CALIFORNIA LAW GOVERNING CONFLICT OF INTEREST

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I.
INTRODUCTION

Over the years, our office has responded to hundreds of questions about potential conflicts of interest of school employees and board members. In 2005, the California Fair Political Practices Commission (FPPC) published a revised pamphlet entitled, "Can I Vote?" The pamphlet, which is available on the FPPC web page, provides an overview of public officials' obligations under the Political Reform Act's conflict of interest rules. This memorandum will briefly summarize the recommendations contained in that pamphlet, as well as statutory law addressing contractual conflicts of interest. The purpose of this memo is to assist districts in identifying potential conflicts of interest, so that districts will recognize possible conflicts of interest and consult legal counsel or the FPPC, when appropriate.

California's conflict of interest statutes are based on the belief that a public official cannot serve two masters simultaneously, and that the duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office.[1] The purpose of the conflict of interest statutes is to eliminate temptation, avoid the appearance of impropriety, and limit the possibility of improper personal influence on a public official's decisions.

The California Legislature has enacted two important bodies of statutory law which address potential conflicts of interest of school district employees and board members:

1. Government Code sections 1090, et seq., pertaining to contractual conflicts of interest, and

2. The Political Reform Act of 1974 (Government Code sections 81000 et seq.).

The provisions of the Political Reform Act are not limited to contracts, but apply to all "governmental decisions."

II.
CONTRACTUAL CONFLICTS OF INTEREST

A. Statutory Provisions

Government Code section 1090 provides in pertinent part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially

[1] People v. Honig (1996) 48 Cal.App.4th 289; Thomson v. Call (1985) 38 Cal.3rd 633.

> interested in any contract made by them in their official capacity, or by any body or board of which they are members."

When Section 1090 applies, the entire governing board is precluded from entering into a contract. The financially interested member may not merely abstain from discussing and voting on a contract.[2] Government Code section 1092 provides that every contract made in violation of Section 1090 may be avoided by any party except the official who has the conflict of interest. Despite the permissive language of Section 1092, the courts have held that any contract made in violation of Section 1090 is not merely voidable, but is void.[3]

Section 1090 does not define when an official is "financially interested" in a contract. However, the courts and the California Attorney General have applied the prohibition to a broad range of interests. The following are a few examples of decisions and opinions in which a prohibited "financial interest" was found.[4]

On September 19, 2014, Governor Brown signed Senate Bill 952 effective January 1, 2015.[5]

Senate Bill 952 amends Government Code section 1090 and adds a subsection (b). Subsection (b) states that an individual shall not aid or abet a member of the Legislature or state, county, district, judicial district, or city officer or employee.

Senate Bill 952 amends Government Code section 1093 and adds a subsection (b). Subsection (b) prohibits an individual from aiding or abetting the treasurer, controller, a county or city officer or their deputy or clerk in violating the conflict of interest laws. Senate Bill 952 amends Government Code section 1097 and adds a subsection (b) which states:

> "An individual who willfully aids or abets an officer or person in violating a prohibition by the laws of this state for making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any number of the governing board of a school district, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison and is forever disqualified from holding any office in this state."

[2] 70 Ops.Cal.Atty.Gen. 45, 48 (1987).
[3] People ex rel. State of California v. Drinkhouse (1970) 4 Cal.App.3d 931.
[4] See, for example, Eden Township Healthcare District v. Sutter Health, 33 Cal.App.4th 208 (2011) (the two officials involved did not have a financial interest in violation of Section 1090).
[5] Stats. 2014, ch. 483.

B. Prohibited Interests

In Fraser-Yamor Agency, Inc. v. County of Del Norte,[6] the Court of Appeal concluded that a public official who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a city would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefited by increased business, so did the official, despite the fact that the benefit was indirect.

In People v. Vallerga,[7] the Court of Appeal found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city.

In People v. Sobel,[8] Section 1090 was applied to remedy a classic self-dealing situation in which a city employee, involved in purchasing books, awarded contracts to a corporation in which he and his wife were the primary shareholders.

In a 2014 opinion,[9] the California Attorney General issued an opinion regarding conflict of interest under Government Code section 1090. The Attorney General concluded that except in instances of actual necessity, Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has a 50% ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decision.[10]

Government Code section 1090 states in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees 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. . . ."

The Attorney General noted that Government Code section 1090 is a codification of the common wisdom that a person cannot serve two masters simultaneously, and that even well-meaning people may be influenced when their personal economic interests are at stake in an official board transaction. The Attorney General observed that an important purpose of Section

[6] 68 Cal.App.3d 201 (1977).
[7] 67 Cal.App.3d 847 (1977).
[8] 40 Cal.App.3d 1046 (1974).
[9] 97 Ops.Cal.Atty.Gen. 70 (2014).
[10] This opinion from the Attorney General would apply to community college districts, school districts, and regional occupational programs as well.

1090 is to avoid even the appearance of impropriety in government transactions.[11] As a result, Section 1090 is construed broadly.[12]

In the matter examined by the Attorney General, a member of a city council owned a 50% interest in a business that manufactures and sells glass products. The city's staff routinely makes retail purchase decisions without consultation with or direction from the city council. The Attorney General stated that the fact that city staff routinely makes retail purchase decisions does not affect the legal issues, nor does the fact that the council member would abstain from participating in purchasing decisions remove these contracts from the requirements of Section 1090. The Attorney General stated:

> "Where an officer is a member of a board that has the power to execute a contract, the member is conclusively presumed as a matter of law to be involved in the making of the board's contracts – regardless of whether the member actually participates in the making of a contract."[13]

The Attorney General then considered whether the common law "rule of necessity" might apply. The rule of necessity provides that a government agency may acquire essential goods or services from a conflict producing source only in cases of actual necessity after all possible alternatives have been explored, and only in cases of real emergency and necessity.[14] In a previous opinion, the Attorney General concluded that a city council could contract with a service station owned by one of its council members, when it was the only service station open at night, but only in cases of real emergency and necessity.[15] The Attorney General concluded that the rule of necessity did not apply in the present case because there were other businesses in the general vicinity (even if they were outside the city limits) that could provide products and services that the city needed.[16]

The Attorney General stated that the fact that contracting with sources farther from the city might result in increased costs or might be more inconvenient does not invoke the rule of necessity. The Attorney General concluded by stating:

> "We therefore conclude that except in instances of actual necessity – which are not apparent here – Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has

[11] People v. Honig, 48 Cal.App.4th 289, 314 (1996).
[12] Id. at 314-15.
[13] 97 Ops.Cal.Atty.Gen. 70, 71 (2014). See, also, Thomson v. Call, 38 Cal.3d 633 (1985); Fraser- Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 211-12 (1977); 89 Ops.Cal.Atty.Gen. 49, 50 (2006).
[14] 4 Ops.Cal.Atty.Gen. 264 (1944).
[15] 4 Ops.Cal.Atty.Gen. 264 (1944).
[16] Lexin v. Superior Court, 47 Cal.4th 1050, 1097 (2010); 89 Ops.Cal.Atty.Gen. 217, 221-22 (2006).

> a 50% ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decisions."[17]

In summary, districts should not contract with businesses in which a board member has an ownership interest.

In a 2015 opinion,[18] the Attorney General issued an opinion interpreting the conflict of interest provisions of Government Code section 1090. The Attorney General was asked whether a city council member who is associated, as an independent contractor, with a public relations firm that provides services to two non-profit organizations that have contracts with the city, has a prohibited financial interest in those contracts where the city council member performs no services for the two contracting non-profits and receives no compensation based on the firm's provision of services to those entities.

The Attorney General concluded that under Government Code 1090, a city council member who is associated, as an independent contractor, with a public relations firm that provides services to two non-profit organizations that have contracts with the city, does not have a prohibited financial interest in those contracts where the council member performs no services for the two contracting non-profits and receives no compensation based on the firm's provision of services to the those entities. The Attorney General noted that the city council member is not an employee of the public relations firm rendering services to the contracting non-profits nor is the city council member an owner or officer of the public relations firm.[19]

C. Prohibition on Self-Dealing

The Attorney General stated that Section 1090 was enacted to prevent "self-dealing" in contracts by public officials.[20]

In a 1983 opinion, the Attorney General stated:

> "Section 1090 of the Government Code codifies the common law prohibition and the general policy of this state against public officials having a personal interest in contracts they make in their official capacities. Mindful of the ancient adage, that '<u>no man can serve two masters</u>,' a self-evident truth, as trite and impregnable as the 'law of gravity,' the section was enacted to ensure that public officials 'making' official contracts not be distracted by personal financial gain from exercising absolute

[17] 97 Ops.Cal.Atty.Gen. 70, 72 (2014).
[18] 98 Ops.Cal.Atty.Gen. 102 (2015).
[19] Id. at 108.
[20] See, 66 Ops.Cal.Atty.Gen. 156, 157-158 (1983).

> loyalty and undivided allegiance to the best interest of the entity which they serve, and at least with respect to those contracts, it does so by removing or limiting the possibility of their being able to bring any direct or indirect personal influence to bear on an official decision regarding them. The mechanism of the section is one of prohibiting public officials from being personally financially interested as private individuals in any such contract . . ."[21] [Emphasis added.]

In a 1993 opinion, the Attorney General stated:

> ". . . Section 1090 is concerned with financial interests, other than remote or minimal interests, which would prevent officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies. Moreover, when Section 1090 is applicable to one member of the governing body of a public entity, the proscription cannot be avoided by having the interested member abstain; the entire governing body is precluded from entering into the contract. A contract which violates Section 1090 is void."[22]

Even if the terms of the contract might be advantageous to the public agency, Section 1090 would still prohibit entering into the contract.[23]

In 1986,[24] the California Attorney General addressed a situation in which a school board member was married to a tenured district teacher. Noting that the board member had a financial interest in his spouse's salary by virtue of the state community property laws, the Attorney General opined that Section 1090 would prohibit the employed spouse from being promoted if such promotion involved any action by the board itself. The Attorney General had earlier opined that a board member who was married to a district teacher would be required to abstain from discussing and voting on a collective bargaining agreement affecting his spouse's salary, but that the board could vote on the agreement under the common-law "rule of necessity" (i.e., such agreements are statutorily mandated by the Educational Employment Relations Act).[25]

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[21] Id. at 157-158.

[22] 76 Ops.Cal.Atty.Gen. 118, 119 (1993).

[23] See, Thomson v. Call, 38 Cal.3d 633, 645-646 (1985); Frazer-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 214-215 (1977); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).

[24] 69 Ops.Cal.Atty.Gen. 255 (1986).

[25] 69 Ops.Cal.Atty.Gen. 102 (1986).

D. Financial Interest

In Eden Township Healthcare District v. Sutter Health,[26] the Court of Appeal held that there was no conflict of interest under Section 1090 because the two officials involved, George Bischalaney and Dr. Francisco Rico, did not have a financial interest in the contract.

The Court of Appeal concluded that Bischalaney received a salary from the nonprofit organization negotiating with the Healthcare District, but would not receive any increase in salary or benefits or decrease in salary or benefits as a result of the contract. Therefore, there was no violation of Section 1090. The Court of Appeal also found that Dr. Rico, by 2008, did not have a financial interest in the contract as he was providing very few services for the nonprofit organization involved in the contract.

The Court of Appeal held that the public officials' financial interest must be related to the contract to be a violation of Section 1090 of the Government Code. The purpose of the prohibition in Government Code section 1090 is to prevent a situation where a public official would stand to gain or lose something with respect to the making of a contract over which, in his official capacity, he could exercise some influence.[27]

In Davis v. Fresno Unified School District,[28] the Court of Appeal overturned the dismissal of a taxpayer's lawsuit against the Fresno Unified School District alleging that the district violated Government Code section 1090 which prohibits conflicts of interests involving contracts entered into by a district.

The Court of Appeal reviewed the provisions of Government Code section 1090(a) which prohibits members of a district board from being financially interested in any contract made by them in their official capacity. The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time. [29]

The Court of Appeal then addressed the issue of whether the conflict of interest provisions of Government Code section 1090 extend to independent contractors and consultants who are involved in the contract process on behalf of the public entity and have an interest in the result of contract.[30] The Court of Appeal in Davis held that in the civil context as opposed to criminal prosecutions the provisions of Section 1090 apply to independent contractors and

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[26] 202 Cal.App.4th 208, 135 Cal.Rptr.3d 802 (2011).
[27] See, People v. Vallerga, 67 Cal.App.3d 847, 867, n. 5, 136 Cal.Rptr. 429 (1977).
[28] 237 Cal.App.4th 261 (2015).
[29] Lexin v. Superior Court, 47 Cal. 4th 1050, 1072 (2010).
[30] See, Hub City Solid Waste Services, Inc. v. City of Compton, 186 Cal.App.4th 1114, 1124-1125 (2010); California Housing Finance Agency v. Hannover/California Management and Accounting Center, Inc., 148 Cal.App.4th 682, 693 (2007).

consultants. Therefore, the Court of Appeal allowed the lawsuit to proceed on the conflict of interest cause of action as well.[31]

E. Exceptions to the Provisions of Section 1090

Exceptions to the prohibition of Section 1090 are provided by Government Code section 1091 for "remote interests" and by Section 1091.5 for what might be called "noninterests." A board member, who has a "remote interest" in a contract pursuant to Section 1091, must disclose that interest to the board and must abstain from attempting to influence other members and from voting on the contract. However, a board may approve a contract in which a member has only a remote interest, in contrast to the blanket prohibition of Section 1090, if the following conditions are met:

1. Discloses his or her financial interest in the contract to the public agency;

2. Such interest is noted in the body's official records; and

3. The officer completely abstains from any participation in the making of the contract.[32]

The following are some of the more frequently occurring "remote interests" which are listed in Section 1091:

- That of an officer or employee of a nonprofit, tax-exempt entity or a nonprofit corporation.[33]

- That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office.[34]

- That of a landlord or tenant of the contracting party.[35]

- That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.[36]

[31] 237 Cal.App.4th 261, 299-302 (2015).
[32] See, 83 Ops.Cal.Atty.Gen. 246, 248 (2000).
[33] Section 1091(b)(1).
[34] Section 1091(b)(2).
[35] Section 1091(b)(5).

On October 4, 2015, Governor Brown signed Senate Bill 704[37] effective January 1, 2016.

Senate Bill 704 amends Government Code section 1091 and includes in the definition of "remote interest" the interest of a person who is an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency, if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency, and from all participation in reviewing a project that results from that contract. Senate Bill 704 also includes in the definition of "remote interest" the interest of a planner employed by a consulting engineering, architectural, or planning firm.

As to the "noninterests" of Section 1091.5, these "noninterests" delineate situations which might technically create conflicts of interest under Section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exception of Section 1091, an interest which falls into one of the categories in Section 1091.5 is treated as no interest at all, and holding such an interest does not require abstention and generally does not require disclosure. Some of the more common "noninterests" specified in Section 1091.5 are the following:

- The ownership of less than 3 percent of the shares of a corporation for profit, provided the total annual income to the official from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.[38]

- That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.[39]

- That of a spouse of an officer or employee in his or her spouse's employment or office-holding if his or her spouse's employment or office-holding has existed for at least one year prior to his or her election or appointment.[40]

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[36] Section 1091(b)(13).
[37] Stats. 2015, ch. 495.
[38] Section 1091.5(a)(1).
[39] Section 1091.5(a)(2).
[40] Section 1091.5(a)(6).

F. Financial Interest in Spouse's Salary and Benefits

If the board member's spouse has been a district employee in excess of one year prior to the board member's election or appointment, the member would not be deemed to be interested in the spouse's contract of employment and the spouse's employment could continue. However, the district could not change the spouse's employment status and/or promote the spouse during the board member's tenure on the Board.[41]

In a 1986 opinion,[42] the Attorney General stated that, where the spouse of a school board member had been employed by the district for several years before the member's election or appointment, Government Code section 1090 prohibited the employed spouse from being promoted or appointed to a different employment position with the district. The Attorney General concluded that the above-cited exception of Government Code section 1091.5(a)(6) applies only to the same employment with a school district, and does not apply where an employee is appointed to a new or different position. The Attorney General stated:

> "Thus, this subdivision [Government Code Section 1091.5(a)(6)] does not authorize an employee who has worked for a school district for a year or more to move from one type of employment to another after his or her spouse becomes a school board member. It is only when the spouse remains in the same employment that the board member-spouse may take contract actions affecting such employment without violating the proscription of Section 1090."
>
> "Accordingly, under a strict construction of subdivision (a)(6) of Section 1091.5 of the Government Code, a certificated employee could not move across employment lines to become an employee in the classified service. Nor could a classified employee move from one position in the classified service (e.g., accountant) to a completely different position within the classified service (e.g., attorney). Different employments and different employment contracts would be involved…"[43]

Different employments would include a substitute employee attempting to become a permanent employee of the district since this would involve a new contract with the board and different employment rights such as tenure.

The Attorney General went on to discuss promotions:

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[41] 69 Ops.Cal.Atty.Gen. 255 (1986).

[42] 69 Ops.Cal.Atty.Gen. 255 (1986). Ibid. In a 1997 opinion, 80 Ops.Cal.Atty.Gen. 320, the Attorney General opined that the prohibition applied to the hiring of a substitute teacher as well.

[43] Id. at 258-259.

> "If a promotion involved no action by the school board itself, we believe it would qualify as the same employment. The situation which comes to mind is salary step or merit increases which usually require no action by the board itself.
>
> "However, if, for example, a senior classroom teacher were to be 'promoted' to an administrative position such as a school principal, such a promotion would be to a different employment. The decision to appoint would be that of the board itself, since a new contract would clearly be required.
>
> "Likewise in the classified service a promotion from one grade (e.g., Accountant II) would, we presume, involve significant discussion action by the board in approving the promotion… If this is the case under the rules adopted by the particular school board, then this again would constitute a different employment under our analytical framework. A new appointment would be made by the existing (new) board and hence a new contract would be made by them within the meaning of Section 1090…
>
> "In sum, we conclude that where the spouse of a school board member has been employed by a school district for several years before the board member's election or appointment, Section 1090 of the Government Code would prohibit the spouse from being appointed to a different employment position with the school board. It would also prohibit the spouse from being promoted if such promotion involved any action by the board itself."[44]

The Attorney General noted that the courts have held that Government Code section 1090 constitutes an absolute prohibition from entering into prohibited contracts by a governing board. Accordingly, its proscriptions cannot be avoided merely by having the interested board member abstain from any participation in making of the contract.[45]

In a 1998 opinion, the Attorney General stated that Section 1090 prohibits the reemployment of a probationary teacher (since it is a new contract) as a probationary or permanent teacher.[46] However, in a 2004 opinion, the Attorney General stated Section 1090 does not prohibit a probationary employee from being employed as a permanent teacher if the teacher has been a probationary teacher for more than one year before her spouse became a member of the governing board.[47] The Attorney General stated that such a change in classification may be

[44] Id. at 259-260.
[45] Id. at 256.
[46] 81 Ops.Cal.Atty.Gen. 331 (1998).
[47] 87 Ops.Cal.Atty.Gen.23 (2004).

considered the same employment for purpose of Section 1091.5(a)(6) since after two years of probation, the teacher must either be terminated or become a permanent employee.[48]

In Thorpe v. Long Beach Community College District,[49] the Court of Appeal held that a person employed by the same community college district in which the employee's spouse is a member of the governing board may not seek a promotion that requires board ratification or action by the governing board. The Court of Appeal held that the governing board was barred from promoting the employee under Government Code section 1090, et seq., which define conflict of interest. The court held that the employee could not be promoted from the position of Accountant to a newly created position entitled, "Supervisor, Accounting Special Projects." The position was classified as a management position and the governing board was required to formally ratify the hiring of any candidate.[50]

In a 2009 opinion, the Attorney General stated that a school district may grant a teacher's transfer request from one teaching position to another that has the same compensation but involves different teaching duties. The teacher's spouse became a board member more than one year after the teacher's employment. Therefore, there was no violation of Government Code section 1090.[51]

In 2011, the Attorney General issued an opinion stating that when marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest in the income or assets of the other, the financial interests of one spouse are nevertheless attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090. The Attorney General concluded that notwithstanding such an agreement, one spouse's financial interest must be attributed to the other spouse for purposes of determining conflict of interest under Government Code section 1090.[52]

The Attorney General did not address whether the Political Reform Act prohibits public officials from participating in or attempting to influence governmental decisions in which they have a financial interest because Section 1090 was the sole focus of the question before the Attorney General. Therefore, the Attorney General did not address whether a prenuptial agreement might affect determinations under the Political Reform Act.[53]

The Attorney General noted that Section 1090 codifies the common law prohibition against "self-dealing" with respect to contracts. In a recent California Supreme Court decision, the Court recognized that the common law rule in Section 1090 recognized the truism that a

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[48] Education Code section 44929.21(b).
[49] 83 Cal.App.4th 655 (2000).
[50] Ibid.
[51] 92 Ops.Cal.Atty.Gen. 26 (2009).
[52] 94 Ops.Cal.Atty.Gen. 22 (2011).
[53] Id. at 22, n. 2.

person cannot serve two masters simultaneously.[54] In Lexin, the Court held that the term "financially interested" cannot be interpreted in a restricted or technical manner, but must be understood to encompass any situation where official judgment may be influenced by personal considerations rather than the public good.[55]

The Attorney General noted that in the case of married officials, it has long been held that a person's interest in a spouse's employment and income is a financial interest within the meaning of Section 1090. The Attorney General noted that in California, premarital agreements are governed by the Family Code.[56] Premarital agreements are defined as agreements between prospective spouses made in contemplation of marriage, and to be effective upon marriage.[57] Through premarital agreements, marital partners may override otherwise controlling statutory definitions of their respective property rights as spouses. Family Code section 1500 provides that, "The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement."

The Attorney General noted that there are some limitations to the scope and force of premarital agreements. For example, the law imposes an informative obligation on each spouse to support the other during the marriage and provides that, while marital partners are living together, such support shall come out of the separate property of the person when there is no community property or quasi community property. Similarly, the rights of children to support may not be adversely affected by a premarital agreement.[58] The Attorney General reviewed prior opinions regarding spouses and conflict of interest under Section 1090 and stated:

> "As we consider this question, we bear in mind that, even in the face of an airtight separate-property agreement, a marital partner could probably never be completely objective or disinterested when it comes to matters affecting the financial interests of his or her spouse or children. Indeed, it would 'be naive to assume that a husband has no concern about the property of his wife (or vice versa) simply because it is her separate property,' and such neutrality 'would be both unnatural and undesirable.' 'Common sense tells us that although an official may have no economic interest in [his spouse's separate] property, nevertheless, he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property. By the same token, that official might naturally react

[54] Lexin v. Superior Court, 47 Cal. 4th 1050, 1073 (2010); see, also, Thomson v. Call, 35 Cal. 3d 633, 637 (1985).
[55] Id. at 1073.
[56] See, Family Code sections 1500-1620.
[57] See, Family Code section 1610(a), 1613.
[58] See, Family Code section 1612(b).

> unfavorably to proposals that could materially diminish the value of the spouse's separate property and cause her economic harm."[59]

The Attorney General noted that no matter how unequivocal a premarital agreement may seem to be in its purported separation and divestiture of interests, each spouse nevertheless retains at least an indirect or contingent material, financial interest in the income and assets of the other spouse.[60] Thus, the Attorney General stated, premarital agreements cannot nullify or diminish each spouse's legal obligation to utilize his or her separate property for expenses reasonably necessary to support the other according to the party's station in life during their marriage while the two are living together. Even with the premarital waiver of interest in a spouse's separate property, such property remains liable under law to fund the other spouse's necessaries of life. This obligation to tap separate property for support occurs when there is no community property or quasi community property.[61]

Thus, the separate property of one spouse may serve both as an emergency reservoir of assets available to ensure one's own comfort in difficult times and as a hedge against the need to expend one's own separate assets to support that spouse, a dynamic that highlights the marital partner's continuing financial connection and interdependence, notwithstanding their prenuptial agreement.[62] In addition, premarital agreements do not defeat or diminish the party's legal obligation to apply their separate property to pay for the basic needs of their children and the cost of that obligation to one spouse would presumably depend to a significant extent upon the other spouse's financial ability to shoulder a share of the burden. This relationship demonstrates the continuing financial interest of one spouse and the separate property of the other.[63]

The Attorney General concluded:

> "Accordingly, and in harmony with judicial precedent in our earlier opinions, we conclude that one spouse's financial interests are attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090, even when the marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest whatsoever in the income or assets of the other."[64]

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[59] 94 Ops.Cal.Atty.Gen. 22, 29 (2011).
[60] Id. at 30.
[61] Id. at 30-31.
[62] Id. at 31.
[63] Id. at 31.
[64] Id. at 32.

In a 2014 opinion, the California Attorney General stated that a trustee of a community college district board who is married to a tenured professor in the district may participate in collective bargaining negotiations between the district and the bargaining unit that represents the professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and the collective bargaining agreement does not result in new or different employment for the spouse. The Attorney General further stated that a trustee of the community college district board who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees.[65]

In determining whether a trustee of a community college district who is married to a tenured professor in the bargaining may participate in collective bargaining negotiations, the Attorney General reviewed the provisions of Government Code section 1090. Government Code section 1090 provides in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees 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. . . ."

The purpose of Government Code section 1090 is to prohibit public officers from participating in decisions in which they have a personal financial interest. Section 1090 prohibits a public official who has a conflict of interest not only from approving a contract, but from participating in preliminary discussions, planning, influencing, compromising or otherwise participating in the process leading up to the formal making of the contract.

In situations in which Government Code section 1090 applies, it generally prevents not only the member with a conflict of interest, but also the entire governing board upon which the official sits, from making a contract. In limited circumstances, however, a rule of necessity may be employed to allow a governing board to perform essential business despite a member's conflict. In particular, the rule of necessity has been applied to allow school boards to contract with its employees in situations where a school board is the only entity empowered to contract on behalf of a community college district or school district (i.e., a district must employ teachers).[66]

The Attorney General noted that Government Code section 1091.5(a)(6) makes an exception if the spouse is an employee of a public agency and the employment has existed for at least one year before the officer's election or appointment. In a 1986 Attorney General opinion, the Attorney General noted if the spouse has not worked for more than a year for the district, then the board member could not participate in collective bargaining negotiations.[67]

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[65] 97 Ops.Cal.Atty.Gen. 62 (2014). While this Attorney General opinion addresses community college districts, it would also apply to school districts and regional occupational programs.
[66] 73 Ops.Cal.Atty.Gen. 191, 195 (1990).
[67] 69 Ops.Cal.Atty.Gen. 102 (1986).

The Attorney General concluded that a board member may participate in the making of a contract involving his or her spouse's employment only to the extent that the contract concerns the conditions applicable to the spouse's current class of employment, rather than creating some new or different employment for the board member's spouse. Therefore, the board member may participate in the making of a contract that affects the salary and benefits of a class of employees that includes the spouse, but the board member may not participate in the making of any contracts involving unique benefits to the spouse, such as decisions to promote, reclassify, or hire the spouse. In such cases, the trustee would be required to abstain from any involvement in the contract-making process.[68]

The Attorney General concluded:

> "Accordingly, we conclude that a trustee of a community college district board may participate in collective bargaining between the district and the bargaining unit that represents his professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and that the collective bargaining agreement does not result in new or different employment for the spouse."[69]

As a retired community college president, the board member's health benefits are the same as those provided to the district's current employees. This circumstance gives rise to the question as to whether the board member may participate in the process of renegotiating current employee health benefits. The Attorney General concluded that the board member's personal financial interest in the level of current employee benefits requires the board member to abstain from bargaining on this subject. The Attorney General concluded:

> "Therefore, we conclude that a trustee of a community college district who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees."[70]

G. Financial Interest in Retirement Benefits

In Lexin v. Superior Court,[71] the California Supreme Court held that the conflict of interest statutes, Government Code sections 1090 et seq., were not violated by members of the San Diego City Employees Retirement System when the board members voted to increase the

[68] 69 Ops.Cal.Atty.Gen. 102, 103, 112-13 (1986).
[69] 97 Ops.Cal.Atty.Gen. 62, 65 (2014).
[70] 97 Ops.Cal.Atty.Gen. 62, 67 (2014).
[71] 47 Cal.4th 1050, 103 Cal.Rptr.3d 767 (2010).

retirement benefits of all city employees. The members of the retirement system were also city employees and received the same pension increases.

The California Supreme Court held that Government Code section 1091.5(a)(3), the "Public Services" exception, applied. The Court of Appeal held that under Section 1091.5(a)(3), an officer or employee shall not be deemed to be interested in the contract if his or her interests is any of the following: "That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board." The California Supreme Court held that the benefits that the board approved (i.e., increasing the formula for retirement benefits and thus increasing benefits of retirees) was generally provided and, therefore, the board members could not be charged with a violation of the conflict of interest statutes.[72]

The California Supreme Court noted that the Legislature mandated the inclusion of employees on retirement boards. Therefore, the Legislature intended for retirement board trustees to share interests with their membership. The court noted that every decision a retirement board makes and every contract it enters is likely to affect the financial interests of its employee/retiree members. The court stated:

> "This is the same increase that applied to every non-safety city employee. These defendants' interests thus mirror those of their constituents; they received a pension benefit on the same terms and conditions as did a broad segment of their constituents, without regard to their board membership, and with no special tailoring or individualized consideration."[73]

However, the California Supreme Court held that one member of the retirement board who received retirement benefits both from his city salary and his union salary received an individually tailored benefit and, therefore, Section 1091.5(a)(3) did not apply. The Court of Appeal held this was a unique benefit that was not provided on the same terms and conditions as the other members of the retirement system.[74]

H. Effect of Conflict of Interest

Government Code section 1092 provides that every contract made in violation of Section 1090 may be avoided by any party except the official with the conflict of interest. Despite the wording "may be avoided," the case law holds that any contract made in violation of Section 1090 is void, not merely voidable.[75]

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[72] Id. at 1085-86.
[73] Id. at 1099.
[74] Id. at 1101-03.
[75] Thomson v. Call, (1985) 38 Cal.3d 633; People v. Drinkhouse, (1970) 4 Cal.App.3d 931.

A public officer who is found guilty of willfully violating any of the provisions of Sections 1090, et seq., is punishable by a fine of not more than $1,000 or imprisonment in state prison.[76] Additionally, such an individual is forever disqualified from holding any office in this state. In People v. Honig,[77] the Court of Appeal affirmed the conviction of former State Superintendent of Public Instruction, Bill Honig, for violating Government Code sections 1090 and 1097.

I. Rule of Necessity

In 2006, the California Attorney General issued an opinion stating that when a member of the governing board of a community college district receives retirement health benefits from the district as a former faculty member under the terms of a collective bargaining agreement, the governing board may renegotiate the amount of health benefits provided under the current collective bargaining agreement so long as the financially interested board member does not participate in the decision making process.[78]

The Attorney General noted that the governing board of a community college district has broad authority to act in the manner not in conflict with the purposes for which community college districts are established, including establishing employment practices, salaries and benefits for district employees.[79] The Attorney General noted that Government Code section 1090 precludes the board of a public agency from entering into a contract in which one of its members has a personal financial interest. Section 1090 is concerned with financial interests that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies.[80] A contract that violates Section 1090 is void and a public official who willfully violates this statute is subject to criminal penalties.[81]

In previous opinions, the Attorney General has concluded that the modification of a collective bargaining agreement by a school district's governing board constitutes the making of a contract within the meaning of Section 1090.[82] The Attorney General noted that under Government Code sections 53201 and 53208, governing board members may vote to provide themselves with health benefits despite Section 1090's general prohibition against a board member having a personal financial interest in such an agreement. However, in the present case, the board member is receiving health benefits as a former faculty member.

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[76] Government Code section 1097.
[77] People v. Honig, 48 Cal.App.4th 289 (1996); Thomson v. Call, 38 Cal.3d 633 (1985).
[78] 89 Cal.Atty. 217 (2006).
[79] Education Code section 70902(a); Education Code section 70902(b)(4); Service Employees International Union v. Board of Trustees, 47 Cal.App.4th 1661, 1665-1666 (1996); 84 Ops.Cal.Atty.Gen. 175, 176 (2001).
[80] Stigall v. Taft, 58 Cal.2d 565, 569 (1962).
[81] Thomson v. Call, 38 Cal.3d. 633, 646 (1985); Government Code section 1097; People v. Gnass, 101 Cal.App.4th 1271, 1297 (2002).
[82] See, 65 Ops.Cal.Atty.Gen.305, 307 (1982).

The Attorney General noted that to preclude the entire governing board from renegotiating the collective bargaining agreement would be impractical and therefore the "rule of necessity" should be applied since the governing board of the community college district is the only entity empowered to contract on behalf of the community college district. For these reasons, the Attorney General concluded that the governing board of a community college district may renegotiate the amount of health benefits for its faculty members, so long as the financially interested board member refrains from participating in any discussions, negotiations or decisions regarding the agreement.

In a 2003 opinion, the Attorney General concluded that the city was not required to award the contract to the lowest responsible bidder and concluded that the "rule of necessity" did not apply.[83] The rule of necessity was explained in Eldridge v. Sierra View Local Hospital District[84] as follows:

> "The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest, and in nonprocurement situations it permits a public officer to carry out the essential duties of his/her office despite a conflict of interest where he/she is the only one who may legally act. The rule ensures that essential government functions are performed even where a conflict of interest exists."[85]

The Attorney General concluded that as long as other responsible bids were submitted, the rule of necessity does not apply and therefore, the public agency may not enter into a public works contract with the prime contractor even though the prime contractor is the lowest bidder for the project of the city's mayor is an officer, shareholder and employee of a listed subcontractor of the prime contractor and the mayor has not been a supplier of goods or services to the prime contractor for at least five years prior to his election as an officer.

J. Prohibition Even Where Contract is Advantageous

In 2003, the Attorney General stated that a city council may not enter into a contract with a law firm where a member of the city council is a partner in the law firm, even if the law firm would receive no fees from the city for the services and would agree to turn over to the city any attorney's fees that might be awarded in the litigation.

The Attorney General stated that Government Code section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The Attorney General concluded that Section 1090 would prohibit a city

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[83] 86 Ops.Cal.Atty.Gen. 118 (2003).
[84] 224 Cal.App.3d 311 (1990).
[85] Id. at 321.

council from entering into such a contract even when the terms of the proposed contract are fair and equitable or plainly to the city's advantage.[86]

The Attorney General found that there would be a "financial interest" present in the form of a possible economic loss to the law firm which would place the city council member in a compromising situation where in the exercise of his official judgment or discretion he may be influenced by personal considerations rather than the public good. What might be in the best interest to the city in conducting the litigation when entering into settlement negotiations, may not be in the best interest of the law firm and what might be in the best interest of the law firm may not be in the best interest of the city.

Under the proposed agreement, the law firm would not receive any legal fees and would bear all litigation expenses normally borne by the client. In these circumstances, the city's interest and the firm's interest might diverge. Success in the litigation could be financially advantageous to the law firm with respect to the law firm's reputation and be to the council member's personal benefit by enhancing the value of his interest in the law firm. Therefore, the Attorney General concluded that the city may not enter into a contract with the law firm.

K. Delegation of Board Authority

In a 2004 Attorney General opinion, the Attorney General stated that a governing board of a school district may not avoid the conflict of interest provisions of Government Code section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district, and thus allow the superintendent to approve a promotion for the spouse of a member of the governing board, as well as lease school equipment from a firm that employs the spouse of another board member.[87]

The Attorney General noted that each school district in the state is under the control of a governing board and that a school board may act in any manner that is not inconsistent with state law and not inconsistent with the purposes for which school districts are established.[88] School boards may enter into contracts for employment and the purchases of goods and services.[89] The Attorney General concluded that the Education Code thus provides that a school district's authority to enter into contracts, whether related to employment or the purchase or lease of equipment, remains vested in the governing board, and when a district superintendent or other administrator participates in the making of a contract, he or she does not do so independently, but on behalf of the governing board.[90]

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[86] Thomson v. Call, 38 Cal.3d 633, 645 (1985).

[87] 87 Ops.Cal.Atty.Gen. 9 (2004).

[88] See, Education Code sections 35010, 35160.

[89] See, Education Code sections 45100 et seq., Sections 17595 et seq.; Public Contract Code section 20111.

[90] Education Code section 35161.

The Attorney General concluded that a governing board may not avoid the conflict of interest provisions of Section 1090 by adopting a policy delegating its authority to the district superintendent to enter into contracts. The Attorney General noted that while a governing board may delegate its contractual authority pursuant to Education Code section 35161 to the district superintendent, the superintendent's contractual powers remain subject to the review and control of the governing board as a matter of law.

L. Awarding of Civil Damages

In County of San Bernardino v. Walsh,[91] the Court of Appeal held that the County of San Bernardino may file a civil action and recover compensatory and punitive damages against individuals who were found guilty of bribery and conflict of interest under Government Code section 1090.

The former chief administrative officer of the County of San Bernardino and several individuals doing business with the County of San Bernardino were found guilty of bribery and conflict of interest. The County of San Bernardino initiated a civil action and obtained a money judgment against the individuals involved. The individuals challenged the method of determining damages.[92]

With respect to the waste management contract, the Court of Appeal held that the County of San Bernardino suffered damages as a result of the bribery and conflict of interest in the amount of millions of dollars. The Court of Appeal held that damages were properly based on unjust enrichment and the court was justified in requiring the individuals to give up all of the proceeds received in the bribery scheme. In addition to awarding compensatory damages over $4.2 million, the court also assessed $1 million in punitive damages against one individual and $500,000 in punitive damages against another individual on the breach of fiduciary and fraud causes of action.[93]

With respect to the billboard lease issue, the court found that individuals paid bribes to the former chief administrative officer to expedite the permit and construction process and to allow the assignment of leases. The trial court awarded the County $3.8 million in damages. The Court of Appeal affirmed the trial court's findings and held that under Government Code section 1090, the County had a right to recover restitution damages and to require the individuals involved to give up all profits made as a result of their fraud and conflict of interest.[94] The Court of Appeals stated:

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[91] 158 Cal.App.4th 533, 69 Cal.Rptr.3d 848 (2007).
[92] Id. at 537-40.
[93] Id. at 547-49.
[94] Id. at 549.

> "Because contracts in violation of Section 1090 are against fundamental public policy, parties who participate in the unlawful making of the contract should forfeit all interest flowing from the contract to avoid the prospect of unjust enrichment. An actual loss to the public entity is not necessary. . . .
>
> "We conclude, however, that under the circumstances of this case, an award of damages representing the price paid by a third party to obtain benefits under a contract which violates Section 1090 is warranted. Such a remedy is consistent with the purpose of Section 1090 to prevent an offending party from benefitting from a contract that involves self-dealing by a public official. . . . As with the principal of unjust enrichment, Section 1090 focuses on the wrongdoer rather than the victim. Disgorgement of profits is a logical extension of the rationale of Section 1090 that public officials cannot profit by a breach of their duty or take advantage of their own wrongdoing."[95]

This decision should be beneficial to public agencies that are the victim of fraud, bribery or conflict of interest. This decision will allow public agencies to not only recover damages from the public officials involved but also from the individuals who bribed or induced the public officials to engage in a conflict of interest, fraud or bribery.

In San Diegans For Open Government v. Har Construction, Inc.[96] the Court of Appeal affirmed the lower court decision, dismissing an anti-SLAPP motion under Code of Civil Procedures section 425.16. The Court of Appeal held that Har Construction's motion was untimely and the anti-SLAPP statute is inapplicable because Plaintiffs fell within the statute's public interest exemption under Code of Civil Procedure section 425.17(b).

The underlying facts were that the San Diego County District Attorney filed a criminal complaint against the former district Superintendent and three board members of the Sweetwater Union High School District in January 2012, for alleged wrongdoing related to construction projects at district schools. The Plaintiffs then filed a taxpayers' action against the contractors involved in those projects, seeking to invalidate their contracts with the school district under Government Code section 1090. The Plaintiffs challenged the district's contract for work at Southwest Middle School and Southwest High School, alleging that the contractors bribed the Superintendent and board members by providing them with gifts in exchange for approving unjustified change orders.

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[95] Id. at 550-51.
[96] 240 Cal.App.4th 611 (2015).

The Court of Appeal held that taxpayers may sue under Government Code section 1090 to have improper contracts declared void. These lawsuits may be against public agencies as well as the private parties who entered into the improper contract with public agencies.

However, a taxpayer may not bring an action on behalf of a public agency unless the governing body has a duty to act, and has refused to do so. Where the public agency has expended funds illegally or for an unlawful purpose and its management is in the hands of the accused of the wrongdoing, the taxpayer is not required to make a demand on the public agency as it would be unavailing.

M. Criminal Prosecution for Conflict of Interest

In People v. Christiansen,[97] the Court of Appeal held that an independent contractor was not an employee capable of committing a criminal offense under the conflict of interest laws.

Karen Christiansen was charged with four counts of conflict of interest in violation of Government Code section 1090, which generally prohibits public officials from being financially interested in contracts they make in their official capacity. A jury convicted Christiansen on all counts, and the trial court sentenced her to four years and four months in prison and ordered her to pay restitution of approximately $3.5 million.[98]

On appeal, the Court of Appeal held that because Christiansen was not a member, officer, or employee of the school district, Section 1090 does not apply to her. Therefore, the Court of Appeal reversed her convictions, vacated her sentences, and restitution award, and directed the Superior Court to dismiss all charges against her.

N. Conflict of Interest – Fair Political Practices Commission

Assembly Bill 1090[99] added Government Code sections 1097.1, 1097.2, 1097.3, 1097.4, and 1097.5, effective January 1, 2014. Assembly Bill 1090 expanded the jurisdiction of the Fair Political Practices Commission (FPPC) to allow the FPPC to investigate or initiate an administrative or civil action (including fines) against an officer or other person for violation of Government Code section 1090. Government Code section 1090 prohibits public officials and employees from having financial interest in any contract made by them in their official capacities, or by any body or board of which they are members.

Government Code section 1097.1(a) states that the FPPC shall have the jurisdiction to commence an administrative action, or a civil action, against an officer or person prohibited by Section 1090 from making or being interested in contracts, or from becoming a vendor or a purchaser at sales, or from purchasing SCRIP, or other evidences of indebtedness, including any

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[97] 216 Cal.App.4th 1181, 157 Cal.Rptr.3d 451 (2013).
[98] See, Government Code section 1097.
[99] Stats. 2013, ch. 650.

member of the governing board of a school district, who violates any provision of those laws or who causes any other person to violate any provisions of those laws. Section 1097.1(b) states, "The FPPC shall not have jurisdiction to commence an administrative or civil action or an investigation that might lead to an administrative or civil action against a person except upon written authorization from the District Attorney of the county in which the alleged violation occurred. A civil action alleging a violation of Section 1090 shall not be filed against a person pursuant to Section 1091.7, if the Attorney General or a District Attorney is pursuing a criminal prosecution of that person pursuant to Government Code section 1097.

Government Code section 1097.1(c)(1) states that, "The FPPC's duties and authorities under the Political Reform Act of 1974[100] to issue opinions or advice shall not be applicable to Sections 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5, 1091.6 or 1097, except as provided in Section 1097.1(c)." Section 1097.1(c)(2) states that a person subject to Government Code section 1091 may request the FPPC to issue an opinion or advice with respect to his or her duties under Section 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5 and 1091.6. The FPPC shall decline to issue an opinion or advice relating to past conduct. The FPPC is required to forward a copy of the request for an opinion or advice to the Attorney General's office and the local District Attorney prior to proceeding with the advice or opinion.[101]

When issuing the advice or opinion, the FPPC shall either provide to the person who made the request a copy of any written communications submitted by the Attorney General or a local District Attorney regarding the opinion or advice, or shall advise the person that no written communications were submitted. The failure of the Attorney General or a local District Attorney to submit a written communication shall not give rise to an inference that the Attorney General or local District Attorney agrees with the opinion or advice.[102]

The opinion or advice, when issued, may be offered as evidence of good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice. Any opinion or advice of the FPPC issued pursuant to Section 1097.1 shall not be admissible by any person other than the requester in any proceeding other than a proceeding brought by the FPPC pursuant to Section 1097.1. The FPPC shall include in any opinion or advice that it issues a statement that the opinion or advice is not admissible in a criminal proceeding against any individual other than the requester.[103]

Government Code section 1097.1(d) states that any decision issued by the FPPC, pursuant to an administrative action commenced pursuant to the jurisdiction established by Section 1097.1(a), shall not be admissible in any proceeding other than a proceeding brought by

[100] Government Code section 81000 et seq.
[101] Government Code section 1097.1(c)(3).
[102] Government Code section 1097.1(c)(4).
[103] Government Code section 1097.1(c)(5).

the FPPC pursuant to Section 1097.1. The Commission shall include in any decision it issues a statement that the decision applies only to proceedings brought by the FPPC.[104]

Government Code section 1097.1(e) states that the FPPC may adopt, amend, and rescind regulations to govern the procedures of the FPPC consistent with the requirements of Sections 1097.1, 1097.2, 1097.3, 1097.4 and 1097.5. These regulations shall be adopted in accordance with the Administrative Procedure Act.[105]

Government Code section 1097.2(a) states that upon the sworn complaint of the person or on its own initiative, the FPPC shall investigate possible violations of Section 1090, as provided in Section 1097.1. After complying with the notice provisions to the Attorney General and local District Attorney, the FPPC shall provide a written notification to the person filing a complaint. Government Code section 1097.2 sets forth the procedures under which the FPPC may bring an administrative action. Section 1097.3 establishes the requirements which authorize the FPPC to file a civil action for an alleged violation of Section 1090. A person held liable for such a violation shall be subject to a civil fine payable to the FPPC for deposit in the general fund of the state and in an amount not to exceed the greater of $10,000 or three times the value of the financial benefit received by the defendant for each violation.

Government Code section 1097.4 states that in addition to any other remedies available, the FPPC may obtain a judgment in Superior Court for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties. Section 1097.5 states that if the time for judicial review of the final FPPC order or decision has lapsed, or if all means of judicial review of the order or decision has been exhausted, the FPPC may apply to the Clerk of the Superior Court for a judgment to collect the penalties imposed by the order or the decision.

In summary, Assembly Bill 1090 expands the authority of the FPPC to investigate violations of Government Code section 1090.

III.
POLITICAL REFORM ACT

A. Purpose of the Political Reform Act

The second important body of statutory law which governs conflicts of interest is the Political Reform Act of 1974 (Government Code sections 81000, et seq.). Chapter 7 of the Act (Sections 87100, et seq.) deals with conflicts of interest. Section 87100 states the basic prohibition as follows:

> "No public official at any level of state or local government shall make, participate in making, or in any way attempt to use his

[104] Government Code section 1097.1(d).
[105] Government Code section 1097.1(e).

> official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

In general, a public official has a conflict of interest with regard to a particular government decision if it is sufficiently likely that the outcome of the decision will have an important impact on their financial interests. It is important to emphasize that a conflict of interest under the Political Reform Act can only arise from particular kinds of financial interests.

The disqualification provisions of the Act hinge on the effect a decision will have on a public official's financial interest. When a decision is found to have the requisite effect, the official is disqualified from making, participating in the making, or using his or her official position to influence the making of the decision at any level of the decision-making process.

B. Statutory Provisions

The Political Reform Act of 1974, prohibits board members from participating in decisions if the board's decision (including, but not limited to contracts) will have a material effect on the board member or his immediate family.[106] Government Code section 87100 states:

> "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Government Code section 87103(c) states:

> "An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:
>
> * * *
>
> "(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollar ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made."

[106] Government Code sections 81000 et seq.

However, Government Code section 82030(b)(2) states that "income" does not include:

> "Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide educational, academic, or charitable organization."

If the spouse's salary is received from a local government agency, it does not constitute "income" within the meaning of Government Code section 87103(c).[107] A regulation of the California Fair Political Practices Commission further defines this exception, as follows:

> "(c) Notwithstanding subsection (a) an official does not have to disqualify himself or herself from a governmental decision if:
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> "(1) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. This subsection does not apply to decisions to hire, fire, promote, demote, or discipline an official's spouse, or to set a salary for an official's spouse which is different from salaries paid to other employees of the spouse's agency in the same job classification or position."[108]

Government Code section 87103(d) states in part:

> "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:…(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management."

Government Code section 82005 defines a "business entity" of purposes of the Political Reform Act[109] as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. Section 82005 does not include a non-profit organization in the definition of a

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[107] See, also 61 Ops.Cal.Atty.Gen. 412, 414-415 (1978); Bach v. McNelis, (1989) 207 Cal.App.3d 852, 866-67.

[108] Title 2, California Code of Regulations section 18702.1(c)(1). See, also, Education Code section 35107(e), which states that a board member may participate in collective bargaining decisions affecting a relative or a spouse's salary and benefits, but may not participate in decisions to fire, demote, or discipline a spouse.

[109] Government Code sections 81000 et seq.

"business entity" within the meaning of the Political Reform Act.[110] Therefore, service on the board of directors of a nonprofit organization, for example, would not create a conflict of interest.

C. Settlement of Lawsuit

In a 2003 opinion, the Attorney General stated that a member of a board of directors of a community services district may remain on the board after filing a lawsuit against the district challenging a board action. However, if the member of the board remains on the board, the district and the board member may not enter into an agreement settling the lawsuit.[111]

The Attorney General was asked whether a member of the board of directors of a community service district may remain on the board after filing a lawsuit against the district challenging the board's issuance of a development permit to the owner of property adjacent to the board member's property.

The Attorney General reviewed the Political Reform Act of 1974,[112] which prohibits public officials from participating in government decisions in which they have a financial interest. The Attorney General noted that the Political Reform Act and its regulations,[113] requires the board member having a financial interest to abstain from participating in every aspect of the decision making process. The board member may not be counted for purposes of establishing a quorum and is prohibited from attending any closed session affecting his interest and the board member may not obtain any confidential information from the closed session.

However, the Attorney General concluded that the disqualified board member is not required to forfeit his public office but is only required to play no part in the particular deliberations and decisions affecting his economic interest. The Attorney General also concluded that nothing in the Political Reform Act prohibits a board member from filing a lawsuit against a public agency of which he is a board member or requires his resignation from office for having done so.

The Attorney General went on to state that if the affected board member remains on the board after filing the lawsuit, the district and the affected board member may not enter into an agreement settling the lawsuit since settlement agreements are contractual in nature and any attempt by the board and the board member to execute an agreement would violate the conflict of interest provisions of Government Code section 1090.

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[110] See also 2 Cal. Code of Regulations section 18703.1(d).
[111] 86 Ops.Cal.Atty.Gen. 142 (2003).
[112] Government Code sections 81000, et seq.
[113] 2 California Code of Regulations section 18704.2(a)(1).

Section 1090 prohibits public officers, acting in their official capacities, from making contracts in which they are financially interested. If as here, the public officer is a board member, this prohibition extends to the entire board.[114]

The purpose of Section 1090 is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on the official's decision, as well as to avoid contracts which are actually obtained through fraud or dishonest conduct.[115] The Attorney General noted that Section 1090 is intended not only to strike at actual impropriety but also to strike at the appearance of impropriety.[116]

Section 1090's prohibition applies even when the terms of the proposed contract are demonstratively fair and equitable or plainly to the local agency's advantage under Section 1090. No matter how carefully or completely a board member attempts to avoid participating in or influencing the execution of a contract, the board member is conclusively presumed to have "made" the contract for purposes of Section 1090 and the contract is void.

The Attorney General concluded that the possible settlement of the board member's lawsuit would present an unavoidable conflict and the interested director would be presumed to be making the contract as part of the board as well as for himself. Absent some exception, Section 1090 would prohibit entering into a settlement agreement.

The reasoning of the Attorney General's opinion would apply to community college districts, school districts and regional occupational programs as well. The practical implications of the Attorney General's opinion are that if an individual board member were to file a lawsuit against the board, the lawsuit could not be settled until after the board member resigned.

D. Prospective Employment

Effective January 1, 2004, the Legislature amended Government Code section 87407.[117] Section 87407, as amended, prohibits public officials from making, participating in making, or using their official position to influence any governmental decision directly relating to any person with whom he or she is negotiating or has any arrangement concerning prospective employment.

Previously, Government Code section 87407 applied only to state officials. The amendment to Government Code section 87407 expanded the prohibition to public officials,

[114] See, Thomson v. Call, 38 Cal.3d 633 (1985).
[115] See, Stigall v. City of Taft, 58 Cal.2d 565 569 (1962).
[116] See, City of Imperial Beach v. Bailey, 103 Cal.App.3d 191, 197 (1980).
[117] Stats. 2003, ch. 778, A.B. 1678.

which is defined as every member, officer, employee or consultant of a state or local government agency.[118]

Government Code section 87407, as amended, states:

> "No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

Therefore, if any officer or employee of a district is negotiating or has an arrangement concerning prospective employment with an individual or company, that officer or employee should not be involved in making, participating in making, or using his or her official position to influence any decision by the district relating to that individual or their company.

E. Charter Schools

The above discussion regarding conflict of interest applies to charter schools as well since charter schools are a part of the public school system.[119] In Knapp v. Palisades Charter High School,[120] the Court of Appeal held that a charter school was not a separate legal entity for purposes of the Government Tort Claims Act. Most likely the courts would also rule that a charter school would not be a separate legal entity for purposes of conflict of interest as well.

IV.
COMMON LAW CONFLICT OF INTEREST

In a 2009 opinion,[121] the Attorney General concluded that it was a common law conflict of interest violation for a city redevelopment agency board member to participate in any official action or to influence the discussion, negotiations or both, concerning a proposed commercial property improvement loan from the city redevelopment agency to the board member's adult non-dependent son who also resides with the board member in the same rented apartment.

The Attorney General concluded that the redevelopment agency board was not precluded by Government Code section 1090 from entering into the contract. The Attorney General also concluded that the provisions of the Political Reform Act, Government Code sections 87100 et seq. were not violated. However, the Attorney General found a common law conflict of interest violation.

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[118] See, 2 California Code of Regulations section 18701.
[119] Wilson v. State Board of Education, 75 Cal.App.4th 1125, 1141 (1999).
[120] 141 Cal.App. 4th 780, 46 Cal.Rptr.3d 295, 210 Ed.Law Rep. 765 (2006).
[121] 92 Ops.Cal.Atty.Gen. 19 (2009).

The Attorney General stated that the common law doctrine of conflict of interest prohibits public officials from placing themselves in a position where their private, personal interest may conflict with their official duties.[122] The Attorney General noted that while the focus of Government Code sections 1090 and 87100 is on actual or potential financial conflicts, the common law conflict of interest prohibition extends to non-economic interests as well.[123] The Attorney General stated that even where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the common law doctrine of conflict of interest.[124]

The Attorney General concluded that even if the agency board member does not have a statutory financial interest in their son's contract with the redevelopment agency within the meaning of Section 1090 or the Political Reform Act, the agency member, most likely, has a private or personal interest in whether her son's business transactions are successful. The Attorney General concluded that the appearance of impropriety or conflict would arise by the member's participation in the negotiations and voting upon an agreement that, if executed, would presumably benefit the board member's son financially.[125]

The Attorney General noted that a public officer is bound to exercise their powers with disinterested skill, zeal and diligence for the benefit of the public. Actual injury is not the principle the law proceeds on. Fidelity to the public interest is the purpose of conflict of interest laws.[126] The Attorney General concluded:

> "In our view, the agency board member's status as the private contracting party's parent and co-tenant places her in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence' in the public interest, thereby presenting a potential conflict. In an earlier opinion, we advised that a common law conflict of interest may 'usually be avoided by [the official's] complete abstention from any official action' with respect to the transaction or any attempt to influence it. Under these circumstances, we believe that the only way to be sure of avoiding the common law prohibition is for the board member to abstain from any official action with regard to the proposed loan

[122] Id. at 23; citing, Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1171 (1996); 64 Ops.Cal.Atty.Gen. 795, 797 (1981); Kunec v. Brea Redevelopment Agency, 55 Cal.App.4th 511, 519 (1997).
[123] Ibid.; see, also, 70 Ops.Cal.Atty.Gen. 45, 47 (1987); 64 Ops.Cal.Atty.Gen. 795, 797 (1981); Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1171, note 18 (1996).
[124] Ibid.; see, also, 53 Ops.Cal.Atty.Gen. 163, 165-167 (1970).
[125] Id. at 23-24.
[126] See, Noble v. City of Palo Alto, 89 Cal.App. 47, 51 (1928); Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1170-1171 (1996).

agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement."[127]

In summary, the Attorney General concluded that the redevelopment agency board member, to avoid a conflict between her official and personal interests, must abstain from any official action with regard to the proposed loan agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement.[128]

V.
THE FPPC'S EIGHT STEP ANALYSIS

To determine whether a conflict of interest exists under the Political Reform Act, the Fair Political Practice Commission (FPPC) has published a pamphlet that discusses the eight steps or eight questions that must be asked. The first three questions are comparatively easy to answer, while the remaining questions can be quite technical. Thus, if a district determines that the answer to the first three questions is "yes," this is an indication of a potential conflict of interest. The district may then contact legal counsel or the FPPC.

STEP 1 – Are you a "public official," within the meaning of the rules?

The first step in the analysis is usually a formality. If you are an elected official or an employee of a state or local government agency, you are a "public official." Tougher cases involve consultants, investment managers and advisors, and public-private partnerships. If you have any doubts, contact legal counsel or the FPPC.

STEP 2 – Are you making, participating in making, or influencing a governmental decision?

The Act's conflict of interest rules apply when a public official:

- **Makes** a governmental decision (for example, by voting or making an appointment);
- **Participates** in making a governmental decision (for example, by giving advice or making recommendations to the decision-maker); or
- **Influences** a governmental decision (for example, by communicating with the decision-maker).

[127] Id. at 23-24; see, also, 70 Ops.Cal.Atty.Gen. 45, 47; 64 Ops.Cal.Atty.Gen. 795, 797; McQuillin, The Law of Municipal Corporations, Vol. 4, Section 13.35, pp. 840-841 (3d ed., Rev. 1992); 26 Ops.Cal.Atty.Gen. 5, 7 (1955).
[128] Id. at 24.

A good rule of thumb for deciding whether a public official's actions constitute making, participating in making, or influencing a governmental decision is to ask if the official is exercising discretion or judgment with regard to the decision. If the answer is "yes," then the conduct is probably covered.

STEP 3 – What are your financial interests? That is, what are the possible sources of a financial conflict of interest?

As we have noted, the Act's conflict of interest provisions apply only to conflicts of interest arising from financial interests. There are six kinds of such financial interests:

- **Business Investment.** You have a financial interest in any business entity in which you, your spouse, your registered domestic partner, or your dependent children, or anyone acting on your behalf has invested $2,000 or more.

- **Business Employment or Management.** You have a financial interest in a business entity for which you are a director, officer, partner, trustee, employee, or hold any position of management.

- **Real Property.** You have a financial interest in real property in which you, your spouse, your registered domestic partner, or your dependent children, or anyone acting on your behalf has invested $2,000 or more, and also in certain leasehold interests.

- **Sources of Income.** You have a financial interest in anyone, whether an individual or an organization, from whom you have received (or from whom you have been promised) $500 or more in income within 12 months prior to the decision about which you are concerned. Additionally, under California's community property laws, a person for whom your spouse or registered domestic partner receives income may also be a source of a conflict interest to you.

- **Gifts.** You have a financial interest in anyone, whether an individual or an organization who has given you gifts which total $390[129] or more within 12 months prior to the decision about which you are concerned.

[129] The current gift limit of $390 is subject to increases determined by an inflation factor.

- **Personal Financial Effect.** You have a financial interest in your personal expenses, income, assets or liabilities, as well as those of your immediate family. This is known as the "personal financial effects" rule. If these expenses, income, assets or liabilities are likely to go up or down by $250 or more in a 12-month period as a result of a governmental decision, then the decision has a "personal financial effect" on you.

STEP 4 – Are your financial interests directly or indirectly involved in the governmental decision?

In general, a financial interest which is directly involved in – and therefore directly affected by – a governmental decision creates a bigger risk of a conflict of interest than does a financial interest which is only indirectly involved in the decision. Therefore, the FPPC's conflict of interest regulations distinguish between financial interests that are directly involved and interests that are indirectly involved. These regulations are rather technical. If a district has reached Step 4 of the analysis, we recommend consultation with legal counsel and/or the FPPC, for assistance in applying the correct standard.

STEP 5 – What kinds of financial impacts on your financial interests are considered important enough to trigger a conflict of interest?

The FPPC has adopted regulations for deciding what kinds of financial effects are important enough to trigger a conflict of interest. These rules are called "materiality standards," that is, they are the standards that should be used for judging what kinds of financial impacts resulting from governmental decisions are considered material or important.

In general, if the financial interest is directly involved in the governmental decision, the standard or threshold for deeming a financial impact to be material is stricter (i.e., lower). This is because a financial interest that is directly involved in a government decision presents a bigger conflict of interest risk for the public official who holds the interest. On the other hand, if the financial interest is not directly involved, the materiality standard is more lenient, because the indirectly involved interest presents a lesser danger of a conflict of interest.

Again, these FPPC regulations are complex, and we recommend consultation with legal counsel and/or the FPPC for assistance with this analysis.

STEP 6 – Is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your financial interests?

For a conflict of interest to exist, the Political Reform Act requires that it be "reasonably foreseeable" that a governmental decision will have a material financial effect on a public official's financial interests. The FPPC has interpreted these words to mean "substantially

likely." Generally speaking, the likelihood need not be a certainty, but it must be more than merely possible.

STEP 7 – If you have a conflict of interest, does the "public generally" exception apply?

If the answer to questions one through six is "yes," a conflict of interest exists. However, Steps 7 and 8 specify exceptions that permit you to participate anyway.

The "public generally" exception exists because a public official is less likely to be biased by a financial impact when a significant part of the community has financial interests that are substantially likely to feel essentially the same impact from a governmental decision that the official's financial interests are likely to feel. The FPPC has adopted specific regulations for identifying the specific segments of the general population with which an official may compare their financial interests, and specific regulations for determining whether the financial impact is substantially similar. Again, we recommend consultation with legal counsel and/or the FPPC.

STEP 8 – Even if you have a disqualifying conflict of interest, is your participation legally required?

The "legally required participation" exception applies only in very specific circumstances in which the official's government agency would be paralyzed, unable to act. Districts are encouraged to seek advice from legal counsel and/or the FPPC before acting under this exception.

The foregoing discussion of the Political Reform Act's conflict of interest rules is derived from the FPPC's publication entitled, "Can I Vote?" Districts may directly contact the FPPC on its website (www.fppc.ca.gov), or on its toll-free telephone advice line (1-866-275-3772).