

III.

CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

Government Code Section 84308*

A. OVERVIEW

As previously noted in Chapter I, discussing financial conflicts of interest under the Political Reform Act of 1974 (hereinafter “Act”), campaign contributions are not a basis for disqualification by directly elected public officials. (See §§ 82028(a)(4), 82030(b)(1)³; *Woodland Hills Residents Assoc. v. City Council of the City of Los Angeles* (1980) 26 Cal.3d 938.) However, because of the increased concern about the link between campaign contributions and alleged conflict-of-interest situations, the Legislature enacted section 84308 in 1982.

B. THE BASIC PROHIBITION

Briefly stated, Government Code section 84308 provides the following:

- (1) The law applies to proceedings on licenses, permits, and other entitlements for use pending before certain state and local boards and agencies.
- (2) Covered officials are prohibited from receiving or soliciting campaign contributions of more than \$250 from parties or other financially interested persons during the pendency of the proceeding and for three months after its conclusion. Note: Local laws may impose limits on campaign contributions that are lower than \$250. (§ 85703 et seq.)
- (3) Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than \$250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding.
- (4) At the time parties initiate proceedings, they must list all contributions to covered officials within the previous 12 months.
- (5) The law expressly exempts directly elected state and local officials except when they serve in a capacity other than that for which they were directly elected.

*Selected statutory materials appear in appendix E (at p. 162).

³All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

A more comprehensive description of the provisions of section 84308 is set forth below. If you have specific questions, you should consult the actual wording of the statute, and the regulations of the Fair Political Practices Commission (hereinafter, “FPPC”).

C. PERSONS COVERED

The law applies to two types of individuals: covered officials and interested persons.

Covered officials typically include state and local agency heads and members of boards and commissions. (§§ 84308(a)(3) and 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1.) Alternates to elected or appointed board members and candidates for elective office in an agency also are covered. (§ 84308(a)(4); Cal. Code Regs., tit. 2, § 18438.1(c).) Covered officials do not include city councils, county boards of supervisors, the Legislature, constitutional officers, the Board of Equalization, judges and directly elected boards and commissions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies (e.g., joint powers agencies, regional government bodies, etc.). (§ 84308(a)(3), (a)(4); Cal. Code Regs., tit. 2, § 18438.1.)

Interested persons refers to persons who are financially interested in the outcome of specified proceedings (e.g., parties and participants). Parties (e.g., applicants or subjects of the proceeding) are always presumed to be financially interested in the outcome. In addition, persons or entities that satisfy both of the following criteria are financially interested and are called “participants”: (1) they foreseeably would be materially financially affected by the outcome of the decision as those terms are defined in Government Code section 87100 et seq.; and (2) they have acted to influence the decision through direct contacts with the officials or their staffs. (§ 84308(a)(1), (a)(2), (b) and (c); Cal. Code Regs., tit. 2, § 18438.4.)

When a closely held corporation is a party or participant in a proceeding, the requirements of the law apply to the majority shareholder. (§ 84308(d).)

D. AGENTS

Agents of parties and participants are subject to the same prohibitions and requirements as their principals. (§ 84308(b), (c).) A person is an agent under section 84308 if he or she represents an interested person in connection with the covered proceeding. (Cal. Code Regs., tit. 2, § 18438.3(a).) If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering, or consulting firm, both the individual and the firm are considered agents. (Cal. Code Regs., tit. 2, § 18438.3(a).)

To determine whether the threshold of more than \$250 for triggering the contribution prohibition or disqualification requirement has been reached, contributions made within the preceding 12 months from parties or participants are aggregated with those of their agents. Contributions from an individual agent include contributions from that agent’s firm but do not include contributions from other individual partners or members of the firm unless such contributions are reimbursed by the firm. (Cal. Code Regs., tit. 2, § 18438.3(b).)

E. PROCEEDINGS COVERED

The law covers proceedings involving a license, permit, or other entitlement for use. These terms include all business, professional, trade and land use licenses and permits, and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. (§ 84308(a)(5).) The law covers conditional use permits, zoning variances, rezoning decisions, tentative subdivision and parcel maps, and consulting contracts (but does not apply to general land use plans or general building and development standards). (*City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480; *In re Curiel* (1983) 8 FPPC Ops. 1.) Ministerial decisions also are not covered. (Cal. Code Regs., tit. 2, § 18438.2(b)(3).)

F. REQUIRED CONDUCT

Section 84308 imposes various requirements – in connection with the making or receipt of campaign contributions – on covered officials, parties, and participants involved in specified proceedings. As used in section 84308, the term “contribution” refers to money, goods or services provided in connection with federal, state, or local political campaigns. (§ 84308(a)(6).)

1. Disclosure

At the time parties initiate proceedings, they must disclose on the record of the proceeding all covered officials to whom they, or their agents, made contributions of more than \$250 during the previous 12 months. (§ 84308(d).) Similarly, officials, must, at the beginning of the hearing, disclose on the record of the proceeding any party or participant who has contributed more than \$250 during the previous 12 months. (§ 84308(c); Cal. Code Regs., tit. 2, § 18438.8.) If there is no public hearing, the disclosure must be entered on the written record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.8.) As will be discussed subsequently, receipt of such contributions may necessitate the disqualification of the official from the decisionmaking process.

2. Prohibition On Contributions

During the pendency of the proceeding involving the license, permit, or entitlement for use, and for a period of three months thereafter, parties and participants are prohibited from making contributions of more than \$250 to covered officials involved in the proceedings. (§ 84308(d).) Likewise, covered officials are prohibited from soliciting or receiving such contributions from parties or from participants who they know or have reason to know are financially interested in the outcome of the proceeding. (§ 84308(b).) Covered officials also are prohibited from soliciting, receiving, or directing contributions on behalf of another person or on behalf of a committee. (§ 84308(b).) (But see, Cal. Code Regs., tit. 2, § 18438.6 for exceptions.)

3. Disqualification

If, prior to making a decision in a covered proceeding, more than \$250 in contributions has been willfully or knowingly received by an official from a party or their agent during the previous 12 months, the official must disqualify himself or herself from participating in the proceeding. (§ 84308(c).) A similar prohibition exists with respect to contributions received from a participant, or his or her agent, if the official knows or has reason to know that the participant is financially interested in the outcome of the proceeding. (§ 84308(c); Cal. Code Regs., tit. 2 § 18438.7.) If an official returns the contribution (or that portion which is over \$250) within 30 days from the time he or she knows or has reason to know of the contribution and the proceeding, then disqualification is not required. (§ 84308(c).)

4. Knowledge

In order for the contribution prohibition and disqualification requirement to apply, the covered official must have the requisite knowledge of (1) the contribution and (2) the fact that the source of the contribution is financially interested in the proceeding. By regulation, the FPPC provides that the knowledge requirement is satisfied with respect to the contribution when either the covered official has actual knowledge of it or it has been disclosed on the record of the proceeding. (Cal. Code Regs., tit. 2, § 18438.7(c).) With respect to the official's knowledge of the financial interest of the source of the contribution, parties are conclusively presumed to be financially interested. (§ 84308(a)(1), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(1).) With respect to participants, the covered official's knowledge requirement is satisfied if the participant reveals facts to the agency that make his or her financial interest apparent. (§ 84308(a)(2), (b), (c); Cal. Code Regs., tit. 2, § 18438.7(a)(2).)

G. PENALTIES AND ENFORCEMENT

Section 84308 is a part of the Political Reform Act. For a discussion of penalties and enforcement provisions under the Act, see Chapter V of this pamphlet.

IV.

LIMITATIONS ON FORMER STATE OFFICIALS APPEARING BEFORE STATE GOVERNMENT AGENCIES

Government Code Section 87400 Et Seq.*

A. OVERVIEW

Historically, there has been a regular flow of personnel between government and the private sector. Sometimes, individuals from the private sector enter government for a short tenure of service and then return to their private enterprise occupations. Other times, individuals with longstanding government service who have developed expertise choose to leave government service and join the private sector. In still other instances, elected officers retire or are defeated and return to private industry.

The Political Reform Act of 1974 (hereinafter, the “Act”) includes Government Code section 87400 et seq., commonly known as the “Revolving Door Prohibition.”⁴ The Legislature also has enacted categorical restrictions on post-government employment. Section 87406 places restrictions on former government officials from contacting specified government agencies. These sections constitute the only general state law regulating the activity of former government officials who enter the private sector. (But see Pub. Contract Code, § 10411, for additional specific prohibitions.)

In addition, the Act prohibits public officials from participating in government decisions relating to any person with whom the official is negotiating concerning future employment. (§ 87407.)

If a former local government official wishes to influence his or her former agency, the official should consult local laws and rules to determine if there are limitations on his or her activities. Special provisions for air pollution control districts appear in section 87406.1.

B. LIFETIME RESTRICTIONS

1. The Basic Prohibition

The basic prohibition contained in section 87400 et seq. provides that: (1) no former state administrative official, (2) shall for compensation act as agent or attorney for any person other than the State of California, (3) before any court or state administrative agency, (4) in a judicial or quasi-judicial proceeding if previously the

*Selected statutory materials appear in appendix F (at p. 163).

⁴All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

official personally and substantially participated in the proceeding in his or her official capacity. (See *In re Lucas* (2000) 14 FPPC Ops. 15.)

If the elements of the prohibition are found to be present, a former state administrative official is forever banned from acting as an agent or attorney in a covered proceeding or from assisting another to so act.

2. State Administrative Official

State administrative officials include every member, officer, employee or consultant of a state administrative agency who, as part of his or her official responsibilities, engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity. (§ 87400(b).) State administrative agencies include every office, department, division, bureau, board and commission of state government, but do not include the Legislature, the courts or any agency in the judicial branch. (§ 87400(a).)

3. Compensation For Representation As Agent Or Attorney

The statutory prohibition extends only to former state administrative officials who, for compensation, represent someone else as agent or attorney. (§ 87401, 87402.) Former officials who provide representation without compensation are not covered by the prohibition. (Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Representing an individual as part of one's employment constitutes receiving compensation for such representation. A firm which has as one of its partners a former administrative official generally may not represent persons in covered proceedings, because the official ultimately will benefit directly or indirectly from the compensation paid to the firm for such representation. However, where a former administrative official merely shares office space and some other overhead expenses with another attorney, that attorney would not be prohibited from handling such cases so long as the former administrative official were in no way involved in fee splitting or the representation. (*Zatopa* Advice Letter, No. A-82-095.)

The statute specifies the types of conduct which constitute prohibited representation of another in a covered proceeding (e.g., § 87402). It prohibits any formal or informal appearance or any written or oral communication with an intent to influence the covered proceeding. The prohibition on representation applies only to proceedings in which the State of California is a party or in which it has a direct or substantial interest. (§ 87401(a), (b); Cal. Code Regs., tit. 2, § 18741.1(a)(3).) In addition, the statute prohibits former administrative officials, for compensation, from aiding or assisting another to represent a person in a covered proceeding. (§ 87402; Cal. Code Regs., tit. 2, § 18741.1(a)(2).) Thus, if a former administrative official would be prohibited from personally acting as the client's representative, he or she is also prohibited, for compensation, from aiding or assisting another in such representation.

4. Court Or Quasi-Judicial Proceeding

It is important to note that the statute applies only to judicial, quasi-judicial or other proceedings involving specific parties before a court or administrative agency (§ 87400(c); *Xander* Advice Letter, No. A-86-162; *Berrigan* Advice Letter, No. A-86-045.) Thus, quasi-legislative proceedings of an agency for the purposes of adopting general regulations do not trigger the prohibition. (*Nutter* Advice Letter, No. A-86-042; *Swoap* Advice Letter, No. A-86-199.) Participation in a lawsuit, an administrative enforcement action under section 11500 of the Government Code, or application proceedings are specifically covered. (§ 87400(c).) Any other proceeding which involves a controversy or ruling concerning specific parties also is covered. (§ 87400(c).)

5. Previous Participation

Once it has been determined that a former administrative official is prepared to act as an agent or attorney for another in a court or in an administrative proceeding, it must be determined whether the former official participated in the proceeding during his or her official tenure. (*In re Lucas, supra*, 14 FPPC Ops. 15; *Anderson* Advice Letter, No. A-86-324; *Petrillo* Advice Letter, No. A-85-255.) If so, the elements of the prohibition are complete and the former administrative official is prevented from acting in a representative capacity. (§ 87401.) A former administrative official is deemed to have participated in a proceeding only if he or she were personally and substantially involved in some aspect. (§ 87400(d); *In re Lucas, supra*, 14 FPPC Ops. 15; *Brown* Advice Letter, No. A-91-033.) The statute specifically covers personal and substantial participation in a decision, the approval or disapproval of a decision, the making of a formal recommendation, and the rendering of substantial advice. In addition, involvement in an investigation or the use of confidential information qualifies as participation under the statute. (§ 87400(d).) However, the statute specifically exempts from coverage the rendering of legal advice to departmental or agency staff which does not involve specific parties.

Unless covered by a specific exemption, a former administrative official who participated in a covered proceeding in his or her official capacity, is forever banned from receiving compensation for acting as an agent or attorney in that proceeding, or from assisting another to do so. Section 87403 provides several limited exceptions to this general prohibition.

The statute does not prevent a former administrative official from making a statement which is based on his or her own special knowledge of the area, provided that the official does not receive any compensation, other than witness fees as set forth by law or regulation. (§ 87403(a).) The statute also exempts communications made solely for the purpose of providing information if the court or administrative agency to which the communication is directed first makes specified findings. (§ 87403(b).) The court or administrative agency must find that the former administrative official has outstanding and otherwise unavailable qualifications, that the proceeding in question requires such qualifications, and that the public interest would be served by

participation of the former official. Lastly, where a court or administrative agency has made a final decision but has retained jurisdiction over the matter, it may permit an appearance or communication from the former administrative official if the agency of former employment gives its consent by determining that the former administrative official left office at least five years previously and the public interest would not be harmed by the appearance or communication.

6. Enforcement And Disqualification

Upon petition of any interested person, or party, the court or administrative agency may act to enforce the terms of the statutory prohibition. After notice to the former administrative official, the court or administrative agency may exclude him or her from further participation or from assisting or counseling any other participant. (§ 87404.) In addition, the administrative, civil and criminal sanctions available for enforcement of the Act apply to section 87400 et seq. (See Chapter V of this pamphlet.)

C. ONE-YEAR PROHIBITION

1. The Basic Prohibition

The restrictions prohibit the following former officials from accepting compensation to act as the agent, attorney or representative of another person for purposes of influencing specified government agencies through oral or written communications.

- With respect to members of the Legislature, the law imposes a one-year prohibition on communications with members of the Legislature, members of any legislative committee or subcommittee, or any officer or employee of the Legislature for the purpose of influencing legislative action. (§ 87406(b).)
- With respect to an elected state officer (excluding legislators), the law imposes a one-year prohibition on communications with any state administrative agency, for the purpose of influencing any administrative action or any action or proceeding concerning a permit, license, grant or contract, or the sale or purchase of goods or property. (§ 87406(c).)
- With respect to a state designated employee or member of a state body, the law imposes a one-year prohibition on communications with any state administrative agency – which either employed or was represented by the former official during the last 12 months of his or her government service – for the purpose of influencing: any administrative or legislative action; any action or proceeding concerning a permit, license, grant or contract; or the sale or purchase of goods or property. (§ 87406(d)(1).) (For a discussion of designated employees, see Chapter II, Section F.)

Appearances before a court, a state administrative law judge, or the Workers Compensation Appeals Board are not subject to the prohibitions of section 87406. Also, uncompensated appearances are not subject to the prohibition. The prohibition is not applicable to officials who transfer between state agencies (§ 87406(e); Cal. Code Regs., tit. 2, § 18741.1(a)(2)), and designated employees of the Legislature (§§ 87406(d) and 87400(a)). The prohibitions are also inapplicable to a former state official who holds a local elective office when the appearance or communication is made on behalf of the local agency. (87406(e)(2).)

2. Administrative Or Legislative Action

“Administrative action” means the proposal, drafting, development, consideration, amendment, enactment or defeat of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding. (§ 82002.) “Legislative action” means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination, or other matter by the Legislature or by either house or any committee thereof, or by a member or employee of the Legislature acting in his or her official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill. (§ 82037.)

D. JOB SEEKING BY GOVERNMENT OFFICIALS

Prior to leaving government office or employment, the Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any arrangement, concerning prospective employment. (§ 87407; Cal. Code Regs., tit. 2, § 18747.) Previously, this prohibition applied to a more limited list of state officials.

E. GOVERNMENT CODE SECTION 87450

In addition to the disqualification requirements previously discussed in Section I, state administrative officials as defined in section 87400 are disqualified from making, participating in, or using their official position to influence governmental decisions that directly relate to any contract where the official knows or has reason to know that any party to the contract is a person with whom the official, or any member of his or her immediate family, has engaged in any business transaction on terms not available to the public, regarding any investment or interest in real property, or the rendering of any goods or services totaling in value \$1,000 or more within the prior twelve months.

V.

PENALTIES, ENFORCEMENT AND PROSPECTIVE ADVICE UNDER THE POLITICAL REFORM ACT OF 1974

Government Code Sections 83114-83123 and 91000 Et Seq.

A. PENALTIES AND ENFORCEMENT

The Political Reform Act of 1974 (hereinafter, “Act”) provides administrative, civil and criminal penalties for its violation. In past years, the Fair Political Practices Commission (hereinafter, “FPPC”) and local district attorneys have brought numerous enforcement actions that have resulted in millions of dollars of fines. The Attorney General and the district attorney have concurrent jurisdiction over criminal violations at the state level. (§ 91001(a).)⁵ If you have a question about a potential violation of the Act you should contact the FPPC’s enforcement division (428 J Street, 7th Floor, Sacramento, CA 95814, (916) 322-6441 or 1-800-561-1861) or your local district attorney. You can also utilize the FPPC’s website at: <<http://www.fppc.ca.gov>>.

Civil prosecution may be pursued by various persons, including residents of the jurisdiction, depending upon the circumstances. (§ 91001 et seq.)

Administrative penalties are levied by the FPPC after a hearing or stipulation. (§ 83116.) Administrative penalties include a \$5,000 fine per violation, cease and desist orders, and orders to file reports, etc. (§ 83116.) The FPPC has the authority to bring administrative actions against both state and local officials. (§ 83123; see also *McCauley v. BFC Direct Marketing* (1993) 16 Cal.App.4th 1262, 1268-69 [certain provisions of the Act can be addressed only by an FPPC administrative action].)

Injunctive relief may be sought by the civil prosecutor or any person residing in the official’s jurisdiction. (§ 91003(a).) The court, in its own discretion, may require a plaintiff to file a complaint with the FPPC prior to seeking injunctive relief. In the event the action would not have been taken but for the conflict of interest, the court is empowered to void the decision. (§ 91003(b); *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983.) The civil prosecutor or any resident of the jurisdiction also may seek civil damages for violations of the Act. (§§ 91004 and 91005.) A plaintiff who prevails in an action brought pursuant to this section may be awarded attorney’s fees. (§ 91012.) Such fees are awarded pursuant to the standards set forth in Code of Civil Procedure section 1021.5, including the use of a multiplier. (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528; *Downey Cares v. Downey Community Development Com.*, *supra*, 196 Cal.App.3d at p. 997.) A prevailing defendant, however, may be awarded attorney’s fees only if the plaintiff’s suit is frivolous, unreasonable or without foundation. (*People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810, 816-19; see also *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 574-77.)

⁵All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

The Act also provides misdemeanor criminal sanctions for knowing or willful violations of the Act including fines of up to the greater of \$10,000 or three times the amount involved. (§ 91000.) Generally, a person convicted of violating the Act cannot be a candidate for elective office nor act as a lobbyist for four years after the conviction. (§ 91002.)

In addition, any person who purposely or negligently causes any other person to commit a violation, or aids and abets in the commission of a violation, may be subject to administrative sanctions. (§ 83116.5; *People v. Snyder* (2000) 22 Cal.4th 304.) There are specific exceptions for government and private attorneys who provide advice to persons with filing responsibilities under the Act. (Cal. Code Regs., tit. 2, § 18316.5.)

Generally, legislators and other elected state officers are exempt from administrative, civil and criminal penalties for violation of the disqualification requirement contained in Government Code section 87100; however, the Legislature adopted limited disqualification requirements for legislators and other elected state officers. These disqualification requirements are subject only to administrative enforcement by the FPPC. (§§ 87102.5-87102.8.)

Persons who violate the gift or honoraria limits set forth in Government Code section 89500 et seq. are subject to a civil action brought by the FPPC for up to three times the amount of the unlawful gift or honoraria. (§ 89521.) Violators are also subject to administrative sanctions, which include fines of up to \$5,000 per violation, but are exempt from the civil or criminal penalties contained in section 91000 et seq. (§ 89520.)

The statute of limitations for civil and criminal enforcement actions is four years from the date of violation. (§§ 91000(c) and 91011(b).) The statute of limitations for administrative actions brought by the FPPC is five years from the date of violation. (§ 91000.5.)

The chart which follows briefly describes who has authority to initiate enforcement proceedings under the Act, with respect to each type of proceeding (administrative, civil and criminal).

ENFORCEMENT AUTHORITY FOR THE POLITICAL REFORM ACT

| Type of Enforcement Action | Actions Against State Officials | Actions Against Local Officials |
|---|---|--|
| Administrative (§ 83115 et seq.) | The FPPC may impose administrative sanctions. | The FPPC may impose administrative sanctions. |
| Civil (§§ 91001(b), 91001.5, 91003 et seq.) | <p>The FPPC is the civil prosecutor of state officials.</p> <p>The AG is the civil prosecutor of the FPPC and its employees.</p> <p>If the civil prosecutor fails to act, individual residents may file civil suit.</p> | <p>The DA is the civil prosecutor.</p> <p>The elected city attorney of a charter city may act as a civil prosecutor of violations occurring within the city.</p> <p>If the civil prosecutor fails to act, individual residents may file a civil suit.</p> <p>The DA may authorize the FPPC to file a civil suit whenever an individual resident could file suit.</p> |
| Criminal (§§ 91001(a), 91001.5) | The AG and the DA have concurrent authority. | <p>The DA has authority.</p> <p>The elected city attorney of a charter city may act as criminal prosecutor of violations occurring within the city.</p> |

B. PROSPECTIVE ADVICE

Staff members at the FPPC will provide verbal or written advice on the Political Reform Act to assist officials in avoiding prospective violations of the law. Written advice can usually be obtained within 21 working days. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) The FPPC also may adopt formal published opinions. (§ 83114(a); Cal. Code Regs., tit. 2, § 18329.) These opinions usually require two commission hearings and two to six months to adopt.

Formal opinions under section 83114(a) provide the requester with complete immunity from the enforcement provisions of the Act so long as the requester provides the FPPC with all material facts and the official follows the FPPC's advice in good faith. Written advice is not a formal opinion nor a declaration of FPPC policy. Therefore, it may provide only "guidance" to persons other than the requestor. (Cal. Code Regs., tit. 2, § 18329(b)(7).)

Written advice pursuant to 83114(b) provides the requester only with immunity from enforcement actions brought by the FPPC itself, if the requestor committed the acts complained of either in reliance on the FPPC's advice or because the FPPC did not provide advice within section 83114's time limits. (§ 83114(b); Cal. Code Regs., tit. 2, § 18329.) "Informal assistance," as opposed to a formal opinion or written advice, rendered by the FPPC does not provide the requestor with the immunity set forth in either section 83114(a) or (b). (Cal. Code Regs., tit. 2, § 18329(c).)

The FPPC may be contacted in writing at 428 "J" Street, Sacramento, California 95814; by phone at (916) 322-5660; and on-line via the FPPC's website at <<http://www.fppc.ca.gov>>.

VI.

CONFLICTS OF INTEREST IN CONTRACTS

Government Code Section 1090 Et Seq.*

A. OVERVIEW

The common law prohibition against “self-dealing” has long been established in California law. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090⁶, which codifies the prohibition as to contracts, can be traced back to an act passed originally in 1851 (Stats. 1851, ch. 136, § 1, p. 522) and has been characterized as “merely express legislative declarations of the common-law doctrine upon the subject.” (*Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 597.)

Frequently amended in its details, the concept of the prohibition has remained unchanged. In fact, this office and the courts often refer to very early cases when discussing possible violations of this fundamental precept of conflict-of-interest law. (See, for example, *Berka v. Woodward* (1899) 125 Cal. 119.)

In 59 Ops.Cal.Atty.Gen. 604 (1976), this office specifically concluded that the Political Reform Act did not repeal section 1090 et seq. “but that the Political Reform Act will control over section 1090 et seq. where it would prohibit a contract otherwise allowable under section 1090 et seq.”

Section 1090 basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities. In *Thomson v. Call* (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of section 1090. The purpose of section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.” (*Id.* at p. 650.) The Court also stated:

. . . [T]he principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all of this in his own favor. [Citation.]

(*Id.* at p. 648; see also *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 542.)

*Selected statutory materials appear in appendix G (at p. 167).

⁶All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

.....

It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation.

(*Thomson v. Call* (1985) 38 Cal.3d at p. 648; emphasis in original; footnote omitted.)

.....

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity. (*Capron v. Hitchcock* (1893) 98 Cal. 427.)

(*Id.* at p. 649.)

B. THE BASIC PROHIBITION

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Any participation by an officer or an employee in the process by which such a contract is developed, negotiated and executed is a violation of section 1090. If no contract is involved, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists. A board member is conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract.

The prohibition applies to virtually all state and local officers, employees and multi-member bodies, whether elected or appointed, at both the state and local level. Section 1090 does not define when an official is financially interested in a contract. However, the courts have applied the prohibition to include a broad range of interests. The remote interest exception set forth in section 1091 enumerates specific interests which trigger abstention for board members but which do not prevent the board from making a contract. The interests set forth in section 1091.5 are labeled "non-interests" in that, once disclosed, they do not prevent an officer, employee or board member from participating in a contract.

Generally, any contract made in violation of section 1090 is void and cannot be enforced. In addition, an official who commits a violation may be subject to criminal, civil and administrative sanctions.

C. PERSONS COVERED

Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (*Thomson v. Call, supra*, 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel* (1974) 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533; 70 Ops.Cal.Atty.Gen. 271 (1987) [contract city attorney].) Beginning in 1986, section 1090 became applicable to school boards pursuant to Education Code section 35233. Section 1090 also applies to members of advisory bodies if they participate in the making of a contract through their advisory function. (82 Ops.Cal.Atty.Gen. 126 (1999).)

Board members are conclusively presumed to be involved in the making of all contracts under their board's jurisdiction. (*Thomson v. Call, supra*, 38 Cal.3d at p. 649.) With respect to all other public officials, it is a question of fact as to whether they were involved in the making of the contract.

The status of consultants is not entirely clear. This office's opinion in 46 Ops.Cal.Atty.Gen. 74 (1965) continues to represent our views concerning the applicability of Government Code section 1090 to consultants and independent contractors. In that opinion, we concluded that a consultant who performed a feasibility study could not compete for the resulting contract. That opinion hinged on our determination that the section 1090 prohibition against conflicts of interest by "officers and employees" applied to consultants and independent contractors exercising judgment on behalf of public entities. We subsequently ratified this decision in 70 Ops.Cal.Atty.Gen. 271 (1987). The particular issue of follow-on contracts by consultants of state agencies has been specifically addressed in section 10365.5 of the Public Contract Code which codifies the result in 46 Ops.Cal.Atty.Gen. 74, *supra*, albeit through a different statutory vehicle.

Independent contractors, who serve in positions that are frequently held by officers, or employees such as city attorneys, have also been subject to section 1090 in the past. (*Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App.4th 1271; 70 Ops.Cal.Atty.Gen. 271 (1987).) It has also been held that Government Code section 1090 applies to a special city attorney retained under contract. Such an attorney is an "officer and agent" of the city. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207.)

However, in recent years, several trial courts throughout the state have concluded that section 1090 does not apply to consultants and independent contractors because they are not in fact "employees." At least one appellate court has hinted at this possibility as well. (*NBS Imaging Systems, Inc. v. State Bd. of Control* (1997) 60 Cal.App.4th 328, fn.13.) Absent an authoritative appellate court decision, we continue to embrace our interpretation as representing a sound and appropriately broad application of section 1090.

D. PARTICIPATION IN MAKING A CONTRACT

Having determined that a public official is involved, the next issue is whether the decision in question involves a contract which was “made” in his or her official capacity. The use of the term “made” in the statute indicates that a contract must be finalized before a violation of section 1090 can occur. Once a contract is made, section 1090 would be violated if the official had participated in any way in the making of the contract. (See *People v. Sobel, supra*, 40 Cal.App.3d 1046.)

In *People v. Sobel, supra*, 40 Cal.App.3d 1046, 1052, the court outlined the broad reach of section 1090:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

In determining whether a decision involves a contract, one should refer to general contract principles. (84 Ops.Cal.Atty.Gen. 34 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (*People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass, supra*, 101 Cal.App.4th 1271.) Three situations that were not readily apparent have been analyzed by this office. In 78 Ops.Cal.Atty.Gen. 230 (1995), this office determined that a development agreement between a city and a developer was a contract for purposes of section 1090. (See also, 85 Ops.Cal.Atty.Gen. 34 (2002).) In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member’s spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse’s expenses and that the payment itself constituted a contract. Finally, this office concluded that a certificate of public convenience and necessity from a City to operate an ambulance service is not a contract but rather is in the nature of a license, and therefore is regulatory in nature. The same analysis applies to the rate schedule which regulates the prices that the ambulance company can charge its riders. (84 Ops.Cal.Atty.Gen. 34 (2001).)

Participation in a decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under section 1090. In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the city entered into a contract for construction and operation of a concession stand on a pier. Later, one of the owners was elected to the city council. Under the contract, the provider had an option to renew the contract and seek an adjustment of rates. The court concluded that exercise of this option would require the city council to affirm the contract and negotiate a rate structure. In so doing, the city would be making a contract within the meaning of section 1090. In 81 Ops.Cal.Atty.Gen. 134 (1998), this office opined that where an existing contract required periodic renegotiation of payment terms, the modification of such terms constituted the making of a contract. Likewise, sending the

payment issue to arbitration or merely allowing the existing terms to continue would also constitute the making of a contract.

With respect to the making of a contract, the court in *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, held that the test is whether the officer or employee participated in the making of the contract in his or her official capacity. The court defined the making of the contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (See also *Stigall v. City of Taft* (1962) 58 Cal.2d 565; *People v. Sobel, supra*, 40 Cal.App.3d at p. 1052.)

These, and similar interpretations, make it clear that the prohibition contained in section 1090 also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley, supra*, 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by merely disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126 (1999).)

If an official is a member of a board or commission that actually executes the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 645, 649.) This absolute prohibition applies regardless of whether the contract is found to be fair and equitable (*Thomson v. Call, supra*, 38 Cal.3d 633; *People v. Sobel, supra*, 40 Cal.App.3d 1046) or the official abstains from all participation in the decision. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201.)

Where the contract is not under the jurisdiction of the board member, the contract is not automatically prohibited by section 1090. (See, 81 Ops.Cal.Atty.Gen. 274 (1998) [where contracts of County Housing Authority Commission were independent from the County Board of Supervisors and consequently could employ a member of the board of supervisors as its executive director]; 85 Ops.Cal.Atty.Gen. 87 (2002) [where a city council member could contract with joint powers authority because it was independent of its city council members]; 21 Ops.Cal.Atty.Gen. 90 (1953) [where contracts of the City Treasurer were not under the supervision or control of the city council]; 3 Ops.Cal.Atty.Gen. 188 (1944) [where a head Court House gardener who owned a private nursery was not disqualified from selling nursery supplies to the county of which he was an employee because of the discretion vested in the county purchasing agent]; 17 Ops.Cal.Atty.Gen. 44 (1951) [where a County Supervisor was not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are let by Boards of School Trustees without control or supervision of the County Board of Supervisors].) The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency.

In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, the court held that a member of the board of a special district who applied for and was offered the position of district manager while still serving on the board violated section 1090. Similarly, in 84 Ops.Cal.Atty.Gen. 126 (2001), this office concluded that section 1090 prohibited a community college board of trustees from contracting with a member of the board to serve as a part-time or substitute instructor. In Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992), the issue concerned whether a water district could enter into an employment contract with a member of the board of trustees on the proviso that the individual would not be paid any compensation until he resigned his position on the board. The board member in question would disqualify himself from any participation in the board's decision. This office concluded that the proposed contract would violate Government Code section 1090 since board members are conclusively presumed to make all contracts made by the district. Once the board member retires, the district may enter into an employment contract with the former board member, so long as no discussions concerning such employment took place between the board member and his or her colleagues or staff prior to the date of retirement. See also Cal.Atty.Gen., Indexed Letter, No. IL 91-210 (February 28, 1991) (in which Government Code section 1090 was interpreted to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher). (See also Gov. Code, § 53227 [which prohibits an employee of a local agency from simultaneously serving on the legislative body of the local agency]; Ed. Code, § 35107(b) and 72103(b) [which specifically applies the same prohibition to school and community college employees].) These code sections were enacted in response to *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311 (in which a hospital employee was permitted to hold office as an elected member of the hospital board of directors).

Where one agency's decision to contract is subject to review and modification by another agency, this office concluded that both agencies were participating in the making of the contract. In 77 Ops.Cal.Atty.Gen. 112 (1994), a city airport commission awarded a contract for the construction of a new airport terminal. The design of the terminal also had to be approved by the city's art commission, and all modifications ordered by the art commission had to be made free of charge to the city. The question posed was whether the contract could be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission. The opinion concluded that a member of the firm who sat as a member of the art commission would have a financial interest in the contract because each modification ordered by the art commission would impose costs on the architectural firm which could not be recouped from the city. Accordingly, the opinion concluded that the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the art commission.

In *Stigall v. City of Taft, supra*, 58 Cal.2d 565, the court concluded that where a council member had been involved in the preliminary stages of the planning and negotiating process, but had resigned from the council prior to its vote on the contract, the council member had been involved in the making of the contract. In *City Council v. McKinley, supra*, 80 Cal.App.3d 204, 212, the court followed this reasoning and stated:

[T]he negotiations, discussions, reasoning, planning, and give and take which go beforehand in the making of a decision to commit oneself must

all be deemed to be a part of the making of an agreement in the broad sense [citation] If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

In 66 Ops.Cal.Atty.Gen. 156 (1983), this office concluded that county employees who proposed that their functions be accomplished through private consulting contracts were barred from contracting with the county to perform such services. This office stated:

We are told that the persons involved, while employees of the county, and as employees of the county, have provided input in the formulation of the contract. . . . By that participation in the give and take that went into such “embodiments” of the contract as the negotiations, discussions, reasoning, planning, and drawing of plans and specifications, the county employees had the opportunity to, and did bring their influence to bear on the ultimate contract itself. While no fraud or dishonesty may have been involved, we are nonetheless satisfied that in so doing they participated, not in their personal capacities but in their official ones as county employees, in the “making of the contract” within the meaning of section 1090.

(*Id.* at p. 160.)

(See also 63 Ops.Cal.Atty.Gen. 19 (1980) [where county officials were prohibited from bidding on surplus county land at a public auction conducted by the county because of participation in the land sale process in their official capacity].)

In 81 Ops.Cal.Atty.Gen. 317 (1998), this office concluded that a council member could not participate in the establishment of a loan program and then leave office and apply for a loan. In Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993), the issue was whether a former planning commissioner could contract with the city to perform consulting services in connection with revisions of the general plan. The policy decisions, including budgetary considerations, were discussed by the commission prior to the former member’s resignation. This office’s informal opinion concluded:

In short, the former commissioner was an active participant in the overall city policy decision to “contract-out” much of the general plan revision. Accordingly, he cannot now benefit from such participation. (*Cf.* 66 Ops.Cal.Atty.Gen. 156 [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

In *Santa Clara Valley Water Dist. v. Gross* (1988) 200 Cal.App.3d 1363, 1369-1370, the court concluded that participation in a statutorily mandated process in connection with the

sale of property through eminent domain did not constitute involvement in the making of a contract. In that case, a water district initiated eminent domain proceedings against a landowner who was a member of the water district’s board of directors. In order to recover litigation expenses, Code of Civil Procedure section 1250.410 requires the parties to file a final demand and offer respectively. Believing they were barred from participating in the demand and offer process by section 1090, the parties failed to file the required documents.

The court concluded that participation in the demand and offer process was mandated by statute and did not violate section 1090, and therefore refused to allow litigation expenses. The court stated:

Once a condemnation action has been filed, however, the property owner and his agency become adversaries, subject to the rules of court and civil procedure which govern the course of litigation. A settlement achieved pursuant to these rules can be supervised by the court and receive the imprimatur of court confirmation. Government Code section 1090 is directed at dishonest conduct and at “conduct that tempts dishonor” (*Thomson v. Call* (1985) 38 Cal.3d 633, 648 [214 Cal.Rptr. 139, 699 P.2d 316]); it has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.

.....

The Legislature [in § 1250.410] did not direct the parties to “apprise” each other or “communicate” with each other about an offer or demand. (*City of San Leandro v. Highsmith, supra*, 123 Cal.App.3d 146, 155.) Rather it directed that each file with the court, and serve upon the other, a formal offer and demand, as an absolute prerequisite to an award of attorney’s fees. This procedure is not the equivalent of negotiations between the parties and consequently does not run afoul of section 1090.

(*Santa Clara Valley Water Dist. v. Gross, supra*, 200 Cal.App.3d at pp. 1369-1370.)

Absent these or similar special procedures, a board may not enter into settlement negotiations with a board member with whom it is in litigation. This office concluded in opinion 86 Ops.Cal.Atty.Gen. 142 (2003) that a settlement agreement resolving litigation, involving issuance of a development permit, between a district and one of its board members would violate section 1090.

When an employee, rather than a board member, is financially interested in a contract, the employee’s agency is prohibited from making the contract only if the employee was involved in the contract-making process. So long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee’s duties or because the employee has disqualified himself or herself from all such participation) the employee’s agency is not prohibited from contracting with the employee or the business entity in which the employee is interested.

In 80 Ops.Cal.Atty.Gen. 41 (1997), firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity. In 63 Ops.Cal.Atty.Gen. 868 (1980), a real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal. (See Cal.Atty.Gen., Indexed Letter, No. IL 73-146 (August 29, 1973) [regarding state employee]; but see Pub. Contract Code, § 10410 [prohibiting contracts between state employees and state agencies]; see also Chapter VII of this pamphlet.)

E. PRESENCE OF REQUISITE FINANCIAL INTEREST

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the term “financial interest” is not specifically defined in the statute, an examination of case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that the definitions of the remote and noninterest exceptions should be consulted for guidance to determine what falls within the scope of the term “financial interests” as used in section 1090.

In *Thomson v. Call*, *supra*, 38 Cal.3d 633, 645, the court stated that the term financial interest included both direct and indirect interests in a contract. As an example of an indirect interest, the court cited *Moody v. Shuffleton* (1928) 203 Cal. 100, in which a county supervisor sold his business to his son in return for a promissory note secured by the business. Because the business helped to secure the value of the official’s mortgage, a conflict existed when county printing contracts were awarded to the son. The court also stated that an official who was a stockholder in a corporation had an indirect interest in the contracts of the corporation.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee of a contracting party; attorney, agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

Prior to 1963, section 1090 applied to all interests, not merely financial ones. However, since most reported cases prior to 1963 involved financial interests, these older cases still represent viable interpretations of the law. Even where these cases do not involve a financial interest, they are still instructive on the issue of whether there is a sufficient connection between the contract and the interest held by the official in order to bring the transaction under the coverage of the prohibition.

In *People v. Deysher* (1934) 2 Cal.2d 141, 146, the court stated that:

‘However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.’

(See also *People v. Honig*, *supra*, 48 Cal.App.4th at p. 315.)

The court went on to say that section 1090 attempted to prohibit any measure of duality in contractual situations because officials, as trustees of the public, may not exploit their public positions for private benefits. In *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565, 571, the court stated:

The legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided.

In *People v. Gnass*, *supra*, 101 Cal.App.4th 1271, 1298, the court indicated that:

[T]he certainty of financial gain is not necessary to create a conflict of interest. '[T]he object of the [statute] is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision. . . .' (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.) 'The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.' (*Honig*, *supra*, 48 Cal.App.4th at p. 325.)

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that there was no "reach-back period" (such as the 12-month period for income under the Political Reform Act) within the context of section 1090. There the financial interest in question was that of a supplier of goods or services, but the discussion regarding the "termination" of the interest would appear to apply to an employer or other source of income as well. The opinion concluded that only during the pendency of the business relationship was there a financial interest from which the official might benefit directly or indirectly. However, if the business relationship were not terminated in a manner that removed "the possibility of any personal influence, either directly or indirectly" the prohibition of section 1090 would remain in effect.

Below is a discussion of several decisions and opinions in which the public officials in question have possessed the requisite financial interest.

Complex multi-party transaction -- In the 1985 California Supreme Court case of *Thomson v. Call*, *supra*, 38 Cal.3d 633, the court found that a complex multi-party transaction involving the sale of property from a city council member through an intermediary corporation to the city constituted a violation of section 1090. The corporate intermediary obtained the land to convey to the city for use as a park and the corporation was to be issued a use permit for construction of a high-rise building on adjacent property. If the corporation failed to obtain the council member's property, the corporation was to pay to the city a sum of money with which it could acquire the land through eminent domain. Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, the section 1090 prohibition might not have been invoked. However, in *Thomson*, the court found that the purchase by the corporation of the council member's land was part of a pre-arranged

agreement with the city. Under these circumstances, the court concluded that the city council member was financially interested in the contract that conveyed the land to the city.

Shareholder insulated from contract payments -- In *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d 201, the court 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 county 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 benefitted by increased business, so did the official, despite the fact that the benefit was in some way indirect. (The court indicated that it did not have enough evidence to determine whether the interest was remote.)

In 84 Ops.Cal.Atty.Gen. 158 (2001), this office reached a similar conclusion. There, a city councilman owned 48 percent of the shares of an architectural corporation, with the remaining shares owned by three other licensed architects. The architectural corporation also leased its premises from the councilman. Under these circumstances, one of the other three architects may not establish a separate firm for the purpose of contracting with the city to provide architectural services utilizing the corporation's premises, employees, and equipment even if the corporation would bill the firm for its pro rata share of the rent, employees' services, and use of equipment, and the corporation would not share in the profits of the firm from the city's contracts. Under these circumstances, the opinion concluded that the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts and the corporation would likely benefit indirectly from the city's business.

In 86 Ops.Cal.Atty.Gen. 138 (2003), this office was asked whether it would violate section 1090 for a city council to enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit. Under the proposed agreement, the law firm would not receive any legal fees and would bear all litigation expenses normally borne by the client. The opinion pointed out that this arrangement could give rise to potentially significant costs to the firm. In these circumstances, the city's interests and the firm's interests might diverge. For example, the city might wish to litigate swiftly and aggressively, using the firm's best qualified senior attorneys and pursuing an elaborate discovery plan. The law firm, on the other hand, might wish to minimize its costs at the outset of the litigation and spread them over a longer period of time. Also, depending upon such factors as staff salaries, overhead, and the needs of its other clients, the law firm might prefer to assign fewer attorneys to the city's case and engage in less discovery. Depending upon initial court rulings, it might be in the interests of the law firm to enter into settlement negotiations which might not be in the best interests of the city.

The contract could also bring indirect economic gain to the law firm in that success in the litigation could be financially advantageous to the law firm and inure to the council-member's personal benefit by enhancing the value of his interest in the firm. Accordingly, the opinion concluded that the council member had a financial interest in the contract and that such an arrangement would violate section 1090.

Contingent payment -- In *People v. Vallerga, supra*, 67 Cal.App.3d 847, the court 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. The court found that the requisite financial interest existed where the contracting entity is in a position to render actual or potential pecuniary gain to the official by virtue of the award of the contract.

Primary shareholder in contracting party -- In *People v. Sobel, supra*, 40 Cal.App.3d 1046, section 1090 was applied to remedy a classic self-dealing situation. There, a city employee, involved in purchasing books, awarded contracts to a corporation in which, unknown to the city, he and his wife were the primary shareholders.

Creditor-debtor relationship -- In *People v. Watson* (1971) 15 Cal.App.3d 28, the court concluded that a creditor-debtor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody v. Shuffleton, supra*, 203 Cal. 100.) The defendant was a harbor commissioner whose corporation had loaned money to a corporation which subsequently was attempting to negotiate a lease with the commission. While the loan was still outstanding, defendant voted as a commissioner to approve the proposed lease, thereby violating section 1090.

Spousal property -- An official also has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655.) In 78 Ops.Cal.Atty.Gen. 230 (1995), this office concluded that a city council member had a financial interest in a development agreement where the council member's spouse was a partner in a law firm that represented the contracting developer on matters unrelated to the contract. Since the spouse's property is attributed to the official, exemptions which would be applicable if the official possessed the interest directly are also attributed to the spouse's property. (See section I of this Chapter for a discussion of remote interests.)

In 85 Ops.Cal.Atty.Gen. 34 (2002), this office concluded that where a city proposed to enter into a development agreement with a developer, a senior staff member of the city may not participate in the negotiating and drafting of the development agreement where the staff member's spouse is employed by a consulting firm that provides outreach services to the developer on a yearly retainer even though the spouse has no ownership interest in the firm, he will not work on the city's project, and his income will not be affected by the outcome of the development agreement or project. The spouse of the city staff member was one of the people in the consulting firm that provided services to the developer. As a result, the spouse, and hence the public employee, was found to have a financial interest in the contract by virtue of being a supplier of services to the contracting party.

In 69 Ops.Cal.Atty.Gen. 255 (1986), this office discussed remote interest and the application of the exemption in section 1091.5(a)(6) to a school board member and a teacher who were married. (See 65 Ops.Cal.Atty.Gen. 305 (1982) [regarding an interested superintendent's participation in labor negotiations]; see also section J, subsection (6) of this chapter for further discussion.)

In 69 Ops.Cal.Atty.Gen. 102 (1986), this office discussed participation of a school board member in a collective bargaining agreement with the union which represented the member's spouse who was a tenured teacher.

In 75 Ops.Cal.Atty.Gen. 20 (1992), section 1090 was interpreted to prohibit a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. Just as a board may not employ a director's spouse without violating section 1090, neither may it pay the travel expenses of a director's spouse. The opinion further concluded that there was no direct and substantial public purpose to be served by paying the travel and incidental expenses of a director's spouse. Therefore, payment of such expenses would also represent an unconstitutional expenditure of public funds. (See also 84 Ops.Cal.Atty.Gen. 131, 132, fn. 2 (2001); 81 Ops.Cal.Atty.Gen. 169, 171-172 (1998).)

Public officers to receive commission -- In 66 Ops.Cal.Atty.Gen. 376 (1983), this office concluded that the terms of the compensation package for the city attorney and other city personnel made them financially interested in all land development contracts to which the city was a party. Compensation for these officials was tied to increases in land value, based on the approval of land developments. The opinion pointed out that in approving land developments, a number of policy issues, aside from land value, must be considered, e.g., the ratio between commercial and residential development, density factors, etc. In basing compensation solely on land values, there was an incentive to consider only land value factors.

Employee of contract provider -- In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that a local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.

F. TEMPORAL RELATIONSHIP BETWEEN FINANCIAL INTERESTS AND THE CONTRACT

The essence of the 1090 prohibition is to prevent self-dealing in the making of public contracts. In determining whether self-dealing has occurred, the timing of events may be crucial. Factors such as the date that the official assumed or resigned from office, the date the contract was executed and the duration of the contract are important and may prove to be dispositive.

Thus, an official who has contracted in his or her private capacity with the government before the official is elected or appointed does not violate the section, and the official may continue in his or her position as such contracting party for the duration of that contract. The official's election or appointment does not void it. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 176 (2002); 84 Ops.Cal.Atty.Gen. 34 (2001).) However, when the

time comes for the contract to be extended, amended or renegotiated, the official faces a new set of problems.

In the case of a board member, the official must resign from office or eliminate the private interest to avoid the proscription of section 1090. (*City of Imperial Beach v. Bailey, supra*, 103 Cal.App.3d 191; *Finnegan v. Schrader, supra*, 91 Cal.App.4th 572; see also Cal.Atty.Gen., Indexed Letter, No. IL 92-407 (June 2, 1992); Cal.Atty.Gen., Indexed Letter, No. IL 75-170 (July 29, 1975).) A new contract between the board member and the city, county or district, which the board member represents, may not be executed. (But see Pub. Contract Code, §§ 10410, 10411 [regarding state employees discussed in Chapter VII of this pamphlet].)

However, simply resigning a public post may not cure a conflict in all situations. Timing is essential. In *Stigall v. City of Taft, supra*, 58 Cal.2d 565, the court ruled that a public official may not resign from office at the last minute in order to take private advantage of a contract where the official had participated in the formation of the contract in his or her public capacity. In that case, a city council member owned a plumbing business which was awarded a plumbing subcontract in connection with construction of a city civic center. The official had taken part in the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids for the civic center project. The court held that this council member had participated in the “making” of the contract within the meaning of section 1090, even though the official resigned from office before the contract was finally awarded. (See *City Council v. McKinley, supra*, 80 Cal.App.3d 204; 66 Ops.Cal.Atty.Gen. 156 (1983); 81 Ops.Cal.Atty.Gen. 317 (1998); Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (January 26, 1993).)

Since board members are conclusively presumed to have made all contracts under their jurisdiction, it is possible that a court could conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member’s time in office.

In the case of an employee, a contract may be renegotiated, so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract. When a contractor serves as a public official (e.g., a city attorney) renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding arising concerning whether the contractor’s statements were made in the performance of the contractor’s public duties or in the course of the contractual negotiations. However, in the absence of special circumstances, the fact that a contract city attorney’s advice to initiate or defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090.

G. EFFECT OF SPECIAL STATUTES

Some statutes may contain special provisions which alter or eliminate the general rule set forth in section 1090 in a specific situation. For example, Education Code section 35239

provides that governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.

For special rules concerning hospitals and health care districts, see Government Code section 37625 (municipal hospitals), Health and Safety Code section 1441.5 (county hospitals), and Health and Safety Code section 32111 (health care districts).

It should be noted that such special statutes may not take precedence over the Political Reform Act unless they are adopted in accordance with the procedures set forth in section 81013.

H. GENERALLY, A CONTRACT MADE IN VIOLATION OF SECTION 1090 IS VOID AND UNENFORCEABLE

In addition to the proscription against officials making contracts in which they have a financial interest, courts have held that a contract made in violation of section 1090 is void. Any payments made to the contracting party, under a contract made in violation of section 1090 must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract. (*Thomson v. Call, supra*, 38 Cal.3d at p. 650; *Finnegan v. Schrader, supra*, 91 Cal.App.4th 572.)

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. (See § 1092.5 for exception concerning good faith parties involved in the lease, sale or encumbrance of real property.)

Despite the wording of the section “may be avoided,” case law has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable. (*Thomson v. Call, supra*, 38 Cal.3d 633; *People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931.) However, in *Marin Healthcare District v. Sutter* (2002) 103 Cal.App.4th 861, the court refused to void a contract where the legal action challenging the contract did not come within an applicable statute of limitations. Thus, the *Marin* decision appears to have the effect of making such contracts voidable and not void from the inception. (The court failed to indicate which statute of limitations applies to section 1090 violations.) Courts often give public policy reasons for the holding that contracts made in violation of section 1090 are void (see *City of Oakland v. California Const. Co., supra*, 15 Cal.2d 573), and note the general rule that a contract made in violation of an express statutory provision is always void. (*Stockton P. & S. Co. v. Wheeler, supra*, 68 Cal.App. 592; *Smith v. Bach* (1920) 183 Cal. 259.) In *Stockton P. & S. Co., supra*, the court said, ““where a statute provides a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.”” (*Id.*, at p. 601.)

A contract can be rendered void even if made without the participation of the official with the conflicting interest if he or she is a member of the contracting body. (§ 1092; *Thomson v. Call, supra*, 38 Cal.3d 633.) Contracts made in violation of section 1090 are unenforceable, and no recovery will be afforded the contracting party for services rendered under the contract. (*Thomson v. Call, supra*, 38 Cal.3d 633; *County of Shasta v. Moody*

(1928) 90 Cal.App. 519, 523-524.) In *County of Shasta, supra*, the court said, “[t]he contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels.” (*Id.*, at p. 523; see also *County of San Diego v. Cal. Water and Telephone Co.* (1947) 30 Cal.2d 817, 830.)

In addition to the contract being void under section 1092, section 1095 provides that payment of any warrant or other evidence of indebtedness against the state, city, or county which has been purchased, sold, received, or transferred contrary to section 1090 or section 1093 is specifically disallowed. Any claim to payment pursuant to a contract, made in violation of section 1090, is effectively rendered worthless by this section.

In *Thomson v. Call, supra*, 38 Cal.3d 633, the court stated:

Clearly, no recovery could be had for goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflict-of-interest statutes. (*Moody v. Shuffleton, supra*, 203 Cal. 100; *Berka v. Woodward, supra*, 125 Cal. at pp. 121, 123-124; *Domingos v. Supervisors of Sacramento Co.* (1877) 51 Cal. 608; *Salada Beach etc. Dist. v. Anderson* (1942) 50 Cal.App.2d 306, 310 [123 P.2d 86]; *Miller v. City of Martinez, supra*, 28 Cal.App.2d at pp. 370-371; *Hobbs, Wall & Co. v. Moran, supra*, 109 Cal.App. at p. 320; *County of Shasta v. Moody, supra*, 90 Cal.App. at pp. 523-525.) Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. (*Berka, supra*, at pp. 123-124; *Miller, supra*, at p. 370; *County of Shasta, supra*, at pp. 523-524.)

...

.....

Mitigating factors--such as Call’s disclosure of his interest in the transaction, and the absence of fraud--cannot shield Call from liability. Moreover, the trial court’s remedy--allowing the city to keep the land and imposing a money judgment against the Calls--is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.

(*Id.* at pp. 646-647, 650.)

In *Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533, a city attorney was required to forfeit a finder’s fee which he received in connection with a contract between the city and a private law firm.

In *Finnegan v. Schrader, supra*, 91 Cal.App.4th 572, 583, in which a member of a board applied for and was hired as the board’s executive officer without first resigning, the court stated:

It is settled law that where a contract is made in violation of section 1090, the public entity involved is entitled to recover any compensation that it has paid under the contract without restoring any of the benefits it has received. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 646-647; see also Gov. Code, § 1092.) The contract is against the express prohibition of the law, and “. . . courts will not entertain any rights growing out of such a contract, or permit a recovery upon quantum meruit or quantum valebat.” (*Thompson v. Call, supra*, 38 Cal.3d at p. 647, quoting *County of Shasta v. Moody* (1928) 90 Cal. App. 519, 523-524 [265 P. 1032], italics omitted.) This principle applies without regard to the willfulness of the violation. ‘A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract.’ (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 538 [49 Cal.Rptr.2d 676].)

(*Finnegan v. Schrader, supra*, 91 Cal.App.4th at p. 583.)

I. REMOTE INTERESTS OF MEMBERS OF BOARDS AND COMMISSIONS

1. The Exception And Its Operation

The remote interest exception applies only to members of multi-member bodies; it does not apply to individual decision makers or employees. When a board member has a remote interest, it means that the board member may disqualify himself or herself from any participation in the making of the contract and permit the remainder of the body to decide all issues involved in its making. If a member of a board has an interest that is not either a remote interest or a noninterest (see *post* section J of this chapter), the contract may not be made unless it is subject to the rule of necessity.

It is to be noted that “remote” always refers to the private interest an official has in the contract. The official’s public interest either exists or it does not. An official whose interest falls into one of the “remote interest” categories (see discussion below) must, however, (1) disclose the official’s interest to his or her agency, board, or body and (2) have it noted in the official records of that body. An official who intentionally fails to disclose the existence of a remote interest before action is taken on the contract in question would violate section 1090 and would be subject to criminal prosecution. (See discussion of sanctions, below.) However, such a violation would not void the contract unless the private contracting party knew of the official’s remote interest at the time of contracting. (§ 1091(d).)

When an official claims a remote interest, the board or agency may take action on the sale, purchase, or other contract involved if it acts in good faith and if the vote to authorize, approve, or ratify is sufficient without counting the vote or votes of those with remote interests. The provision that permits the action to be taken, without counting the interested official’s vote, has been interpreted by this office to require complete disqualification of the interested officials. (78 Ops.Cal.Atty.Gen. 230, 237-238 (1995); 67 Ops.Cal.Atty.Gen. 369, 377, fn. 8 (1984); 65 Ops.Cal.Atty.Gen. 305 (1982).) If an official with a remote interest in a contract fails to disqualify himself

or herself or if the official influences or attempts to influence a colleague's vote on the matter, the official may not enjoy the benefit of the remote interest exception. (§ 1091(c).)

The term "remote" has a special statutory meaning in the context of section 1090 et seq. It is a term of art having an assigned meaning that does not always square with its "common" meaning.

The remote interest exception is to be interpreted narrowly. (*Eldridge v. Sierra View Local Hospital District* (1990) 224 Cal.App.3d 311, 324.) We are to construe narrowly the exceptions to the prohibition of section 1090 so as not to extend their reach to situations the Legislature did not manifestly intend. (See *City of National City v. Fritz* (1949) 33 Cal.2d 635, 636; 81 Ops.Cal.Atty.Gen. 169, 174 (1998).)

2. Definition Of Remote Interests

"Remote interests" are carefully defined in the statutes. Set forth below is a brief description of the remote interest exceptions.

a. Officer or Employee of a Nonprofit Corporation

An officer or employee of a nonprofit corporation has only a remote interest in the contracts, purchases, and sales of that corporation. (§ 1091(b)(1).) This means that a board that includes a member who is an officer or employee of a nonprofit corporation may nevertheless enter into a contract with that nonprofit corporation so long as the interested member avoids all participation in the making of the contract and discloses his or her interest which is noted in the public entity's official records. (85 Ops.Cal.Atty.Gen. 176 (2002).) Such a contract might involve the provision of services or the making of a grant to the nonprofit. (85 Ops.Cal.Atty.Gen. 176, *supra*.)

By adopting this exception, the Legislature made it clear that corporate officers have a financial interest in their corporations even if the corporations are nonprofit. This exception indicates that an official can legally, under section 1090, have a financial interest even though the official does not have a personal interest in the contract. (See also § 1091.5(a)(8) concerning "noncompensated officers" of specified tax-exempt corporations.)

b. Employee or Agent of a Private Contracting Party

An employee or agent of a private contracting party may have only a remote interest in its contracts when (1) the private party has 10 or more other employees; (2) the official/employee has been an employee or agent of that party for at least three years; (3) the officer owns less than 3 percent of the shares of stock of the contracting party; (4) the employee or agent is not an officer or director of the contracting party and (5) the employee or agent did not directly participate in formulating the bid of the contracting party.

Some latitude is allowed in computing the three-year period, to permit an employee of a business, which has gone through a reorganization or some other metamorphosis, to count time employed before the change, as long as the “real or ultimate ownership of the contracting party” remains substantially unchanged. “Real or ultimate ownership” is further defined to include “stockholders, bondholders, partners, or other persons holding an interest. . .” (§ 1091(b)(2));

A person is an agent of the contracting party only if an agency relationship has been created authorizing the person to represent the principal in specified contexts. (See Civ. Code, § 2295; *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d 201; 85 Ops.Cal.Atty.Gen. 176 (2002).)

c. Employees or Agents; Special Contracts

Section 1091(b)(3) provides that an official who is an employee or agent of a contracting party has a remote interest in the contract if all of the enumerated factors set forth in the subsection are present. (1) The official must be an officer in the local agency located in a county with a population of 4,000,000 or less; (2) The contract must be competitively bid [and not for personal services], and the contracting party must be the lowest bidder; (3) The official must not hold a primary management position with or ownership interest in the contracting party, and must not be an officer or director of the contracting party; (4) The official may not have directly participated in formulating the bid of the contracting party; and (5) The contracting party must have at least 10 other employees.

d. Parent

A parent has only a remote interest in the earnings of his or her minor child for personal services. (§ 1091(b)(4).)

e. Landlord or Tenant

A landlord or tenant of a contracting party has a remote interest in the contracts of that party. (§ 1091(b)(5).) Formerly, the landlord/tenant relationship had been held to create an interest within the meaning of section 1090. (*People v. Darby* (1952) 114 Cal.App.2d 412.)

f. Attorney, Stockbroker, Insurance or Real Estate Broker/Agent

Under specified conditions set forth in § 1091(b)(6), the remote interest exception may apply to:

- the attorney of a contracting party

- 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/broker, or real estate agent/broker.

The remote interest exception applies when the individual has a 10% or greater interest in the law practice, or firm, stock brokerage firm, insurance firm, or real estate firm but when the individual will receive no remuneration, consideration, or commission as a result of the contract.

Thus, if both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may disqualify himself or herself from participating in the making of the contract, and the remaining members of the board would be free to enter into the contract. (Attorneys and agent/brokers who have less than a 10-percent ownership interest in their firm and receive no compensation have a noninterest, see 1091.5(a)(10).)

In 78 Ops.Cal.Atty.Gen. 230 (1995), a city council member was found to have an interest in the client of a law firm in which his spouse was a partner. However, since the representation was on matters unrelated to the contract, the remote interest exception applied to the spouse's interest as attributed to the official. This opinion was issued prior to the addition of the 10-percent ownership provision in § 1091(b)(6).

g. Member of a Nonprofit Corporation Formed Under the Food and Agricultural Code or Corporations Code

A special designation of remote interest is given to a member of a nonprofit corporation formed under either the Food and Agricultural Code or Corporations Code for the sole purpose of selling agricultural products or supplying water. (§ 1091(b)(7).)

h. Supplier of Goods and Services

An official has only a remote interest in a party that seeks to contract with the official's government agency when the official has been a supplier of goods or services to the contracting party for at least five years prior to the official's election or appointment to office. (§ 1091(b)(8); 86 Ops.Cal.Atty.Gen. 118 (2003).) In 85 Ops.Cal.Atty.Gen. 176 (2002), this office opined on a situation in which a council member had provided services in connection with a single project for more than five years, but for less than five years with the current contracting party. The opinion of this office concluded that the five-year requirement for this exemption may not be met by totaling the time the council member has provided subcontracting services on the project; rather, the official must have provided goods or services to the contracting party in question for the requisite period of time. (See *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d at pp. 217-218.)

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that the five-year period ran from the board member's most recent term, as opposed to the initial term. Thus, a board could enter into an agreement with a business firm that purchases goods and services from a board member who has been a supplier of goods and services to the firm for at least five years prior to the commencement of his current term of office so long as the board member properly disqualified himself or herself from all aspects of the contract-making process.

i. Party to a Land Conservation Contract

An official who enters into a contract or agreement under the California Land Conservation Act of 1965 (The Williamson Act) is deemed to have only a remote interest in that contract for the purposes of section 1090. (§ 1091(b)(9).) This allows land-owning supervisors to enter into such contracts with their own counties in accordance with the purpose of the Land Conservation Act. But note Cal.Atty.Gen., Indexed Letter, No. IL 73-197 (November 9, 1973) (in which this office advised that county supervisors who had previously made land conservation contracts were ineligible to vote on a motion to abolish future use of the Land Conservation Act in their county because of the common law prohibition against conflict of interest).

j. Director or 10-percent Owner of Bank or Savings and Loan

An official who is a director, or holds a 10-percent ownership interest or greater in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091(b)(10).) (For officers, employees and persons holding less than a 10-percent ownership interest, see 1091.5(a)(11); for competitively bid banking contracts, see 1091.5(b).)

It should be noted here that a private loan can, however, create an interest which is not remote. In *People v. Watson, supra*, 15 Cal.App.3d 28, the court determined that a loan by a corporation, controlled by a public official, to another corporation created a financial interest for the official in the contract activities of the second corporation.

k. Employee of a Consulting, Engineering, or Architectural Firm

An engineer, geologist, or architect has a remote interest in a consulting, engineering, or architectural firm so long as he or she does not serve as an officer, director, or in a primary management capacity. (§ 1091(b)(11).)

l. Housing Assistance Contracts

Subsection (b)(12) of section 1091 provides a limited exception from the 1090 prohibition in connection with housing assistance contracts. This

exception provides that an elected officer has a remote interest in a housing assistance contract, which is entered into pursuant to section 8 of the United States Housing Act of 1937, provided that the officer was elected after November 1, 1986, and the contract was in existence prior to the officer's assumption of office. The exemption for housing assistance contracts extends only to the renewal or extension of an existing tenant's contract or to new tenants, where the unit was previously under a housing assistance contract and the rental vacancy rate for the jurisdiction is less than five percent.

m. Salary or Payments from Another Government Entity

When a member of a board is receiving salary, per diem, or reimbursement for expenses from another government entity, the board member has a remote interest in the contracts of that other government entity. When the contract does not involve the department that employs the board member, the board member has a noninterest pursuant to section 1091.5(a)(9). (See section J, subsection 9 of this chapter.)

In 83 Ops.Cal.Atty.Gen. 246 (2000), this office concluded that a city council, one member of which is a deputy sheriff, may enter into a contract with the sheriff to provide police services to the city, so long as the deputy sheriff discloses the interest to the city council which is noted in its official records and the deputy sheriff completely abstains from any participation in the matter.

This exception cannot be used to permit a member of a board to enter into a contract with his or her own board.

n. Shares of a Corporation When the Shares Were Derived from Employment

When a person owns less than 3 percent of the shares of a contracting party that is a for-profit corporation, he or she has a remote interest in the corporation provided that the ownership of the shares derived from the person's employment with that corporation. (§1091, subd. (b)(14), as amended by Stats. 2003, ch. 701, effective January 1, 2004.)

J. NONINTERESTS

Section 1091.5 delineates situations which might technically create a conflict 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, noninterest do not require abstention or, except in very limited circumstances, disclosure.

However, it must be remembered that an interest which is a noninterest under section 1091.5 might still create an interest for an official under the terms of the Political Reform Act. That

Act's provisions must be consulted before proceeding with any transaction in which an official may have a conflict of interest since, by its own terms, it supersedes other conflict-of-interest legislation where inconsistencies exist. (§ 81013.)

The interests which fall into the section 1091.5 exception are as follows:

1. Corporate Ownership And Income

An official has a noninterest in a business corporation, in which he or she owns less than three percent of its shares, as long as the official's total annual income from dividends and stock dividends from the corporation amounts to less than five percent of his or her total annual income and any other income he or she receives from the corporation also amounts to less than five percent of his or her total annual income. In other words, it is a three-part test, and the official who fails any of the three parts cannot qualify for the noninterest exemption with regard to that corporation. (§ 1091.5(a)(1).)

2. Reimbursement Of Expenses

An official has a noninterest in reimbursement for his or her actual and necessary expenses incurred in the performance of his or her official duties. (§ 1091.5(a)(2).) However, this exception does not include the expenses of an official's spouse. (75 Ops.Cal.Atty.Gen. 20 (1992).)

3. Public Services

An official has a noninterest in the receipt of public services provided by his or her agency or board as long as he or she receives them in the same manner as if he or she were not a public official. (§ 1091.5(a)(3).)

In 81 Ops.Cal.Atty.Gen. 317 (1998), this office analyzed whether a city-established small business loan program was the type of public service exempted by section 1091.5(a)(3). Our opinion concluded that section 1091.5(a)(3) applies to "public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public. (See 80 Ops.Cal.Atty.Gen. 335, 338 (1997).)" (*Id.* at p. 320.) The opinion concluded that obtaining a government loan was not a public service within the meaning of the exemption in subdivision (a)(3) because it involved the exercise of discretion to determine the recipient of the service.

4. Landlords And Tenants Of Governments

Public officials who are landlords or tenants of the local, state, or federal government or any arm thereof, have a noninterest in the government entities contracts unless the

subject matter of the contract is the very land for which the official is either the landlord or tenant. In the latter case, the official has a remote interest rather than a noninterest, and is subject to the provisions of section 1091. (§ 1091.5(a)(4).)

5. Public Housing Tenants

A tenant in public housing, created pursuant to the provisions of the Health and Safety Code, has a noninterest in agreements regarding that housing if he or she is serving as a member of the board of commissioners overseeing it. This provision was passed in response to the situation illustrated in Cal.Atty.Gen., Indexed Letter, No. IL 70-64 (April 3, 1970) (in which a public housing tenant who was also a member of the Housing Authority Commission was advised he or she would have a remote interest in most of the regulatory activities of the commission and would have to abstain from participating in many decisions pursuant to section 1091, thus making his or her appointment almost a nullity). The subsequent passage of this subsection shows clear legislative intent that public housing tenants are to be allowed to serve as housing authority commissioners. The exemption was extended further in 1975 to a tenant serving on a community development commission. (§ 1091.5(a)(5).)

6. Spouses

A noninterest exists when both spouses in a family are public officials. One spouse has a noninterest in the other's office holding if it has existed for at least one year prior to his or her election or appointment to office. (§ 1091.5(a)(6).)

In *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, the court narrowly construed the exception to mean that one spouse could retain his or her employment even though the other spouse was a member of a board that participated in the employment contract so long as the terms of the employment did not change. Thus, there could be no promotion or similar change in status.

Pursuant to section 1091.5(a)(6), this office concluded in 69 Ops.Cal.Atty.Gen. 255, *supra*, that the spouse of a school board member could have his or her teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position.

The board of trustees of a community college district may not approve a selective reclassification of a classified employee's position if the employee's spouse is a member of the board of trustees and the reclassification makes the employee eligible for an increase in salary. (84 Ops.Cal.Atty.Gen. 175 (2001).) Similarly, the spouse of a member of a school board may not be hired by the district, whether as a substitute teacher or in any other employment capacity. (80 Ops.Cal.Atty.Gen. 320 (1997).)

In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office concluded that the "rule of necessity" permitted a school district to contract on an annual basis with a tenured teacher who was the spouse of a member of the school district board, until the board member

could qualify for an exemption under section 1091.5(a)(6). Pending qualification, this office concluded that the board member was prohibited from participating in the collective bargaining agreement. The “rule of necessity” might not have been applicable had the spouse not been a tenured teacher who, barring special circumstances, was required to be offered a new contract annually.

In 65 Ops.Cal.Atty.Gen. 305, *supra*, this office reached a similar conclusion with respect to a superintendent who was interested in his or her spouse’s school employment. However, because the superintendent is an individual officer rather than a member of a board, the rule of necessity permits both the making of the contract and the superintendent’s participation in its making.

7. Unsalaries Members Of Nonprofit Corporations

A noninterest exists when a public official is a nonsalaried member of a nonprofit corporation provided the official’s interest is disclosed to the body or board at the time the contract is first considered and is noted in its official records. (§ 1091.5(a)(7).)

Although there are no cases or opinions concerning application of this section, this office believes that the reference to “members” refers to persons who constitute the membership of an organization rather than to persons who serve as members of the board of directors of such organizations. (See Legislative History, Stats. 1977, ch. 706 (Sen. Bill No. 711).) For the exception to apply, the person, who is a member of the organization, may not simultaneously hold a salaried position with the organization.

(See §§ 1091(b)(1) and 1091.5(a)(8) concerning “officers” as opposed to “unsalaried members” of nonprofit corporations.)

8. Noncompensated Officers Of Tax Exempt Corporations

A noninterest exists when a public official is a noncompensated officer of a nonprofit, tax-exempt corporation which, as a primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. Such interest, if any, must be noted in the official records of the public body. An officer is noncompensated even though he or she receives reimbursement for travel or other actual expenses incurred in performing the duties of his or her office. (§ 1091.5(a)(8).) For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra.

(Compare with § 1091(b)(1) concerning “officers of nonprofit corporations” and § 1091.5(a)(7) concerning “unsalaried members of nonprofit corporations.”)

9. Contracts Between Government Agencies

Subdivision (a)(9) of section 1091.5 deals expressly with contracts between two public agencies. It provides that an officer or employee of one government agency is not interested in the contracts of the other government agency unless the contract directly involves the department that provides the salary, per diem or reimbursement to the officer or employee in question. The interest must be disclosed to the board when the contract is considered, and the interest must be noted in its official record.

In 85 Ops.Cal.Atty.Gen. 115 (2002), this office evaluated whether a deputy county counsel, who was elected to a city council, could participate in negotiations on a contract with the county to provide law enforcement services to the city. This office concluded that the city council member was covered by the noninterest exception of section 1091.5(a)(9) because the contract between the city and the county did not involve a contract with the County Counsel's Office (i.e. the department that employed the council member).

If the contract had involved the department that employed the council member, the official would have had a remote interest in the contract of the employer pursuant to section 1091(b)(13).

10. Attorney, Stockbroker, Insurance Or Real Estate Broker/Agent

Under specified conditions set forth in section 1091.5(a)(10), the noninterest exception may apply to:

- the attorney of a contracting party
- 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/broker, or real estate agent/broker.

For the noninterest exception to apply, two conditions must be present. First, these individuals may not receive any remuneration, consideration, or a commission as a result of the contract. Second, these individuals must have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

If both of these conditions are present, a member of a board who is an attorney of a contracting party, or an agent/broker of a contracting party may participate in the making of the contract. (For attorneys and agent/brokers who have more than a 10-percent ownership interest in their firm, see § 1091(b)(6).)

11. Officers, Employees And Owners Of Less Than 10 Percent Of A Bank Or Savings And Loan

A government official who also is an officer or employee, or who owns less than 10 percent of a bank or savings and loan, has a noninterest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091.5(a)(11).) A narrower exemption relating only to competitively bid contracts is set forth in section 1091.5(b), and appears to be subsumed within the exemption added to section 1091.5 in subdivision (a)(11). (For directors or persons holding more than a 10-percent ownership interest, see § 1091(b)(10).)

12. Nonprofit Organization Supporting Public Resources

An officer, director, or employee has a noninterest in the contracts of a nonprofit, tax-exempt corporation where the corporation has as one of its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, and where the officer, director or employee is acting on behalf of the corporation pursuant to an agreement between the corporation and a public agency to provide services related to such resources.

K. SPECIAL EXEMPTION FOR SUBDIVISION OF LAND; LOCAL WORKFORCE INVESTMENT BOARDS; COUNTY CHILDREN AND FAMILIES COMMISSION

1. Subdivision Of Land Permitted

Section 1091.1 provides a special exemption from the prohibition of section 1090 for public officials who must deal with state and local government entities regarding subdivision of land which they own. This section provides that such an official may subdivide lands which he or she owns, or has an interest in, without violating section 1090. He or she must, however, fully disclose the nature of his or her interest in such lands to the body which has jurisdiction over his or her subdivision (§ 1091.1(a)), and abstain from voting on any matter concerning it (§ 1091.1(b)).

The Subdivision Map Act allows a county to require subdividers to make certain public improvements to benefit future development. When such improvements are mandated, the law also requires that the owner be reimbursed for the costs of the improvements designed to benefit others. In 81 Ops.Cal.Atty.Gen. 373 (1998), this office concluded that the exception in section 1091.1 could be used to accomplish the reimbursement.

2. Local Workforce Investment Boards

Section 1091.2 provides that section 1090 does not apply to any contract or grant made by local workforce investment boards established pursuant to the federal Workforce Investment Act of 1998, unless both of the following conditions are met:

- a. The contract or grant directly bears on services to be provided by any member of a local workforce investment board or the entity the member represents, or financially benefits the member or the entity which the member represents.
- b. The member fails to recuse himself or herself from making, participating in making, or any way attempting to use his or her official position to influence a decision on the grant or grants.

3. County Children and Families Commission

Section 1091.2 provides that section 1090 does not apply to any contract or grant made by a county children and families commission established pursuant to the California Children and Families Act of 1998, unless both of the following conditions are met:

- a. The contract or grant directly bears on services to be provided by any member of a county children and families commission or the entity the member represents, or financially benefits the member or the entity which the member represents.
- b. The member fails to recuse himself or herself from making, participating in making, or any way attempting to use his or her official position to influence a decision on the grant or grants.

L. LIMITED RULE OF NECESSITY

This office and the courts have applied a limited rule of necessity to the application of section 1090. In 69 Ops.Cal.Atty.Gen. 102, 109, *supra*, this office described the rule of necessity as follows:

‘With respect to a contractual conflict of interest the “rule of necessity” may be said to have two facets. The first, . . . to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. [Citation.] The second facet of the doctrine, . . . [citation] arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act. It ensures that essential governmental functions are performed even where a conflict of interest exists.’

The first facet of the rule of necessity concerns situations where a board must contract for essential services and no source other than that which triggers the conflict is available. In 4 Ops.Cal.Atty.Gen. 264 (1944), a city was advised that it could obtain nighttime service from a service station owned by a member of the city council, where the town was isolated

and his station was the only one open. This office cautioned that “[a]n event that can be reasonably anticipated, such as the repeated failure of a battery or the necessity for periodic service, would not be considered an emergency” so as to give rise to the rule of necessity. Other arrangements would be required in such cases. (But see Gov. Code, § 29708 [which flatly prohibits a county officer or employee from presenting a claim to the county for other than his or her official salary].)

The second facet of the rule of necessity focuses on the performance of official duties rather than upon the procurement of goods and services. In 69 Ops.Cal.Atty.Gen. 102, *supra*, this office applied the rule of necessity to permit a school board to enter into a memorandum of understanding with a teachers’ association despite the fact that a member of the school district board was married to a tenured teacher. A similar conclusion was reached in 65 Ops.Cal.Atty.Gen. 305, *supra*, where this office concluded that the Superintendent of Education could enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee. Both opinions concluded that the labor agreements with the teachers’ association were necessary and that there was nothing in the history of section 1090 that suggested a person should be required to resign his or her employment because of marital status. Accordingly, to the extent that the noninterest exception for public official spouses set forth in section 1091.5(a)(6) was not applicable, this office advised that the rule of necessity would permit issuance of a memorandum of understanding.

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, this office has concluded that the board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit the board with an interested member to nevertheless make a contract, but the board member is still prohibited from participating in its making. In the case of a single official or employee, application of the rule of necessity permits the official or employee to participate in the making of the contract. (69 Ops.Cal.Atty.Gen. 102, *supra*, at p. 112 [school board trustee abstention]; 67 Ops.Cal.Atty.Gen. 369, *supra*, at p. 378 [board member abstention]; 65 Ops.Cal.Atty.Gen. 305, *supra*, at p. 310 [superintendent of schools permitted to participate].)

M. PENALTIES FOR VIOLATION BY OFFICIALS

A willful violation of any of the provisions of section 1090 et seq., is punishable by a fine of not more than \$1,000 or imprisonment in state prison. (§ 1097.) For an official to act “willfully,” his or her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People v. Honig, supra*, 48 Cal.App.4th at pp. 334-339.) The statute of limitations for section 1090 prosecutions is three years after discovery of the violation. (*Id.*, at p. 304, fn. 1; Penal Code, §§ 801, 803, subd. (c).) Additionally, such an individual is forever disqualified from holding any office in this state. (§ 1097.) When a state or local government agency is informed by affidavit that a board member or employee has violated section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation. (§ 1096.)

One example of a conviction under section 1097 is *People v. Sobel, supra*, 40 Cal.App.3d 1046. In that case, a deputy purchasing agent for a county had a financial interest in a book seller that sold books to the county pursuant to contracts made by that agent. His conviction was based on the prosecution having established that he had the opportunity to and did influence execution of purchase contracts, directly or indirectly, to promote his personal interests.

For a discussion of other consequences which may result from a violation of section 1090, see section H (contract made in violation of § 1090 is void and unenforceable) of this chapter.

VII.

CONFLICT-OF-INTEREST LIMITATIONS ON STATE CONTRACTS

California Public Contract Code Sections 10365.5 and 10410-10430*

A. OVERVIEW

Sections 10410 and 10411⁷ of the California Public Contract Code provide a two-level approach to potential conflict-of-interest situations in connection with the making of state contracts. Section 10410 concerns potential conflicts by persons currently holding office and section 10411 concerns potential conflicts by those who have left state service. The prohibitions do not apply to unsalaried members of part-time boards and commissions who receive payments only in connection with preparing for meetings and per diem for travel and accommodations. (§ 10430(e).) The code also expressly exempts the Board of Regents for the University of California from its coverage. (§ 10430(a).)

Other specific exemptions are contained in section 10430(b)-(g). They include contracts for architectural land engineering services, specified contracts exempt by section 10295, and contracts by spouses of state officers or employees and their employers for the provision of services to regional centers for persons with developmental disabilities pursuant to section 4648 of the Welfare and Institutions Code. With these exceptions, sections 10410 and 10411 generally cover all appointed officials, officers and civil service employees of state government.

Section 10365.5 contains a specific prohibition applicable to consultants involving “follow-on contracts.” These provisions of the Public Contract Code form a helpful adjunct to the provisions of Government Code section 1090 which also concern conflicts of interest in the contract-making process.

B. THE BASIC PROHIBITION REGARDING CURRENT STATE OFFICERS AND EMPLOYEES

Reduced to its essentials, section 10410 provides that: (1) no state officer or employee (2) shall engage in any employment, activity or enterprise (3) from which the officer or employee receives compensation, or in which he or she has a financial interest and (4) which is sponsored or funded, in whole or in part, by any state agency or department through a contract. An exception is provided if the employment or enterprise is required as a condition of the individual’s regular state employment. In addition to the general prohibition, section

*Selected statutory materials appear in appendix H (at p. 174).

⁷All section references in this chapter hereafter refer to the California Public Contract Code unless otherwise specified.

10410 specifically prohibits any covered official from contracting on his or her own behalf with a state agency as an independent contractor to provide goods or services.

The prohibition contained in section 10410 does not appear to be a transactional disqualification provision such as that contained in the Political Reform Act. Rather, it is a prohibition against state employees having specified financial interests. In the case of section 10410, the statute prohibits an individual from engaging in certain activities which are supported, in whole or in part, by a state contract. By prohibiting the “activity,” the statute in effect prohibits the making of state contracts in which the individual has the specified interest. Thus, in many instances, the provisions of section 10410 will be duplicative of the provisions of Government Code section 1090. However, the provisions of section 10410 apply only to state contracts and are different than the restrictions contained in Government Code section 1090 in certain respects.

In 84 Ops.Cal.Atty.Gen. 131 (2001), this office concluded that the prohibitions set forth in section 10410 did not generally apply to the spouse of a state officer or employee. The spouse of a state employee may, therefore, contract to provide goods or services to the employee’s department if the employee neither participates in the department’s decision to enter into the contract nor engages in the spouse’s business.

With respect to the prohibition against state officers or employees contracting on their own behalf as independent contractors, to provide goods or services, this office has orally advised that state employees who prepare educational film, video and printed materials as a part of their state employment cannot contract with another department as independent contractors to provide similar services in their off-hours.

C. THE BASIC PROHIBITION REGARDING FORMER STATE OFFICERS AND EMPLOYEES

Section 10411 regarding former state officials is divided into two parts. Subsection (a) involves a two-year prohibition against participating in a contract with which the official was involved during his or her state service. Subsection (b) involves a one-year prohibition of any contract by former policy making officials with their prior agencies.

Section 10411(a) provides that no retired, dismissed, separated or formerly employed state officer or employee may enter into a state contract in which he or she participated in any of the negotiations, transactions, planning, arrangements or any part of the decision-making process while employed in any capacity by an agency or department of state government. The statute does, however, place a two-year limit on the application of this statutory prohibition commencing on the date the person left state employment. For application of similar provisions under Government Code section 1090, see *Stigall v. City of Taft, supra*, 58 Cal.2d 565 and 66 Ops.Cal.Atty.Gen. 156 (1983).

Section 10411(b) establishes a 12-month moratorium on any former state officer or employee, entering into a contract with his or her former agency, if the covered official held a policymaking position with the agency in the same general subject area as the proposed

contract within 12 months prior to his or her departure from state government. The statute expressly exempts contracts for expert witnesses in civil cases and contracts for the continued services of an attorney regarding matters with which the attorney was involved prior to departing state service.

D. LIMITATIONS ON CONSULTANTS

Section 10365.5 specifically applies to “consultants” as that term is defined in section 10335.5. With certain exceptions, section 10365.5 provides that no person or firm that has been awarded a consulting services contract may be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. In other words, a contractor may not be hired to conduct a feasibility study or produce a plan, and then be awarded a contract to perform the recommended services. The prohibition does not apply to architectural contracts covered by Government Code section 4525, nor to specified subcontractors having less than 10 percent of the consulting contract. (§ 10365.5(b) and (c).)

E. PENALTIES AND ENFORCEMENT

Section 10420 provides that any contract made in violation of these prohibitions is void unless the violation is technical and non-substantive. Section 10421 provides the state or any person acting on behalf of the state, the right to bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. Successful plaintiffs may be awarded costs and attorney’s fees but the statute specifically provides that defendants may not receive either. Section 10425 provides that willful violation of the prohibitions is a misdemeanor and sections 10422 and 10423 provide felony penalties for persons involved in the corrupt performance of contracts.
