

Ethical Conduct in Public Service (AB 1234)

Presented By:
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FENTON & KELLER
ATTORNEYS AT LAW
EXPERIENCE - INTEGRITY - RESULTS

AB1234
Housekeeping

- Please sign in. Certificates will be mailed.
- Two hours.
- Feel free to get up and stretch, use the restroom.
- Ask general questions.

Objectives

- **Meet AB 1234 Requirements**
  - Applies to Elected & Appointed Officials, as well as department heads
  - 2 hours ethics training every 2 years
- **Review laws governing public service**
- **Discuss ethics and ethics laws**

Impossible to go into detail in just 2 hours, so the objective is to understand enough to ask questions where needed.

Importance of Training

1. Comply with the law!
2. Gain familiarity with the law, as well as ethical principles.
3. Encourage you to think beyond the law and guide you in doing so.
4. Help each of you promote public trust in local government.

Roadmap for Today

- Ethics
  - Common Law
  - Gov. Code §1090
  - Political Reform Act
  - Use of Public Resources
- Open Government
  - Public Records Act
  - Brown Act



Ethics vs. The Law

- The law is the floor, not the ceiling. Just because it's legal, doesn't mean it is ethical.

- "20 years to build a reputation and five minutes to ruin it. If you think about that you'll do things differently." - Warren Buffett

Sources of Law

- Common Law Conflicts (*i.e.*, case law and legal customs)
- Political Reform Act (Gov. Code § 87100)
- Government Code § 1090
- Criminal Law Prohibitions (Penal Code § 68)
- Ethics in Government Act

Common Law Duties

- Duty of **Loyalty** – Multiple boards and commissions.
- Duty of **Due Diligence** – Reading packet for first time at dais?
- **Incompatible** offices - supervisory, auditory, or removal power over the other. (Gov't Code § 1099)
- Fair Process (Duty to **Avoid Bias) -** notice and opportunity to be heard in front of a neutral tribunal.

Bias

- Quasi judicial decisions must be without bias.
- Comes in two flavors:
  - Personal bias
  - Financial bias
- The question is: Can a public official make a decision based on what is presented alone, and not on other inappropriate grounds?

Two Southern California Bias Cases

- City of Los Angeles – Near Mulholland
- City of Hermosa Beach



Bias Case Study – *Newsletter*

- The Project:
  - Nasha, LLC sought to develop five lots on Multiview Drive in L.A, near Mulholland Dr.
  - The project was approved at the administrative level - but appealed to the City's Planning Commission.

Bias Case Study – *Newsletter Cont.*

- Shortly before the Planning Commission hearing, the Studio City Residents Association Newsletter contained an anonymous article entitled, "MULTIVIEW DRIVE PROJECT THREAT TO WILDLIFE CORRIDOR."
- At the hearing, Planning Commissioner Tony Lucente said: "… as president of the Studio City Residents Association, we have included information on this matter in our monthly newsletter…, which is a routine thing that we do… I feel I can make a fair and impartial decision regarding this matter."



Bias Case Study – *Newsletter Cont.*

- At the meeting, Commissioner Lucente not only voted against the project, he made the motion!
- At the hearing, he never mentioned that he was the author of the article.
- Later, during his deposition in the lawsuit that followed, Lucente admitted he authored the newsletter article.



:ente

Bias Case Study – *Newsletter Cont.*

- The Court says: “the newsletter article was not merely informational. The article clearly advocated a position against the project, which it characterized as a “threat to wildlife corridor.”
- “Lucente's authorship of the newsletter article gave rise to an unacceptable **probability** of actual bias…”
- “Lucente clearly should have recused himself from hearing this matter.”



:ente

Bias Case Study – *Newsletter Cont.*

- "In considering the applicability of due process principles, we must distinguish between actions that are *legislative* in character and actions that are *adjudicatory*."
- "Procedural due process in the administrative setting requires that the hearing be conducted *before a reasonably impartial, noninvolved reviewer*."
- City decision vacated by Court.

Bias Case Study – The Vanishing View



Bias Case Study –
The Vanishing View

- The Clark's owned a duplex applied to the City of Hermosa Beach for a permit to demo the condo and build a two-unit condo.
- The Planning Commission approved the project.
- An "inland" neighbor, Robert Benz, sought to overturn the Planning Commission's decision. He gathered signatures on five petitions, which stated that the project "will adversely affect the views of the neighboring homes."

Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152

Bias Case Study – The Vanishing View Cont.

- In the meantime, Mr. Benz is elected to the City Council.
- The City Council – including Mr. Benz - denies the project application.
- Mr. Benz did not disqualify himself, stating he rented his residence and therefore had no conflict.

Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152

Bias Case Study – The Vanishing View (cont.)

- Court: Councilmember Benz member had a common law conflict… ***participation was improper even though the interest did not meet FPPC materiality.***

"Because Benz lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks' project. It is irrelevant that Benz did not own his residence; an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment."

Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152

Bias Case Study – The Vanishing View (*cont.*)

- Councilmember Benz would run by the Clark's house and yell "loud, obnoxious noises in the morning."
- Benz "urinated on the house."
- Local press (Daily Breeze) quoted Councilmember Benz: "Mrs. Clark wanted to see me urinate."
- Later, Benz said this was ***taken out of context***. Later denied urinating on Clark property.

Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152

Bias Case Study – The Vanishing View (cont.)

- Court found due process violation.

- $213,300 in damages:
  - $93,300 - increased development costs
  - $20,000 - emotional distress
  - $100,000 - lost property value

- $133,895 for attorney's fees, expert witness fees and costs.

Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152

You be the Judge

- Ken Black runs for a seat on the CAWD Board because he doesn't think his new ADU should be assessed a separate connection and user fee.
- An agenda for an upcoming CAWD meeting is entitled "Concept Review: Include ADU's as a separate category in rate study."
- Should Mr. Black participate?

Bias Best Practices

- Be mindful of actual *and perceived* fairness.
- Avoid statements that your mind is made up in advance.
- Don’t consider or rely on evidence outside of the record.

Conflicts of Interest under the Political Reform Act

Basic Rules:

1. Public Officials Cannot ***make***, ***participate in***, or ***influence*** any decision in which they have a disqualifying conflict of interest under the Political Reform Act.
   - Make = vote, appoint a person, contract agreement
   - Participate = provides information, opinion, or recommendation
   - Influence = contacts or appears before official's agency.
2. Public officials must disclose any conflict of interest on the record.

Government Code § 87100

Conflicts of Interest under the Political Reform Act

Types of interests that may result in disqualification:

1. **Business Investment/Entity**. A business entity in which the official has an investment or in which they are a director, officer, partner, trustee, employee, or manager.
2. **Real Property**. Real property in which the official has an interest.
3. **Source of Income**. An individual or an entity from whom the official has received income or promised income.
4. **Source of Gifts**. An individual or an entity from whom the official has received gifts.
5. **Personal Finances**. The official's personal finances including his or her expenses, income, assets, or liabilities.

Conflicts of Interest under the Political Reform Act

Four-Step process to determine if a conflict exists:

1. Is the financial effect of the decision "reasonably foreseeable" on your economic interest?
   - Reasonably foreseeable = realistic possibility
2. Is the financial effect "material"?
   - FPPC sets standards.
3. Is the financial effect on the official indistinguishable from its effect on the "public generally"?
   - (1) 25% of properties, businesses, or individuals, and (2) no unique effect on public official.
4. Does another exception (*e.g.*, rule of necessity, personal interest) apply?

Conflicts of Interest under the Political Reform Act

What to do when a conflict exists?

- Disclose it on the record and leave the room. Zoom = mute and turn camera off.
  - Exception – personal interest.
- Do not make, participate in, or influence the decision.
  - Staff, colleagues, or others.

You be the Judge

- At a Board Meeting, when an agenda items comes up that will affect Director Black's business, he announces on the record that he has a conflict of interest. He gets up, leaves the dais, and leaves the board room to get some tea.
- After he gets his tea, he re-enters the board room and sits in the back and waits for the item to play out. Then rejoins his colleagues at the dais.

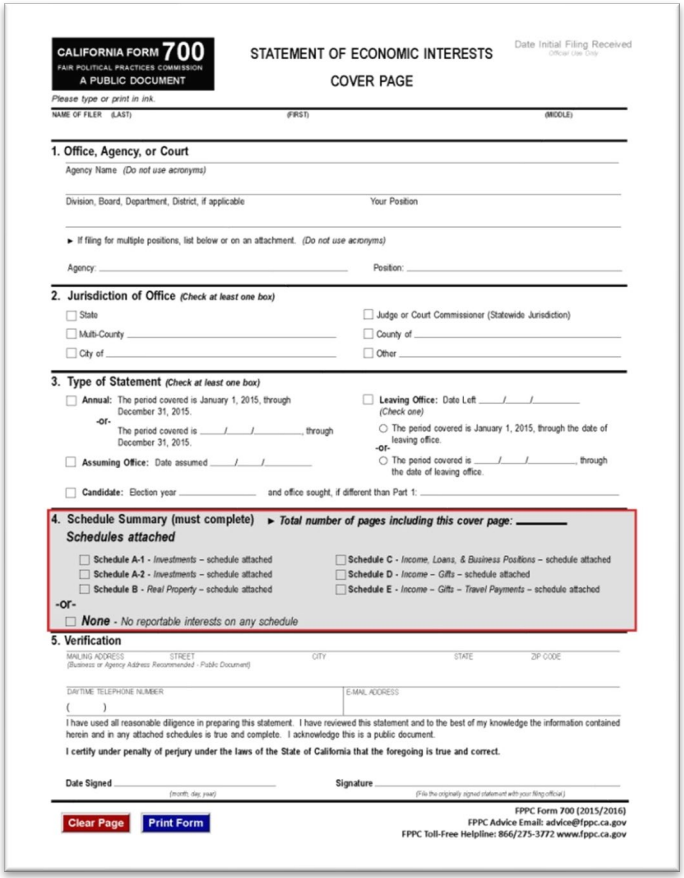
Conflicts of Interest under the Political Reform Act

- Violation a Misdemeanor
- Loss of Office
- Action Rescinded
- Incarceration
- Civil Penalties / Restitution
- Fines
- Attorney's Fees

Disclosures

Interests That Must Be Disclosed on Form 700 – A Public Document

- Business Entities
  - Incl. management positions
- Business investments
- Financial Interests
- Real Property
- Source of Income
- Gifts



CALIFORNIA FORM 700
FAIR POLITICAL PRACTICES COMMISSION
A PUBLIC DOCUMENT

STATEMENT OF ECONOMIC INTERESTS
COVER PAGE

Date Initial Filing Received
Official Use Only

Please type or print in ink.

NAME OF FILER (LAST) (FIRST) (MIDDLE)

1. Office, Agency, or Court

Agency Name *(Do not use acronyms)*

Division, Board, Department, District, if applicable Your Position

► If filing for multiple positions, list below or on an attachment. *(Do not use acronyms)*

Agency: Position:

2. Jurisdiction of Office *(Check at least one box)*

☐ State ☐ Judge or Court Commissioner (Statewide Jurisdiction)
☐ Multi-County ☐ County of
☐ City of ☐ Other

3. Type of Statement *(Check at least one box)*

☐ **Annual:** The period covered is January 1, 2015, through December 31, 2015.
-or-
The period covered is __/__/__ through December 31, 2015.

☐ **Assuming Office:** Date assumed __/__/__

☐ **Candidate:** Election year and office sought, if different than Part 1:

☐ **Leaving Office:** Date Left __/__/__ *(Check one)*
○ The period covered is January 1, 2015, through the date of leaving office.
-or-
○ The period covered is __/__/__ through the date of leaving office.

4. Schedule Summary (must complete) ► ***Total number of pages including this cover page:*** ____

Schedules attached

☐ **Schedule A-1** - *Investments* – schedule attached
☐ **Schedule A-2** - *Investments* – schedule attached
☐ **Schedule B** - *Real Property* – schedule attached
☐ **Schedule C** - *Income, Loans, & Business Positions* – schedule attached
☐ **Schedule D** - *Income – Gifts* – schedule attached
☐ **Schedule E** - *Income – Gifts – Travel Payments* – schedule attached

-or-

☐ ***None*** - *No reportable interests on any schedule*

5. Verification

MAILING ADDRESS STREET CITY STATE ZIP CODE
(Business or Agency Address Recommended - Public Document)

DAYTIME TELEPHONE NUMBER E-MAIL ADDRESS
( )

I have used all reasonable diligence in preparing this statement. I have reviewed this statement and to the best of my knowledge the information contained herein and in any attached schedules is true and complete. I acknowledge this is a public document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date Signed *(month, day, year)* Signature *(File the originally signed statement with your filing official.)*

Clear Page Print Form

FPPC Form 700 (2015/2016)
FPPC Advice Email: advice@fppc.ca.gov
FPPC Toll-Free Helpline: 866/275-3772 www.fppc.ca.gov

California Code of Regulations 18700

Conflicts of Interest under the Political Reform Act

Best Practices:

- Consult District Counsel early and often
- FPPC
  - Phone advice
  - Written advice



Gifts/Perks

- A gift is any payment or other benefit (including a discount!) that confers a personal benefit for which a public official does not provide payment or services of equal or greater value. (Gov't Code §82028)
- Examples: money, food, beverages, lodging, entertainment, goods, services, passes, or tickets.
- Reportable whether made by an outside donor or the official's own agency.



FPPC Rules for Gifts

- Gifts from a single source aggregating to $50 or more must be *disclosed* on your Statement of Economic Interest (Form 700).
- No local elected officeholder or candidate for local elected office may accept any gift or gifts from a single source in excess of $680 in any calendar year (1/1/2027 – 12/31/2028).
- Fair Market Value is used to determine amounts.

Gifts Come in All Forms

- Hollywood Council member fined $4,800 (Academy Award tickets), said: “I paid the full cost of the award show tickets, I messed up when it came to the [three] dinners afterward.”

- Oakland Council member accepted free parking at San Francisco International Airport: $1,500 fine.

Gifts – Common Sense Exceptions

- Gifts from family members, acts of neighborliness, home hospitality, inheritances.
- Informational materials (books, periodicals, conference admission).
- Gifts that are returned or donated to a charity within 30 days without being claimed as a tax deduction.

Gifts – Common Sense Exceptions *Cont.*

- Ceremonial Role – Example: tickets to a baseball game to throw out first pitch (includes any benefit included with ticket, e.g., lunch).
- Campaign contributions.
- Personalized plaques or trophies with a value of less than $250.
- Exchanges commonly made between persons in a bona fide dating relationship.

Gifts – Common Sense Exceptions *Cont.*

- Existing Personal Relationship. "…it is clear that the gift was made because of an existing personal or business relationship unrelated to the official's position and there is no evidence whatsoever at the time the gift is made that the official makes or participates in the type of governmental decisions that may have a reasonably foreseeable material financial effect on the individual who would otherwise be the source of the gift."

Prohibited Gift ?

- The Sunset Center is to host a concert by a world-renowned pianist. Tickets are $500 a piece.
- For his many years of service to the community the show's host gives Mr. Black and his wife tickets for the show.
- Is this a prohibited gift?

Prohibited Gift ? (Cont.)

- After the concert, a local restauranter hosts several dozen local luminaries, including Director Black for dessert.
- During the dessert, the restauranter pours everyone several rounds of an expensive port.
- Is this a prohibited gift??

The Kicker

"Any person … who claims that a payment is not a gift by reason of receipt of consideration has the **burden of proving** that the consideration received is of equal or greater value."

FPPC & Gifts

- The California Fair Political Practices Commission has enforcement power over gifts.
- Enforcement fines generally equal amount of gift received.
  - Councilmember – Colton (gift of an iPad) $200 fine
  - Staff Director – Marina (15 meals = $402) $400 fine
  - Project Manager –Marina (meals = $104) $200 fine
  - President – N. Orange College (meals = $333) $400 fine
  - City Manager – San Rafael (meal = $127) $200 fine

Travel – A Type of Gift

- General Rule – payment for travel (including parking, lodging, and food) is a reportable gift or income.
- Common Sense Exceptions –
  - Travel for agency related business.
  - Travel for bona fide personal business, trade, or profession.
  - Sharing a ride with another official.

Government Code Section 1090

- Gov't Code Section 1090 has prohibited self dealing since 1851.
- Officials cannot have any interest in City contracts – even remote or theoretical.
- Self Dealing cannot be cured by disqualification, absence, or abstention – because the conflict is imputed to the entire board or commission.

Government Code §1090 – Case Study #1 – Actual Conflict

- City wants to build a park.
- Council member sold land to developer.
- Developer sold land to the City.
- Council member abstained on advice of attorney.
- Supreme Court found this a §1090 violation.
- City retained land AND the Council member forfeited $258,000 (plus interest) to the City.

Thomson v. Call (1985) 38 Cal. 3d 633

Government Code §1090 – Case Study #2 – Actual Conflict

- President of 3-member school board – 90 students
- His firm submitted lowest of 3 bids to solve nitrate contamination of well
- Bids: $351,595 - $347,650 - $311,700
- President of Board abstained
- D.A. investigates as a §1090 violation
- Headline: "Bid Faces Scrutiny"

Government Code §1090
Case Study - Theoretical Conflict

- A construction firm is the low bidder on a $350,000 building contract for a new city hall complex.
- The construction firm owner is on the City's Planning Commission.
- Per the bid docs, the construction document must go to the City's Architectural Review Board before going to Council.
- However, because the ARB's decision could be appealed to the PC under the City's code, the City could not accept bid.

Section 1090 - Close to Home Case Study

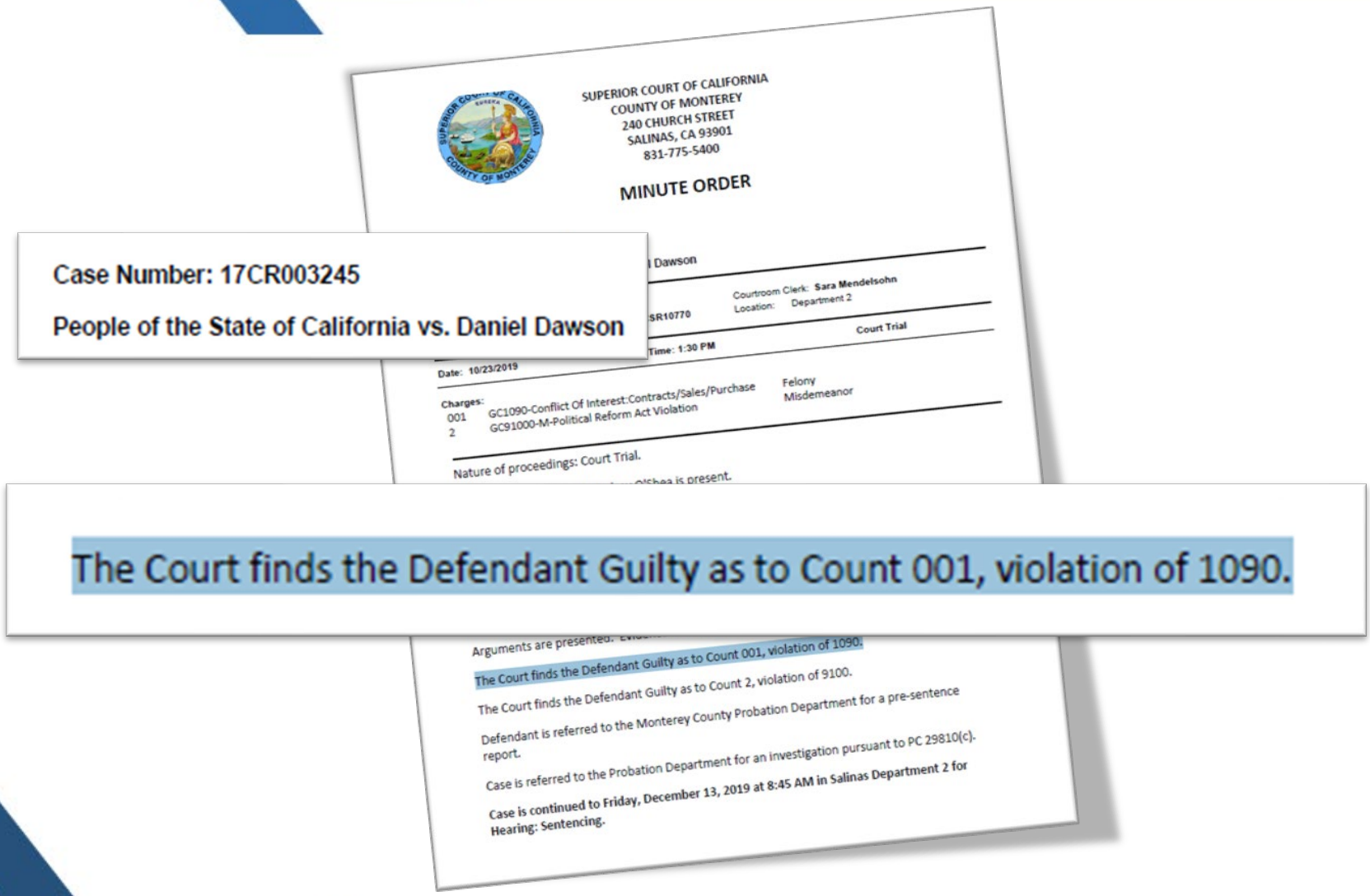
- June 2017 - Just a few weeks after he resigned as City Manager, Dan Dawson filed an application with the Monterey Peninsula Water Management District to transfer water credits from City-owned property to a residential lot in the City.

- Identified himself as “City Manager” on Water Management District application.

Section 1090 - Close to Home Case Study *cont.*

- Turns out Dawson owned the residential lot. He bought his lot in 2015 for $50,000. It was the last buildable lot located within the city - but had no water credits.

Section 1090 - Close to Home Case Study *cont.*



SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY
240 CHURCH STREET
SALINAS, CA 93901
831-775-5400

MINUTE ORDER

Case Number: 17CR003245

People of the State of California vs. Daniel Dawson

Dawson

Courtroom Clerk: Sara Mendelsohn
Location: Department 2

SR10770

Time: 1:30 PM

Court Trial

Date: 10/23/2019

Charges:
001 GC1090-Conflict Of Interest:Contracts/Sales/Purchase — Felony
2 GC91000-M-Political Reform Act Violation — Misdemeanor

Nature of proceedings: Court Trial.

The Court finds the Defendant Guilty as to Count 001, violation of 1090.

Arguments are presented.

The Court finds the Defendant Guilty as to Count 001, violation of 1090.

The Court finds the Defendant Guilty as to Count 2, violation of 9100.

Defendant is referred to the Monterey County Probation Department for a pre-sentence report.

Case is referred to the Probation Department for an investigation pursuant to PC 29810(c).

Case is continued to Friday, December 13, 2019 at 8:45 AM in Salinas Department 2 for Hearing: Sentencing.

Section 1090 - Close to Home Case Study *cont.*

Former Del Rey Oaks city manager Dan Dawson sentenced on felony conflict of interest conviction.

Mary Duan Feb 6, 2020 1



Former Del Rey Oaks city manager Daniel Dawson stands next to his lawyer Michael Lawrence in the Salinas courthouse during his sentencing hearing on Feb. 5, 2020.

Parker Seibold

additional information regarding application workshops, requirements, and

Section 1090 -
Close to Home Case Study *cont.*



Section 1090

Unlike a conflict of interest under the FPPC rules, conflicts under Section 1090 cannot be cured by abstention or disqualification.

Government Code §1090 Violations and Remedies

- Contract is void (not voidable)
- Willful violation is a *felony, i.e.,* DA will bring criminal charges
- Violator forever barred from holding public office
- No FPPC action if AG or DA pursuing criminal prosecution
- Seek Advice!
  - FPPC may issue advisory opinions not related to past conduct.
  - Local officials or employees may seek advice or opinions; evidence of good faith conduct.

Section 1090 – Aiding and Abetting

- Legislative response to *D'Amato v. Superior Cou*rt, which limited §1090's liability to the official having an interest in a contract.
- Prosecution allowed for those who *aid or abet* making a contract where government official is financially interested.
- Any inducement or bribe for legislative action creates a financial interest for public official.

Criminal Behavior – Penal Code § 68

- Bribery – Solicit or receive benefits for official acts
- 2013 FBI sting – L.A. building inspectors accepted bribes to quickly approve projects (& did not perform inspections)
- Penalties
  - Loss of Office
  - Prison Time
  - Fines
  - Restitution
  - Attorney's Fees
  - Embarrassment

Criminal Behavior
Case Study – Cronyism

- Mayor asks contractor to hire his sister's firm.
- Sister's firm pays Mayor's campaign debt…and renovates Mayor's house.
- Cash to sister's firm equals Mayor's benefit.
- Mayor sentenced to 188 months in Federal Prison.

Use of Public Resources

- Personal Use Prohibited
- Political Use Prohibited
- Penalties:
  - Significant fines
  - Criminal Penalty
  - Disqualification from office
  - IRS implications

Gift of Public Funds

- California Constitution - Article XVI, Section 6 prohibits making a gift of public funds.
- Public Funds = giving of monetary funds and any "thing of value."



Gift of Public Funds?

- A wastewater district has a policy of allowing employees to select anniversary gifts for years of service.
- After her 30-year anniversary at the district, the district's Chief of Operations chooses a ski pass worth $1200.
- Is this a gift of public funds?

Gift of Public Funds?

- Same scenario, but because the Chief of Operations has been doing such outstanding work, she scores a "10 out of 10" on her annual review. In recognition of this, the Board votes to also give her spouse a ski pass.
- Gift of public funds?

Competitive Bid Requirements

- Public agencies have a duty to publicly bid certain contracts, particularly construction contracts.

"The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds…"

- Each jurisdiction has own purchasing policy – review it!

- Exception exists, e.g., Professional Services (Legal, accounting, engineering, design/build).

Konica Business Machines U.S.A., Inc. v. Regents of University of California, 206 Cal. App. 3d 449 (1988)

Mass Mailing Limits

- Mass mailings (newsletter, flyers etc.) cannot be sent at public expense if they:
  - Includes the "name, office, photograph, or other reference to an elected officer…" and
  - Includes "200 substantially similar items are sent in a single calendar month…"
  - For which the costs of design, production and printing exceed $50 and are paid with public moneys.

Public Resources: Honoraria Ban

- Honoraria: a payment received for making a speech, publishing an article or attending any public or private event, meal, or similar gathering.
- Local elected officers and candidates and all officials holding positions listed in Government Code Section 87200 are prohibited from receiving honoraria payments.
- Limited exceptions apply, such as income earned from a bona fide business or profession, or where honoraria is returned within 30 days.

Public Resources: Employment-Related Prohibitions

- Officials cannot parlay positions into job opportunities.
- Cannot do advocacy before or after the official has left ("revolving door law").
- Cannot make decisions for someone likely to be a future employer. *Carlsbad Unified School Trustee* – FPPC **$4,000 fine** for accepting a job offer.

Strict Liability Standard

- Not a Defense:
  - Good Intentions – “I was trying to save the District money.”
  - Honest Mistake
  - Ignorance of the Law – “I never paid attention during AB 1234 trainings.”

Sunshine Laws

Public Records Act

Brown Act



Public Records Act

"Governmental records shall be disclosed to the public, upon request, unless there is a legal basis not to do so."

- Applies to state and local agencies (this means you!)
- Broadly defines records
- Disclose unless exempt
- Request to review or copy
- Duty to assist requester
- Strict statutory deadlines

Marken v. Santa Monica-Malibu Unified School District (2012) 202 Cal.App.4th 1250

What is a Public Record?

"[A]ny 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."

Gov't Code section 6250(e)

Beware - Most Email is Public Record

- Employee to employee: “I can’t believe they promoted Jim, he’s an idiot.”
- Planning Director to Councilmember: “You and I know this project isn’t going to be approved because…”
- Email from constituent:

  “Dear Chair, I write you in strict confidence…”



Public Records Act

- I'm texting and emailing District business from my personal cell phone, so I don't have to turn them over, right?

- "Here, we hold that when a [public] employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act." *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608

Records Retention

- Local agencies generally must retain public records for a minimum of 2 years – however some records may be destroyed sooner, and some must be kept permanently.

- Failure to timely destroy records may result in staff spending days sifting through documents in response to a PRAR.



- Can effectively shut down entire department.

- Check records retention/destruction policy *before* destroying records.

Brown Act

"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."

(Introduction to the Brown Act, Gov't. Code § 54950)

General Rule

"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 otherwise provided in this chapter."

(Government Code § 54953)

What is Covered by the Brown Act?

- The Brown Act requires all meetings of a **legislative body** of a **local agency** to be open and public.
  - The Board of Directors is the legislative body of a local agency, *i.e.*, CAWD Board.
- Commissions and Committees (*e.g.,* a Technical Advisory Committee) are also covered.

What is Covered by the Brown Act?

- Standing committees (even if comprised of less than a quorum)
  - Continuing subject matter jurisdiction; or
  - A meeting schedule fixed by charter, ordinance, resolution or other formal action of the legislative body. Example: "the Finance Committee shall meet on the third Thursday of every month."
- Compare - Subcommittee comprised of only members of a body with defined task and limited duration, e.g., *ad hoc* Sea Level Rise Committee.

Who is Covered by the Brown Act?

- Members of the legislative body.
- Any individual who is elected or appointed to a legislative body, *e.g.*, a newly elected councilmember who has not assumed office yet.

What is a “Meeting”

Where a **majority of members** (not necessarily a quorum) are present (e.g., 3 of 5 members) at the same time and location, including teleconference location, **to hear, discuss, deliberate, or take action** on any item that is within the subject matter jurisdiction of the legislative body.

“Same location” means anywhere, not just at noticed meetings.

Serial Meetings - Prohibited

- ***Serial Meetings*** – The use of other persons or electronic means to **hear**, **discuss**, **deliberate**, or **take action** on any item that is within the subject matter jurisdiction of the legislative body is **prohibited**.
  - "Daisy chain" meeting – A calls B, B calls C, C calls D…
  - "Hub and Spoke" meeting – Involves a central point of contact
    - A member of the legislative body acting as the hub
    - A staff member acting as the hub
- Note: no "collective concurrence" requirement.
- Beware "Reply All."
- Beware social media.





What is Not a Meeting?

Circumstances **not** considered a meeting under the Brown Act:

- Individual contacts that **do not** result in a serial meeting:
  - Allowed between a member of a legislative body and any other person (except other members) so long as they do not result in a serial meeting. (Example: meeting with constituents.)
  - Staff briefings are permitted to answer questions and provide information to individual members of a legislative body as long as they do not result in a hub and spoke meeting. (Example: calling the General Manager after receiving the packet with a question.)
- Where a majority of members attend:
  - Conferences and seminars*
  - Open community meetings*
  - Other legislative body meetings
  - Social or ceremonial events
  - Standing committee meetings
- Grand jury hearings.

Provided District business is not discussed amongst the members.

*2023 AG Opinion

- The Ventura Chamber of Commerce is a private, voluntary association.
- Chamber hosts and annual breakfast.
- Mayor of the City of Ventura to give a “State of the City Address.”
- Attendance and participation is open to the public, but attendees must buy ticket/breakfast.
- At the event, less than a quorum attended the breakfast.

AG Opinion No. 23-102

Two related exemptions to the definition of a "meeting" under the Brown Act were discussed.

- Attendance of a majority of a quorum at "a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body."
- An "open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency."

Attorney General's Office Opinion found:

1. If a majority of councilmembers attended, it would constitute a "meeting."
2. The events, as planned, would not satisfy the Brown Act exemption for *conferences:*
   - Basic definition of "conference" not met here. Rather, it was a single speech by a single person.
3. The events, as planned, would not satisfy the Brown Act exemption for *community meetings*:
   - Because the meeting could only be attended by those who paid for a ticket, those unable to afford a ticket could not attend. Therefore, the meeting was not sufficiency "open" to the public to fall under the "community meeting" exception.

Types of Meetings

- Regular Meeting
  - Is a meeting that is held at a time and place specified by ordinance or other formal action.
    - *E.g.*, Del Rey Oaks Municipal Code § 2.04.010 – "The City Council shall hold regular meetings on the fourth Tuesday of each month at 6:00 p.m. or as may be designated by resolution of the City Council."
- Special Meeting
  - May be called at any time to discuss discrete items of business.
- Emergency Meeting
  - Examples of an emergency – work stoppage (*e.g.*, labor strike), natural disaster (*e.g.*, earthquake), activity that severely impairs or threatens to impair public health and safety.

Teleconference Meeting

Hypothetical - Councilmember will be on a cruise during a council meeting. May they call into the meeting if they post an agenda on board and allow anyone on the ship to comment?



New Rules for Remote Participation - Just Cause and Emergency Circumstances

- Members of a legislative body may participate remotely without identifying location or making it accessible to the public:
  - Just Cause
    - Caregiving for a family member, contagious illness, physical or mental disability; travel while on business of the legislative body or another state or local agency.
  - Emergency circumstances
    - Physical or family medical emergency that prevents a member from attending in person.
    - Must request that the legislative body allow them to participate in the meeting remotely because of emergency circumstances and the legislative body must take action to approve the request

New Rules for Remote Participation - Just Cause and Emergency Circumstances

Additional Rules:

- Public must be able to hear and see meeting and remotely address legislative body in real time.
- Technical difficulties result in no further action being taken until resolved.
- Members participating remotely must participate through both audio and visual technology.
- Disclosure of any other individuals 18 years of age or older are present in the room and the general nature of the member's relationship with the individual.
- Quorum of the legislative body must participate in person from a physical location open to the public.

Agendas

- Notice periods
  - Regular Meeting - 72 hours' notice – i.e., post agenda.
  - Special Meeting - 24 hours' notice i.e., post agenda.
  - Emergency Meeting - Generally, no notice required (media that have requested notice must be notified by telephone at least one hour in advance of an emergency meeting).
- Notice Locations
  - Must be posted in publicly accessible location.
  - If the legislative body has a website, it has a supplemental obligation to post the agenda on it.
- Notice Content
  - The agenda must state the meeting **time** and **place.**
  - Must contain "a **brief general description** of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session."

Agendas

- Rule - No action or discussion permitted of matters **not** on the agenda.
- Exceptions:
  - Where a majority of the body determines there is an "emergency situation."
  - Where 2/3 of the body determine there is a need for immediate action that came to the attention of the local agency **after** the agenda was posted.
  - Where an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.
  - Members of the legislative body or staff may:
    - briefly respond to comments or questions from the public;
    - direct staff to place an item on a future agenda;
    - request information be provided;
    - ask a question for clarification;
    - make a brief announcement or report on activities.

Rights of the Public – Public Comment

- Public must be given opportunity to address body **before** action is taken.

- Legislative body may **not** prohibit public criticism of the body, its members, staff, or policies.

Rights of the Public – Public Comment

Public comment – Is 3 minutes sacred?

- *Ribakoff v. City of Long Beach* (Sept. 2018)– the latest in a line of cases holding cities may impose reasonable "time, place, and manner restrictions" on public comment.
- "[R]estricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place, and manner restrictions that preserve [an agency's] legitimate interest in conducting efficient, orderly meetings."

Rights of the Public

- A member of the public cannot be required to provide their name or fulfill any condition precedent to attendance.
  - "Sign in" sheets must clearly state providing information is voluntary and does not affect the right to attend the meeting.
- ADA compliance is an absolute requirement.
  - Hypothetical – What if the meeting is on second floor and the elevator goes out?
- Public has right to record meeting.

Rights of the Public

- Attendees have the right to record proceedings by audio or video.
- Right to all materials - writings distributed during a meeting must be made public:
  - **At the meeting** if prepared by the local agency or a member of its legislative body; or
  - **After the meeting** if prepared by some other person.

Rights of the Legislative Body

- Legislative body may prohibit comments regarding matters outside of the body's jurisdiction.
- Legislative body may prohibit **disruptive** conduct.
  - If a meeting is disrupted and orderly conduct of the meeting is unfeasible and order cannot be restored by removing the disrupter(s), the legislative body may order the meeting room cleared and continue in session.
  - Media (unless participating in disruption) must be allowed to remain.
  - The legislative body may readmit those not participating in the disruption.

Disruptive Speech

"Actual disruption means actual disruption."

It does not mean constructive disruption, technical disruption, virtual disruption, nunc pro tunc disruption, or imaginary disruption.

Norse v. City of Santa Cruz (2010) 629 F.3d 966

Disruptive Speech

- Speaker dumped garbage on the floor at a District meeting & was arrested.
- Court: arrest proper; he was warned to not dump. Board could not proceed because of conduct.
- Court noted, "meeting would have been further delayed while [Speaker] picked up garbage ***or*** others standing near the trash to address the board ***and*** audience would have to peer over a mound of garbage to watch a public body perform its duty."
- Trash did not merely "disturb the sensibilities," but ***impaired the meeting***.

McMahon v. Albany Unified School Dist. (2002) 104 Cal.App.4th 1275.

More Disruption

Speaker ONE asked audience to silently stand if they agree with him.

Mayor asked Speaker ONE to clarify people would stand ***only*** to show he was the sole representative of this group. Speaker ONE agreed.

Speaker TWO later called the Mayor a "racist pig." Mayor told him to stop. The slur was repeated.

2 minutes later, Speaker TWO asked if audience agreed to stand.

Mayor said "No, we're not going to do that." Facing the audience, Speaker TWO then said "Do it" three times. 20 – 30 people stood and clapped.

Acosta v. City of Costa Mesa 694 F.3d 960 (9th Cir. 2012)

More Disruption, *cont.*

Mayor called for a recess, cutting Speaker TWO short. Speaker TWO then called the Mayor a "f***ing racist pig."

Police approached Speaker TWO, said his time was up, moved the microphone and asked him to leave the chambers. Speaker did not.

Officers said Speaker TWO was not under arrest, but was removed to diffuse the situation. A large crowd was in Council Chambers.

Speaker TWO increased resisted by wrapping his legs and arms around a pole. An officer then fell. Speaker TWO was then arrested.

Acosta v. City of Costa Mesa 694 F.3d 960 (9th Cir. 2012)

More Disruption, *cont.*

Acosta brought 11 speech and unlawful arrest claims against Mayor, Police and the City.

Jury decided the material question & *found his conduct disruptive*.

Court emphasized council meetings are limited public forums. Council can regulate the time, place & manner of speech. Content of speech is subject to reasonable and viewpoint neutral regulations.

Speaker TWO's conduct – not his words (though profane) – supported he "substantially disrupted" the meeting: he addressed the audience and urged them to stand. An unplanned recess was needed to diffuse the disruption.

Acosta v. City of Costa Mesa 694 F.3d 960 (9th Cir. 2012)

Closed Session

- Pending litigation
- Personnel matters
- Compensation and salaries
- Labor Negotiations
- Real property negotiations
- Security threats and public safety
- New – Cybersecurity threats

Closed Session – Confidentiality

- Members of a legislative body may not disclose confidential information acquired during closed session.
  - Those that do may be referred to the grand jury.
  - Only the entire body can decide to reveal confidential information.
- Attorney-Client privilege - the entire body is the holder of the attorney-client privilege and as such only the entire body can decide to waive the privilege.

Brown Act Enforcement

Criminal - The District Attorney or any may bring a court action to invalidate an action of the legislative body on the basis of a Brown Act violation.

Civil - Action by district attorney or other party (e.g., citizen) to invalidate action at an improper meeting = costs and attorney's fees.



Best Practices

- Regular Training –
  - AB1234
  - Review the Brown Act
- Always feel free to contact the District Council with questions.

Thank You

FENTON & KELLER
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