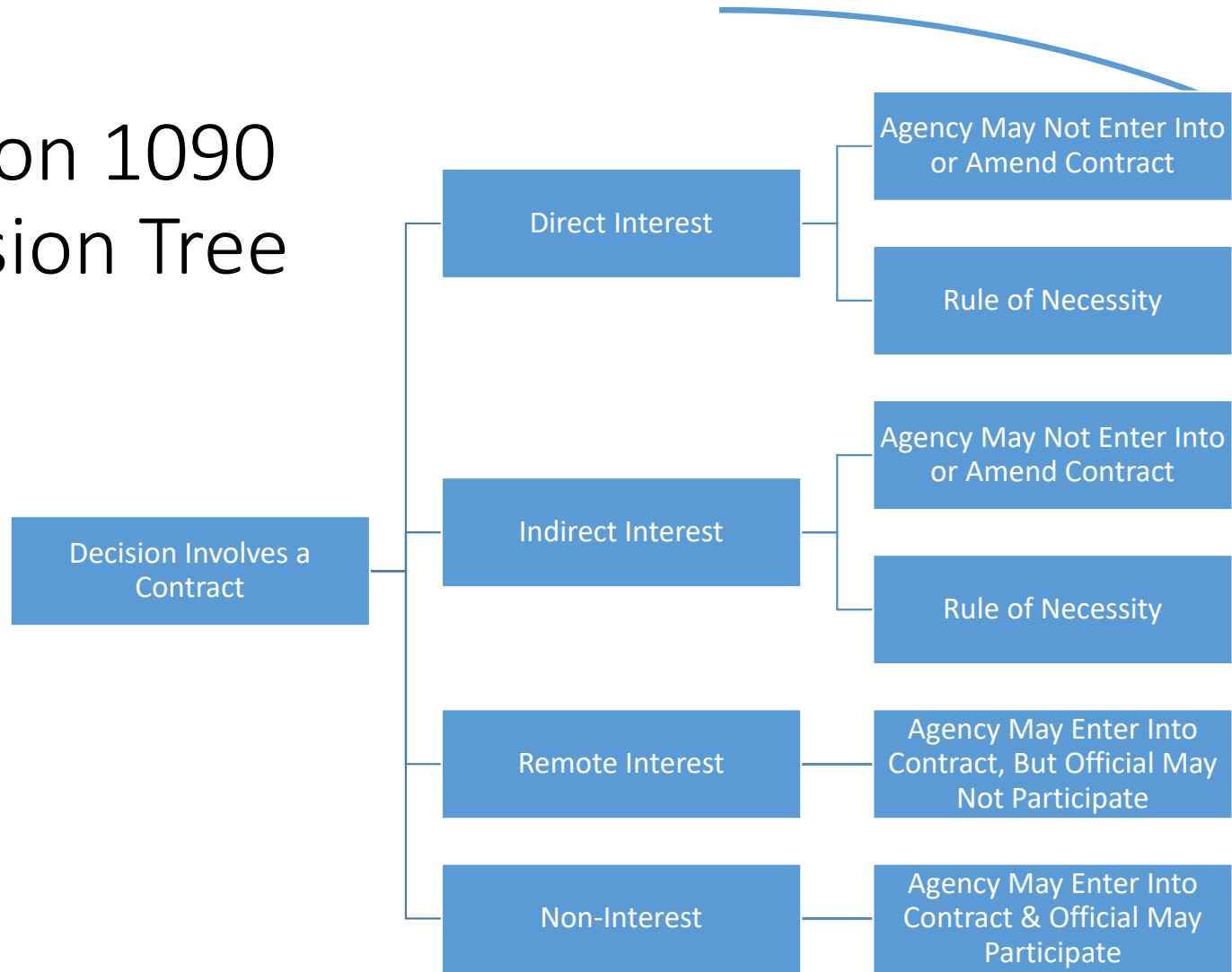
- Voting to approve
- Designing specifications
- Preliminary discussions
- Negotiating
- Actual signing of contract
- For consultants: Entering into contracts on matters where previously provided design or other services
  - *People v. Superior Court (Sahlolbei)* (2017) Cal.5<sup>th</sup> 230



# Gov't Code § 1090 Exceptions

- The Remote Interest Exception
  - Disqualifies official, but board may act
- The Non-interest Exception
  - The financial interest “doesn’t count” and is ignored
- The Rule of Necessity
  - Non-statutory rule applicable only in very limited circumstances

# Section 1090 Decision Tree



# Government Code § 1090

## *Harsh Consequences*

- Contract is void and unenforceable
- Agency may keep benefit of the contract
- Official must disgorge any monies
- Violation is a **felony**
  - Fine,
  - Imprisonment,
  - Lifetime ban from public office

# Political Reform Act v. Common Law

- The Political Reform Act – Public Officials are disqualified from participating in governmental decisions in which they have financial interest
- Common Law – prohibits officials acting in their own interests at the expense of the public's interest
- Perceptions vs. requirements

# Conflict of Interest under PRA: Basic Rule

“A **public official** ... has a prohibited conflict of interest and **may not make, participate in making, or in any way use or attempt to use his or her official position to influence** a governmental decision when he or she knows or has reason to know he or she has a disqualifying financial interest. A public official has a **disqualifying financial interest** if the decision will have a **reasonably foreseeable material financial effect**, distinguishable from the effect on the public generally, directly on the public official, or his or her immediate family, or on any financial interest.”

- Cal. Code Regs, tit. 2, § 18700 (emphases added)

# Does the Political Reform Act Apply?

Public Official

Governmental Decision

Financial Interest

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# “Public Official” Defined

- Persons who are members, officers, employees, or consultants of a public agency – includes Commissioners
- Consultants who serve in a staff capacity by contract, or make decisions on behalf of the public agency



# Who is a “Public Official”?



87200 Filers



Designated Public Servants



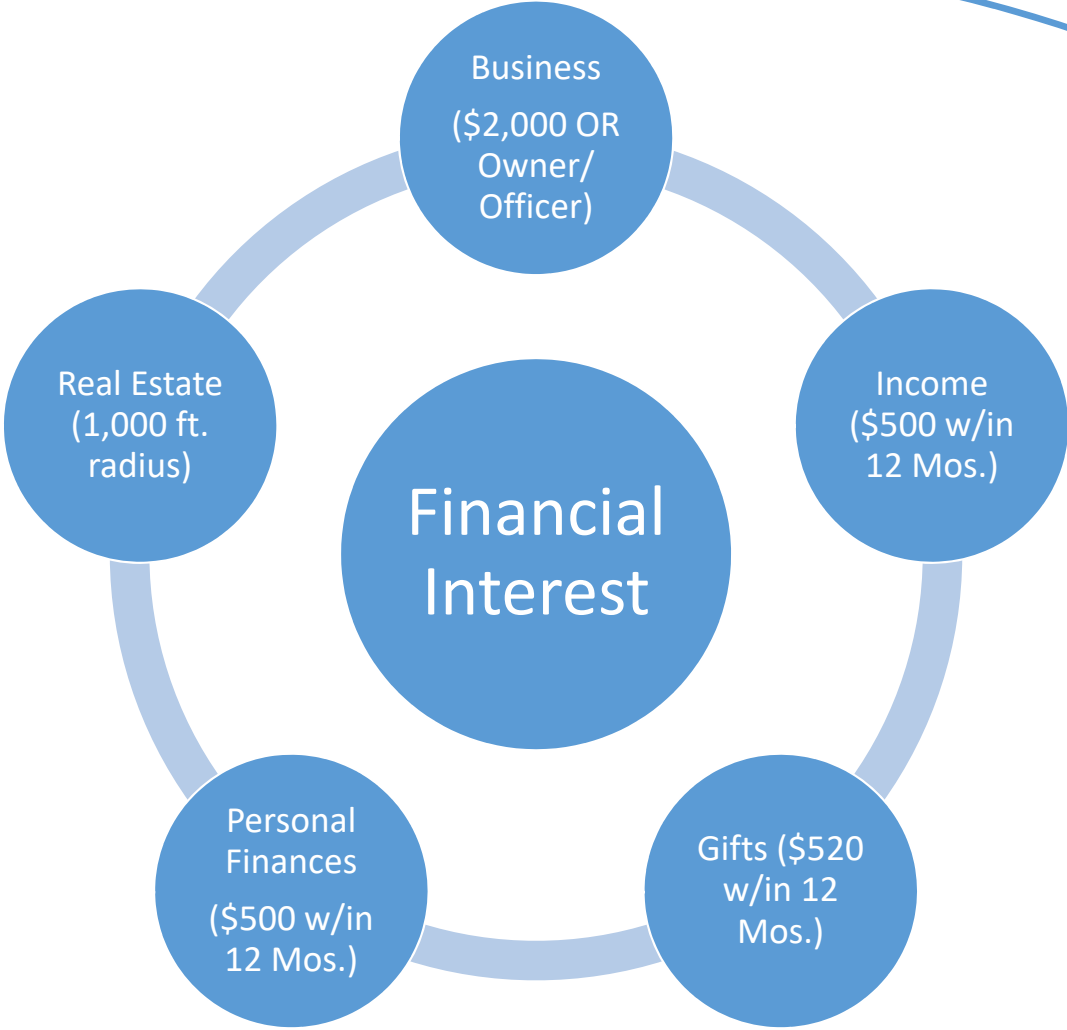
Consultants who serve in a staff capacity by contract, or make decisions on behalf of the public agency

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# “Financial Interests” Defined

- Personal finances and finances of immediate family member (spouse/partner/dependent child)
- Business entity with investment of \$2,000 or more
- Real property valued at \$2,000 or more
  - Leases too, but under a special rule
- Source of income of \$500 or more in past 12 months
- Business entity as director, officer, partner, trustee, employee, or management position
- A donor, intermediary, agent for a gift or gifts over \$470 in past 12 months

# What is a “Financial Interest”?



# “Reasonably Foreseeable”: Determining Disqualifying Conflict of Interest

- Explicitly Involved: Named party or subject of governmental decision, e.g., license, permit, entitlement, or contract
- Not Explicitly Involved: Realistic possibility and more than hypothetical or theoretical
- “Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating the position”

# 4-Step Test: Is the Interest Disqualifying?

Is there a reasonably foreseeable effect on the financial interest?

Is the effect material?

Is the effect indistinguishable from the effect on the public generally?

Is there an exception that applies?

# “Material”: Determining Disqualifying Conflict of Interest

- Depends on the type of financial interest involved in the governmental decision
- Generally: Means “important enough to matter”
  - “A reasonably prudent person” would conclude the decision would change the value of the business or entity
  - “One penny rule” no longer applies
- Public official may not participate in governmental decision affecting real property within 500 feet of his or her real property **without written clearance from FPPC**

# “Indistinguishable from Public Generally”: Determining Disqualifying Conflict of Interest

- Effect of governmental decision on public official’s financial interest is not unique compared to effect on a significant segment of the public
- “Significant segment” includes:
  - 25% of businesses or entities in the jurisdiction
  - 25% of all real property in the jurisdiction
  - 25% of all individual’s in the jurisdiction
- And no disproportionate effect on public official’s financial interest
- Exception: Assessments, taxes, fees, rates, charges that apply equally to public official’s financial interest or entire jurisdiction



# Making or Attempting to Influence a Governmental Decision

- Very broad and includes:
  - Voting
  - Discussing
  - Lobbying
- Applies to any use of your government position to affect any governmental decision.

# What To Do If There Is a Conflict

- **Publicly identify** each financial interest on the record after agenda item announced and before discussion and voting begins
- **Recuse yourself** from participation in discussion and refrain from attempting to influence
- **Abstain** from voting
- **Leave the room** while the item is discussed (unless on consent calendar or another exception applies)

# Conflict of Interest

## How to Obtain Advice

- Agency Attorney
- Own attorney
- 1-866-ASK-FPPC
- FPPC Advice Letters



# Violations & Fines of the PRA

- Criminal
- Civil
- The Court of Public Opinion



# Nepotism

- No specific state laws concerning nepotism.
- May be affected by “income” interest under Political Reform Act or definition of “family” under Political Reform Act.
- Local agency may draft anti-nepotism policy.
- Federal funding requirements.

# Incompatible Offices

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“One cannot serve two masters.”

# Incompatible Offices

- Exists if any significant clash of duties exists between the offices, if the dual holdings would be improper because of public policy, or if one officer exercises supervisory, auditory or removal power over the other.
- Examples: water district director and city council position; school board member and city council member
- Offices are incompatible when one:
  - Audits, overrules, or removes members of the other
  - Possibility of a significant clash of duties or loyalties
  - Public policy considerations make it improper
- Does not apply to an employment position
- Forfeit the first office upon acceding to the second



# Government Code § 1126

- “[A] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.”
- Agency must provide policy.

# Other Political Reform Act Issues

- Statements of Economic Interest (Form 700s)
- Gifts
- Travel Payments
- Honoraria
- Mass Mailing

# Statement of Economic Interest

- All local agencies adopt conflict of interest codes.
- Calabasas's conflict of interest code requires Commissioners file the Form 700, each year by April 1.
- Requires disclosure of personal financial interests to:
  - Alert official to a personal, financial interest that might be affected
  - Inform the public about potential conflicts of interest

The image shows a sample of California Form 700, Schedule A-2. The form is titled "SCHEDULE A-2 Investments, Income, and Assets of Business Entities/Trusts" and is identified as "CALIFORNIA FORM 700". It contains several sections for reporting financial information, including:

- 1. BUSINESS ENTITY OR TRUST:** Name, address, and type of entity.
- 2. GENERAL DESCRIPTION OF BUSINESS ACTIVITY:** Description of the business and its dates.
- 3. INVESTMENTS:** Reporting of investments held by the entity, including value and acquisition/disposal dates.
- 4. REAL PROPERTY:** Reporting of real property owned by the entity, including address and value.

# Gift Restrictions

- “What you get free costs too much.”
  - Jean Anouilh



# Gift Restrictions

- No local elected office holder, candidate for local elected office, or designated employee of a local agency may accept any gift or gifts from a **single source** aggregating in excess of \$500 (1/1/19 – 12/31/20)
- Gifts aggregating \$50 or more in the reporting period must be disclosed on a Form 700

# Gift Restrictions

Is it a gift?

- A “payment made by any person of any thing of value when the official does not provide full consideration for the value of the benefit received.”
- Rebates
- Gifts to Family (unless no business before official in 12 months prior or foreseeable future + established)

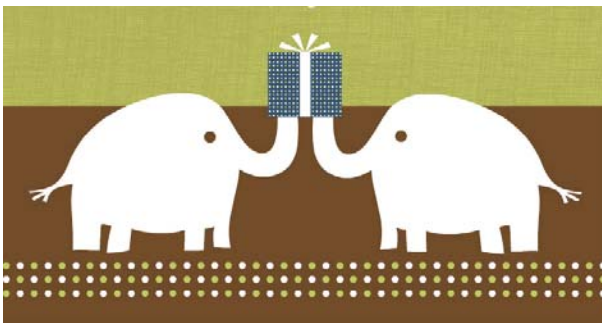


# Exceptions to Gift Restrictions



## When is a gift not a gift?

- Informational material (electronic media ok).
- Home hospitality.
- Gifts from family (expanded to include more distant relations and former family)
- Reciprocal gifts (between friends during special occasions; \$500; not lobbyists)





# Exceptions to Gift Restrictions

- Ceremonial Role (2 tickets to entertainment event)
- Gambling, Prizes, Raffles (must report as income; not because of official status)
- Gifts for Attending Wedding
- Bereavement Gifts (typically provided)
- Acts of Neighborliness (free ordinary services polite people provide without charge)
- Dating (unless lobbyist or matter pending before agency)
- Gifts of Human Compassion (Charity from within social circle to offset medical or living expenses when in need)

# Exceptions to Gift Restrictions

- Gifts from Close Friends (“long term, close personal friendship, unrelated to the official’s position with the agency”)
- Catch all Exemption: If it is clear that the gift is not from a lobbyist or someone who was attempting to influence the official’s official position, then the gift is exempt.

# Gifts of Travel

- Not Reportable, unlimited
  - Ride-sharing, training paid for by government, government travel, bona fide business travel for official's private business (not speeches), certain campaign travel.
- Reportable, unlimited
  - USA governmental travel; Presentation at conference, paid by charity or foreign government; Travel directly related to official business paid directly to agency
- Reportable and limited

# Gift Restriction Summary



Gifts aggregating \$50 or more in the reporting period must be disclosed on a Form 700



Gifts aggregating \$520 or more in the reporting period from a single source are a conflict of interest



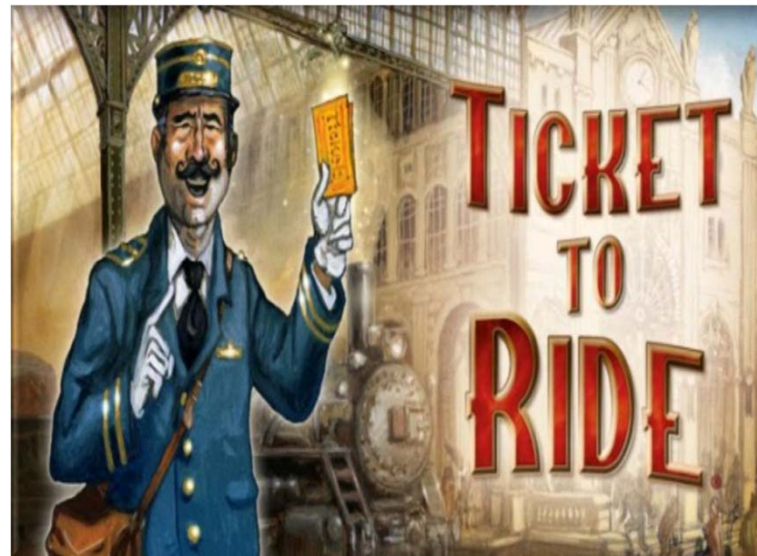
Return to donor within 30 days



Donate to a charity, but can't claim as a tax deduction

# Travel Payments: Article XII, § 7

A transportation company may not grant free passes or discounts to anyone holding an office in this State; acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office.



# Honorariums



- No local elected office holder, candidate for local elected office, or designated employee, including Commissioners, may accept any honorarium.
- “Honorarium” means a payment for a speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.

# Mass Mailing Restrictions

## **Items prepared or mailed at state or local public expense may not:**

- Feature an elected officer affiliated with the agency; or
- Include the name, photograph, or other reference to an elected officer if the item is prepared in coordination with the elected officer.

Applies if 200 pieces or more by mail



# Exceptions to Mass Mailing Rule



Press Releases



Inter/Intra-Agency  
Communications



Payment/ Collection  
of Funds



Letterhead/Roster  
Listing



Essential Program  
Mailings



Legal Notices



Directories



Meeting Notices



# Other Restrictions

- Gifts of Public Funds
- Extra Compensation
- Bribery
- Embezzlement
- Due Process

# Gifts of Public Funds

All expenditures of public funds must be for a public purpose.

- Cal. Const., Art. XVI, Section 6



- Does the expenditure serve the public interest?

# Misuse of Public Resources

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



# Misuse of Public Resources

- **Penalties:** disqualification from office, jail, civil penalties up to \$1,000 / day plus 3x the value of the unlawful use.
- **Tip:** Ensure that expense or use is consistent with adopted agency policy or practice.

# Extra Compensation

- Extra compensation paid to employees after services have already been rendered is generally prohibited.
  - Cal. Const. art. XI, § 10(a)
- **Exception:** When retroactive compensation is paid to employees pursuant to terms of newly negotiated MOU covering the period for which retroactive compensation is being paid



# Bribery

- Penal Code § 68:
  - “Every officer...who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity” is guilty of bribery
  - Penalties: prison, fine, loss of office, barred from office for life



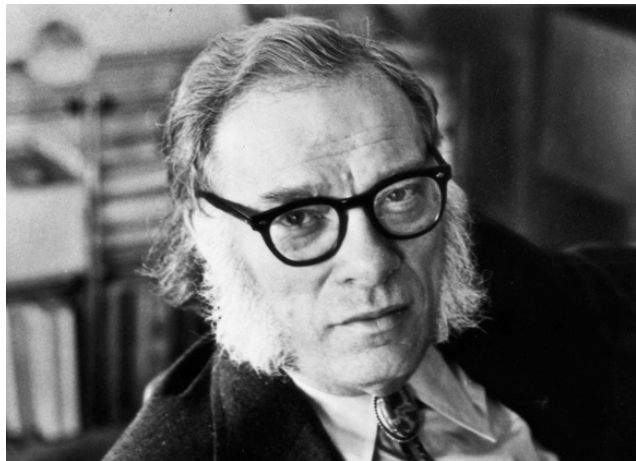
# Embezzlement

- Penal Code § 424 & Gov't Code § 8314:
  - Personal use, private loan, refusal to turn over public money
  - Campaign or electoral use of public property
- Penalties: prison, loss of office, barred from office for life
- “Incidental and minimal use” is not a violation

# Common Law Bias/Due Process

“Never let your sense of morals get in the way of doing what is right.”

- Isaac Asimov





# Common Law Bias/Due Process

- Public officials cannot use their official position for private benefit.
- Due process in an administrative hearing demands an appearance of fairness and the absence of even a *probability* of outside influence on the adjudication.
- Does not preclude holding opinions; just participation by someone with a closed mind as to a quasi-judicial decision.

# Due Process

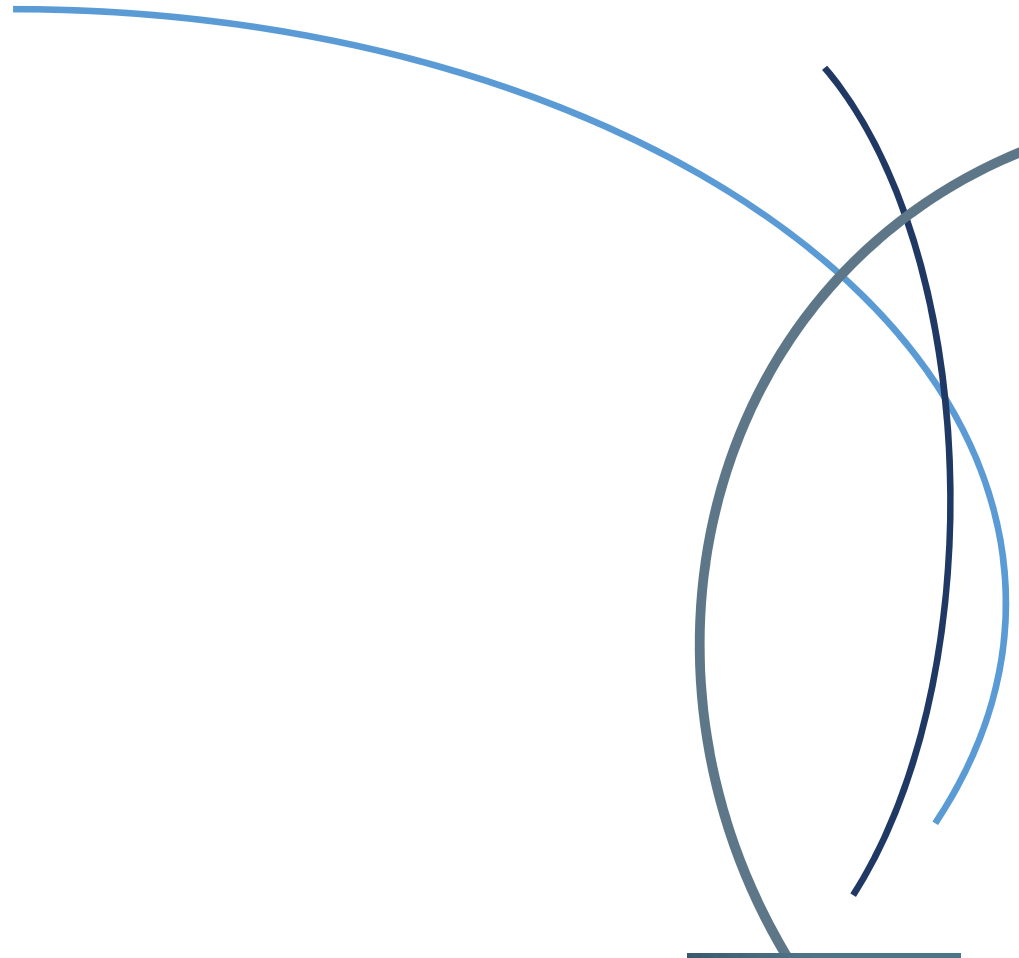
- Constitutional guarantee that citizens may not be deprived of:
  - Life
  - Liberty (good reputation, incarceration)
  - Property (civil service job, real or personal property)
- Without “due process.”

# Due Process

Requires:

- Notice of the intended action;
- Opportunity to prepare;
- Opportunity to be heard; and
- Fair and impartial hearing.

# Questions?



# Competitive Bidding Requirements

Under state law:

- Competitive bidding for public works contracts for public projects over \$5,000 is required for general law cities.

Public Contract Code § 20162

# Competitive Bidding Requirements

A “public project” is:

- A project for the erection, improvement, painting, or repair of public buildings and works.
- Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
- Street or sewer work except maintenance or repair.
- Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.
  - Public Contract Code § 20161

# Competitive Bidding Requirements

## Exceptions to competitive bidding:

- **Emergency:** By a four-fifths vote that an emergency exists.
- **Professional Services:** private architectural, engineering, environmental or construction management
  - Must be awarded on the basis of demonstrated competence and professional qualifications.
- **Special Services:** financial, economic, accounting, engineering, legal, or administrative matters
  - If specially trained, experienced and competent

# Competitive Bidding Requirements

## Violations of Competitive Bidding Laws:

- Contact is void and illegal;
- Contract cannot subsequently be ratified; and
- Contractor has no right to reimbursement for service or materials furnished, even if they were rendered in compliance with contract requirements.





# The Brown Act

“Government ought to be all outside and no inside.”

- Woodrow Wilson



# Purpose of the Brown Act

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as provided in this chapter.”



# Legislative Body

- City Council, Board of Supervisors, District Board
- Any committee created by formal action of the City Council, BOS, or Board (ordinance, resolution, minute action)
- Any committee created by a committee
- Standing Committees
- Not ad hoc committees

# What is a Meeting?

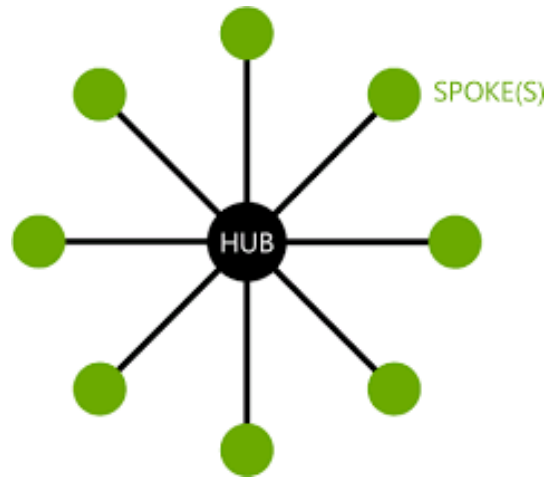
“Any congregation of a majority of the members of a legislative body at the same time and place, to **hear, discuss, or deliberate** upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”

# What is a Meeting?

Any use of a **series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

# Serial Meetings

- Daisy Chain
- Hub and Spoke
- Serial Briefings
- Email



# Exceptions to the Scope of the Meeting Definition

- Individual Contacts
- Conferences
- Community Meetings
- Meetings of another Legislative Body
- Social or Ceremonial Occasions

# Teleconferencing

- Audio or video or both connecting locations;
- The notice and agenda identify the remote location;
- The remote location is posted and accessible to the public;
- All votes are by roll call;
- All locations comply with the Brown Act, including allowing public participation;
- A quorum participates from within the jurisdiction

\*\* Emergency rules relax all of this. \*\*



# Agendas and Public Comment

- Agenda must be posted 72 hours (regular meeting) in advance with brief description of each item of business
- Limited to agenda items unless special circumstances justify addition to agenda
- Every agenda must allow comment on items on the agenda prior to action
- Regular agendas must allow comment on items not on the agenda but within agency's jurisdiction ("Public comment")

# Agendas and Public Comment

- “Briefly respond” to comments or questions or to report on individual activities
- Agendize for subsequent discussion
- Special circumstances
  - Emergencies (floods, fires, strikes)
  - Subsequent need (2/3 vote)



# Closed Sessions



- Limited topics, typically limited to Council and necessary staff
- Specified agenda format and “reporting out” requirements
- Don’t go into closed session without legal assistance
- Don’t disclose closed session confidences

# Dealing with the Public

- Public right to photograph and record (audio/video)
- Reasonable time, place, and manner restrictions permitted



# Enforcement

- Court of Public Opinion
- Written notice and opportunity to cure
- Civil Action
- Criminal Action



# Conclusion

- **Complicated details, but simple general rule**
  - Do the public's business in public
  - Give the public notice and an opportunity to participate
- **When in doubt, ask for help**

# California Public Records Act

“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both.”

- Pres. James Madison



# California Public Records Act

## **Purpose:**

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”



# California Public Records Act

- “Any writing
- containing information relating to the conduct of the public’s business
- prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”



- Employment contracts specifically included
- Includes emails, even if on personal email account if concerning public business

# Retention and Destruction

- The City has a records retention policy.
- Records must be:
  - Preserved for period specified by policy
  - Destroyed only after approval by designated persons, including the City Clerk and City Attorney

# Public Records Requests

An agency must:

- Make records available for inspection during business hours
- Redact confidential portions so balance can be made available
- Provide copies “promptly” at cost if “reasonably identifiable”
- Respond within 10 days of request unless “unusual circumstances” justify up to 14 more days

# Exemptions from Duty to Disclose

- “Preliminary drafts, notes or memoranda ... not retained ... in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.”
- Pending litigation
- “personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”
- Documents of agency contractors that are not by contract owned by the agency

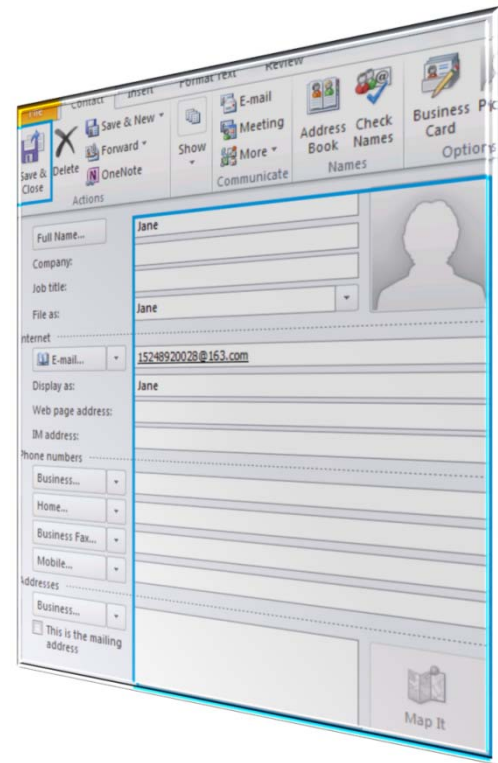
# More Exemptions from Duty to Disclose

- Real estate appraisals
- Taxpayer data received in confidence
- Records protected by legal privilege (attorney client, work product, etc.)
- Security assessments
- General balancing exception:
  - “Public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.”



# Public Officials' Home Address and Phone Number

“No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual”



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# Duty to Assist Requestor

The agency will:

- Assist requester to identify records responsive to request
- Describe the medium and location in which records exist
- Provide suggestions to overcome “any practical basis for denying access.”
- Or provide index of records (if an Index exists can provide and let requester identify the records they want)

# Electronic Records

## The agency:

- Must make electronic records available in electronic format
  - In any format used by the agency
  - In any format in which agency holds it
- May recover only direct cost of duplication
- Requester pays hardware and software costs for unusual formats
- No duty to compromise computer system security





# Remedies

- Requesters can sue to challenge denial
- Burden is on the agency to justify withholding records
- Agency has no right of appeal; review is by discretionary writ
- Agency pays legal fees on loss
- Agency wins fees only if suit is “clearly frivolous”

# Recommendations

- Don't create unhelpful records
- Copy staff on all items provided to entire legislative body
- Don't retain records without a reason
- Segregate exempt from non-exempt records
- Segregate personal from public
- Be careful with email

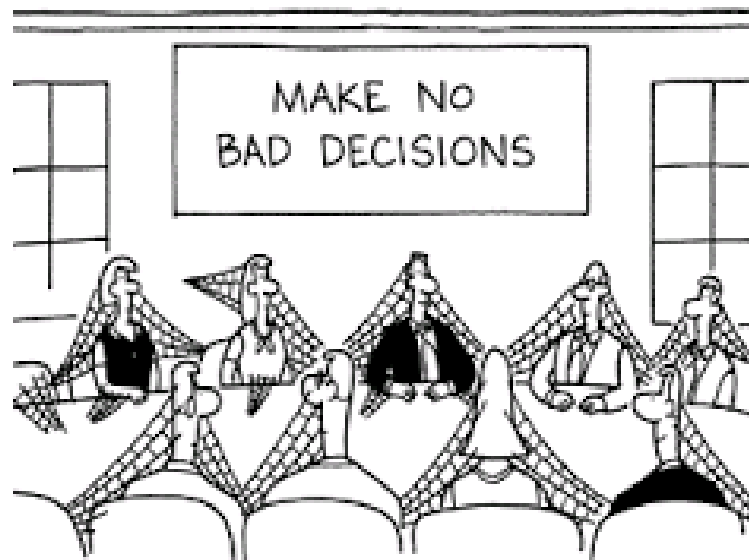
# Recommendations

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- Segregate exempt from non-exempt records
- Segregate personal from public
- Be careful with email

# Ethical Decision-Making

“Whenever two good people argue over principles, they are both right.”

- Marie Ebner von Eschenbach



Goff

# General Thoughts on Ethical Decision-Making

- Is the action legal?
- Does it meet your own sense of right and wrong?
- Is it good public policy?
- Is it consistent with the agency's or the community's values?
- Does it comply with the Golden Rule?



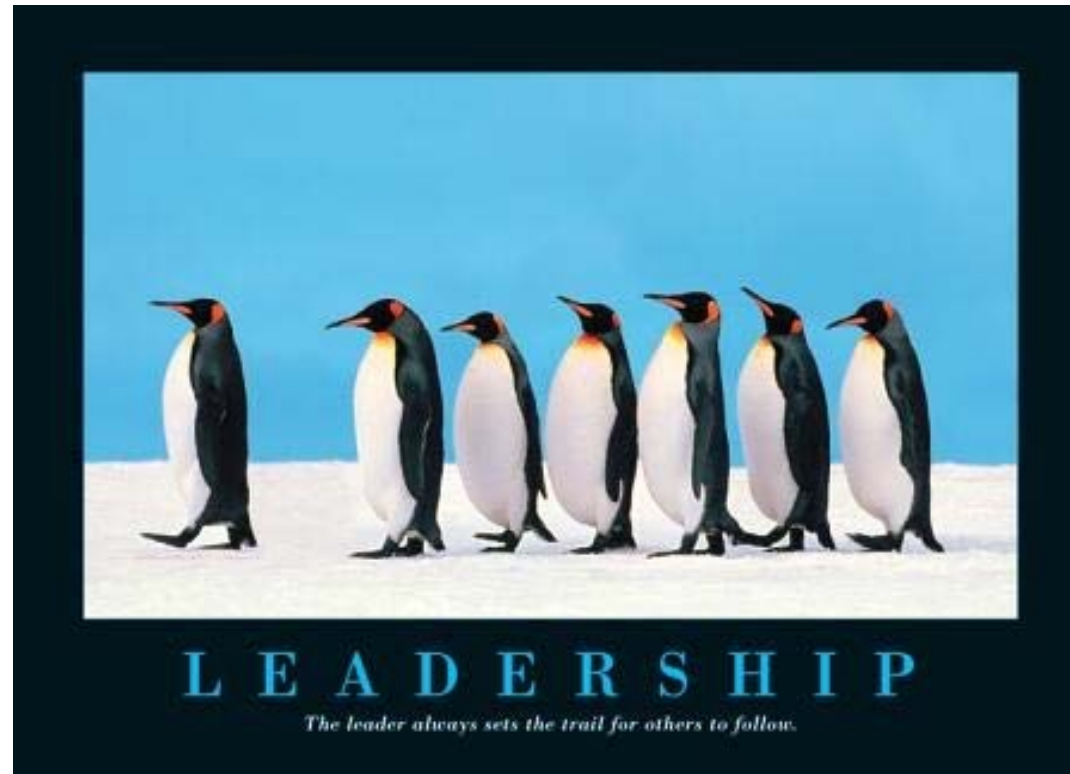
# General Thoughts on Ethical Decision-Making

- Don't be afraid to invite ethics into the room
- There is often more than one “right” answer and it is okay to disagree about what is right or wrong
- Consider adopting a local ethics or standards of conduct policy
- The Institute for Local Government has good resource materials at [www.ca-ilg.org](http://www.ca-ilg.org)

# Conclusion

“Management is doing things right; leadership is doing the right things.”

- Peter Drucker



# Questions and Answers





# Colantuono, Highsmith & Whatley, PC

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