

**CSAC NEW SUPERVISORS
INSTITUTE
NOVEMBER 27, 2018
AGENDA**

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**Introduction to the Role and Duties of County Counsel &
Potential Pitfalls for New Supervisors**

OUTLINE

County Counsel

- Who are we?
- What do we do?
- Who do we do it for?

Board Ethical Issues

Conflicts of Interest

- Gov. Code Sec.
1090/81000-91014
Contracts/Financial
Interests.

Due Process

- Board Member as Judge.
- Ex Parte Contacts.
- Personal
Embroidment/Bias.
- Conflicts of Interest.

The Brown Act

- When it Applies.
- Why it is required?

County Counsel – Who Are We? General Law Counties

- Authorized by the California Government Code and appointed by the Board of Supervisors. (Gov. Code § 27640.)
- Appointed to 4 year terms. (Gov. Code § 27641.)
- May be removed for neglect of duty, malfeasance or misconduct in office, or for other good cause. (Gov. Code § 27641.)
- There are 44 general law counties in California.

Charter Law Counties

- Position is created by County Charter. (Cal. Const., art. XI, § 4, subd. (c).)
- Where charter does not create the office the Board of Supervisors may contract with outside counsel. (Gov. Code §§ 31000, 31000.4, 31001.)
- Duties and role of County Counsel will be defined by County Charter but generally correspond to duties in general law counties.
- Where county charters are silent, Government Code may be used to “fill in the blanks.”
- There are 14 charter law counties in California.

WHAT DO WE DO? COUNTY COUNSEL DUTIES

Multitasking



COUNTY COUNSEL DUTIES

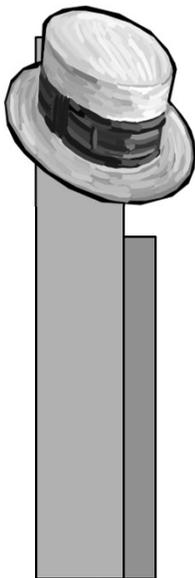
- Legal advisor to the Board of Supervisors, attend meetings of the Board of Supervisors and oppose all unjust and illegal claims and accounts against the county. (Gov. Code § 26256.)
- Provide legal services and opinions, to the county and all county officers and departments. (Gov. Code §§ 26520, 27642.)
- Review contracts, leases, memorandums, legal documents, Board Agenda Items, and other documents. (Gov. Code §§ 26520, 27642.)

COUNTY COUNSEL DUTIES



- Defend/prosecute civil actions where the county, or any officer, is a party in an official capacity. (Gov. Code § 26529, subd. (a).)
- Defend some civil actions against county employees for acts or omissions in the scope of their public employment. (Gov. Code § 995.)
- Serve as the legal advisor to the Grand Jury with respect to civil matters. (Pen. Code § 934.)

COUNTY COUNSEL DUTIES



- Prepare the ballot title and summary for all county ballot measures. (Elec. Code, section 9105.)
- Prepare impartial analysis of county ballot measures showing the effect of the measure on the existing law and the operation of the measure. (Elec. Code § 9313.)
- Ensure that the proposed ballot measure is constitutional. (*Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250.)
- Represent the Auditor/Treasurer relating to questions about the validity or constitutionality of any laws or direction affecting the payment of funds held in the county treasury in those cases where the interest of the county is not adverse. (Gov. Code § 26523.)

COUNTY COUNSEL DUTIES

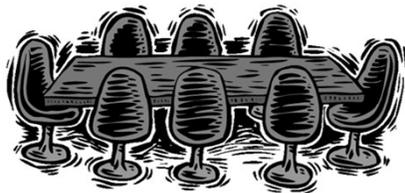


- Act as counsel in probate, conservatorship, guardianship, and juvenile dependency proceedings. (Gov. Code §§ 27643, 27646, Wel. & Inst. Code §§ 318.5.)
- Appear and defend proceedings brought by persons involuntarily confined for treatment in private hospitals (Wel. & Inst. Code § 5000 *et seq.*)
- Respond to petitions regarding conditions of confinement in the County jail.
- Other duties: nuisance abatement, dangerous dogs, special districts (cemetery districts, resource conservation districts, flood control, etc.), and defend celery and cotton.

WHO IS THE CLIENT?

County as a whole

Individual Supervisor



Who Directs County Counsel?

- County Counsel works for the Board of Supervisors. The collective Board, not an individual Supervisor, directs County Counsel.
- The CEO/CAO does not supervise the County Counsel.

County Counsel Cannot be Your Personal Attorney

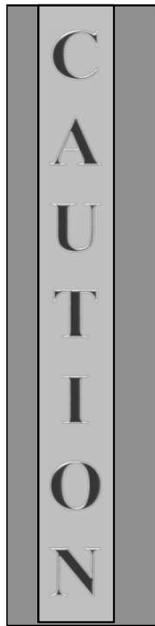
- Attorney-client privilege only exists with the “Board” as a whole.
- While discussions between County Counsel and individual Board members are privileged from public disclosure, discussions may be subject to full disclosure to other Board members.
- No attorney-client privilege on non-county business.
- Ask, does my question relate to County business?

County Counsel Conflicts

- Conflicts may arise with County Counsel when he/she acts in a dual representation role.
 - Examples:
 - Retirement Board and Employing Department
 - Civil Service Commission and County Department or “Appointment Authority”
 - Assessment Appeals and County Assessor
 - A lawyer engaged in a professional function (e.g., code enforcement) may not, in the same or related case, participate or advise in either the decision or the agency’s review of the decision. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App. 4th 81.)

When a Conflict Arises, County Counsel May

- Screen off attorneys to avoid conflicts.
- Hire outside counsel.
- Contract with a neighboring County Counsel to represent one of the parties.
- When a conflict has been declared and outside counsel has been provided, communication about the issue should be with the outside counsel.



ETHICAL DANGERS AND PITFALLS



Serving as a Judge: Acting in Quasi Judicial Matters

Board must act as an impartial tribunal.

Quasi-judicial matters include hearings on applications and appeals for:

- special use permits and amendments;
- variances;
- surfacing mining permits;
- subdivision maps;
- parcel maps; and
- permit revocations.

General Plan amendments and re-zoning actions are considered legislative and not subject to the rule requiring decisions to be based only on evidence presented at the public hearing.

Basic Due Process Rule

- Government must give a person notice of action and opportunity to be heard before decisions affecting property interests are made.



Point of Concern

- Contacts outside of the public hearing between members of the Board and persons that appear before the Board are of concern and must be properly addressed to avoid violation of due process rights and resulting County and individual liabilities.

Three Basic Types of Contact Create Due Process Problems

- Ex parte contact;
- personal embroilment,
bias; and
- conflict of interest.



Ex Parte Contacts

- Ex parte contacts are generally those contacts between members of the Board and persons that appear before the Board in hearings on special use permits, variances, or similar other land use decisions and appeals. These contacts may include site visits which give the Board member information outside of the public hearing.

- Supervisors are obligated to be available to the public; however, when such contact moves from general policy or general information to site specific or project specific information, it becomes an ex parte contact which must be disclosed at the public hearing.

Issue

If the information or knowledge obtained outside of the public hearing is not presented to persons attending the public hearing, including other Board members, those persons are denied the opportunity to consider, comment on, or challenge the information. That denial is a violation of due process & fair hearing law.



Recommendations

As soon as a situation moves from a general constituent contact to an ex parte contact, we recommend:

- that any ex parte contact be terminated; and
- that the circumstances and content of the contact be noted as accurately as possible for disclosure in case the matter should later be the subject of a public hearing before the Board.

Cure

Ex parte contacts can generally be “cured” by adequate disclosure in the public hearing. To be effective, the disclosure must occur early in the public hearing so that interested parties have the opportunity to consider the information disclosed, and must be sufficiently detailed as to the activities and specific information learned to allow meaningful comment or response.



Personal Embroilment/Bias *Clark v. City of Hermosa Beach*

- The Clarks bought a duplex a block from the beach. They planned to demolish and build a two unit condo. Planning Commission approved the project.
- Neighbor, Robert Benz, opposed decision as it would adversely affect his view. He gathered signatures on petitions, wrote letters to the City Council and filed an appeal.
- In the interim, Mr. Benz was elected to the City Council.

Embroidment/Bias (cont'd)

- At the Public Hearing before the City Council a resident raised a “point of order,” asking Councilmember Benz to recuse himself because he lived in close proximity to the proposed project and had opposed the Clarks' plans.
- City Attorney stated that the location of Benz's apartment did not create a financial conflict of interest as Benz leased, rather than owned, his residence. Further, he stated that Benz's opposition to the Clarks' project did not establish bias.

Embroidment/Bias (cont'd)

- The City Council voted to deny the permits.
- **The court found for the Clarks, ruling that their right to due process had been violated.**

Personal Embroilment/Entanglement and Prior Involvement Bias

Personal embroilment is characterized by a prior relationship between a Board member and persons who appear before the Board in hearings on special use permits, variances, or similar land use decisions and appeals, when that relationship may result in bias either for or against a project.

Embroilment/Bias

Prior involvement includes increased level of interest or participation in a project resulting from:

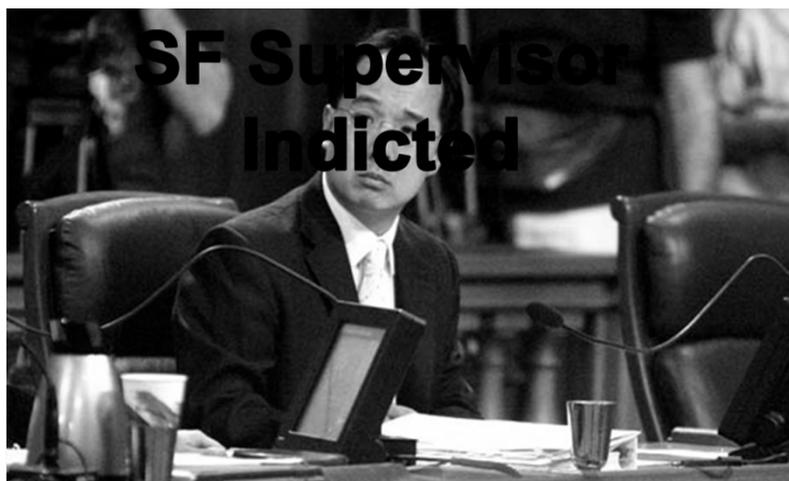
- an independent investigation of the project;
- giving direction to County staff;
- consulting with County staff and one or more interested parties;
- communicating with third parties; or
- advocating for or against the project.

Problem

The prior relationship or involvement may result in:

- an unacceptable degree of bias for or against the project;
- a legally intolerable risk of unfairness, amounting to a prejudgment of the matter; or
- a denial of one or more of the interested parties' rights to an impartial hearing.

Prejudgment or denial of an impartial hearing is a violation of due process of law.



Don't be Your Own Headline

FPPC, Form 700 and Potential Conflicts

Form 700 – Statement of Economic Interests is a helpful gauge of whether a conflict of interest may exist.

County Counsel can generally advise on Form 700 questions, but cannot advise on specific conflict issues.

County Counsel does not advise individual board members regarding particular disclosures or when to disqualify themselves from particular decisions. (Remember, no attorney-client privilege for individual members discussing personal matters.)

Reminder - A Form 700 must be filed within 30 days of assuming office. (Gov. Code § 87200.)

Financial Conflict of Interests

- Conflict of interest refers to bias or private prejudice for or against a project, contract or other governmental action based on a financial interest of some nature.
- The financial interest involved include sources of income, gifts, property interests, business interests, campaign contributions. The conflicts and their ramifications are defined both by statute and by case law.
- Cannot serve 2 masters!



Board Conflicts of Interest Involving Contracts Gov. Code § 1090

- Public Officers cannot enter into any contract in which they have a financial interest.
- If one supervisor has a financial conflict, the entire Board is disqualified from contracting. (*People v. Drinkhouse* (1970) 4 Cal.App.3d 931.)
- Contracts made in violation of Section 1090 are void.
- Section 1090 violations may be a felony and are punishable by fine or imprisonment and permanent disqualification from holding any California public office. (Gov. Code § 1097.)

POLITICAL REFORM ACT

- Covers political campaigns, campaign donations, disclosures, gifts, decision-making, financial interests. Government Code 87100-91014
- Decision-making: officials cannot make or influence the making of a government decision in which they have a financial interest
- Impacts property, business, income of self or family
- Recuse & leave chambers

Issue

Public officials are prohibited from making, participating in making, or attempting to use their official position to influence a governmental decision in which they know, or have reason to know, that they have a financial interest.



Financial Interests

A public official has a financial interest in a decision if it is reasonably foreseeable that:

- ❑ The decision will have material effect on the official or his/her immediate family.
- ❑ The decision will have an effect a business or real property which the official has an interest.
- ❑ The decision will have an effect on a source of income or employment position of the official; or

Financial Interests

- ❑ Supervisor may not accept or solicit a campaign contribution from a party (or their representative) while a land use proceeding involving their party is pending or for 3 months afterwards.
- ❑ Supervisor who has received a contribution of \$250 or more in prior 12 months must disclose and recuse. (Gov. Code §84308.)

Recommendations

A Supervisor who has a financial conflict of interest should immediately notify staff and Counsel at the earliest possible point and decline to participate in the Board deliberation and decision. Must recuse. (Different than a contractual financial interest, which cannot be cured by recusal).

Practice Tip

- If a Supervisor is disqualified due to a financial conflict of interest, consider putting on the record the following:
“Before we proceed on this matter, I would like to announce for the record that I have declared a conflict of interest in this matter because _____. (Specific description of financial interest.)
Consequently I will not hear this matter or participate in the Board’s deliberations or decision in this matter.”
- At that point, step down from platform/dais and remove self from chambers for balance of discussion on that matter.

Cure

- Conflict interest resulting from the receipt of a gift or gifts totaling between \$50 and \$460 may be cured by disclosure at the public hearing.
- Otherwise, conflicts of interest can only be cured by the Supervisor disqualifying him/herself from sitting as a member of the Board during the hearing, deliberations and decision in the matter.
- Section 1090 violations, where there is direct financial interest, are not subject to cure.

Consequences

Continued participation by a Supervisor in a matter as a decision maker where the Supervisor is personally embroiled with interested parties or has had prior involvement in the matter can result in a lawsuit:

- setting aside the Board decision;
- awarding money damages, costs and attorneys fees; and
- leading to possible personal liability for a civil rights or conflicts of interest violation.



COMMON LAW CONFLICTS

Common law conflicts exist even where the legislature is silent.

Public officers must perform with integrity and fidelity and not let private interests influence them.

Always disclose conflicts and withdraw from participation.

The law provides a floor, not a ceiling, avoid the appearance of impropriety.

Other ways to find yourself in hot water.

CONFLICTS & LEGAL ADVICE

- Legal advice does not insulate from criminal prosecution or FPPC prosecution
- Only FPPC opinion or AG opinion can protect
- If in doubt, recuse or don't enter contract.

If You Think You Have a Conflict

OPTION 1

Seek an oral or written opinion from the FPPC
1-800-ask-fppc.

OPTION 2

Seek the advice of independent personal counsel.

ALWAYS ERR ON THE SIDE OF CAUTION

THE BROWN ACT

History

In 1951, San Francisco Chronicle reporter Mike Harris spent 6 weeks looking into how local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings were common. He wrote a 10 part series on “Your Secret Government.” Harris was asked to write the preface to the Brown Act.

Legislature Responds

- In response, the public pushed for a new state open meeting law and Modesto Assemblyman Ralph M. Brown introduced the Brown Act. The bill was signed into law in 1953.



The Intent of the Brown Act

- Government officials are elected by the people and govern on behalf of the people.
- Legislative bodies must discuss, deliberate and act on the public's business openly.
- The public needs to have access and the ability to observe, monitor, and evaluate its legislative bodies.
- Goal is to create a culture of compliance.

When Does the Brown Act Apply?

- All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting.
(Government Code Sec. 54953.)
- A Supervisor-Elect is subject to the Brown Act.
- There must be a public report of the vote taken by each member, including abstentions.

What is a Legislative Body?

- If the Board of Supervisors takes action to create a commission or advisory body, that commission or advisory body, becomes its own legislative body. (Government Code Sec. 54952(b).)

- If that commission takes action to create a subcommittee, that subcommittee also becomes subject to the Brown Act. (Government Code Sec. 54952(b).)

“Legislative Body” Exception Ad Hoc Committees

A committee is not a Legislative body if:

- The committee is comprised solely of less than a quorum of the legislative body which created it; and
- The committee meets for a short duration to gather information about a single subject.

Example: The Board of Supervisors has 5 members. The Board Chair appoints 2 members to an Ad Hoc Committee to research Pension Reform Options and return with a report in 6 months. The Ad Hoc Committee is not a legislative body.

What is NOT a Legislative Body?

An advisory committee **created by a single county officer** is not subject to the Brown Act. This committee would not have authority to take action or advise a legislative body. It would exist solely to make recommendations to be considered by a single county officer.

(California Attorney General Opinion 72-67.)

What is a Meeting? What Elements Comprise a Meeting?

“Meeting” means any congregation of a **majority** of the members of a legislative body at the same time and location to **hear, discuss, deliberate or take action** on any item that is **within the subject matter jurisdiction** of the legislative body.

ELEMENTS:

- ❑ Congregation of a majority.
- ❑ Same time and place.
- ❑ To hear, discuss, deliberate, or take action on any item.
- ❑ Subject matter jurisdiction.

Prohibited Meetings: Group Meetings

- There are 5 members on an advisory committee. Members A, B and C meet before a meeting to exchange research they did on Agenda Item #2.

Serial Meetings

- **Serial Meetings** conducted through direct communications, personal intermediaries, or technological devices **for the purpose of developing a concurrence** are expressly prohibited. (Government Code Sec. 54952.2(b).)
- **What is a serial meeting?**
 - Direct or indirect communication by a majority.
 - To develop a collective concurrence.
 - As to action to be taken.

Email or Text Chain

- Member A texts Member B about Agenda Item #7. Member B emails Member C about the same issue.



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Hub and Spoke



- Member A calls Member B to discuss Agenda Item #3. Next, Member A calls Member C to get her thoughts.

What is NOT a Serial Meeting?

- Individual contacts between Members and staff, counsel or others, e.g. staff meeting with a Member to answer questions or provide information. (Government Code Sec. 54952.2(c)(1); 54952.2(b)(1).)
- Staff should not ask and Member should not answer questions about concerns or position of other Members.

NOT a Meeting

- Attendance at social or ceremonial events where no business of the body is discussed. (Government Code Sec. 54952.2(c)(5).)
- Community forums and meetings of other government bodies.
- Attendance at public conferences if members do not discuss among themselves business under the body's jurisdiction. (Gov. Code Secs. 54952.2(c)(2)(3) and (4).)

Social Media

Law in this area is developing. Best practice to avoid allegations of Brown Act violations include:

- ❑ Not engaging in discussions within the Board's subject matter jurisdiction on fellow Members' blogs, Twitter and Facebook pages.
- ❑ Not texting, emailing or engaging in other forms of electronic communication during meetings.
- ❑ Do not **“reply all.”**
- ❑ Business information on private devices is subject to disclosure.

Notice & Posting Agendas

- ❑ Agenda must be posted 72 hours in advance.
- ❑ Brief description of items of business.
- ❑ Agendas must be publicly accessible and distributed in advance to those who request copies.

Items Not on Agenda



- No discussion or decision on items not on the posted agenda.
- Members or staff may briefly respond to questions posed by the public.
- Members may ask staff a question, make a brief announcement or make a brief report on his or her own activities.
- Members may ask staff to report back to the body at a subsequent meeting, or take action to direct staff to place a matter on a future agenda.

Public Comment

- Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject area of the legislative body.
- Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration.
- The Brown Act permits legislative bodies to adopt "[r]easonable regulations" for public comment periods, but the body may not "prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." Gov. Code section 54954.3(b), (c). See also *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966.

Public Comment

- The moderator at a public meeting may limit speech in order to maintain order at the meeting.
- In public meetings, “[c]itizens have an enormous first amendment interest in directing speech about public issues to those who govern their city.” (*White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421.)

Closed Sessions



Closed Sessions – General Principles

- Closed sessions are narrow exceptions to the open meeting rule.
- Permitted only where specifically available by statute (e.g., litigation, real estate negotiations, labor negotiations, personnel decisions, etc.)
- Standard is NOT whether the subject is sensitive, embarrassing or controversial.
- Discussion must stay within parameters of item.
- What happens in closed session, stays in closed session. Only Board as a whole can waive privilege.

Brown Act Violations: Civil Action

- Any individual or the District Attorney may file a civil lawsuit for injunctive relief or to void action taken in violation of the Brown Act.
(Government Code Sec. 54960.)
- Attorneys' fees are available to prevailing plaintiffs. (Government Code Sec. 54959.)

Brown Act Violations: Criminal Penalties

- Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of the Brown Act and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled to, is guilty of a misdemeanor. (Government Code Sec. 54959.)