

CONFLICTS OF INTEREST: KNOW WHO YOUR "FRIENDS" ARE

*Presentation by Grant Herndon
August 7, 2009*

The year was 1922. President Warren G. Harding found himself embroiled in a scandal following his transfer of Naval oil reserves at Elk Hills, California, and Teapot Dome, Wyoming, to the Department of the Interior. The Wall Street Journal reported that Harding's Secretary of the Interior leased the oil fields without competitive bidding to two



oil company executives who had lent him large sums of money, much of it interest-free, which he used to improve his New Mexico ranch. A lengthy Senate investigation followed. The Secretary resigned from office a year later and was found guilty of bribery, for which he was fined \$100,000 and sentenced to a year in prison. This and other scandals involving his political appointees prompted Harding to remark,

"I have no trouble with my enemies. I can take care of my enemies all right. But my damn friends. They're the ones that keep me walking the floor nights." The oil fields were returned to the government when the Supreme Court invalidated the leases in a 1927 decision.

"I have no trouble with my enemies. I can take care of my enemies all right. But my damn friends. They're the ones that keep me walking the floor nights."

-Warren G. Harding

➡ **FAST FORWARD TO 2009:** It is more important than ever for California education officials to know who their "friends" are for conflict of interest purposes. Understanding some of the basic relationships which can trigger a conflict of interest will help superintendents/chancellors and board members steer clear of the serious consequences and negative press that can result from conflict of interest violations.

California has two major conflict of interest laws: Government Code section 1090 (a version of which was on the books before Harding's presidency) can prohibit the entire board from approving a transaction in which just one member has a financial interest. The post-Watergate Political Reform Act requires key decision makers to file annual statements of their economic interests (Form 700) and to abstain from decisions impacting their finances. It requires officials to disqualify themselves from decisions which will impact their financial interests. Severe penalties, including criminal penalties, can result from violations of either statute, not to mention grave political consequences.

This article is intended to help educational officials continue to hone their instincts in the area of conflict of interest. It is not intended to be an exhaustive discussion of all of the

many legal aspects of this topic. The law contains numerous exceptions and “safe harbors” that may allow a transaction to proceed despite an apparent conflict. The application of these exceptions can turn on the smallest nuances of fact, and many remain subject to interpretation by the Attorney General, Fair Political Practices Commission and the Courts. The exceptions will be generally discussed in this article, but any actual issue facing a district should be carefully reviewed with legal counsel as early as possible in the process. In some instances, a transaction can proceed with proper planning if conflict issues are spotted early on. In other instances, a transaction is simply prohibited and prompt discussion helps make officials aware of the issues and avoid serious consequences. Important tools will include your district’s local “conflict of interest code,” FPPC Forms 700 filed by employees and board members, and any board policies on the subject.¹

WHAT KINDS OF DECISIONS CAN TRIGGER A CONFLICT OF INTEREST?

Government Code section 1090 focuses on financial interests on the part of an official or a board on which the official serves. These can include contracts, employment of a person connected with the official, and other financial transactions. The Political Reform Act looks at any official government decisions which may impact by the financial interests of officials involved in the making of the decision.

Officials who learned too late the impact of conflict of interest rules:

~~**Bill Honig**, State Superintendent of Public Instruction, was convicted on felony conflict of interest charges relating to transactions with a nonprofit group headed by his wife.

~~**Hubert Call**, a San Francisco city council member who sold land to the city through third parties. The city was permitted to keep the land, and Call was ordered to disgorge the amounts paid to him by the city.

WHOSE FRIENDS DOES THE DISTRICT NEED TO WORRY ABOUT?

Government Code section 1090 applies to the principal decision-makers in a school or community college district.² Its impact is not limited to board members who vote on transactions with the district. Staff members (and in some instances even consultants) who advise the board or are involved in the preliminary steps of the contractual process can trigger a 1090 violation.

Relationships on the part of staff members may trigger a conflict of interest if the role of a staff member (or the staff member’s spouse or registered domestic partner [“RDP”]) is any of the following:

¹ K-12 districts which are CSBA members should consult Board Bylaw 9270, last amended in November 2003. It is important to keep this Bylaw updated and review it with your Board.

² While this article focuses on school and community college districts, the principles discussed will also apply to county boards of education, county superintendents of schools, and other education entities such as regional occupation programs.

- ✓ Participation in the negotiations, reasoning, planning, and other preliminary matters prior to concluding a contract. (85 Ops.Cal.Atty.Gen. 34 (2002))
- ✓ Conducting extensive investigations and preparation of detailed proposals relating to the contract. (*San Diego City Council v. McKinley* (1978) 80 Cal.App.3d 204)
- ✓ "Give and take which goes beforehand." (*Stigall v. City of Taft* (1962) 58 Cal.2d 565)
- ✓ Advising the Board regarding a contract. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278)

EXAMPLE: A facilities employee who is a partial owner of a construction company has no contact with the Board concerning a construction contract on which the construction company is likely to bid. However, the employee works on the initial planning for the project and helps draft contract specifications. The employee's participation in the contractual process may trigger a 1090 conflict.

The Political Reform Act focuses on "public officials," defined as every member, officer, employee of a local government agency, as well as certain consultants who function in a staff capacity or as agents of the agency.³ The Act extends to anyone involved in the "making" of a government decision. An official is considered to be participating in the making of a governmental decision when doing any of the following:

- ✓ Voting on a matter or otherwise obligating the agency to a course of action
- ✓ Negotiating, without significant substantive review, with a governmental entity or private person regarding a governmental decision;
- ✓ Advising or making recommendations to the decision maker either directly or without significant intervening substantive review.
- ✓ Conducting research or making any investigation which requires the exercise of judgment on the part of the official in order to influence a governmental decision.
- ✓ Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official in order to influence of governmental decision.
- ✓ Attempting to influence a governmental decision, such as through contacts with agency personnel or other attempts to influence on behalf of the official's business entity, customers or other financial interests.

For spouses and RDPs, use the rule that "any friend of yours is a friend of mine." In other words, if an official's spouse/RDP has a connection which would trigger a conflict, the

³ Government Code section 82048, 2 California Code of Regulations section 18701

official is considered to have the same conflict due to the operation of community property and reciprocal support laws.⁴

Finally, the Education Code contains specific requirements for K-12 districts relating to the approval of personnel decisions which uniquely affect a board member's relative (Education Code section 35107). With the exception of collective bargaining agreements and personnel matters affecting a class of employees to which the relative belongs, board members must abstain from any such decision. A "relative" for this purpose is defined as a relative by blood, affinity, or adoption within the third degree.

A DISTRICT'S "DAMN FRIENDS" FOR PURPOSES OF GOVERNMENT CODE SECTION 1090 AND THE POLITICAL REFORM ACT

A. 1090 Friends.

Government Code section 1090 and following prohibit governing boards from approving transactions in which one of their members (and in some cases employees or consultants) have a prohibited financial interest. A transaction approved in violation of section 1090 will be considered void, and those who approved it may be subject to civil and even criminal penalties.

Transactions with certain "friends" can be approved if the relationship qualifies as one of a series of "remote interests" described in the Code. A district can do business with these friends if the affected board member declares the relationship on the record and abstains from participation in the discussion and voting on the matter. Still other relationships may qualify as a "non-interest," which will not require abstention. Again, the use of these exceptions is highly dependent upon the facts in a particular case and is subject to legal interpretation. Review with legal counsel at the earliest possible stage is highly recommended. (Copies of Government Code sections 1091 and 1091.5, containing most of the available remote and non-interests, are included with the materials.) Remember also that there may be situations where a board member will be well-advised to abstain to avoid the appearance of impropriety even where the relationship falls short of a legal conflict of interest.

If a relationship between a board member or other education official and a person or entity seeking to do business with the district involves a financial interest and is **NOT** one of the remote interests or non-interests described, it will likely be presumed a prohibited financial interest. This may mean that the transaction, if approved, will be void, and the board members approving the transaction may be subject to fines and even criminal penalties.

⁴ The Political Reform Act looks at the impact on official decisions on the economic interests of the official or the official's "immediate family," which is defined as the spouse and dependent children of the official (Government Code section 82029).

The following are some examples of friends to be on the lookout for (likely prohibited financial interests). In each case, several exceptions may apply to “save” the transaction, but the idea is to develop instincts as to the kinds of relationships to look for so that you can examine the possible conflict of interest beforehand.

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| SHAREHOLDERS | The district official or the official’s spouse/registered domestic partner (“RDP”) is a shareholder in a corporation seeking to do business with the district. |
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Several exceptions may apply. The transaction may qualify for a **remote interest**, for example, if the official’s only connection is ownership of less than 3 percent of the shares and the ownership derived from employment with the company. Another remote interest applies if the transaction is a bank or savings and loan with which the district a relationship of borrower or depositor, debtor or creditor, where a district official involved in the transaction has a 10 percent or higher stake in the bank. A **noninterest** may be available if total annual income from dividends, including the value of stock dividends, from the corporation, does not exceed 5 percent of the district official’s annual income, and any other payments made to the official do not exceed 5 percent of total annual income.

An additional remote interest may be available for certain contracts with law firms, stock brokerages and real estate agencies in which a district official has a partial ownership interest.

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| CORPORATE BOARD MEMBERS | The district official (or the official’s spouse/RDP) is a member of the board of directors of a corporation seeking to do business with the district. |
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A remote interest applies in a transaction involving a bank or savings and loan with which the district has a relationship of borrower or depositor, debtor or creditor where the district official’s only relationship to the contracting party is that of a director of a bank or savings and loan association.

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| EMPLOYEE OR “AGENT” (FOR-PROFIT COMPANY) | The district official or spouse/RDP is the employee or agent of a for-profit company seeking to do business with the district. |
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No remote or non-interest is available for district officials employed by very small companies seeking to do business with the district. Two **remote interests** which would permit a transaction where a board member is an employee of a contractor/vendor apply only to companies with 10 or more employees where the district official-employee did not participate in formulating the bid: (1) the first focuses on long term affiliation with the company (3+ years), lack of participation in bid formulation and ownership of less than 3

percent of the company's shares; and (2) the second focuses on the employee's primarily non-management status, lack of ownership of any company shares, and lack of other roles in the company, and is available where the company is eligible for the contract as the low bidder in a competitive bidding process.⁵

An additional remote interest may be available in certain transactions with engineering, geology or architectural firms employing a district official in a non-management capacity.

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| EMPLOYEE OR AGENT (NONPROFITS AND GOVERNMENT ENTITIES) | The district official or spouse/RDP is the employee or agent of a nonprofit organization or a government agency seeking to do business with the district. |
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Where a district seeks to enter into a contract with another government entity employing a district official, a **remote interest** is available where the official's only role in the other agency is receipt of a salary, per diem or expense reimbursement. The transaction will qualify for a **non-interest** (provided it does not involve the specific department which employs the district official) if the district official's relationship is disclosed to the Board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

Transactions with certain tax-exempt nonprofits qualify for a **remote interest** where a district official's only tie is the official's status as an officer or employee of the nonprofit. A **non-interest** may be available where the district official serves as a non-compensated officer of a tax-exempt nonprofit the primary purpose of which is to support the functions of the district, provided the relationship is noted in the official records of the transaction.

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| SOLE PROPRIETORS AND PARTNERS | The district official or spouse/RDP is a sole proprietor or a partner in a business seeking to do business with the district. |
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A **remote interest** may be available in the case of a transaction with a bank or savings and loan where the district official's only relationship to the contracting party is that of an ownership interest of 10 percent in the company.

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| SUPPLIERS | The district official or spouse/RDP is a supplier of goods or services to a vendor doing business with the district |
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⁵ This second remote interest is available only in counties with population of less than 4,000,000. Government Code section 1091.

Yes, even suppliers to district contractors and vendors can trigger a 1090 violation. A **remote interest** may be available where the district official has been a supplier for at least five years prior to election or appointment to office. Special rule for directors and 10 percent owners of banks, bank holding companies may be applicable.

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| DEBTOR/CREDITOR | The district official or spouse/RDP is a debtor or creditor of the person or entity seeking to do business with the district. |
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If a district official involved in the transaction is the landlord or tenant of the person or entity seeking to contract with the district, a **remote interest** may be available. (If the contracting party is a federal, state, county, city or other specified public agency, a **non-interest** is available).

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| DISTRICT EMPLOYEE SPOUSE | The district official's spouse/RDP is employed by the district. |
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A **non-interest** is available if the spouse was employed for at least one year prior to the district official's election or appointment and continues in the same employment. A board cannot approve most transactions which would be considered to change the employee spouse's employment (promotion, salary increase, etc.)

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| "MEMBER" OF A NONPROFIT CORPORATION | The district official is a "member" of a nonprofit corporation seeking to do business with the district. A member is a person with special status under the nonprofit corporation laws permitting the person to vote on certain matters. This is NOT the same as a member of the nonprofit board of directors. |
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A non-interest may apply where the district official's only relationship to the nonprofit corporation is that of a nonsalaried "member," provided that this interest is disclosed to the board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records. If the contracting party is a nonprofit, tax-exempt corporation a primary function of which is to support the district, a non-interest may apply where a district official is a noncompensated officer of the corporation.

B. Political Reform Act Friends

The Political Reform Act calls for a detailed multi-step review to analyze how an official decision may impact economic interests. Once the economic interest potentially affected by the decision is identified, the analysis under the Political Reform Act examines whether the interest is "direct" or "indirect," applying detailed criteria to determine whether

disqualification is required.⁶ It must also be determined whether it is “reasonably foreseeable” that the official’s economic interest will be “materially” affected in a manner which is distinguishable from the decision’s impact on the general public.

Each of these factors is the subject of detailed regulations. The following are the kinds of relationships regulated under the Act.

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| INVESTMENT IN BUSINESS ENTITY (\$2,000) | The district official has a minimum \$2,000 investment in a business entity seeking to do business with the district. |
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An interest in a parent company will likely be considered an interest in the subsidiary and vice-versa. Various potential exceptions exist for specific vehicles such as mutual funds, or where the business entity does not do business in the jurisdiction. Employees may be exempt if the entity is not one requiring disclosure on Form 700 under the district’s Conflict of Interest Code.

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| INTEREST IN REAL PROPERTY (\$2,000) | The district official has a minimum \$2,000 investment in real property which is involved in the transaction. |
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This is generally an issue where the transaction involves real property within 2 miles of the district boundaries. Numerous exceptions may apply.

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| INCOME SOURCE (\$500) | The party seeking to do business with the district provides an income source to the district official or the official’s spouse/RDP of at least \$500. |
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A transaction with anyone from whom the official received \$500 within the 12 months prior to the decision may trigger a conflict. This can include individual clients of a business entity in which the official has an interest.

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| GIFT SOURCE (\$420) | The party seeking to do business with the district provides has provided gifts to the district official or the official’s spouse/RDP. |
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In general, Board transactions or decisions which impact a person who is a gift source to a district official can trigger a violation. There are numerous exceptions and exemptions

⁶ See the FPPC publication entitled *Can I Vote?* which is included with your materials. Note that this publication focuses on the Political Reform Act only, and not Government Code section 1090.

which may apply. Employees may not be disqualified if the source is not one they are required to disclose on Form 700.

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| <p>BUSINESS POSITION (OFFICER, DIRECTOR, EMPLOYEE, OTHER)</p> | <p>The district official is an officer, director, employee or holds another business position with an entity seeking to do business with the district.</p> |
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The official is an officer, director, employee or holds another business position.

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| <p>PERSONAL FINANCIAL EFFECT</p> | <p>The decision before the district may result in an increase or decrease in the personal expenses, income, assets, or liability of a district official.</p> |
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Generally, this will not be an issue with respect to real property and investment interests, which are treated separately.

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| <p>DISTRICT EMPLOYEE (IMMEDIATE FAMILY)</p> | <p>The district official's spouse/RDP or dependent child is an employee of the district.</p> |
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The district official is disqualified from voting on any decision to hire, fire, promote, demote, suspend without pay or take other disciplinary action against the family member-employee, or to set the employee's salary (unless the salary is the same as salaries paid to other employees of the district in the same job classification).

CONCLUSIONS

This article is intended to help education officials spot potential conflicts of interest on the horizon before they become a problem. Form 700 may help identify some relationships which can lead to conflicts of interest, but others may surface only by training board and staff to be aware of the issues and to report possible problems to the appropriate administrator as early as possible.

With some training and protocols in place, a Superintendent/Chancellor need not walk the floors at night on account of the friends and relations of district officials.

Attachments: Government Code sections 1091 and 1091.5
Board Bylaw 9270

GOVERNMENT CODE

§ 1091. "Remote interest" in contract; Disclosure of interest; Penalty for willful failure to disclose

(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) 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 and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in

organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of the contracting party.

(3) That of an employee or agent of the contracting party, if all of the following conditions are met:

(A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.

(B) The contract is competitively bid and is not for personal services.

(C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.

(D) The contracting party has 10 or more other employees.

(E) The employee or agent did not directly participate in formulating the bid of the contracting party.

(F) The contracting party is the lowest responsible bidder.

(4) That of a parent in the earnings of his or her minor child for personal services.

(5) That of a landlord or tenant of the contracting party.

(6) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive

remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(7) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.

(8) That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

(9) That of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.

(10) Except as provided in subdivision (b) of Section 1091.5, that of a director of, or a person having an ownership interest of, 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.

(11) That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

(12) That of an elected officer otherwise subject to Section 1090, in any housing assistance payment contract entered into pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before Section 1090 became applicable to the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction

in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a Section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.

(13) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.

(14) That of a person owning less than 3 percent of the shares of a contracting party that is a for-profit corporation, provided that the ownership of the shares derived from the person's employment with that corporation.

(15) That of a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

(c) This section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

(d) The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097. That violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

§ 1091.5. Interest in contract; Quantity and quality of interest; Relation to contracting party

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her 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.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.

(3) 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 body or board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of, or a person having less

than a 10-percent ownership interest in, a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower, depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" shall have the meanings set forth in subdivisions (d), (g), and (l) of Section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions

necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(13) That of an officer, employee, or member of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs if the officer, employee, or member participated in the planning, discussions, development, or approval of the loan product or program and both of the following two conditions exist:

(A) The loan product or program is or may be originated by any lender approved by the agency.

(B) The loan product or program is generally available to qualifying borrowers on terms and conditions that are substantially the same for all qualifying borrowers at the time the loan is made.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

CSBA Sample (K-12 Districts)

Board Bylaw

Conflict Of Interest

BB 9270

Board Bylaws

Incompatible Activities

***Note: Government Code 1126 prohibits district officers and employees from engaging in any employment or activity which is inconsistent, incompatible, in conflict with or inimical to their duties with the district. Such incompatible service or assumption of office results in termination of the prior incompatible office. Attorney General opinions have indicated that it would be incompatible for Governing Board members to serve on other elected or appointed boards, councils or commissions that have interests which may conflict with the interests of the district (e.g., 85 Ops.Cal.Atty.Gen. 60 (2002); 68 Ops.Cal.Atty.Gen. 171 (1985); 65 Ops.Cal.Atty.Gen. 606 (1982)). The determination as to whether an activity or office is incompatible is complex and requires a case-by-case analysis of the particular activities or duties of the office; therefore, it is recommended that district legal counsel be consulted as appropriate. ***

Governing Board members shall not engage in any employment or activity which is inconsistent with, incompatible with, in conflict with or inimical to the Board member's duties as an officer of the district. (Government Code 1126)

***Note: Pursuant to Education Code 35107, an employee of a school district may not be sworn into office as an elected or appointed member of that district's Board unless he/she resigns as an employee. If the employee does not resign, the employment automatically terminates when he/she is sworn into office. ***

Conflict of Interest Code

***Note: The Board is required to adopt a conflict of interest code in compliance with Government Code 87300-87313. Pursuant to 2 CCR 18730, Government Code requirements are satisfied if a district incorporates that regulation by reference along with a designation of employees and the formulation of disclosure categories in an Appendix, as provided for in this bylaw. The following paragraph provides for the incorporation of 2 CCR 18730, and any subsequent amendments adopted by the Fair Political Practices Commission (FPPC), as the terms of the district's conflict of interest code. In some counties, the county provides the conflict of interest code to be used. ***

The district's conflict of interest code shall be comprised of the terms of 2CCR 18730 and any amendments to it adopted by the Fair Political Practices Commission, together with a district attachment specifying designated positions and the specific types of disclosure statements required for each position.

***Note: Pursuant to Government Code 87303, the district's conflict of interest code must be approved by the appropriate "code reviewing body" as specified in Government Code 82011. For school districts located entirely in one county, the "code reviewing body" is the Board of Supervisors of the county in which the district is located. The FPPC is the "code reviewing body" for school districts with jurisdiction in more than one county. Those districts that submit their code to the FPPC for review are not required to submit this entire bylaw to the FPPC but should submit: (1) the "incorporation" paragraph above and (2) the list of designated employees with corresponding disclosure categories (see the Appendix to this bylaw). ***

Upon direction by the code reviewing body, the Board shall review the district's conflict of interest code in even-numbered years. If no change in the code is required, the district shall submit by October 1 a written statement to that effect to the code reviewing body. If a change in the code is necessitated by changed circumstances, the district shall submit an amended code to the code reviewing body. (Government Code 87306.5)

When a change in the district's conflict of interest code is necessitated by changed circumstances, such as the creation of new designated positions, amendments or revisions, the changed code shall be submitted to the code reviewing body within 90 days. (Government Code 87306)

When reviewing and preparing conflict of interest codes, the district shall provide officers, employees, consultants and members of the community adequate notice and a fair opportunity to present their views. (Government Code 87311)

If a Board member or designated employee determines that he/she has a financial interest in a decision, as described in Government Code 87103, this determination shall be disclosed. The member shall be disqualified from voting unless his/her participation is legally required. (2 CCR 18700)

Statements of economic interests submitted to the district by designated employees in accordance with the conflict of interest code shall be available for public inspection and reproduction. (Government Code 81008)

Financial Interest

***Note: Pursuant to Government Code 1092, if any one Board member or designated employee has a financial interest in a contract, it is an absolute bar for that Board to enter into the prohibited contract. The Attorney General has opined in 69 Ops.Cal.Atty.Gen. 255 (1986) that these prohibitions cannot be avoided by having the financially interested Board member abstain from participating in the matter. ***

***The determination of whether a financial interest exists involves a review of statutes, court decisions and attorney general opinions as they apply to the particular facts at issue. The analysis can be complex and legal counsel should be consulted as appropriate. ***

Board members and designated employees shall not be financially interested in any contract made by the Board or in any contract they make in their capacity as Board members or designated employees. (Government Code 1090)

A Board member shall not be considered to be financially interested in a contract if his/her interest includes, but is not limited to, any of the following: (Government Code 1091.5)

1. That of an officer who is being reimbursed for his/her actual and necessary expenses incurred in the performance of an official duty
2. That of a recipient of public services generally provided by the public body or board of which he/she is a member, on the same terms and conditions as if he or she were not a member of the board
3. That of a landlord or tenant of the contracting party if such contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial or other public district of this state or an adjoining state unless the subject matter of such contract is the property in which such officer or employee has such interest as landlord or tenant in which even his/her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Government Code 1091

***Note: Pursuant to Government Code 1090, a Board member shall not be considered financially interested in a contract if the interest is considered so small as to be a non-interest. One example of a non-interest is when a Board member's spouse has been employed by the district for at least one year prior to the Board member's election or appointment, as specified below. Attorney General opinions and case law has further clarified this exception. In *Thorpe v. Long Beach Community College District*, the court held that the promotion of an employee, whose spouse was a member of the district's Board of Trustees, to a new position constituted a new employment and thus was a prohibited conflict of interest under Government Code 1090 and 1091.5. This decision is consistent with several Attorney General opinions. In 80 Ops.Cal.Atty.Gen. 320 (1997), the Attorney General found that a Board member's spouse who has no previous contractual relationship with the district could not be hired by the district, whether as a substitute teacher or in any other employment capacity. While this opinion involved the initial hiring of the substitute teacher by the district, the Attorney General has previously strictly interpreted the phrase "employment for at least one year" to refer to the same employment with the district. This opinion, 69 Ops.Cal.Atty.Gen. 255 (1986), stated that a spouse employed by the district at the time the Board member was elected or appointed may continue annual employment as a substitute teacher, since the status quo with respect to the spouse's employment would continue. However, if the spouse were to attempt to become a regular employee, the Board would be required to make a new contract, an action which would be prohibited under Government Code 1090. In 81 Ops.Cal.Atty.Gen. 327 (1998), the Attorney General opined that a first-year probationary teacher whose spouse becomes a board member during the teacher's first year of probation, may not return the following year as a second-year probationary teacher since a new contract would be required for the following year. However, the Attorney General reached a contrary result in 87 Ops.Cal.Atty.Gen. 23 (2004) and opined that a second year probationary employee, who had been a probationary teacher for more than one year before his/her spouse's

election, could attain permanent status during his/her spouse's term of office. Because it is difficult to reconcile these two decisions, and because this area of law is complex, it is strongly recommended that district legal counsel be consulted if a board member's spouse is an employee of the district. ***

4. That of a spouse of an officer or employee of the district if his/her spouse's employment or officeholding has existed for at least one year prior to his/her election or appointment

5. That of a nonsalaried member of a nonprofit corporation, provided that such interest is disclosed to the Board at the time of the first consideration of the contract, and provided further that such interest is noted in its official records

6. That of a noncompensated officer of a nonprofit, tax-exempt corporation which, as one of its primary purposes, supports the functions of the nonprofit board or to which the school Board has a legal obligation to give particular consideration, and provided further that such interest is noted in its official records

7. That of a person receiving salary, per diem, or reimbursement for expenses from a governmental entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that such interest is disclosed to the Board at the time of consideration of the contract, and provided further that such interest is noted in its official records

8. That of an attorney of the contracting party or that of an owner, officer, employee or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm or real estate firm

In addition, a Board member or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his/her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor. (Government Code 1091.5)

A Board member shall not be deemed to be financially interested in a contract if he/she has only a remote interest in the contract and if the remote interest is disclosed during a Board meeting and noted in the official Board minutes. The affected Board member shall not vote or debate on the matter or attempt to influence any other Board member to enter into the contract. Remote interests are specified in Government Code 1091(b); they include, but are not limited to, the interest of a parent in the earnings of his/her minor child. (Government Code 1091)

***Note: Pursuant to Government Code 87101, even if no exception in Government Code 1091.5 applies, an official may still enter into a contract if the rule of necessity or legally required participation applies. In general, this rule will permit a district to acquire an essential supply or service. The rule also permits a Board member to carry out an essential duty of his/her office where

he/she is the only one who may legally act and there is no alternative source of decision-making authority other than to permit the conflicted official to participate in accordance with 2 CCR 18708. ***

***It is recommended that the district consult legal counsel when situations arise involving financial interests in contracts or the rule of necessity. ***

A Board member may enter into a contract if the rule of necessity or legally required participation applies as defined in Government Code 87101.

***Note: Board members who willfully fail to disclose a remote interest in a contract may be subject to a fine or imprisonment pursuant to Government Code 1097. ***

Even if there is no prohibited or remote interest, a Board member shall abstain from voting on personnel matters that uniquely affect a relative of the Board member. A Board member may vote, however, on collective bargaining agreements and personnel matters that affect a class of employees to which the relative belongs. "Relative" means an adult who is related to the person by blood or affinity within the third degree, as determined by the common law, or an individual in an adoptive relationship within the third degree. (Education Code 35107)

***Note: The following paragraph reflects the common law definition of "relative within the third degree." ***

A relationship within the third degree includes the individual's parents, grandparents and great-grandparents, children, grandchildren and great-grandchildren, brothers, sisters, aunts and uncles, nieces and nephews, and the similar family of the individual's spouse unless the individual is widowed or divorced.

Disqualification for Board Members Who Manage Public Investments

***Note: The following optional section is for use only by districts in which Board members and/or the Superintendent or designee are considered to be "officials who manage public investments" and who are required to file a full financial disclosure statement in accordance with Government Code 87200. According to the FPPC, "officials who manage public investments" are Board members and/or superintendents and/or other officials who manage investments in districts that have surplus or special reserve funds to invest in permitted securities and investments pursuant to Education Code 41015 and are defined in 2 CCR 18701. Individuals who direct the investment of these funds, formulate or approve policies for the investment of these funds, or approve investment transactions involving these funds are considered "officials who manage public investments." Even if the Board delegates day-to-day investment decisions to the Superintendent or designee, Board members are considered "officials who manage public investments" if they set or approve policy as to the investment of these funds. The determination as to whether a conflict exists and whether recusal is required is complex. When a question exists, district legal counsel should be consulted. ***

***AB 1797 (Ch. 233, Statutes of 2003) added Government Code 87105 to require an "official who manages public investments" and has a financial interest in a decision to take the following actions. 2 CCR 18702.5, as added by Register 2003, No. 24, further clarifies the conditions upon which the Board member must recuse himself/herself, as well as the content and timing of the identification of the conflict. ***

A Board member who manages public investments pursuant to Government Code 87200 and who has a financial interest in a decision shall, upon identifying a conflict or potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:

1. Publicly identify the financial interest that gives rise to the conflict or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required. (Government Code 87105)
2. Recuse himself/herself from discussing and voting on the matter, or otherwise acting in violation of Government Code 87100. This Board member shall not be counted toward achieving a quorum while the item is discussed. (Government Code 87105; 2 CCR 18702.5)
3. Leave the room until after the discussion, vote and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters. (Government Code 87105)

If the item is on the consent calendar, the Board member must recuse himself/herself from discussing or voting on that matter, but the Board member is not required to leave the room during the consent calendar. (2 CCR 18702.5)

(cf. 3430 - Investing)

The Board member may speak on the issue during the time that the general public speaks on the issue. The Board member shall recuse himself/herself from voting on the matter and leave the dais to speak from the same area as members of the public. He/she may listen to the public discussion of the matter with members of the public. (Government Code 87105; 2 CCR 18702.5)

If the Board's decision is made during closed session, the public identification may be made orally during the open session before the Board goes into closed session and shall be limited to a declaration that his/her recusal is because of a conflict of interest pursuant to Government Code 87100. The Board member shall not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the Board's decision. (2 CCR 18702.5)

Gifts

***Note: Pursuant to 2 CCR 18730, the prevailing gift limitation is currently \$420. This amount is adjusted on odd-numbered years by the FPPC. ***

Board members and designated employees may accept gifts only under the conditions and limitations specified in Government Code 89503 and 2 CCR 18730.

The limitations on gifts do not apply to wedding gifts and gifts exchanged between individuals on birthdays, holidays and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value. (Government Code 89503)

Gifts of travel and related lodging and subsistence shall be subject to the prevailing gift limitation except as described in Government Code 89506.

A gift of travel does not include travel provided by the district for Board members and designated employees. (Government Code 89506)

Honoraria

Board members and designated employees shall not accept any honorarium, which is defined as any payment made in consideration for any speech given, article published, or attendance at any public or private gathering, in accordance with law. (Government Code 89501, 89502)

***Note: Exceptions exist within the Government Code's definitions of gifts, income, interest in real property and investment; see Government Code 82028, 82030, 82033 and 82034. ***

The term honorarium does not include: (Government Code 89501)

1. Earned income for personal services customarily provided in connection with a bona fide business, trade or profession unless the sole or predominant activity of the business, trade or profession is making speeches
2. Any honorarium which is not used and, within 30 days after receipt, is either returned to the donor or delivered to the district for donation into the general fund without being claimed as a deduction from income for tax purposes

APPENDIX

DESIGNATED POSITIONS/DISCLOSURE CATEGORIES

***Note: It is important that the district's Conflict of Interest Code contain the following appendix listing designated positions. This appendix should be modified to reflect the specific reporting requirements and positions within the district. Those districts in which the FPPC is their code reviewing body are required to submit their designated positions and disclosure categories to the FPPC along with a copy of the district's incorporation statement; see page (a). ***

***The following optional section is for use only by districts in which Board members and/or the Superintendent or designee are considered to be "officials who manage public investments" and who are required to file a full financial disclosure statement in accordance with Government Code 87200.

See section above entitled "Disqualification for Board Members who Manage Public Investments" for a further discussion of this issue. In such districts, Board members must be listed below, even if the Superintendent or designee makes all day-to-day decisions. If investments are managed by a person other than or in addition to the Superintendent, that person's title should be added to the list.

***Districts in which Board members and the Superintendent do not "manage public investments" should delete the following paragraph and move the items in the list ("Governing Board Members" and "Superintendent of Schools") to Category 1 below. These are districts in which (1) the district does not have any surplus or special reserve funds to invest and merely deposits all funds it receives in the county treasury pursuant to Education Code 41001-41002.5 or (2) the district participates in a fund where a Tax and Revenue Anticipation Note (TRANs) are issued. Board members and superintendents in these types of situations are not considered to have discretion regarding the investment of the district's money and are therefore not "public officials who manage public investments." Instead of being required to file full financial disclosure statements, they are subject to their district's conflict of interest code and should be listed as designated employees. ***

It has been determined that persons occupying the following positions manage public investments and shall file a full statement of economic interests pursuant to Government Code 87200:

Governing Board Members
Superintendent of Schools

***Note: This remainder of this appendix is for use by all districts. Government Code 87302 requires the district conflict of interest code to identify the district positions that require the disclosure of financial interests and the specific types of disclosure required for each position. Positions listed below are examples only and should be modified to reflect district practice. If the district's Board members and Superintendent are not "officials who manage public investments," they are subject to the district's conflict of interest code and their titles should be added to Category 1. ***

1. Persons occupying the following positions are designated employees in Category 1:

Assistant/Associate Superintendent
Purchasing Agent

Designated persons in this category must report:

- a. Interests in real property located entirely or partly within district boundaries, or within two miles of district boundaries or of any land owned or used by the district. Such interests include any leasehold, beneficial or ownership interest or option to acquire such interest in real property.
- b. Investments or business positions in or income from sources which:
 - (1) Are engaged in the acquisition or disposal of real property within the district

(2) Are contractors or subcontractors which are or have been within the past two years engaged in work or services of the type used by the district or

(3) Manufacture or sell supplies, books, machinery or equipment of the type used by the district

***Note: The following list should include staff who make purchasing decisions for the district and should be modified to reflect the specific positions in the district. ***

2. Persons occupying the following positions are designated employees in Category 2:

Director
Principal
Assistant Principal
Maintenance and Operations Director
Program Coordinator
Project Specialist
Supervisor
Dean of Students

Designated persons in this category must report investments or business positions in or income from sources which:

- a. Are contractors or subcontractors engaged in work or services of the type used by the department which the designated person manages or directs, or
- b. Manufacture or sell supplies, books, machinery or equipment of the type used by the department which the designated person manages or directs. For the purposes of this category, a principal's department is his/her entire school.

***Note: The definition of designated employees in Government Code 82019 includes consultants. To preclude amending the code whenever retaining a consultant in a decision-making capacity, the following section provides that the Superintendent or designee shall make case-by-case determinations of the disclosures necessary, depending on the range of duties to be performed by the consultant. ***

3. Consultants are designated employees who must disclose financial interests as determined on a case-by-case basis by the Superintendent or designee. The Superintendent or designee's written determination shall include a description of the consultant's duties and a statement of the extent of disclosure requirements based upon that description. All such determinations are public records and shall be retained for public inspection along with this conflict of interest code.

A consultant is an individual who, pursuant to a contract with the district, makes a governmental decision whether to: (2 CCR 18701)

- a. Approve a rate, rule or regulation

- b. Adopt or enforce a law
- c. Issue, deny, suspend or revoke a permit, license, application, certificate, approval, order or similar authorization or entitlement
- d. Authorize the district to enter into, modify or renew a contract that requires district approval
- e. Grant district approval to a contract or contract specifications which require district approval and in which the district is a party
- f. Grant district approval to a plan, design, report, study or similar item
- g. Adopt or grant district approval of district policies, standards or guidelines

A consultant is also an individual who, pursuant to a contract with the district, serves in a staff capacity with the district and in that capacity participates in making a governmental decision as defined in 2 CCR 18702.2 or performs the same or substantially all the same duties for the district that would otherwise be performed by an individual holding a position specified in the district's Conflict of Interest Code. (2 CCR 18701)

Legal Reference:

EDUCATION CODE

- 1006 Qualifications for holding office
- 35107 School district employees
- 35230-35240 Corrupt practices
- 35233 Prohibitions applicable to members of governing boards
- 35239 Compensation for board members in districts under 70 ADA

GOVERNMENT CODE

- 1090-1098 Prohibitions applicable to specified officers
- 1125-1129 Incompatible activities
- 81000-91015 Political Reform Act of 1974, especially:
- 82011 Code reviewing body
- 82019 Definition of designated employee
- 82028 Definition of gifts
- 82030 Definition of income
- 87100-87103.6 General prohibitions
- 87200-87210 Disclosure
- 87300-87313 Conflict of interest code
- 87500 Statements of economic interests
- 89501-89503 Honoraria and gifts
- 91000-91014 Enforcement

CODE OF REGULATIONS, TITLE 2

- 18110-18997 Regulations of the Fair Political Practices Commission, especially:
- 18702.5 Public identification of a conflict of interest for Section 87200 filers

COURT DECISIONS

Thorpe v. Long Beach Community College District, (2000) 83 Cal.App.4th. 655

Kunec v. Brea Redevelopment Agency, (1997) 55 Cal.App.4th 511

ATTORNEY GENERAL OPINIONS

86 Ops.Cal.Atty.Gen. 138(2003)

85 Ops.Cal.Atty.Gen. 60 (2002)

82 Ops.Cal.Atty.Gen. 83 (1999)

81 Ops.Cal.Atty.Gen. 327 (1998)

80 Ops.Cal.Atty.Gen. 320 (1997)

69 Ops.Cal.Atty.Gen. 255 (1986)

68 Ops.Cal.Atty.Gen. 171 (1985)

65 Ops.Cal.Atty.Gen. 606 (1982)

Management Resources:

WEB SITES

Fair Political Practices Commission: <http://www.fppc.ca.gov>

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