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CONFLICT OF INTEREST -

NON-CONTRACTUAL MATTERS

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The purpose of this paper is to bring up to date two previous papers on the subject presented by me on October 29, 1956 in Los Angeles and on April 25, 1960 in Monterey.

Robert Costello, then City Attorney of Redwood City, presented an analysis of conflict of interest statutes adopted by the 1963 Legislature at the City Attorney's Spring Conference in Monterey in 1964.

This paper will be confined strictly to officers' interest in non-contractual matters. A very complete and thorough analysis of the conflict of interest laws and statutes as they refer to the subject of interest in contracts was made by Richard Carpenter, Executive Director and General Counsel of the League at the bi-annual seminar for mayors and new councilmen in May, 1966 and I recommend this paper to you very highly. Bud was kind enough in his presentation to the mayors and new councilmen to make reference to my previous papers on the subject of officers' interest in non-contractual matters. He referred to the following summary which concluded my paper and which I cite here for your ready reference:

"1. Although there is no specific statute on the subject in this state, California follows the common law rule that it is against public policy for a representative of a municipality to vote in its legislative body on any matter which affects him individually, or for any public officer to participate in a matter before him in which he has a personal or private interest.

2. Refraining from voting removes the disqualification.

3. Legislation in which such an interested officer participates will probably not be set aside unless his vote was necessary to pass the legislation. In all such cases there is a strong presumption to be overcome in favor of the legislation and courts are reluctant to inquire into the motives of councilmen.

4. Participation of an interested officer may result in prosecution under Section 3060 of the Government Code for wilful or corrupt misconduct in office, or Section 182, Subdivision 5, Penal Code, for conspiracy to commit an act injurious to public health, to public morals, or to pervert or obstruct

justice, or the due administration of the laws.

5. Examples of interest which would disqualify and which should be disclosed:

(a) The wife or husband of a councilman or planning commissioner represents an applicant or petitioner before the council or commission.

(b) The planning commissioner is an architect for a subdivider.

(c) A councilman owns property in a parking district which is being considered for acquisition as a parking lot.

(d) A councilman is an employee of an owner of land which is being considered for acquisition as a parking lot in a parking district.

(e) A planning commissioner is a subdivider whose subdivision is being considered by the planning commission."

The 1965 Legislature made no changes in Sections 1090 to 1092 or 36525 to 36527 of the Government Code, the statutes defining conflict of interest and remote interests. There have been very few cases on the subject; however, I do invite your attention to the case of Stigall v. Taft, 58 Cal. 2d 565 (1962). In that case, it was held that a City Councilman who was also owner of a plumbing business which was awarded a plumbing subcontract in connection with construction of a City Civic Center and who took part in the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids for the Civic Center project participated in the "making" of the construction contract in the sense in which the Government Code provisions use the term "made", despite the fact that the councilman resigned his City position before the City awarded the contract to the successful bidder and was thus not a City officer at the time the City Council accepted the successful bidder's offer. The court held that the purpose of Sections 1090, 1092, 36525 and 36527 of the Government Code is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision as well as to void contracts that are actually obtained through fraud or dishonest conduct. In the case of Jeffery v. City of Salinas, (1965), 42 Cal. Rptr. 486, the court considered the question of whether the mayor's participation in a petition for the formation of an assessment district denied the plaintiffs a fair hearing before the City Council. It appears that the

mayor had signed the petition for formation of the parking district as president of the Board of Trustees of a fraternal lodge whose property was immediately adjacent to the proposed improvement. This fact was not discovered until after the hearing was held. The court held:

"As stated in their closing briefs, plaintiffs ' * * do not, nor never have, contended that these facts (the signing by the mayor in his lodge representative capacity of the petition for the formation of the district) resulted in Mayor Atteridge being disqualified in this matter. They contended, however, that because these facts remained undisclosed they were prevented from having a fair hearing before the City Council.' While it probably would have been better for the mayor to have disclosed at the hearing that he had signed the petition, we cannot see how his failure to do so deprived plaintiffs of a fair hearing, in view of the rule, which plaintiffs admit exist, that even if he personally owned property which would be affected by the formation of the district, he would not have been disqualified from participating in the hearing and voting. Had the mayor disclosed this situation, plaintiffs could not have disqualified him from acting."

Misconduct in office, based on a conflict of interest arising from matters other than contract, would be prosecuted under Section 3060 of the Government Code which authorizes the filing of a written accusation by the grand jury. In the case of People v. Hale (1965) 42 Cal. Rptr. 533, the Court discussed the phrase "misconduct in office" and said:

"In summary, if an official commits a crime in connection with the operation of his office, or wilfully or corruptly fails or refuses to carry out a duty prescribed by the law or by the charter, if any, under which he holds his position, or if his conduct as such officer is below the standard of decency rightfully expected of a public official such as drunkenness during working hours, or a gross and repeated failure to carry out his official routine in a timely and appropriate matter, he may be removed from his office as the result of an accusation. Such misconduct in office may be corrupt or merely wilful." (2 Witkin, California Crimes, Crimes Against Governmental Authority, § 874, pp. 820-821).

Although there has been little development or litigation in the area of conflicts of interest, either involving contracts

or otherwise, except as cited above, there has been considerable activity in the area of adopting rules and regulations by statute, ordinance, or otherwise, to establish codes of ethics for public officials. The lead in this respect was taken by the Legislature at the first extra session in 1966 when it adopted Sections 8920 to 8955 establishing a Code of Ethics and a joint Legislative Ethics Committee. These sections were dependent upon adoption of Assembly Constitutional Amendment No. 13, Proposition 1A, which passed by a large vote at the November election.

On February 15, 1966, Governor Edmund G. Brown proclaimed a Code of Ethical Standards for the Executive Department of the State of California applicable to each and every employee of the Executive Department. Copies of Executive Order 66-2 dated February 15, 1966 may be obtained from Governor Brown's office. The following two articles are of sufficient interest to warrant their being included here.

"Article I. Declaration of Policy. State officers and employees are responsible to all of the people of the State and not to any favored segment or group. The business and affairs of the State must be conducted in such an impartial manner that all persons understand that no State officer or employee can be influenced by other than proper methods. State officers and employees must avoid all situations where prejudice, bias or opportunity for personal gain could influence their decisions. They must equally avoid circumstances suggesting that favoritism or personal gain is the motivating force in the conduct of State Government.

"It is the intent of this code to set forth the minimum ethical standards to be followed by all officers and employees of the Executive Department. These standards are intended not only to require officers and employees to avoid activities that might result in using a public office or employment for private gain or the giving of favored treatment to any organization or person, but also to maintain public confidence in the Executive Department by prohibiting activities that might permit opportunity for personal gain or personal preference to influence decisions. The objectives are to maintain an impartial administration of the State Government and to maintain public confidence in government.

"Article II. Standards of Ethical Conduct. No employment, activity, or enterprise shall be engaged in by any officer or employee of the Executive Department of the State which might result in, or create the appearance of resulting in, any of the following:

1. Using the prestige or influence of a State office or employment for the officer's or employee's private gain or advantage, or the private gain or advantage of another. *

2. Using State time, facilities, equipment, or supplies for the officer's or employee's private gain or advantage, or the private gain or advantage of another.

3. Using confidential information acquired by virtue of State employment for the officer's or employee's private gain or advantage, or the private gain or advantage of another.

4. Receiving or accepting money or any other consideration from anyone other than the State for the performance of an act which the officer or employee would be required or expected to render in the regular course or hours of his State employment or as a part of his duties as a State officer or employee.

5. Performance of an act in other than his capacity as a State officer or employee knowing that such act may later be subject, directly or indirectly, to the control, inspection, review, audit or enforcement by the officer or employee or by the agency by which he is employed.

6. Receiving or accepting, directly or indirectly, any gift, including money, any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value, from anyone who is doing or is seeking to do business of any kind with the State or whose activities are regulated or controlled in any way by the State, under circumstances from which it reasonably could be inferred that the gift was intended to influence him in his official duties or was intended as a reward for any official action on his part."

Increasing connections between public and private life have led to public concern over conflicts of interest. Efforts to control and define conflicts of interest have satisfied neither the public nor the legislatures. The 29th American Assembly on State Legislatures in American Politics recommended:

First, codes of ethics should be adopted applying to career appointed and elected public officials in all branches of State Government.

Second, ethics committees or commissions should be created with advisory review and investigative functions.

Third, all instances of corruption should be vigorously prosecuted.

Several cities in the State of California have adopted codes of ethics for their elected and appointed public officials. Among these are the cities of San Jose and Santa Clara. Attached hereto is a draft of a Code of Ethics based upon the codes of ethics of these two cities which may be useful if this problem is ever presented to you. Such a code of ethics should assist the City Attorney in answering many questions on rather ephemeral conflicts of interest problems. It would also establish written and published standards against which public officials and appointed officials could measure their conduct. Although honesty, integrity and fair dealing cannot be legislated, such a code of ethics would certainly be a step in the right direction.

In conclusion, I would like to cite from Justice Moore's opinion in the case of People v. Harby, 51 Cal. App. 2d 759-774 (at page 773). That case involves the misuse of public vehicles by a Los Angeles councilman. Justice Moore outlined what he thought should be the high standards to which all legislators should aspire.

"That a public office is a public trust is a universal truism. No trustee thereof may with impunity exploit its prerogative, embezzle its properties, or appropriate its funds. Should he do so, he is answerable to the wrath of the sovereign beneficiary to the extent of the utmost farthing. Every state or municipal office is a sanctuary whereat not only should keep vigil the constituted guardians of the public store-house but wherein should toil the standard-bearers of public virtue. An incumbent defiles himself and desecrates his office as would the priest at the altar when he plunders the wealth or usurps the privileges under his watch-care. The rights of the owner of property are instinctively comprehended by every normal person. No cloak of office should so dull his conscience or his sense of values as to render an official untrustworthy when unguarded. He should delight in the unfailing consciousness that he has performed tasks not legally required of him and that he has contributed his own substance for the common good rather than to have been the stealthy profiteer from the public bounty. Unless this standard be the pole-star of those who serve the state, we may

envisage the day when the trailing vines and clinging mosses will cover the tomb of a once proud civilization."

CODE OF ETHICS
FOR
PUBLIC OFFICERS AND EMPLOYEES

(City of Palo Alto)

Section 1 - Declaration of Policy

The proper operation of municipal government requires that public officials and employees be independent, impartial and responsible to the people, that governmental decisions and policy be made in the proper channels of the governmental structure, and that public office not be used for personal gain.

Section 2 - Responsibilities of Public Office

Public officials are all elective officials of the City and the members of all official boards, commissions, and committees of the city.

Public officials and employees are bound to uphold the Constitution of the United States and the Constitution of the State of California and to carry out the laws of the nation, state and municipality. Public officials and employees are bound to observe in their official acts the highest standards of morality and to discharge faithfully the duties of their offices regardless of personal considerations, recognizing that the public interests must be their primary concern, that conduct in both their official and private affairs should be above reproach.

Section 3 - Dedicated Service

Public officials and employees should not exceed their authority or breach the law or ask others to do so and they should work in full cooperation with other public officials and employees unless prohibited from so doing by law or officially recognized confidentiality of their work.


Section 4 - Fair and Equal Treatment

Preferential consideration of the request or petition of any individual citizen or group of citizens shall not be given. No person shall receive special advantages beyond that which are available to any other citizen. *

Section 5 - Use of Public Property

No official or employee shall request or permit the use of city-owned vehicles, equipment, materials, or property for personal convenience or profit, except when such services are available to the public generally or are provided as municipal policy for the use of such official or employee in the conduct of official business. No public official or employee shall use the time of any city employee during working hours for personal convenience or profit.

Section 6 - Obligations to Citizens

No public official or employee in the course of his official duties shall grant any special consideration, treatment, or advantage to any citizen beyond that which is available to every other citizen in the same circumstances. 

Section 7 - Conflict of Interest: General

a. Conflict with proper discharge of duties.

No public official or employee, while serving as such, shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed by the Charter or ordinances of the City.

b. Incompatible Employment.

No public official or employee shall accept other employment which he has reason to believe will either impair his independence of judgment as to his official duties or require him or induce him to disclose confidential information acquired by him in the course of and by reason of his official duties.

c. Disclosure of Confidential Information

No public official or employee shall wilfully and knowingly disclose for pecuniary gain to any other person confidential information acquired by him in the course of and by reason of his official duties nor shall any public official or employee use any such information for the purpose of pecuniary gain.

d. Gifts.

No public official or employee shall receive or agree to receive, directly or indirectly, any compensation,

reward or gift from any source except the City of _____, for any service, advice, assistance or other matter related to the legislative process, except fees for speeches or published works on legislative subjects and except in connection therewith reimbursement for expenses for actual expenditures for travel, and reasonable subsistence for which no payment or reimbursement is made by the City of _____.

e. Conflict of Interest

A conflict of interest exists in a matter before an official for consideration or determination if:

- 1) The public official has a substantial financial or substantial personal interest in the outcome, or as owner, member, partner, officer, employee, stockholder or other professional enterprise that will be affected by the outcome, and such interest is or may be adverse to the public interest in the proper performance of governmental duties by the official.
- 2) He has reason to believe or expect that he will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity.
- 3) The public official, because of bias or prejudice, or because he has pre-judged a matter set for public hearing is incapable because of such bias, prejudice or pre-judgment of granting to the matter before him a fair and impartial hearing.

Personal interest as distinguished from financial interest is defined as including, among other matters, an interest arising from blood or marriage relationships or close business association.

Article 8 - Disclosure of Interest and Disqualification.

Any councilman who has a conflict of interest, as defined herein, in any matter before the City Council, shall disclose such fact on the records of the City Council and refrain from participating in any discussion or voting thereon, provided that such exceptions shall be observed as are permitted by law. This provision shall not apply if a councilman has disqualified himself from voting.

Any member of any official board, commission, or committee who has a conflict of interest as defined herein, in any matter before the board, commission, or committee, of which he is a member, shall disclose such fact on the records of such board, commission, or committee and refrain from participating in any discussion or voting thereon, provided that such exceptions shall be observed as are permitted by law.

Any employee, who has a financial or other special interest in a matter before the City Council or any board, commission, or committee and who participates in discussion with, or gives an official opinion to the Council, or to such board, commission, or committee relating to such matter, shall disclose on the records of the council or such board, commission, or committee, as the case may be, the nature and extent of such interest.

Article 9 - Compliance with State Law.

Public officials and employees of the City of Palo Alto shall comply with applicable provisions of state law relative to conflicts of interest and generally regulating the conduct of public officials and employees.