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*presents*

## **Public Law 101 Conference**

*Conflicts of Interest*

Wednesday, November 15, 2023  
3:30 p.m. – 4:30 p.m.

Speakers:

Christina Cameron, Partner  
Devaney Pete Morris & Cameron LLP

### Conference Reference Materials

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## CHRISTINA M. CAMERON

PARTNER

San Diego

### AREAS OF PRACTICE

MUNICIPAL/PUBLIC ENTITY LAW, OPEN GOVERNMENT, GOVERNMENTAL ETHICS, CAMPAIGN/ELECTIONS, LAND USE, PUBLIC WORKS, EMPLOYMENT LAW, LITIGATION.

Christina Cameron is a founding member of Devaney Pate Morris and Cameron and has 35 years of local government experience in both the legislative and legal fields. She currently serves as General Counsel to the San Diego Ethics Commission providing advisory, administrative enforcement and litigation services as well as, regularly training local agencies and officials in governmental ethics laws. Christina is an Assistant City Attorney to the City of Del Mar.

In addition, Christina serves as legal counsel to officials and assists in their compliance with state and federal disclosure laws. Christina currently serves as special counsel to the Los Angeles City Ethics Commission and has previously served as special counsel to the Oakland Public Ethics Commission.

Christina has focused much of her practice around governmental ethics (including conflicts of interest under the Political Reform Act and Government Code section 1090) campaign and economic disclosure laws, Brown Act and Public Records Act compliance. She previously served on the FPPC Committee of the League of California Cities and currently reviews the League's *California Municipal Law Handbook* related to elections.

Christina's litigation practice is focused on the defense of public entities including writs of mandate and defending challenges related to administrative enforcement actions. She also defends public entities in contract, CEQA, employment, and public works litigation.

### AREAS OF LEGAL EXPERTISE

**Open Government and Ethics.** (Brown Act, Public Records, and AB 1234). Ms. Cameron advises and provides in-person training to public officials on governmental ethics laws including economic disclosures and conflicts of interest. She advises large public entities regarding compliance with the

Public Records Act and Ralph M. Brown Act and has litigated Brown Act and Public Records Act issues on behalf of public entities. She served on the drafting team for creation of the City of San Diego Ethics Ordinance and Ethics Commission (2001).

**Campaign/Elections.** Ms. Cameron analyzes proposed ballot initiatives and develops ballot language related to land use, taxation, and charter amendments for large and small municipalities. She has advised candidates on FPPC compliance and investigations and enforces election and campaign laws in the City of San Diego.

**Public Works/Construction.** Ms. Cameron advises public entity clients regarding prevailing wage and public contracting laws including stop work actions and contract change orders. She reviews public works contracts and represents public entities in post-construction disputes including litigation.

**Real Property/Redevelopment.** Ms. Cameron has advised municipalities and redevelopment corporations on California Community Redevelopment Law. She has drafted disposition development agreements, purchase and sale agreements, exclusive negotiating agreements, and affordable housing covenants. She has extensive experience with discretionary projects, voter- approved land use matters, affordable housing, inclusionary housing, and condominium conversion. She served as Coastal Commissioner Scott Peter's primary advisor from 2002 to 2006.

**Employment Law.** Ms. Cameron provides advice on employment and personnel issues including public employee employment contracts, pre- and post-termination procedures, and performance reviews. She has experience related to wrongful termination litigation including FEHA and EEOC employment discrimination and harassment matters.

#### **BAR ADMISSIONS**

- State of California
- Federal Southern District
- Federal Central District

#### **CURRENT/FORMER PUBLIC AGENCY CLIENTS**

- San Diego Workforce Partnership (2015 – present). General Counsel.
- San Diego Ethics Commission (2011 - present). General Counsel.
- Los Angeles City Ethics Commission (2013 – 2015; 2023-present). Special Counsel.
- City of Del Mar (2009 - present). Assistant City Attorney.
- City of Murrieta (2008 - 2022). Assistant City Attorney.
- San Diego Convention Center Corporation (2012 - 2016) Deputy Corporate Counsel.
- San Diego Community College District (2008 - present). Special Counsel.

#### **EDUCATION**

- University of California, San Diego, B.A., 1988
- California Western School of Law, J.D., 2008

#### **HONORS / AFFILIATIONS**

- Member, San Diego Defense Lawyers
- Member, San Diego County Bar Association
- Member, Council on Governmental Ethics Laws (COGEL)
- Member, California Special Districts Association (CSDA)

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## Public Entity Conflicts of Interest

Christina M. Cameron, Esq.  
Devaney Pate Morris & Cameron LLP

**DPMC**  
Devaney Pate  
Morris & Cameron<sub>LLP</sub>

# Introduction

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This presentation will explore the particular conflict-of-interest rules that apply to public entities. These rules apply to both decision makers and staff. Avoiding (and sometimes even the ability to avoid) a conflict looks different for decision makers versus staff. Conflicts of interest can be caused by both financial and non-financial interests depending on the type of decision. Some conflicts cannot be resolved by recusal. This presentation will also discuss challenges and practical issues related to advising public entities and their officials in this area of law.

Note: This presentation will provide a very high-level review of very complicated and detailed laws that are highly fact dependent. FPPC Advice letters are available on Westlaw and cover myriad factual situations.



**“Government officials owe paramount loyalty to the public.”**



**“Personal or private financial considerations should not be allowed to enter the decision making process.”**

Bill Lockyear  
former California Attorney General

# Overview

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Three Broad Categories:

1. Political Reform Act (sometimes referred to as “regular” conflicts of interest)
2. Government Code section 1090 (related to contracts)
3. Other Types of Conflicts-of-Interest
  - Common Law/Dues Process (includes non-economic interests)
  - Campaign Contributions
  - Honest Services/RICO (Federal)

Challenges/Practical Considerations

# Political Reform Act

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Related to an official's financial interests;

Applies to any decision;

Requires complete recusal;

Penalties including fines, criminal prosecution, removal from office.



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**“A public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest. “**

Gov. Code § 87100

## Financial Interests (of official, spouse, or dependent child)

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### Investments

- Stocks or businesses; \$2,000 or more in value

### Real Property

- Includes both ownership and leased real property; \$2,000 or more in value
- Includes property owned by a business or held in a trust

### Income

- \$500 or more from the same source
- Includes sources of income to an official's business positions

Business Positions – Being a director, officer, partner, trustee, employee, or holding a management position in a business

Personal Financial Effect – Measurable financial benefit or loss as a result of decision

## Financial Interests (of official only)

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### Gifts

- Includes rebate/discounts not available to the public
- Travel paid by other than official's agency
- \$590 or more from a single source in the 12 months prior to the decision
  - Adjusted every two years – next adjustment January 2024.
- Official cannot give the gift away to avoid – controlling a gift is enough
  - Options for avoiding – donate to charity, return to giver, or pay down (within 30 days)
- Lots of exceptions

### Campaign Contributions

- Discussed later in this presentation

## Reasonably Foreseeable Financial Effect

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Explicitly Involved – named party or the subject of a governmental decision – financial effect is presumed (and recusal will be required)

Not Explicitly Involved – there is a realistic possibility that the official's economic interest will be financially affected.

- Do other things need to happen for there to be a financial effect on the economic interest?
- Would the public expect there to be a financial effect?
- Is the type of economic interest that which is typically financially affected by this kind of decision?

## Materiality & Rules of Thumb

Is the financial effect on the official's interest big enough that they must recuse?  
FPCC Regulations contain materiality standards for each type interest:

Rules of thumb – there is always a conflict when:

- The official's interest is explicitly involved
- The official's real property interest is the subject of a decision or close to property that is the subject of the decision (New Rule in 2019)
  - Within 500 ft. – materiality presumed. Recuse
  - 500 ft. to 1000 ft. – material IF the decision will impact official's property in specified ways
  - 1000 ft. or more – presumed not to be material (but rebuttable)
- Gifts of more than \$590 received in past 12 months – cumulative of all participants
- Campaign contributions received of more than \$250 – cumulative of all participants and agents

# Exceptions

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## Public Generally

If an official has an economic interest in a decision that would otherwise require disqualification but the effect on that economic interest is no different than that of the public generally, then he or she may not be precluded from participating

- Not a rule of thumb – specific percentages to determine “significant segment”
- Significant segment must be impacted in the same way and to the same extent as the official.

## Legally Required Participation

When a public official is disqualified and that disqualification makes it impossible for the government to act, the official may be allowed to participate under very strict rules if there is no reasonable alternative manner of decision-making

- The need to break a tie vote is never legally required
- Cure quorum when multiple disqualification

# Making and Participating in Making Decisions

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## Making

- Voting, authorizing, appointing, entering into contracts, otherwise obligating the City

## Participating in Making

- Providing information, opinion, or recommendation in order to affect a decision; no significant intervening substantive review.
- Actions leading to decisions/preliminary negotiations.

# Influencing Decisions

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## Influencing

- Contacting or appearing before an official in your own agency or an agency under the authority of budgetary control of your own agency in order to affect a decision
- Acting in official capacity, contacting or appearing before any official in any other government agency in order to affect a decision
- Exceptions apply to ministerial actions, appearing as a member of the public (limited), negotiating the terms of employment (limited), public speaking, architectural and engineering drawings (limited)



## What to do When Disqualified

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At the staff level, simply avoid any involvement in the matter; let other staff prepare the matter for decisionmaker consideration.

### Elected Officials

- Identify the disqualifying interest on the record (by name, address, or asset effected) when the item is called but before it is discussed/before going into closed session
- Leave the room while the matter is discussed and voted on; except for consent items
  - However, if a disqualified official has personal property or business interests at stake, they may be able to remain in the room and participate as a member of the public – rule is limited

## Legal Penalties – Applicable to Official

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Failure to disclose economic interest or failure to disqualify where a conflict exists may result in:

- Administrative or civil monetary penalties
- Criminal prosecution which can lead to removal from office

## Conflicts Related to Contracts (Gov. Code § 1090)

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Often referred to as a “section 1090 problem,” after the Government Code section containing the prohibition

These restrictions are in addition to the restrictions of the Political Reform Act

Limited to contracts

Economic interests are broader

VOIDS contract; contract cannot be enforced

Possible Criminal Penalties (fine or prison up to 3 years, lifetime ban on holding office).

*Since 2014 – FPPC allowed to give advice in 1090 matters*

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**“... city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall ... city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. “**

Gov. Code § 1090

## Making a Contract

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Contracts can be written, oral, informal, e.g., purchasing

Includes preliminary discussions, negotiations, planning and solicitation of bids, & voting on the contract itself

Councilmembers are presumed to have participated in any contracts within the Council's jurisdiction – recusal and leaving the room is not enough

Officials cannot benefit after the fact in a contract they made

## Economic Interests – Not Defined in Statute

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Broadly applied by courts

Includes the following relationships with contracting party:

- Employee
- Attorney, agent or broker
- Supplier of services or goods
- Landlord-Tenant
- Creditor-Debtor
- Officer or employee of non-profit corporation
- Includes spouse community and separate property

The relationship can be complicated or involve intermediaries

## Exceptions to Economic Interests

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### Remote Interests (members of multi-member bodies only)

- Includes some employment situations, stock ownership derived from employment, and landlord-tenant relationships
- Allows an official to disclose the interest and recuse

### Non-Interests

- Includes stock of less than 3% in a corporation, reimbursement of expenses, uncompensated service on non-profit boards
- No disclosure or recusal requirement – official may participate

# Consequences of Violations

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Penalties are severe

Contract is “void”

- Local agency does not have to pay for goods or services received under the contract and may even seek repayment of amounts already paid

Criminal Penalties

- Felonies for willful violations
- Fines – up to \$1,000
- Imprisonment
- Disqualification from ever holding public office again



# Other Conflicts of Interest

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Common Law/Due Process

Campaign Contributions

Federal (Honest Services/RICO)



**“No person shall be deprived of life, liberty or property without due process of law”**

United States Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amendments  
California Constitution, Art. I, §§ 7 & 15

## Common Law/Due Process

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Personal (non-economic) interest can also interfere with an official's ability to act in a fair and impartial manner, resulting in a conflict of interest

Generally applicable to quasi-judicial matters (permits and the like) – whenever there is a due process issue

- Includes familial relationships, friendships, or general sympathy for a particular viewpoint

The question is whether there is a non-economic situation which makes the official unable to make a decision in a fair manner primarily for the benefit of the public

If so, the official may not participate – recusal is sufficient

# Common Law/Due Process – Quasi-Judicial Proceedings

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Public hearings required by state or local law, e.g.,

- Subdivision Map
- Conditional Use Permit
- Development Permit
- Variance

Decision affects specific parties vs. area-wide impact

Decision involves applying an adopted rule or standard to a specific set of facts

In land use, many “legislative” actions are afforded some due process protections through state and local regulation, e.g., rezone notice requirements.

# Common Law/Due Process – Procedural Due Process

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Fair and Impartial Decisionmaker

Proper Notice of the Hearing

Meaningful Opportunity to Prepare and be Heard

Proper Hearing Process

Complete Record

Decision that Meets Legal Requirements and is Based Upon the Record

## Common Law/Due Process – Fair & Impartial Decisionmaker

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Requires both actual fairness and the appearance of fairness

- No personal interest or involvement in the outcome of the matter.
  - However, merely holding opinions, philosophies, or strong feelings about issues or specific projects is not disqualifying.

Best Practices – Officials Should:

- Avoid statements (public or private) that suggest they have already made up their mind.
- Be careful about making comments between hearings. Impartiality is required throughout the process.
- Listen carefully on each occasion to all parties even though an official may have validly developed preliminary opinions based on evidence in the record.
- Avoid appearing impatient with “the process” – can be mistaken by applicants, opponents, or a suspicious public to be bias.

## Campaign Contributions - AB 1439

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Previously, these restrictions only applied to members of appointive bodies. Starting in 2023, these restrictions were extended to all local officials.

Officials are prohibited from participating in proceedings regarding a license, permit or other entitlement for use if the official has received campaign contributions of more than \$250 during the previous twelve months from any party or participant or their agent.

- A “participant” is someone who has a demonstrated financial interest or who has testified in a matter.
- An “agent” is someone who represents a party or a participant.
- “Licenses, permits, or other entitlements for use” are proceedings on all business, profession, trade and land use licenses and permits, and other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises.

## Campaign Contributions - AB 1439 (cont.)

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Officials are also prohibited from receiving, soliciting or directing a campaign contribution of more than \$250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for twelve (12) months after the proceeding.



## Federal - Honest Services/RICO (cont.)

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Under federal law the public has the right to "honest public service" from their officials. Public servants owe a basic duty of loyalty and honesty to the public

- Duty is violated when an official makes decisions or takes actions that are motivated by the official's personal interests, as opposed to the interests of those the official serves.
- The "honest services" laws are found in the federal laws against mail and wire fraud. Accepting bribes and receiving kickbacks are examples of violations.
- Punishable by up to 20 years in jail and a \$250,000 fine.

## Federal – Honest Services/RICO (cont.)

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Failure to report bribes or other ill-gotten gains on income tax forms can result in income tax fraud charges.

Threats that a public agency will not do business with someone who does not give money, gifts or political or charitable contributions can be prosecuted as extortion.

A group of people engaged in any of these types of conduct can be prosecuted under federal organized crime laws (RICO).

# Challenges/Optics/Practical Issues

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## Personal Responsibility of the official

Legal counsel does not know or keep track of officials' interests

Officials are frequently part time with nominal pay – have substantial financial ties to the communities they serve

Train officials to “Ask before you act”

Not all problems can be solved after the fact

## Public Entity Attorney Limitations

Client is the entity not the official

No attorney-client relationship

Limitations on use of public resources (campaigns)

Optics – legal requirements are the minimum; public frequently expects more

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# Questions

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