

AB 1234

Ethics Training

AC Transit Board of Directors

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Training Goals

- Alert Board Members to types of conduct, activities and relationships that can trigger disclosure or disqualification.
- Urge Board Members to comply with ethics laws and general ethical principles.
- Help Board Members comply with mandatory ethics requirements.
- Advise Board Members to consult with counsel when ethics questions arise.

Summary

1. **Prohibitions Against Personal Financial Gain**
 - a. Bribery
 - b. Political Reform Act – Conflicts of Interest
 - c. Form 700
 - d. Contracts With the District
 - e. Leaving District
2. **Perquisites of Office**
 - a. Gifts and Honoraria
 - b. Use of Public Resources
3. **Government Transparency**
 - a. Conducting Business at Open Meetings
 - b. Public Records
 - c. Behested Payments
4. **Fair Processes**

Ethics = Values

Six universal ethical values:

- Trustworthiness
- Loyalty
- Responsibility
- Respect
- Fairness
- Compassion

Ethics Laws

- Minimum standards
 - tells you what you “must” do
- Not always common sense
- Appearances matter
 - also consider what “should” be done

1. Prohibitions Against Personal Financial Gain

- Bribery
- Conflicts of interest
- Conflicts in contracting
- Conflicts in contributions
- Revolving door

Bribery

Public officials may not:

- Solicit, receive or agree to receive
- Anything of value
- In exchange for their official actions

Bribery and Related Crimes

- Beware of: “this for that”
- Think about what you would say if someone approached you
- Think about how your conversation would look on a trial transcript

Bribery: Penalties

- Up to four years in state prison
- Loss of office
- Barred from ever holding office again
- Fines/restitution
- Federal prosecutions: stiffer penalties

Political Reform Act – Conflicts of Interest

Public Officials

- Cannot make, participate in or influence decisions that have a reasonably foreseeable material financial effect on one of their financial interests
 - Sources of income (\$500 or more)
 - Sources of gifts (\$520 or more)
 - Business entities (\$2,000 investment; or position as director, officer, partner, trustee, employee, management)
 - Real property interest (\$2,000 or more)
 - Personal financial effects

Political Reform Act – Conflicts of Interest (cont.)

- In a manner that is distinguishable from the effect on the public generally
- 12-month look back for income
- Violations – administrative fine up to \$5,000 per count; civil penalties; criminal misdemeanor
- Special rule – cannot accept more than \$250 in campaign contributions from a party involved in a proceeding involving a license, permit, or other entitlement for use pending before the public official’s agency, or that was pending within the last 3 months

If You Are Disqualified

1. Don't discuss or influence (staff or colleagues)
2. Identify nature of conflict at meeting
3. Leave room (unless matter on consent)

Failure to Step Aside: Penalties

- Court could invalidate the decision
- Misdemeanor (could result in loss of office)
- Fines (trending up: \$30,000 - \$50,000)
- Attorneys' fees
- Embarrassment

Getting Advice on Conflict Issues

- District counsel
 - No immunity; client is the District
- The FPPC
 - In writing
 - Allow plenty of time
 - Prospective only
 - **Provides immunity**
- Private counsel

Form 700

Disclose financial interests of you, your spouse/domestic partner, and your dependent children:

- Sources of income – \$500 or more
- Ownership/leasehold interest in real property – \$2,000 or more
- Investments – \$2,000 or more

(and if 10% or greater owner, any investment owned by that entity in which your pro rata share is \$2,000 or more, and any source of income to that entity from whom your pro rata share is \$10,000 or more)

Form 700 (cont.)

- Loans – \$500 or more (other than commercial loans at public rate or loans from close family members)
- Businesses – investment of \$2,000 or more, or position as director, officer, partner, trustee, or management
- Gifts – \$50 or more
- Travel payments
- Assuming office; annual; leaving office
- Available for public inspection
- Failure to file/late filing: administrative fine up to \$5,000

Potential Traps for the Unwary

- Disclosure is not always co-extensive with disqualification
 - *E.g.*, disclose sources of income and gifts received during the prior calendar year; disqualify based on income and gifts received in the prior 12 calendar months
 - Don't disclose your personal residence; do disqualify if a decision materially affects your personal residence
 - For businesses where you own 10% or more, disclose if your pro rata share of income received from a single source is \$10,000 or more; disqualify if the pro rata share of income is \$500 or more

Potential Traps for the Unwary (cont.)

- Disqualification/disclosure of financial interests of your spouse, domestic partner or dependent child:
 - Income, gifts: yes, report community property interest and disqualify if over the threshold
 - Real property: yes, report full property value, and community property interest in any rental income, and disqualify if over the threshold
 - Business investments: yes, report full investment and community property interest in income from the investment, and disqualify if over the threshold
 - Business positions: no, only report your own
- Blind trusts, separate property agreements, limited liability partnerships, etc. – need specialized advice

Contracts with the District

Government Code section 1090

- Prohibits public officials from being financially interested in any contract made by them in their official capacity, or made by a body or board of which they are members
- Recusal usually not an option; if one member of the Board has a conflict, then the entire Board is prohibited from making the contract
- Penalty: contract is voidable; individual subject to criminal prosecution or FPPC fine

1090 is Very Broadly Construed!

Financial interests in a contract can include:

- Your spouse's employment by the contracting party
- "Good will" even if you are not being paid
- "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." *People v. Deysher* (1934) 2 Cal.2d 141, 146

1090 is Very Broadly Construed! (cont.)

- Prohibition extends to participating in or making the contract
- Board members are conclusively presumed to be involved in making all contracts under their board's jurisdiction
- Contracts can include grants, development agreements, expense reimbursements, land sales, loan agreements

Always Seek Advice if You Are Unsure if 1090 is Triggered

- Inform District Counsel
- Limited advice from FPPC
 - prospective only
 - always referred to AG and local DA before responding
 - can be evidence of good faith but does not give immunity from prosecution
 - AG and DA can disagree with FPPC

Conflicts When Leaving Office

Political Reform Act prohibitions:

- Ban on participating in any decision directly relating to a person or entity with whom the official is negotiating, or has any arrangement concerning, prospective employment
- One year ban on contacting your former agency for purposes of influencing a decision
- Permanent ban on representing someone other than your former agency in particular proceedings – e.g., lawsuits; administrative hearings; contracts (but not implementation of an existing contract)

2. Perquisites of Office

- Gift limits
- Honoraria
- Misuse of public funds
- Gifts of public funds
- Mass mailing
- Free or discounted transportation

Gifts and Honoraria

Gift limit is \$520 from a single source in a calendar year; applies to any gift that you would be required to report on the Form 700 unless an exception applies

Common exceptions:

- Returned, unused, within 30 days
- From close relative/friend who does not do business with District
- Mutual exchanges on birthdays, special occasions, etc.
- Informational materials
- Personalized plaques worth less than \$250
- Home hospitality (friend must be present in the home)
- Wedding gift (no limit, but must be reported)
- Prize from a bona fide competition (no limit, must be reported)

Gifts and Honoraria (cont.)

Honoraria (payment for speaking or writing, other than travel costs) are prohibited

- Exception for earned income received for speaking or writing as part of one's private employment or in connection with the practice of a profession such as teaching, law or medicine

Political Use of Public Resources

- By individuals or agency itself (support of ballot measures)
- Pre-qualification drafting and research is permissible
- Okay to take a position on the measure
- Informational materials must be objective and factual
- No use of public resources for campaign materials
- Get advice!
- Mass mailing restrictions

Use of Public Resources Issues

- **Personal** use of public resources (including staff time and agency equipment) prohibited
- **Gifts** of public resources prohibited

“Public Resources”

Money or anything paid for with public money:

- Staff time
- Office space
- Equipment
- Supplies

Consequences of Violations

Civil penalties:

- \$1,000/day fine + 3x value of resource used

Criminal penalties:

- 2-4 year prison term + disqualification from office

Gifts from Transportation Companies

- No free transportation from transportation companies
- Means no free passes or discounts
- OK if employment benefit or for official duties
- Applies to officers, but not employees
- Penalty is loss of office

3. Government Transparency

- Brown Act/Bagley-Keene Act
- Public Records Act
- Behested Payment Reports

Conducting Business at Open Meetings

- A majority may not consult outside an agency-convened meeting
- Serial meetings prohibited – including by email
- Must give notice and stay within the topics on the agenda
- Must be open to the public and held within the District

New Law: AB 992

- Members are permitted to communicate on social media with the public to answer questions, provide information to the public, or to solicit information from the public regarding AC Transit business
- Members are prohibited from using social media platforms to engage in communications with a majority of their colleagues regarding matters within AC Transit's jurisdiction, including through the use of emojis
- Officials are prohibited from responding or reacting to anything posted or shared on social media regarding agency business by another member of the same legislative body

Public Records

- Covers any writings prepared, owned, used or retained by agency – including on electronic format – unless an exception applies (e.g., attorney client privilege)
- Includes e-mails sent from District accounts
- California Supreme Court recently decided that the PRA applies if public officials conduct public business on private devices
- Penalties: Adverse media attention; costs and fees if litigated

Behested Payment Reports

- Disclose a donation of \$5,000 or more from a single source to a charity made at the elected official's request
- Charitable, legislative or governmental purpose
- File within 30 days of donor's payment

Key Things to Remember

- “Who’s going to know?” is a very risky line of thinking
- Nothing to hide may be a good goal

4. Fair Processes

- Common law bias
- Due process
- Incompatible office
- Competitive bidding
- Nepotism

Fair Process Laws

Principle: Under certain circumstances, public officials are stewards of fair processes

- Decision-making
- Contracting
- Employment

Due Process

Due process requirements and rules against bias

- Expressions of views prior to hearing
- Personal, but non-financial interests

Incompatible Offices

- Issues: conflicting loyalties & overlapping jurisdictions
- Result: forfeit first office

Competitive Bidding for Public Contracts

- Competitive bidding requirements
- Kickbacks can be prosecuted under federal fraud and extortion laws

Decisions Involving Family Members

- Disqualification generally required if decision affects family's finances
- Nepotism

Use of Personal Email

- AC Transit policy prohibits the use of personal email accounts or text messages to conduct official District business
- All District business should be conducted through the District's email system and through AC Transit resources

Pop Quiz!

Technically, bribery only involves the exchange of an official action for money, not other items of value.

True or False?

Pop Quiz!

FALSE

A bribe involves conferring a benefit on a public official to influence a person's vote, opinion or action. Asking for a bribe is illegal, of course, but so is receiving one or agreeing to receive one. Under the state's criminal laws, a bribe includes anything of value; it also includes receiving advantages. The advantage can be a future one and need not involve the payment of money. The federal law definition of bribery is even broader.

Pop Quiz!

The conflict of interest prohibition is very broad; you cannot attempt to influence the decision in any way. This includes talking with your colleagues or staff about the matter.

True or False?

Pop Quiz!

TRUE

A public official is not allowed to make, participate in, or influence a governmental decision in which they have a conflict of interest. Remember, the breadth of the prohibition: it does not just apply to voting, but the entire process leading up to voting.

Pop Quiz!

A vote that is clearly adverse to one's own interest is not prohibited by conflict-of-interest laws.

True or False?

Pop Quiz!

FALSE

The voters have created an across-the-board, bright line rule: public officials may not participate in governmental decisions affecting their interests. Disqualification does not involve a choice. When you have a disqualifying conflict of interest you must not participate in a decision, even if you believe you can be fair.

Pop Quiz!

There's no risk of going to jail if one violates public service ethics laws.

True or False?

Pop Quiz!

FALSE

Many violations of public service ethics laws can be charged as criminal acts and the penalties for violating these laws are severe. For example, receiving or agreeing to receive a bribe is punishable by a combination of prison time, fines, losing one's office and being forever disqualified from holding public office.

Pop Quiz!

Participating in a contract in which an official has a financial interest may subject the official to particularly harsh sanctions.

True or False?

Pop Quiz!

TRUE

The special rules relating to conflicts of interest in contracts provide for felony penalties and the voiding of the contract.

Pop Quiz!

So long as a member of a board disqualifies himself or herself from consideration of a contract, the official will be insulated from charges of conflict of interest.

True or False?

Pop Quiz!

FALSE

Generally, when a member of a board has a financial interest in a contract, the contract may not be entered into even if the member disqualifies himself or herself from the decision. However, the law provides several exceptions to this general rule that will allow the contract to go forward so long as the official with the financial interest in no way participates in the decision.

Pop Quiz!

It is OK to make decisions affecting someone you are negotiating prospective employment with so long as you have not accepted cash.

True or False?

Pop Quiz!

False

If you are negotiating prospective employment with a person, you may not participate in any governmental decision directly related to that person.

Pop Quiz!

A meal provided free of charge to an official cannot be a gift if government business is discussed at the meal.

True or False?

Pop Quiz!

FALSE

The Political Reform Act broadly defines gift to include any payment or other benefit received (including meals) by a public official unless the official provided something of equal or greater value in return. It does not matter if government business is discussed at a meal.

Pop Quiz!

Public officials may use public resources for personal or political purposes as long as the use occurs after hours and does not interfere with the conduct of the government's business.

True or False?

Pop Quiz!

FALSE

There is no such exception to the prohibition against using public resources for personal or political purposes. Public resources include such things as 1) staff time, 2) office equipment (telephones, fax machines, photocopiers, and computers), and 3) office supplies (stationery, stamps, and other items).

Pop Quiz!

Economic interest disclosure forms are filed upon taking office, annually while in office, and then when one leaves office.

True or False?

Pop Quiz!

TRUE

The disclosure requirements mandated by the Political Reform Act of 1974 apply to members of the AC Transit Board and to designated employees.

Pop Quiz!

Government transparency laws may be bypassed when compliance would impose a substantial inconvenience to the accomplishment of a legitimate government action.

True or False?

Pop Quiz!

FALSE

A "whatever it takes" approach to pursuing agency objectives can lead to violations of the law and undermine an agency's commitment to having a culture of ethics. This is especially true when governmental transparency laws are involved.

Pop Quiz!

“Liking” a fellow director’s post on Twitter about express bus service in Alameda County can be a violation of open meeting laws.

True or False?

Pop Quiz!

TRUE

State law prohibits members of an agency board from using social media to engage in communications with a majority of their colleagues regarding matters within the agency's jurisdiction, including through the use of emojis.

Pop Quiz!

When conducting government business, you should consider the possibility that every document you prepare eventually may be disclosed to the public.

True or False?

Pop Quiz!

TRUE

The disclosure requirements for public records are very broad. There are limited exceptions to the requirements that public records be disclosed. This is why it is wise for public officials to consider the possibility that anything they write may eventually be disclosed to the public.

Pop Quiz!

A public board or commission must allow the public to comment upon an item before it is voted upon by the body.

True or False?

Pop Quiz!

TRUE

Another element of open meeting laws is the public's right to address the governing body on any issue on the agenda before or during the issue's consideration. A public official's role is to both hear and evaluate these concerns.

Pop Quiz!

Under some circumstances, if a decision-maker pre-judges a matter, the decision-maker could be disqualified from participating in the decision.

True or False?

Pop Quiz!

TRUE

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law and some constitutional principals still require a public official to exercise his or her powers free from personal bias, including biases that have nothing to do with financial gains or losses.

Pop Quiz!

Officeworkers may not hold offices that would subject them to conflicting loyalties.

True or False?

Pop Quiz!

TRUE

The law limits the degree to which public officials can hold multiple public offices. The reason is that, when one assumes a public office, one takes on responsibility of the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies that job becomes more complicated.

Pop Quiz!

Awarding public agency contracts based on personal connections and loyalties is considered an accepted practice for public agencies.

True or False?

Pop Quiz!

FALSE

Public contracting laws—including those adopted at the local level—are designed to give all interested parties the opportunity to do business with the government on an equal basis. This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other improper factors.

Pop Quiz!

An official is wise to be especially sensitive to public perceptions when issues concern members of an official's family.

True or False?

Pop Quiz!

TRUE

The Political Reform Act requires public officials to disqualify themselves from participating in decisions that will increase or decrease their immediate family's expenses, income, assets, or liabilities. Moreover, a number of local agencies have anti-nepotism rules that prohibit the employment or appointment of officials' relatives to positions within the jurisdiction. Finally, the public is likely to be especially skeptical that decision-makers can put aside family loyalties and make decisions based on merits when family is involved.

Pop Quiz!

Whenever a board or commission considers a sensitive issue that may expose an individual to embarrassment or rejection by the community, the matter may be heard in closed session.

True or False?

Pop Quiz!

FALSE

Closed sessions may be conducted only when they are expressly authorized by the relevant open meeting law. There is no general embarrassment or sensitive closed meeting exception.

Pop Quiz!

When a permit or application is before a board or commission, it must observe fair process rules that are analogous to those of a court.

True or False?

Pop Quiz!

TRUE

Hearings on permits or applications are quasi-judicial in nature. This type of proceeding must be conducted so as to provide a fair hearing within the meaning of constitutional due process principles.