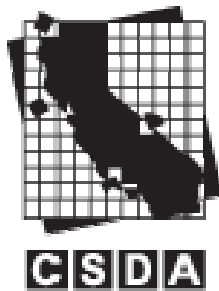


# The Institute for Local Government

ILG is the non-profit research and education  
affiliate of



**California Special  
Districts Association**  
*Districts Stronger Together*





# ILG Mission

- Promoting good government at the local level
- Practical, impartial and easy-to-use materials

# Ethics and Transparency Resources

AB 1234 Training

Understanding Public  
Service Ethics Laws

The Brown Act and  
Open Meetings

Good Governance Checklist



# What Every Business Should Know About California Public Integrity Law in Dealing with Government Entities

California Special Districts Association  
Institute for Local Government  
October 6, 2015

PRESENTED BY

Gary W. Schons, Of Counsel

Dianna Marie Valdez, Senior Paralegal

## Government Entities are Not Like Other Businesses

California has a complex set of “public integrity” statutes designed to promote and require transparency, loyalty, integrity and accountability in government decisions and contracts.

\*\*\*No secret, backroom deals allowed\*\*\*



# California's Public Integrity Laws

- Open Meetings Law (Brown Act) requires all governmental decisions and contracts be made in an open meeting with public participation.
- Political Reform Act and Government Code Section 1090 prohibit any “personal financial interests” of officeholders and employees in making government decisions and contracts and limit and require reporting of contributions and gifts to officeholders.
- Public Records Act gives public right of access to all public records.
- Criminal statutes punish bribery, extortion, misuse of public accounts and funds, conflicts and failure to report interests.

# Webinar Goals

- Introduce you to Government Code Section 1090---California's powerful & far reaching law banning “conflicts” in the making of government contracts.
- Demonstrate how to work within the requirements of this law.
- Demonstrate how violations of Government Code Section 1090 will harm You and Your Business.

# Webinar Goals

- Introduce you to California's laws and regulations concerning "gifts" to public officers and employees.
- Demonstrate how "gifts" to public officers and employees are not like normal "business goodwill" or "business development."
- Cover gift limits, gift reporting requirements and gifts giving rise to a conflict.
- Demonstrate how You and Your Business can avoid creating gift-related issues in your dealings with government entities.

# ***Interest in Public Contracts (Gov. Code § 1090)***

# Financial Interest in Public Contracts

## *Government Code § 1090*

**If:**

- A Public Official
- Who Has a Financial Interest
- Makes
- A Contract

**Then:**

- Contract is VOID
- Penalties Apply—Civil & Crim.
- Gov. Agency Recovers all benefits of the contract



**Self-Dealing**

# Step 1

- Is the person with a potential conflict a Public Official covered by § 1090?
- E.g., Council/Board members, Officers, Employees, Consultants

# Step 2

- Does the governmental decision involve a contract?
- E.g., Agreements, Payments, Certifications, Licenses, Modifications

# Step 3

- Is the Public Official influencing, making or participating in making the contract?
- If No, § 1090 not implicated, but if member of a board ultimately has a conflict, the entire agency cannot make the contract, recusal of the conflicted member is not sufficient to solve the conflict.

# Step 4

- Does the Public Official have a financial interest in the contract?
- Council or Board cannot make the contract if even one official has a conflict.
- Financial Interest can be direct or indirect?
- Examine relationship with contracting party---employee, attorney, shareholder, spouse, broker, agent, supplier, other?
- Direct=Party to Contract; Indirect=
- Relationship with Party

# Step 5

- Do any remote (§ 1091, 1091.4) or non-interest (§ 1091.5) exceptions apply?
- If NO, CONFLICT---contract void, civil & criminal penalties, disqualification from office *unless* the “Rule of Necessity” applies.

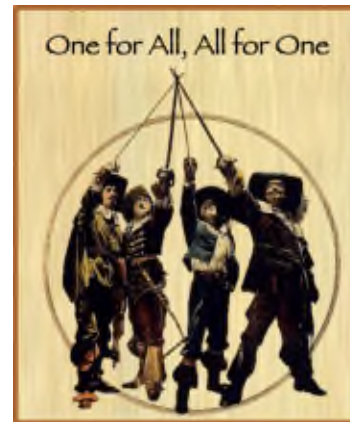
# Step 6

- Remote Interests (§ 1091): applies only to councils and boards, allows the agency to contract
- Member with conflict must: disclose publicly, state reason, disqualify and recuse, have conflict noted in record, leave the room
- No participation in making of the contract whatsoever!

# Financial Interest in Public Contracts

## *Two Scenarios*

- Member of multi-member board approving contract



- Individual official or advisory board member of Agency approving contract



# Financial Interest in Public Contracts

## *Board Member Scenario*

- **Facts:** Council member Jones owns the construction company that has been awarded the contract to remodel City Hall. She recuses herself from participating or voting to approve the contract.
- **Holding:** The contract is void.



# Financial Interest in Public Contracts

## *Board Member Scenario*

- **Analysis:**

- Jones is financially interested in the contract.
- A council member's interest in the contract prohibits the city from entering into the proposed contract, even though the member does not participate in and abstains from the actual decision.



# Financial Interest in Public Contracts

## *Contract Defined*

- Use general contract principles
- Examples:
  - Construction contracts
  - Purchases
  - Development agreements
  - Civil service appointments
  - Grants and donations



# Financial Interest in Public Contracts

## *“Making” the Contract*

“Making” includes

- Negotiations,
- Discussions,
- Reasoning,
- Planning, and
- The “give and take which goes beforehand in the making of the decision to commit oneself ....”



# Financial Interest in Public Contracts

## *Types of Financial Interests*

- **Financial Interest**

- Direct (contracting party)
- Indirect (related to contracting party)

- **Effect**

- Positive or negative

- **Certainty not required**



# Personal Financial Interests

## *Interest in Public Contracts*



### Ramifications

- Criminal
  - Willful Violation = Felony
- Civil
  - Contract = Void and unenforceable
  - Disgorgement of all money
- Lifetime bar to public office

# No excuses, “equitable adjustments” or “do overs”

If 1090 is violated, the violation cannot be cured, mitigated or undone. And, the violation need not be intentional.



# **“‘What, Me Worry?,’ I’m Not a Government Official or Employee,” So Section 1090 Doesn’t Apply to Me!**



# **Guess Again!**

## **Section 1090's Effects on Private Parties & Businesses**

- **Felony Criminal Liability for Aiding & Abetting a Violation (Gov. Code §1097(b)).**
- **Injury to Reputation.**
- **Contract is Void.**
- **Government Agency Recovers All Costs, Your Profits & Retains Benefits of the Contract!**

# Ways to Run Afoul of Section 1090

- Offer Bribes, Kickbacks, Illegal or Undisclosed or Quid Pro Quo “Gifts” or Benefits to Officers or Employees.
- Participate in a “Pay to Play” Scheme, Even if You are the “Victim” of a Shakedown or Extortion.
- Advise as a “Consultant” on a Process that Results in a Contract that Benefits You or Your Company.

# Case Study #1

## Los Angeles Memorial Coliseum Commission



## Concert Promoters & Staff Defraud Commission

**The Coliseum hosted 37 electronic music festivals, with more than one million attendees, pursuant to contracts with Insomniac and Go Ventures, private concert promoters. Go Ventures entered into 17 contracts with the Com., and Insomniac entered into 7 contracts, the purpose of which was to hold music festivals. Despite rapid growth and popularity of these festivals DeStefano, a Com. employee-event coordinator, did not maximize rent or other revenue from them. Instead, he used the growing popularity and increased revenue from these events to benefit himself. DeStefano approved contractual arrangements in which he and his wife had a financial interest with Insomniac and Go Ventures, both of which had information that DeStefano was the Com.'s employee and a public servant.**

**Insomniac and Go Ventures received substantial public funds through their use of the Coliseum, generated revenue and earned profits on their music festivals, and saved costs through cash payments to union workers who were employees of the Com., thereby deriving additional excessive net proceeds from the public funds generated by the event. Insomniac and Go Ventures gave Com. employee DeStefano “kickbacks” for allowing them to enter into their contracts with the Com. and as quid pro quo for their receipt of public funds from the Com. events.**

# Result

- **Rental Agreements Void and Insomniac and Ventures Could Be Required to Disgorge All Profits Made, Not Just “Public Funds” Acquired Under Section 1090**
- **DeStefano, Rotella of Insomniac and Germani of Go Ventures were charged with felony offenses by the D.A. for conspiracy and bribery**

# Case Study #2

## Sweetwater H.S. District/SW College District



**A wide-ranging public corruption case involving 18 defendants connected to two school districts in South County, including Sweetwater Union High School District and Southwestern College. The defendants – who included administrators, trustees and contractors – were indicted by a grand jury on multiple counts including bribery, perjury, filing a false instrument, influencing an elected official and obtaining something of value to influence a member of a legislative body.**

**The cases centered on a ‘pay-for-pay’ culture with businesses that were awarded voter-approved bond projects worth hundreds of millions of dollars.**

**The defendants from the school districts received tens of thousands of dollars' worth of meals, tickets and hotel stays from construction companies vying for voter-approved bond projects. Shortly after board members received financial favors, they approved contracts with the contractors for bond projects stemming from Sweetwater's \$644 million Proposition O and Southwestern College's \$389 million Proposition R.**

**Between 2008 and 2011, the defendants frequented San Diego-area restaurants with contractors and others racking up hundreds of dollars in food and drinks at a time, in some cases reaching more than \$1,000 per outing. Defendants were given Los Angeles Lakers playoff tickets, concert tickets, theater tickets, Rose Bowl tickets, Southwest Airlines tickets, a trip to Pebble Beach and a trip to Napa Valley trips. Officials did not report the gifts on their Statement of Economic Interest, as required by state law. In other instances, administrators and trustees solicited cash for their children's beauty pageants or field trips. They also demanded campaign donations and other favors.**

## Highlights from the cases include:

- eight guilty pleas to felony crimes
- 12 guilty pleas to misdemeanor crimes
- more than \$80,000 in fines
- 1,140 hours of community service
- positive changes in leadership and policies at the school districts

**AND.....**

# Private Civil Actions Under Section 1090

- ***Sweetwater Union High School District v. Gilbane Building Co. et al. : Judgment Sought: \$26,000,000***
- ***San Diegans for Open Government v. Har Construction, Gilbane Building Co., Seville Group: Judgment Sought: \$14,600,000***

# Case Study #3

## Fresno Unified School District & Harris Construction Co.



A taxpayer challenged a noncompetitive bid contract between the Fresno Unified School District and Harris Construction Co., Inc., for the construction of a middle school for \$36.7 million. The construction was completed in 2014 pursuant to a lease-leaseback arrangement that Fresno Unified and Contractor believed was exempt from competitive bidding.

The taxpayer alleged the school construction project should have been competitively bid because the lease-leaseback arrangement did not create a true leaseback. And, Contractor had an impermissible conflict of interest that rendered the lease-leaseback agreement void.

Contractor had a prior contract with Fresno Unified that created a conflict of interest and, therefore, precluded Contractor from being awarded the Lease-leaseback Contracts. Pursuant to the prior contract, Contractor acted as a consultant and provided Fresno Unified with professional preconstruction services related to the project, which included the development of plans, specifications and other construction documents for the project. Contractor was paid by Fresno Unified for consulting on the project and had a hand in designing and developing plans and specifications by which the project is being constructed.

# California Court of Appeal recently held:

- **“Consultant” (including a corporation) is an “employee” under Section 1090**
- **Fresno Unified and Contractor entered into the Lease-leaseback Contracts pursuant to which Contractor agreed to build the project for a guaranteed maximum price of \$36.7 million. These allegations are sufficient to state that Contractor was “financially interested in” the Lease-leaseback Contracts for purposes of Government Code section 1090, subdivision (a).**

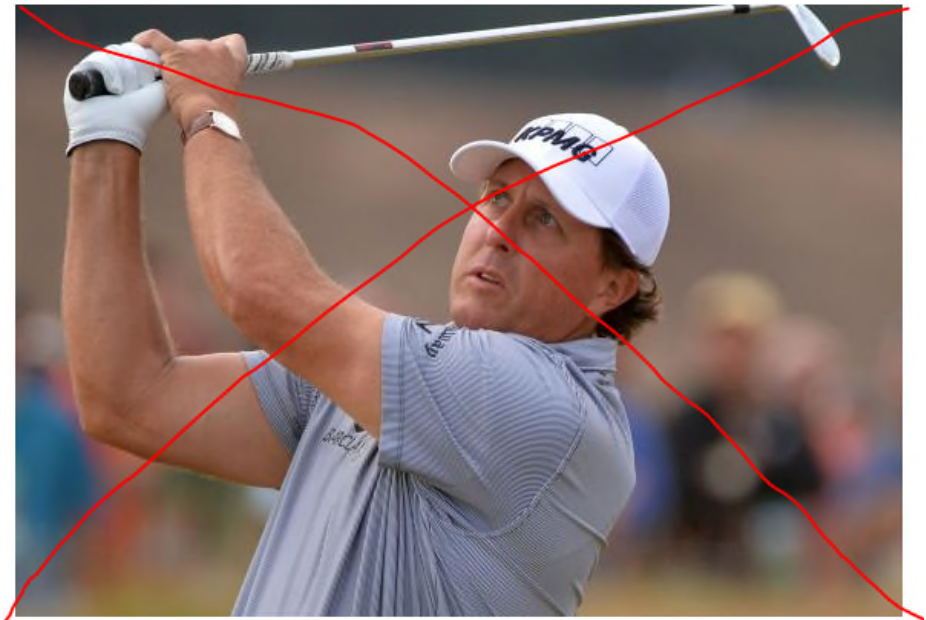
## ...and a Chip In



**PGA Golfer and San Diegan Phil Mickelson acted as a consultant for the City of San Diego to revamp and improve the Torrey Pines Golf Course. A highly modified version of his plan was adopted by the City. But, when he and his company bid on the actual work.....**



**The FPPC stymied Phil and ruled in an Advice Letter that he and his company could not bid on the actual project work because his work as a consultant meant he had participated in “making” the contract.**



# ***GIFTS!!!***

## **Limits Restrictions & Other No-Nos**

*Presented By:  
Dianna Marie Valdez, Senior Paralegal  
Conflicts of Interest & Ethics Coordinator  
for Best Best & Krieger LLP  
2015*

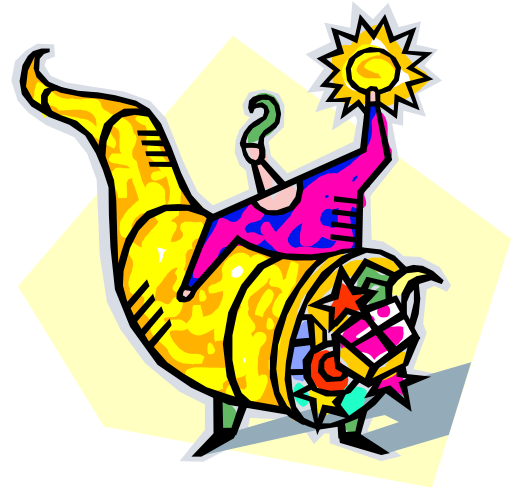


# Political Reform Act

- Imposes Annual Limits on Gifts Received by Public Officials
- Requires Public Officials to:
  - Disclose Financial Interests, including sources of Gifts; and
  - Disqualify from Decisions Affecting Interests, including sources of Gifts



# Gift Limit



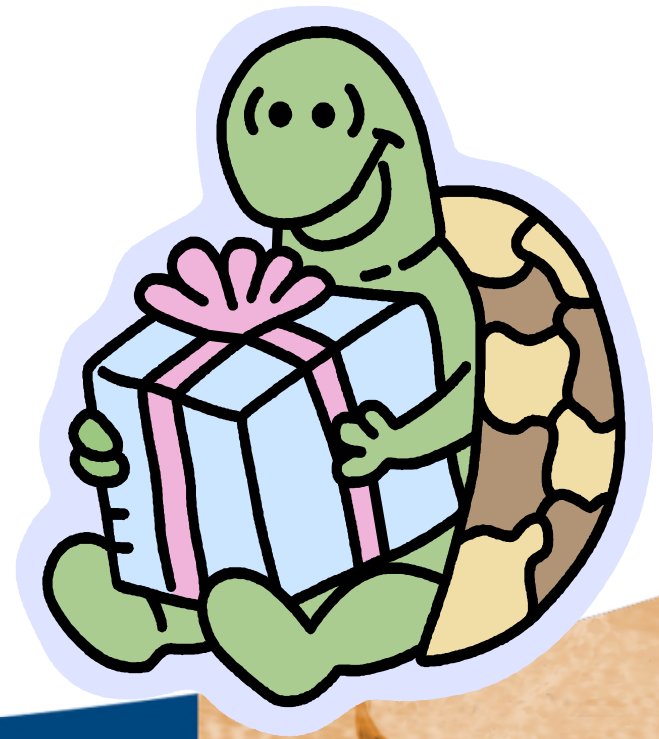
- **Gift Limit.** No more than \$460 per reportable source per calendar year.
- **Disclose in Statements of Economic Interests.** Gifts totaling \$50 or more per source in reporting period.
- **Disqualification.** Officials must disqualify themselves from decisions which may affect sources of gifts of \$460 or more received during the previous 12-months.



# Who is Subject to Gift Rules?

All California officials are subject to gift rules:

- Members of boards, committees & commissions
- Employees
- Consultants
- Volunteers



# Gifts – What; When; and How

- What is a Gift? Anything of value not fully paid for.
- When Does Official Receive/Accept a Gift? When official has possession or control.
- How Are Gifts Valued? Usually at fair market value.



# Common Reportable Gifts

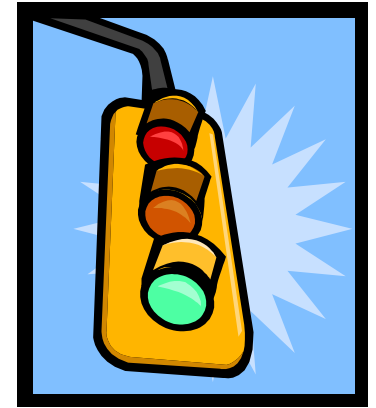


- Tickets to sports or entertainment events; parking passes
- Meals & accommodations
- Gift baskets; greens fees

|                                      |         |                        |
|--------------------------------------|---------|------------------------|
| ➤ NAME OF SOURCE                     |         |                        |
| _____                                |         |                        |
| ADDRESS                              |         |                        |
| _____                                |         |                        |
| BUSINESS ACTIVITY, IF ANY, OF SOURCE |         |                        |
| _____                                |         |                        |
| DATE (mm/dd/yy)                      | VALUE   | DESCRIPTION OF GIFT(S) |
| ____/____/____                       | \$_____ | _____                  |
| ____/____/____                       | \$_____ | _____                  |
| ____/____/____                       | \$_____ | _____                  |



# Gift Exceptions



**Exempt** from disclosure:

- Items that within 30 days are:
  - returned, reimbursed or paid-down to the donor; or
  - donated to a 501(c)(3) or to a government agency;
- Tickets that are unused;
- Hospitality in someone's home with owner present;
- Personalized plaques valued less than \$250;
- Informational/educational material to assist official with duties;
- Equal exchange – holidays, birthdays.



# NEW GIFT EXCEPTIONS

## **Exempt** from disclosure:

- Reciprocal Exchanges – meals, movies, social events;
- BFF Benefits – long term, close relationships;
- Dating Benefits;
- Benefits from existing personal or business relationships unrelated to official's position;
- Hospitality at other locations – vacation home, boat, timeshare, etc.;
- Admission for two to **political or 501(c)(3) fundraiser rec'd only from organization** holding the fundraiser, are deemed to have no value. Additional tickets/admissions valued at nondeductible portion or pro-rata share;
- Acts of neighborliness or human compassion; Bereavement offerings;
- Benefits from attending a wedding/reception.



# Form 801- Travel Payments Provided for Official Agency Business

- Identifies payments made for public business in lieu of using agency funds (not gifts or income)
- Must be made directly to or coordinated with the agency who must determine which official will use the payment.
- Must be used for agency business as specified for limited travel and reported on Form 801.



# Agency Raffles

- Agency holds holiday raffle at annual party. Several employees win prizes.
- Who must report?
- What must be reported?
- How should the gift be valued?



# Agency Raffle



## 3<sup>rd</sup> Party Donates Award

- Award is a gift from donor;
- If winner is a filer winner must determine if donor is a reportable source;
- Winner must find out value: FMV – amount paid to participate in raffle, if any.

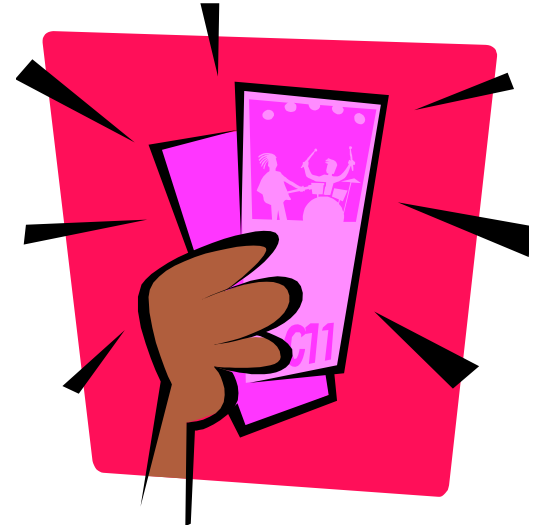
## Agency or Agency Employee Donates Award

- Award donated by agency is not reportable;
- Award donated by employee for raffle is not reportable as long as employee is not acting as intermediary.



# Raffles/Bona Fide Competition

- Official attends a conference which holds a raffle for a door prize. All attendees received a ticket.
  - Who must report?
  - What must be reported?
  - How should the *prize* be valued?



# Questions Officials Must Ask

- Did I receive a gift?
- Who is the source?
  - Is source reportable?
- What's the value?
- Did I do something for the gift?
- What kind of gift is it – do special rules apply?
- What are my options?
- **ACTION!**



# Agency Reporting – Form 802

## Entertainment Passes & Ceremonial Role

- Tickets/Passes to sports/entertainment events must be distributed per policy and disclosed on Form 802
- Form 802 is forwarded to FPPC
- Ceremonial events are disclosed on Form 802



# Penalties for Violation of the Gift Limit

- Violators of the gift limit could be:
  - Liable in civil action for amount up to three times the unlawful gift; and
  - Subject to administrative sanctions, which include fines up to \$5,000 per violation.



# DISQUALIFICATION

- Officials must not make, *participate in making* or influence decisions which may affect any financial interests.



# THANK YOU FOR ATTENDING

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