

## VIII.

### THE CONSTITUTIONAL PROHIBITION ON THE ACCEPTANCE OF PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES

Cal. Const., Art. XII, § 7

#### A. OVERVIEW

The prohibition on the acceptance of passes or discounts from transportation companies by public officers was originally contained in article XII, section 19, of the California Constitution. In 1970, the Constitutional Revision Commission proposed that the provision be repealed. However, the proposal to eliminate this provision was defeated by the electorate. In 1974, the prohibition was moved from section 19 to section 7 of article XII. The genesis of the prohibition is in the historical relationship between the railroads and the state government in California.

In 67 Ops.Cal.Atty.Gen. 81 (1984), this office indicated that the origins of the prohibition were in the corruptive influences which might be brought about by gifts of free transportation to public officials. The opinion provided:

Article XII, section 7 (formerly § 19), was adopted to control the perceived corruptive influences of the railroads upon the legislative process. (See Debates and Proceedings of the Constitutional Convention, p. 379; John K. McNulty, Background Study -- California Constitution Article XII, Corporations and Public Utilities (1966) p. 100.) . . . It is apparent that the perceived corruptive influence consisted of the granting of special benefits in exchange for legislative favor. Thus, explicitly or implicitly, legislation favorable to the railroads was the *quid pro quo*. . . .

(*Id.* at pp. 83-84.)

In a 1982 quo warranto authorization letter, regarding Santa Monica, this office stated:

It appears that the intention of the framers of what is now article XII, section 7 was to inhibit and if possible preclude the undue influence of railroads and other transportation companies over legislators and public officials.

(*In re Knickerbocker*, February 1982.)

For a discussion of quo warranto procedure, see Section F of this chapter.

## **B. THE BASIC PROHIBITION**

The constitutional prohibition on the acceptance of passes or discounts from transportation companies by public officials currently is contained in article XII, section 7 of the California Constitution. It provides:

A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

(Cal. Const., art. XII, § 7.)

Reduced to its component parts, this office has interpreted the prohibition to apply in the following manner:

- (1) The prohibition applies to public officers, both elected and nonelected but does not apply to employees.
- (2) The prohibition applies to interstate and foreign carriers, as well as domestic carriers, and to transportation received outside of California.
- (3) The prohibition applies irrespective of whether the pass or discount was provided in connection with personal or public business.
- (4) Violation of the prohibition is punishable by forfeiture of office and a quo warranto proceeding is the appropriate way to enforce the remedy.

(See, Code Civ. Proc., § 803.)

## **C. PERSONS COVERED**

The prohibition specifically provides that it applies to “public officers.” In 3 Ops.Cal.Atty.Gen. 318 (1944), this office reiterated its interpretation that the prohibition applied only to officers and not employees. “As to the question of passes, it has always been the opinion of this office that the Constitutional prohibition does not operate to include ‘employees’ . . . .” (*Id.* at p. 319.) Accordingly, the prohibition did not bar a state employee from receiving gifts of free transportation from a transportation company in connection with part-time private employment.

It is generally said that an “office” requires the vesting in an individual of a portion of the sovereign powers of the state. (See *Parker v. Riley* (1941) 18 Cal.2d 83, 87.) This office has provided informal advice as to the distinction between an officer and an employee. (Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (1975).) There, we stated that if a particular

individual actually sets or makes policy, he is an officer, if he merely advises policy makers, he is probably not an officer.

Cal. Atty.Gen., Indexed Letter, No. IL 75-294, *supra*, addressed the issue of whether officers and employees of the Division of Tourism could accept free airline transportation in the course of their duties. In that letter, this office concluded that the constitutional prohibition applied only to the officers but not the employees. The letter stated:

If a particular individual actually sets or makes policy, he is an officer, if he merely advises policy makers, he is probably not an officer. (See *Parker v. Riley*, 18 Cal.2d 83, 87 (1941); 42 Ops.Cal.Atty.Gen. 93, 95 (1963); 56 Ops.Cal.Atty.Gen. 556 (1973).

In *Parker v. Riley*, *supra*, the court said:

Thus, it is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state. (*Patton v. Board of Health*, *supra*, pp. 394, 398; *Curtin v. State*, *supra*, p. 390; *Leymel v. Johnson*, 105 Cal.App. 694, 699 [288 Pac. 858]; *Couts v. County of San Diego*, 139 Cal.App. 706, 712 [34 Pac. (2d) 812]; *State ex rel. Barney v. Hawkins*, *supra*, p. 520; *State ex rel. Kendall v. Cole*, *supra*; 53 A.L.R. 595, 602.) The positions here created do not measure up to so high a standard. They involve merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the Legislature. Such tasks do not require the exercise of a part of the sovereign power of the state.

(*Id.* at p. 87.)

Government Code section 1001 includes in the definition of civil executive officers “. . . the head of each department and all chiefs of divisions, deputies and secretaries of a department. . . .”

In Cal. Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970), this office concluded that the executive director of a redevelopment agency was a public officer within the meaning of the constitutional prohibition. This office specifically concluded that the prohibition applied to any officer, not just those who succeeded to office through the electoral process. The letter also reiterated that the constitutional prohibition did not apply to employees as contrasted with officers. (Cal. Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971) [provides additional discussion of these principles and is based on the same factual situation].)

Cal. Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964) concluded that the prohibition, at least in some circumstances, did not apply to the families of public officers. Thus, where the spouse of a covered official legitimately earns or receives a free pass or discount on travel from a transportation company, the acceptance of such a pass or discount would not be attributed to the officer. However, this conclusion might be different if the circumstances

surrounding the pass or discount suggested that it was provided in order to curry favor or extend a benefit to the officer.

In 67 Ops.Cal.Atty.Gen. 81 (1984), this office analyzed a situation involving application of the prohibition to a state legislator. Under the unique facts of that case, the opinion concluded that the legislator was not covered by the prohibition. There, the member of the Legislature was the spouse of a flight attendant. As a part of the flight attendant's employment package all spouses were offered specified free airline trips. The opinion concluded that a state legislator was a public officer for the purposes of the section and that the airline company in question was a transportation company within the meaning of the prohibition. However, the free transportation was offered to the legislator as a member of a larger group under a generally authorized or approved plan.

If, as we assume in the absence of contrary advisement or indication, the sole condition for the receipt of the propounded benefit is the spousal relationship, then the element of corruptive influence appears to be lacking, and the application of the constitutional prohibition would fail to serve its intended objective.

Accordingly, it is concluded that the acceptance by a member of the California Legislature who is the spouse of a flight attendant of a free or discounted air travel pass is not prohibited by article XII, section 7, of the California Constitution where such passes are offered on the same conditions to spouses of all flight attendants.

(67 Ops.Cal.Atty.Gen. 81, 84, *supra*.)

In 74 Ops.Cal.Atty.Gen. 26 (1991), this office indicated that a free upgrade from coach class to first class constituted a "discount" within the meaning of the constitutional prohibition. However, under those facts the receipt of the discount did not violate the prohibition because the officer received the tickets in his capacity as a member of a group unrelated to his official status. The official, who was on his honeymoon, received the free upgrade pursuant to the airline's policy of providing free first-class upgrades to all honeymooning couples.

These situations are distinguishable from the circumstances described in 76 Ops.Cal.Atty.Gen. 1 (1993) in which a mayor received a free first-class airline upgrade as a part of a promotion designed to bestow such upgrades on high profile, prominent individuals in the community. The opinion concluded that the mayor received the free first-class upgrade as a result of his status as mayor and not as a result of his participation in some larger group unrelated to his official status. (*Id.* at p. 4.) The opinion also concluded that the official need not be aware of the prohibition against the receipt of free transportation in order to violate it. (*Id.* at pp. 2-3.)

Thus, if the pass or discount is provided to the official because of his or her position as a government official, the prohibition applies. If, on the other hand, the pass or discount is provided to the official as a member of a larger group, that is not related to the function of his or her office, the prohibition may not be applicable.

In 85 Ops.Cal.Atty.Gen. 40 (2002), this office concluded that members of the board of directors of a public transit agency could accept passes for free transportation on the agency's buses in order to perform their duties of monitoring the agency's transportation services. The opinion was based on the rationale that the district had an obligation to provide those transportation services necessary for the members to perform their public duties. Because the agency is responsible for providing the transportation services without cost to the directors, the providing of such expenses does not constitute a prohibited gift irrespective of whether the district is granting free passes or reimbursing the directors for their expenses. (Whether a public transit agency constitutes a "transportation company" for purposes of the constitutional prohibition was beyond the scope of this opinion. The term may possibly refer exclusively to privately owned and operated transportation companies such as railroads, airlines, and cruise ship companies. (See Cal. Const., art. XII, § 3; *Los Angeles Met. Transit Authority v. Pub. Util. Com.* (1963) 59 Cal.2d 863, 870; *Board of Railroad Commissioners v. Market Street Railway Company* (1901) 132 Cal. 677, 678-680; Webster's 3d New Internat. Dict. (1971) p. 461 [company defined as "a chartered commercial organization"].)

#### **D. INTERSTATE AND INTRASTATE TRAVEL COVERED**

Over the years, this office has interpreted the constitutional prohibition against the acceptance of passes or discounts from transportation companies to apply to interstate as well as intrastate carriers and transportation. This interpretation applies irrespective of whether the interstate carrier in question does business in California and therefore applies to airline carriers over which the official has no jurisdiction. (See, 76 Ops.Cal.Atty.Gen. 1, *supra*.)

In Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 2, 1975), this office concluded that the prohibition applied to members of the Division of Tourism who wished to attend informational seminars at various locations to which the airlines would provide free transportation. In order to avoid any conflict with federal regulatory powers over the issuance of free passes, the letter indicated that the prohibition with respect to interstate transportation prohibited the officer from accepting the pass or discount and not on the transportation company for offering it. This office opined that the prohibition applied to interstate as well as intrastate travel in Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964). That letter concluded that the prohibition applied to Los Angeles City Airport Commissioners who wished to take a free airline trip to Tahiti.

In 1982, this office authorized the filing of a quo warranto lawsuit to remove two officers from the Santa Monica city government for violating the prohibition against the acceptance of free travel. The allegations were that the two officers had accepted free round-trip transportation from Los Angeles to London provided by Laker Airline.

In Cal.Atty.Gen., Indexed Letter, No. IL 71-159 (August 24, 1971), this office authorized another quo warranto lawsuit against the executive director and treasurer of the Redevelopment Agency of the City and County of San Francisco. There the officeholder accepted free round-trip passage from San Francisco to Taipei on China Airlines. In 1985, this office advised the Mayor of Burbank that acceptance of free transportation from Burbank, California to Durango, Colorado and free transportation on a railroad in Durango could violate the constitutional prohibition.

## **E. APPLICATION TO PUBLIC AND PERSONAL BUSINESS**

The issue of public versus private business is generally not viewed as relevant to the application of the prohibition. Except for Public Utility Commissioners who are specifically authorized to accept free transportation in connection with the performance of official duties, the prohibition against the acceptance of free passes or discounts for transportation applies equally to acceptance of transportation in connection with one's official duties as it does in connection with one's personal business. Although the focus may be somewhat different, interpreters of the prohibition have concluded that the purpose of guarding against corruption and undue influence from transportation companies can result from the acceptance of free or discounted transportation in either context.

In Cal.Atty.Gen., Indexed Letter, No. IL 75-294 (March 23, 1975), members of the Division of Tourism wished to attend informational seminars to which they would receive free airline transportation. The attendance at such seminars clearly was within the scope of the member's official public duties. Without discussing the distinction between public and private use of transportation, this office concluded that the constitutional prohibition acted to bar the members from accepting the free airline transportation. Similarly, in Cal.Atty.Gen., Indexed Letter, No. IL 70-155 (August 7, 1970), this office concluded that the executive director of a redevelopment agency was barred from accepting free transportation to assist him in the performance of his official duties. Again, the matter of the public versus the private use of the transportation was not discussed as a relevant factor in determining whether the prohibition applied.

In several other instances, the issue of public versus private business was not viewed as relevant to the application of the prohibition. (E.g., Cal.Atty.Gen., Indexed Letter, No. IL 64-111 (June 8, 1964) [in which the City of Los Angeles Airport Commissioners accepted free trips to Tahiti]; 1982 quo warranto authorization regarding officers of Santa Monica accepting a free round trip from Los Angeles to London; 1985 letter to Burbank mayor regarding transportation from Burbank to Colorado and rail transportation in Colorado.)

## **F. PENALTIES AND ENFORCEMENT**

Article XII, section 7 of the California Constitution specifically provides that the acceptance of a pass or discount by a public officer other than a Public Utilities Commissioner, shall work a forfeiture of that office. The appropriate means for enforcing this forfeiture of office is the filing of a suit in quo warranto.

A quo warranto proceeding pursuant to Code of Civil Procedure section 803 is a civil action by which title to any public office may be determined. (*Barendt v. McCarthy* (1911) 160 Cal. 680, 686-687; 53 Cal.Jur.3d (1979) Quo Warranto, § 7.) The action may be commenced only under the authority of the Attorney General in the name of the People. (*People ex rel. Conway v. San Quentin Prison Officials* (1963) 217 Cal.App.2d 182.) Where such a proceeding is brought on the relation of a private individual (relator), the relator does not become a party to the action. The actions of the relator are under the supervision and complete control of the Attorney General. (*People v. Milk Producers Assn.* (1923) 60

Cal.App. 439, 443; *People ex rel. Conway v. San Quentin Prison Officials, supra*, 217 Cal.App.2d 182.)

The Attorney General requires submission of an application for leave to sue on behalf of the People. (Cal. Code Regs., tit. 11, §§ 1-10.) In deciding whether to issue leave to sue by a relator, the basic question is whether a public purpose would be served. (39 Ops.Cal.Atty.Gen. 85, 89 (1962).) This office must determine whether a substantial issue of fact or law exists which should be judicially determined. (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 648.) However, it is not the province of the Attorney General to pass upon the issues in controversy, for that is the role of the court. (35 Ops.Cal.Atty.Gen. 123 (1960).)

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## IX.

### INCOMPATIBLE ACTIVITIES OF LOCAL OFFICERS AND EMPLOYEES

Government Code Section 1125 Et Seq.\*

#### A. OVERVIEW

These sections, which were originally enacted in 1971, provide a statutory prohibition against any officer or employee of a local agency from engaging in any employment or other activity which is in conflict with his or her public duties. Government Code section 1125<sup>8</sup> defines local agency to mean a “county, city, city and county, political subdivision, district, and municipal corporation.” Section 1126 contains the basic prohibition, and focuses on the remunerative activities of agency officials. See section 1098 concerning prohibition against disclosure of confidential information, which is punishable as a misdemeanor.

#### B. THE BASIC PROHIBITION

Section 1126 provides that a local officer or employee shall not engage in any employment, activity or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her official duties or the duties, functions or responsibilities of his or her appointing authority or employing agency. This general prohibition usually is not self-executing and, in order to give notice of what activities are incompatible, authorities and agencies must promulgate a statement of incompatible activities. The incompatible activities statement may address a broad range of conflict-of-interest issues. But an officer or an employee may not have sanctions imposed on him or her unless the officer or employee has violated a duly noticed statement. If a statement is adopted, the local agency shall enact rules providing notice to employees regarding prohibited activities, disciplinary action and appeal procedures.

#### C. PROHIBITION GENERALLY NOT SELF-EXECUTING

In 1980, the court in *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141 (hereinafter, “*Mazzola*”), ruled that section 1126 provided only authorization to implement a statutory prohibition by adoption of an incompatible activities statement as set forth in section 1126(b). The court reasoned that without notice, an employee could be subject to charges under section 1126 at any time. Therefore, before the prohibition can be applied to an employee based on his or her outside activities, the employee must be informed that those activities constitute a conflict of interest. (See also 70 Ops.Cal.Atty.Gen. 271 (1987).) In addition, the court indicated that the employee was entitled to receive notice of

\*Selected statutory materials appear in appendix I (at p. 175).

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<sup>8</sup>All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

the agency's intended disciplinary action and the procedures for appealing that action. Thus, aside from a narrow exception applicable only to school board members, discussed below, the prohibition is not self-executing.

#### **D. PERSONS COVERED**

Section 1126 applies to officers and employees of local agencies. This office has opined that employees include temporary consultants such as special counsel hired as independent contractors. (See, 70 Ops.Cal.Atty.Gen. 271, *supra*; 61 Ops.Cal.Atty.Gen. 18 (1978).)

In 64 Ops.Cal.Atty.Gen. 795 (1981), this office concluded that, in light of the *Mazzola* case, section 1126 did not apply to a member of the board of supervisors or any other elected official. This conclusion was based on an interpretation of the language of section 1126(b). By its terms, subdivision (b) provides that the guidelines, which the *Mazzola* court stated were a prerequisite to activating the prohibition, are to be adopted by the "appointing power." Since elected officials have no appointing authority, the opinion concluded that section 1126 was applicable only to local employees and not to elected officials.

In 1986, Education Code section 35233 was amended to make school boards subject to the requirements of section 1126. Since school boards have no appointing authority, this office concluded in 70 Ops.Cal.Atty.Gen. 157 (1987), that the provisions of section 1126(a) must be self-executing with respect to school boards if the amendment to Education Code section 35233 was to have any effect. Thus, section 1126 remains inapplicable to elected officials except for school board members where it is both applicable and self-executing.

#### **E. PROHIBITED ACTIVITIES**

In *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, the California Supreme Court ruled that local governments have broad discretion to limit incompatible activities of their employees. (*Id.* at p. 748.) After an involved analysis of legislative history, the court concluded that the enumerated activities set forth in section 1126, subdivision (b) did not constitute the exclusive list of prohibited activities. Rather, the court concluded that the list of enumerated activities was exemplary and did not represent either a floor or a ceiling on the activities which local governments could restrict as incompatible with public employment.

The court cited with favor the opinions of this office and stated that an examination of these opinions revealed a consistent interpretation applying the statute to any factual situation involving a potential conflict of loyalties, whether or not specifically enumerated in subdivision (b). (*Id.* at pp. 747-48, citing, 58 Ops.Cal.Atty.Gen. 109 (1975) [section 1126, subd. (b) doctrine of incompatibility applies to a member of a school board concurrently serving as a member of a city personnel board]; 63 Ops.Cal.Atty.Gen. 868 (1980) [county assessor may determine, pursuant to § 1126, subd. (b), that employee's purchase of land at tax-deeded land sale within the county is incompatible with his duties as an appraiser in the assessor's office]; 68 Ops.Cal.Atty.Gen. 175 (1985) [pursuant to § 1126, subd. (b), a city police department may determine whether the police chief may undertake to contract with private parties to provide private security services by off-duty police officers for a fee]; 70

Ops.Cal.Atty.Gen. 157, *supra*, [school board may determine, pursuant to § 1126, subd. (b), that a board member's operation of a private preschool facility for profit, conflicts with his duties as a member of the board].)

A variety of potential incompatible activities are enumerated in section 1126, subdivision (b). An outside activity which involves the use of the agency's time, resources, uniforms, or prestige may be prohibited. (§ 1126(b)(1).) If the outside activity involves double remuneration, i.e., private payment for the performance of an activity which he or she is already required to perform in his or her public capacity, such employment may be prohibited. (§ 1126(b)(2); see also Pen. Code, § 70.) If the result of this outside activity will ever in any way be subject to the control or audit or other scrutiny of the official's agency, it may be prohibited as well. (§ 1126(b)(3).) Finally, if the outside activity makes such great demands on the official's time that the official is hampered in the performance of his or her public duties, the activity may be forbidden. (§ 1126(b)(4).)

A local agency does not have as broad discretion to restrict the political activities of its officers or employees. Section 3203 prohibits placing restrictions upon the political activities of such officers or employees unless the restriction is otherwise authorized by sections 3201-3209 or is necessary to meet federal requirements relative to a particular employee or employees. Authorized restrictions include a prohibition from participating in political activities while in uniform, and prohibition or restrictions from engaging in political activity during working hours or on the local agency's premises, if the agency has adopted rules in that regard. (§§ 3206, 3207.) In addition, while officers or employees may solicit funds for ballot measures that may affect the working conditions of their employing agency, the agency may restrict its employees' activities during their working hours. (§ 3209.) Sections 3201-3209 also provide for restrictions upon an employee's political activities such as using one's office to influence, positively or negatively, another person's position within the state or local agency, and knowingly soliciting political funds from other local agency employees unless the request is made to a "significant segment of the public" that otherwise includes local agency officers or employees. (Restrictions upon the political activities of state officers or employees is discussed in Chapter X, *post*.)

In addition to these provisions, employees should be aware of Penal Code section 424, which prohibits the misuse of public funds and property for political or personal use. (See also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

Section 1127 specifically states that off-duty employees (e.g., firefighters, police officers) may accept private employment which is related to and compatible with their public employment. To do so, the employee must receive permission from his or her supervisor and must be certified by the appropriate agency.

(For a discussion of the special incompatibility provisions for public attorneys, see section G of Chapter XI, concerning Government Code section 1128.)

## **F. PENALTIES AND ENFORCEMENT**

The statute does not set forth any penalties or remedies for its violation. However, several enforcement vehicles would appear to be available. First, with respect to a local government employee, disciplinary action such as a letter of reprimand, suspension, or termination may be available depending upon the gravity of the violation. With respect to an appointed officer, a complaint could be filed with the appointing authority which may have the power to punish the officer or even terminate the officer's appointment in the case of a particularly serious violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus.

If you have a question about an officer's or employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities, if one has been adopted. A member of the public is entitled to a copy of the statement through the Public Records Act as set forth in Government Code sections 6250 et seq.

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## X.

### INCOMPATIBLE ACTIVITIES OF STATE OFFICERS AND EMPLOYEES

Government Code Section 19990\*

#### A. OVERVIEW

The prohibitions applicable to state officers and employees as contained in Government Code section 19990<sup>9</sup> are similar to those applicable to local officials under section 1126. (See Chapter IX of this pamphlet). Like section 1126, section 19990 creates a general prohibition followed by specific areas of conduct which should be covered in an incompatible activities statement adopted by an employee's appointing power.

#### B. THE BASIC PROHIBITION

Initially, section 19990 prohibits state officers and employees from engaging in any activity or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to their duties as state officers or employees. Each state agency is required to develop, subject to the approval of the Department of Personnel Administration, a statement of incompatible activities for its officers and employees. As discussed below, the statute sets forth several activities that are deemed to be inconsistent, incompatible or in conflict with the duties of a state officer or employee.

#### C. PROHIBITION MAY NOT BE SELF-EXECUTING

In construing section 1126, which is applicable to local officers and employees, the court in *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141, concluded that the general prohibition was not self-executing. There, the City and County of San Francisco had appointed and reappointed a plumbers' union official to the position of airport commissioner. At the time of the appointments, the city had full knowledge that the commissioner was a union official. After several unions, including the plumbers' union, engaged in a lengthy strike against the city, the Board of Supervisors removed the commissioner from office based on "official misconduct." The court set aside that decision, stating that the prohibition against incompatible activities could be exercised only through the agency's adoption of an incompatible activities statement which specifically notified employees of the prohibited activities. The court took the position that a general ban on activities which were inconsistent, incompatible, in conflict with or inimical to one's public duties was too vague to have any effect without the adoption of specific guidelines by the employee's agency. There is no case law construing section 19990. However, the same argument could be made with respect to section 19990.

\*A copy of this statute appears in appendix J (at p. 177).

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<sup>9</sup>All section references in this chapter hereafter refer to the Government Code unless otherwise specified.

## **D. PERSONS COVERED**

There is some question as to whether section 19990 covers state officers who are outside the state civil service. The provision concerning the incompatible activities statement provides:

Each appointing power shall determine, subject to approval of the department, those activities which, for employees under its jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees. . . .

(§ 19990; emphases added.)

In the past, section 19251, predecessor to section 19990, was interpreted by this office to apply to civil service employees only. (53 Ops.Cal.Atty.Gen. 163 (1970).) This conclusion, in part, was based upon the fact that the prohibition and the remedies were placed in the civil service portions of the Government Code. However, in 1981, section 19251 was repealed and replaced with section 19990, which is contained in the portion of the Government Code applicable to the Department of Personnel Administration. These provisions are applicable to both civil service and non-civil service employees and officers of state government. (§ 19815 et seq.) For the purposes of the Government Code sections under the jurisdiction of the Department of Personnel Administration, section 19815(d) defines the term “employee” to include “. . . all employees of the executive branch of government who are not elected to office.”

Thus, there are strong indications that section 19990 covers all non-elected, executive branch officers and employees, not just those who are members of the civil service. However, the only remedy for violating an incompatible activities statement continues to appear in section 19572(r) as a reason for imposing discipline on a civil service employee. In addition, the term “appointing power” is defined in section 18524 as the entity authorized to appoint civil service personnel. Nevertheless, these factors do not conclusively bar the application of section 19990 to non-civil service personnel. For example, non-civil service employees could be subject to disciplinary action or removal under the terms of their appointment.

## **E. PROHIBITED ACTIVITIES**

Only those outside activities that are clearly incompatible, inconsistent or in conflict with the employee’s public duties may be restricted. (73 Ops.Cal.Atty.Gen. 239 (1990); see also *Keeley v. State Personnel Board* (1975) 53 Cal.App.3d 88 [prison guard terminated because of his ownership and operation of a liquor store].) The types of activities specifically enumerated for coverage by incompatible activities statements include: using the prestige or influence of the state for private gain; using state facilities, time, equipment, or supplies for private gain; using confidential information for private gain (see also Government Code section 1098, which prohibits the disclosure of confidential information for pecuniary gain); receiving compensation from other than the state for the performance of state duties; performing private activities which later may be subject to the control, review, inspection, audit, or enforcement by the officer or employee; and receiving anything of value from a person regulated by or seeking to do business with the official’s agency where the item of

value could be reasonably interpreted as having been intended to influence the official. Section 19990 specifically states that incompatible activities shall include, but are not limited to, the enumerated areas of conduct specified in the statute.

Further, in *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, the Supreme Court held that local governments have broad discretion to regulate conflict-of-interest situations. Thus, the statutory language combined with the *Long Beach Police Officers Assn.* holding make it clear that state agencies have broad authority to regulate conflict-of-interest situations as well.

There is, however, less discretion afforded with respect to regulating the political activities of state officers or employees. Pursuant to section 3208, except as otherwise provided in section 19990, the limitations contained in sections 3201-3209 are the only permissible restrictions on the political activities of state employees. (The restrictions upon the political activities of local officers and employees are discussed in Chapter IX, *ante.*) In addition to these provisions, employees should be aware of section 8314 and Penal Code section 424, which prohibit the misuse of public funds and property for political or personal use. (See also *Stanson v. Mott* (1976) 17 Cal.3d 206; *League of Women Voters v. Countywide Crim. Justice Coordinating Com.* (1988) 203 Cal.App.3d 529.)

It should also be noted that the private use of expertise acquired during the performance of one's official duties is not necessarily prohibited. (See, 73 Ops.Cal.Atty.Gen. 239, *supra*, [under specified circumstances, a State Franchise Tax Board employee can teach courses on tax law].)

## **F. PROCEDURAL CONSIDERATIONS**

With respect to civil servants, prior to any determination that an employee has engaged in proscribed activities, the employee must be given notice and subsequently must be afforded appeal rights to contest any finding. (See, *Mazzola, supra*, 112 Cal.App.3d at pp. 154-155.) Since violations of the statement of incompatible activities are a matter of civil service employee discipline pursuant to section 19572(r), all of the safeguards provided by the Government Code and the State Personnel Board in connection with employee disciplinary hearings are applicable. If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to section 3517.5, the memorandum of understanding shall be controlling without further legislative action, unless the expenditure of funds is involved, in which case such expenditures must be approved by the Legislature in the budget act.

## **G. PENALTIES AND ENFORCEMENT**

Section 19990 does not set forth any penalties or remedies for its violation. However, several enforcement vehicles are available. First, with respect to state government employees, disciplinary action such as reprimand, suspension, or termination of employment is available depending upon the gravity of the violation. (§ 19572(r).) With respect to an appointed officer, a complaint could be filed with the appointing authority which may have the power to punish the officer or even terminate the officer's appointment in the case of a

particularly serious violation. In addition, a taxpayer or member of the public may have the right to seek relief through injunction or mandamus. Further, members of the public may file a complaint with the State Personnel Board pursuant to section 19583.5 requesting that disciplinary action be taken against the state employee.

If you have a question about an officer's or employee's outside activities, you should contact the appointing authority or employing agency for a copy of the applicable statement of incompatible activities or memorandum of understanding. A member of the public is entitled to a copy of the statement or memorandum through the Public Records Act as set forth in Government Code section 6250 et seq.

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## XI.

### THE COMMON LAW DOCTRINE OF INCOMPATIBLE OFFICES

#### A. OVERVIEW

The doctrine of incompatible offices concerns a potential clash of two public offices held by a single official. Thus, the doctrine concerns a conflict between potentially overlapping public duties. (*People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636; see also *Mott v. Hortsmann* (1950) 36 Cal.2d 388; 56 Ops.Cal.Atty.Gen. 488 (1973).) This is distinguishable from traditional conflict of interest which involves a potential clash between an official's private interests and his or her public duties. Confusion of these concepts sometimes results from the use of the term "incompatibility" in connection with the doctrine of incompatibility of offices on the one hand and the conflict-of-interest notion of incompatible activities on the other. (55 Ops.Cal.Atty.Gen. 36, 39 (1972).)

#### B. THE BASIC PROHIBITION

The doctrine of incompatible offices is court-made or "common law." (For a brief discussion of common law, see discussion in Section A of Chapter XII.) To fall within the common law doctrine of incompatible offices, two elements must be present. (68 Ops.Cal.Atty.Gen. 337 (1985).) First, the official in question must hold two public offices simultaneously. Second, there must be a potential conflict or overlap in the functions or responsibilities of the two offices.

The doctrine of incompatible offices was announced in the landmark case of *People ex rel. Chapman v. Rapsey, supra*, 16 Cal.2d at pp. 636, 641-642 (hereinafter, "*Rapsey*"). In that case, the court identified factors that must be addressed in evaluating issues under the incompatible offices doctrine: whether there is any significant clash of duties or loyalties between the offices; whether considerations of public policy make it improper for one person to hold both offices; and whether either officer exercises a supervisory, auditing, appointive, or removal power over the other.

In *Rapsey*, a city judge accepted an appointment as city attorney. The court concluded that the two positions in question were public offices and that there was a significant clash in their respective duties and functions.

(For special rules governing public attorneys, see the discussion in section G of this chapter; Government Code section 1128, 66 Ops.Cal.Atty.Gen. 382 (1983) (local); Government Code section 19990.6 (state).)

#### C. DOCTRINE MAY BE ABROGATED BY STATUTE, CHARTER OR ORDINANCE

At the outset, it should be noted that a common law doctrine can be superseded by legislative enactment. Thus, the Legislature or other legislative body may choose to expressly authorize the holding of dual offices notwithstanding the fact that this would otherwise be prohibited by the common law doctrine. In *American Canyon Fire Protection Dist. v. County of Napa*

(1983) 141 Cal.App.3d 100, 104, the court concluded that the members of a county board of supervisors could act as the governing board of a special district and distribute county funds to the district, stating:

Although a conflict of interest may arise under the common law rule against incompatible offices, “There is nothing to prevent the Legislature. . . from allowing, and even demanding, that an officer act in a dual capacity. (*McClain v. County of Alameda* (1962) 209 Cal.App.2d 73, 79 [25 Cal.Rptr. 660].)

In 78 Ops.Cal.Atty.Gen. 60 (1995), this office concluded that section 6508, concerning the creation and powers of joint powers agencies, was intended to ensure that the common law rule does not apply to joint powers agencies or their governing boards. Accordingly, a member of a city council may serve as a member of an airport commission which is a joint powers agency comprised of the city and other governmental agencies. After concluding that the offices of city and county planning commissioners were incompatible, this office in 66 Ops.Cal.Atty.Gen. 293, 302 (1983) stated: “It is concluded, therefore, that the county and city may provide by coordinate legislation for the simultaneous holding of the offices in question notwithstanding the common law rule.” A city charter also may abrogate the common law rule. (82 Ops.Cal.Atty.Gen. 201 (1999); 73 Ops.Cal.Atty.Gen. 357 (1990); 66 Ops.Cal.Atty.Gen. 293 (1983).)

In 81 Ops.Cal.Atty.Gen. 344 (1998), we concluded that a city council of a general law city may serve as the board of directors for fire protection and water districts in the city because it is designated as the “ex-officio board of directors” of such limited powers districts. (§ 56078.)

#### **D. PUBLIC OFFICE VERSUS EMPLOYMENT**

In *Rapsey, supra*, 16 Cal.2d 636, 640, the court defined the elements of a public “office” as including “the right, authority, and duty, created and conferred by law -- the tenure of which is not transient, occasional, or incidental -- by which for a given period an individual is invested with power to perform a public function for public benefit.” In 82 Ops.Cal.Atty.Gen. 83, 84 (1999) this office summarized the court’s conclusions as follows:

For the purposes of the doctrine, we have summarized the nature of a public office as (1) a position in government, (2) which is created or authorized by the Constitution or by law, (3) the tenure of which is continuing and permanent, not occasional or temporary, (4) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. [Citation.]

Members of advisory boards and commissions do not hold “offices” for purposes of the common law rule since they do not exercise any of the sovereign powers of the State. (83 Ops.Cal.Atty.Gen. 153 (2000); 83 Ops.Cal.Atty.Gen. 50 (2000); 62 Ops.Cal.Atty.Gen. 325, 331 (1979); 57 Ops.Cal.Atty.Gen. 583, 585 (1974); 42 Ops.Cal.Atty.Gen. 93, 94-97 (1963).)

Since an “employment” is not an “office,” the doctrine of incompatible offices does not preclude an official from simultaneously holding an office and an employment. (58 Ops.Cal.Atty.Gen. 109, 111 (1975); But see Government Code section 53227 and Education Code section 35107(b) which forbid any employee from simultaneously serving on the governing board of his or her employer.)

A deputy to a principal is not necessarily deemed to be holding the same office as the principal for purposes of the incompatible offices doctrine; only where the deputy stands in the principal’s shoes with respect to policy making decisions will the deputy be deemed to be holding the same office as the principal for purposes of the doctrine. (See 78 Ops.Cal.Atty.Gen. 362 (1995), modifying 63 Ops.Cal.Atty.Gen. 710 (1980).)

Employment with a public agency which is governed by contract, rather than by law, generally is not an office under the Incompatible Offices Doctrine. (76 Ops.Cal.Atty.Gen. 244 (1993).)

When a person holds offices with two governmental entities and there is overlapping geographical and subject matter jurisdiction the offices generally are incompatible. The following are citations to opinions that exemplify this principle:

- **county board of supervisors member and community college board member** (78 Ops.Cal.Atty.Gen. 316 (1995))
- **fire chief and board of supervisors member** (66 Ops.Cal.Atty.Gen. 176 (1983))
- **public utility district member and county board of supervisors member** (64 Ops.Cal.Atty.Gen. 137 (1981))
- **school district trustee and city council member** (73 Ops.Cal.Atty.Gen. 354 (1990))
- **school board member and city council member** (65 Ops.Cal.Atty.Gen. 606 (1982))
- **county planning commissioner and city council member** (63 Ops.Cal.Atty.Gen. 607 (1980))
- **fire chief and city council member** (76 Ops.Cal.Atty.Gen. 38 (1993))
- **county planning commissioner and city planning commissioner** (66 Ops.Cal.Atty.Gen. 293 (1983))
- **county planning commissioner and county water district director** (64 Ops.Cal.Atty.Gen. 288 (1981))
- **city planning commissioner and school district board member** (84 Ops.Cal.Atty.Gen. 91 (1997))
- **city manager and school district board member** (80 Ops.Cal.Atty.Gen. 74 (1997))
- **school district board member and community services district board member** (75 Ops.Cal.Atty.Gen. 112 (1992))

The relationship between a water district and a school district, some portion of which is within the boundaries of the water district, serves to illustrate how an incompatibility can arise. In 85 Ops.Cal.Atty.Gen. 199 (2002), this office concluded that a significant clash of duties and loyalties could arise in connection with the Water District setting the wholesale water rate that will be passed on to the School District, determining the need for restrictions on water usage during times of a water shortage, and imposing conditions for providing sanitation services to the School District. (See also, 85 Ops.Cal.Atty.Gen. 60 (2002); 82

Ops.Cal.Atty.Gen. 74 (1999); 82 Ops.Cal.Atty.Gen. 68 (1990); 73 Ops.Cal.Atty.Gen.183 (1990); 73 Ops.Cal.Atty.Gen. 268 (1990).)

When one of the positions is an “employment” instead of an “office,” the doctrine of incompatible offices is not applicable. Persons holding civil service and other non-officer positions are employees and are not subject to the doctrine. However, specific statutes may limit their office holding. (See discussion below.) Following is a brief listing of several positions that have been determined to be employments rather than offices.

- Assistant city manager was not an office because neither the position nor the duties were referred to in the city charter or statute. The fact that the assistant city manager performed some of the duties of the city manager did not make the position an office. (80 Ops.Cal.Atty.Gen. 74 (1997).)
- A line officer with the police department does not hold an office. (*Neigel v. Superior Court* (1977) 72 Cal.App.3d 373.)
- A sheriff’s deputy chief does not hold an office. (78 Ops.Cal.Atty.Gen. 362 (1995).)
- Fire captain (68 Ops.Cal.Atty.Gen. 337 (1985)) and fire division chief (74 Ops.Cal.Atty.Gen. 82 (1991)) are not offices.
- Community development director is not an office. In 82 Ops.Cal.Atty.Gen. 83 (1999), we analyzed his position as follows:

The director’s formal job description indicates that he exercises managerial functions for the city under the supervision and direction of the city manager. Such managerial functions and supervision are indicative of an employment relationship rather than the holding of a public office. (78 Ops.Cal.Atty.Gen., *supra*, at 368.) Moreover, the director holds a civil service classification with the city as did the police officer in *Neigel v. Superior Court, supra*, 72 Cal.App.3d at 373. He does not serve a definite “term” or at the pleasure of the appointing authority, and his policy making authority is limited by the conditions of his job description and his subordination to the city manager.

- Superintendent of a school district was not an office. Where he was subject to the direction and control of the school board and did not exercise independent authority granted by statute or charter. (62 Ops.Cal.Atty.Gen. 615 (1979).)

In *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, the court determined that the doctrine did not bar a nurse from holding office as a member of the board of directors of the hospital district which employed her because the position of nurse is an employment rather than an office. (*Id.* at p. 319.) However, in response to the *Eldridge* decision and 73 Ops.Cal.Atty.Gen. 191 (1990), the Legislature enacted Government Code

section 53227 and Education Code section 35107(b), which prohibit employees from simultaneously holding office as a member of the governing board that employs them.

#### **E. POTENTIAL CONFLICT IN DUTIES OR FUNCTIONS**

With respect to a conflict between the duties or functions of two offices, a clash between the two offices in the context of a particular decision need not be proved, in order to trigger the doctrine of incompatible offices. It is enough that there is the potential for a significant clash between the two offices at some point in the future. (See 85 Ops.Cal.Atty.Gen. 60 (2002); 84 Ops.Cal.Atty.Gen. 91 (2001); 78 Ops.Cal.Atty.Gen. 316 (1995); 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 289.)

The *Rapsey* court, 16 Cal.2d, *supra*, at pp. 641-642, discussed the conflict between offices in the following passage:

Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.

One of the most basic incompatibilities arises when a single person holds two offices where one office has supervisory authority over the other. In 81 Ops.Cal.Atty.Gen. 304 (1998), this office concluded that a person could not be both the city manager and the police chief because the city manager had budgetary and supervisory authority over the police chief. (See also 82 Ops.Cal.Atty.Gen. 201 (1999) [city administrator and fire chief]; 76 Ops.Cal.Atty.Gen. 38 (1993) [city council member, manager and fire chief].)

In 78 Ops.Cal.Atty.Gen. 316, *supra*, this office concluded that a member of a county board of supervisors could not simultaneously serve as a member of the Board of Governors of the California Community Colleges. There, we found an inconsistency in the duties because a supervisor and a member of the Board of Governors could have divided loyalties over matters concerning the use of college district property, the issuance of district bonds, as well as matters pertaining to funding and fees. Likewise, in 65 Ops.Cal.Atty.Gen. 606, *supra*, this office opined that there was significant potential for a conflict between a city council member and a school board member. The opinion discussed six areas of potentially overlapping jurisdiction which could lead to a clash in official loyalties for an individual holding both positions. (*Id.* at p. 607.) The areas of potential conflict ranged from financial and budgetary matters to zoning and development issues.

In 64 Ops.Cal.Atty.Gen. 288, *supra*, at p. 291, this office discussed potential conflicts in several factual contexts. With respect to a conflict between the offices of city planning commissioner and state highway commissioner, the opinion stated: “What is best for the

state in highway location may differ significantly as to what . . . is best for the . . . city itself.” (*Ibid.*)

With respect to a conflict between the offices of county planning commissioner and a member of the county water district, the opinion stated: “Likewise, what is best for the county in its planning activities may differ significantly from what is best for the county water district and the exercise of its independent powers.” (*Ibid.*)

For similar reasons, we opined that the simultaneous holding of office as a member of the boards of directors of two water districts was incompatible because the actions of one district could have an effect on the interests of the other. (76 Ops.Cal.Atty.Gen. 81 (1993).) Likewise, we have concluded that an individual may not simultaneously hold the office of county superintendent of schools and member of the State Board of Education. (74 Ops.Cal.Atty.Gen. 116 (1991).)

However in 71 Ops.Cal.Atty.Gen. 39, 42 (1988), this office concluded that an individual could be a member simultaneously of the State Industrial Welfare Commission and the Personnel Commission of the Los Angeles County Superintendent of Schools. This conclusion was based on the absence of any incompatibility between the two offices:

While we entertain no doubt that both of the positions in question are public offices, we predicate our conclusion herein exclusively upon the absence of incompatibility between them. The commission is concerned solely with public employees, i.e., the classified employees of the County Superintendent of Schools. As we shall see, I.W.C. is concerned solely with employees in the private sector. Neither agency has any official interest in or jurisdiction over the province of the other.

When two offices held by the same person are consolidated, the common law rule of incompatible offices may be violated if one office is made subordinate to the other. (*People ex rel. Deputy Sheriffs’ Assn. v. County of Santa Clara* (1996) 49 Cal.App.4th 1471.)

## **F. PENALTIES AND ENFORCEMENT**

Where a public official is found to have accepted two public offices, the common law provides for an automatic vacating of the first office. (See 66 Ops.Cal.Atty.Gen. 293, *supra*, at p. 295; 66 Ops.Cal.Atty.Gen. 176, *supra*, at p. 178; 65 Ops.Cal.Atty.Gen. 606, *supra*, at p. 608.) The appropriate mechanism for enforcing the vacating of the office is a suit in quo warranto under section 803 of the Code of Civil Procedure. (See Chapter VIII, section F regarding the quo warranto remedy; *Rapsey*, *supra*, 16 Cal.2d 636.) Disqualification or abstention from those decisions where an actual clash of the two offices is found to occur, is not an available remedy under common law. (See 66 Ops.Cal.Atty.Gen. 176, *supra*, at pp. 177-178; 63 Ops.Cal.Atty.Gen. 710, *supra*, at pp. 715-717.) However, notwithstanding the legal forfeiture, the person remains in the prior position as a de facto member until he or she actually resigns or is removed from office by a quo warranto action or other lawsuit. (74 Ops.Cal.Atty.Gen. 116 (1991).)

## **G. SPECIAL PROVISION FOR PUBLIC ATTORNEYS**

In 1981, the Legislature added section 1128 to the Government Code concerning the right of public attorneys to hold other elective or appointive office. In 63 Ops.Cal.Atty.Gen. 710, *supra*, this office concluded that the incompatibility of office doctrine applied to a deputy if his or her principal would be prohibited from holding the other office in question. The opinion also concluded that the doctrine of incompatibility of offices may not be avoided by use of abstention or by realigning or limiting a deputy's duties.

In 66 Ops.Cal.Atty.Gen. 382, *supra*, this office interpreted Government Code section 1128. The opinion concluded that the statutory provision modified the common law in several respects. First, the statute does not prohibit a public attorney from holding an appointive or elective office merely because a potential conflict may arise. Second, in the case of an actual conflict, transactional disqualification rather than forfeiture is required. Third, the statute not only applies to a deputy who stands in the shoes of his or her principal but to the principal himself or herself. (See 74 Ops.Cal.Atty.Gen. 86 (1991) [deputy district attorney may serve on city council]; 67 Ops.Cal.Atty.Gen. 347 (1984) [appointed city attorney may serve on airport commission].)

This office has opined that, when an actual conflict arises between the duties or responsibilities of a non-elective public attorney's two offices, section 1128 does not result in the automatic forfeiture of either office. However, in the event of such a conflict, the public attorney could be held accountable for misconduct in office or a violation of the rules of professional conduct, or could be subject to recall from elective office or subject to disciplinary action by his or her appointing authority. (66 Ops.Cal.Atty.Gen. 382, *supra*.)

A similar provision for state attorneys and state administrative law judges holding local elective or appointive offices is contained in Government Code section 19990.6.

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## XII.

### THE COMMON LAW DOCTRINE AGAINST CONFLICTS OF INTEREST

#### A. OVERVIEW

Courts and this office have, in the past, found conflicts of interest by public officials to be violative of both the common law and statutory prohibitions. (The common law is a body of law which has been made by precedential court decisions and can be found in the reported California Supreme Court and Appellate Court cases. This law differs from statutory law which is created by the combined action of the State Legislature and the Governor.) (See the discussion in Kaufmann, *The California Conflict of Interest Laws* (1963) 36 So. Cal. L. Rev. 186.)

Although this office continues, for the sake of completeness, to refer to the common law doctrine in our opinions (see, e.g., 67 Ops. Cal. Atty. Gen. 369, 381 (1984) and citations therein) it could be argued that its application has been severely limited by the passage of the Political Reform Act of 1974. In this regard Cal. Atty. Gen., Indexed Letter, No. IL 76-69 (April 6, 1976) stated:

Though one might urge that the Political Reform Act of 1974 has now preempted the common law doctrine against conflict of interest, and therefore that which is not specifically prohibited is now permitted, we would caution against such a conclusion for the reasons (1) that the courts have traditionally predicated their decisions on the dual basis of the statutes and the common law rule, see 58 Ops. Cal. Atty. Gen. 345, 354-56, *supra*, and (2) were a violation of the common law rule found to exist, such could form the basis of an allegation of willful misconduct in office within the meaning of section 3060 *et seq.*

(See also 59 Ops. Cal. Atty. Gen. 604 (1976).)

#### B. THE BASIC PROHIBITION

A good expression of the common law doctrine is found in *Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51: “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. [Citations.]”

This office has cautioned that where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine. (53 Ops. Cal. Atty. Gen. 163 (1970).) That opinion advised that the inquiry to be made was into the possibility that an official’s private interests might be enhanced through his or her official action. Another judicial explication of the common law doctrine was in *Terry v. Bender* (1956) 143 Cal. App. 2d 198. In that case the court stated: “Public officers

are obligated, . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity.” (*Id.*, at p. 206.)

In 26 Ops.Cal.Atty.Gen. 5, 7 (1955), this office advised that if a situation arises where a common law conflict of interest exists as to a particular transaction, the official “is disqualified from taking any part in the discussion and vote regarding” the particular matter.

In *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a nonfinancial personal interest. (*Id.* at p. 1171, fn. 18.)

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### **XIII.**

#### **CODE OF ETHICS**

Government Code Section 8920 Et Seq.

##### **A. THE BASIC PROHIBITION**

Government Code section 8920, the Code of Ethics, applies to state elected and appointive officers. It does not apply to civil service employees. The Code of Ethics generally prohibits officers from participating in decisions which will have a direct monetary effect on them.

Specifically, the Code of Ethics prohibits officers from:

- having any direct or indirect financial interest, or
- engaging in any business transaction or professional activity, or
- incurring any financial obligation

which is in substantial conflict with the proper discharge of the official's duties.

A substantial conflict arises when an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity. Where the officer will be so affected by a decision, the officer should disqualify himself or herself from the decision.

A substantial conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member.

Violations are punishable as misdemeanors.

##### **B. SPECIAL RULES FOR LEGISLATIVE OFFICIALS**

Briefly summarized, the Code of Ethics prohibits legislators and legislative employees from doing the following:

1. Accepting employment which the legislator or legislative employee has reason to believe would impair his or her independence of judgment as to official duties or which would induce the legislator or legislative employee to disclose confidential information acquired by him or her in the course of, and by reason of, official duties. (§ 8920 (b)(1).)

2. Willfully and knowingly disclosing confidential information acquired in the course of and by reason of his or her official duties or using that information for pecuniary gain. (§ 8920 (b)(2).)
3. In general, accepting or agreeing to accept, or being in partnership with any person who accepts or agrees to accept, any employment, fee, or other thing of monetary value, in consideration of his or her appearing, agreeing to appear, or taking any action on behalf of another person before any state board or agency.

Exceptions to this prohibition include the following:

- a. attorney representation before any court,
  - b. representation before the Workers' Compensation Appeals Board,
  - c. inquiries on behalf of constituents,
  - d. advocacy without compensation,
  - e. intervention on behalf of others to require a state board or agency to perform a ministerial, non discretionary act,
  - f. advocacy on behalf of the legislator or legislative employee himself or herself,
  - g. receipt of partnership or firm compensation, if the legislator or legislative employee does not share either directly or indirectly in any fee, less any expenses attributable to the fee resulting from the transaction. (§ 8920 (b)(3).)
4. Receiving or agreeing to receive anything of value for services in connection with the legislative process. (§ 8920 (b)(4).)
  5. Participating, by taking any action, on the floor of either house or in committee or elsewhere, in the passage or defeat of legislation in which a legislator or legislative employee has a personal interest, except as follows:
    - a. **Disclosure:** If the Member files a statement disclosing his or her personal interest to be entered on the journal, and states that he or she is able to cast a fair and objective vote, he or she may vote for the final passage of the legislation.
    - b. **Nondisclosure:** The Member may be excused from disclosing his or her personal interest in legislation and from voting for the final passage of that legislation, without any entry in the journal if the Member believes that he or she should abstain from voting and he or she informs the presiding officer prior to the commencement of the vote. (§ 8920 (b)(5).)

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#### XIV.

### CONFLICT-OF-INTEREST STATUTES APPLICABLE TO PARTICULAR OFFICERS OR AGENCIES

In addition to statutes of general applicability (e.g., Political Reform Act of 1974; Gov. Code, §1090), there are a multitude of conflict-of-interest statutes which are applicable only to particular officers or agencies. The statutes may go beyond and be more sweeping than the general statutes discussed above. Some may be directed to conflicts which may arise on a transactional basis and will permit abstention. Others may be so broad as to constitute a qualification for holding office (i.e., one may not possess specified financial interests and hold office simultaneously). It is beyond the scope of this pamphlet to attempt to set forth all such statutes. However, anyone who is attempting to determine if a conflict of interest exists in a particular instance, must be aware of the fact that these special statutes may exist and must, therefore, determine from the law establishing a particular office or agency, whether any special conflict-of-interest statutes have been enacted.<sup>10</sup>

It must also be emphasized that these special statutes will, in all probability, have had their origin in legislation which was enacted prior to the PRA. Consequently, the normal rule that a special statute controls a more general statute may have been modified by the provisions of section 81013 of that Act. As has been noted numerous times throughout this pamphlet, the PRA prevails over any other act of the Legislature in cases of direct conflict. It is beyond the scope of this discussion to attempt to define or point out areas of conflict between the PRA and special statutes. Each situation must be analyzed on its particular facts to determine the viability of the special statutory provision.

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<sup>10</sup>See generally West's Annotated California Codes, General Index, under the heading "Adverse or Pecuniary Interest" or Deering's Annotated California Codes, General Index, "Conflicts of Interest."