

11/23/76

Memorandum 76-108

Subject: Conflict of Interest--Request for Exemption

Attached to this memorandum is a staff draft of a Request for Exemption From Provisions of Government Code Section 87300 Requiring Adoption and Promulgation of a Conflict of Interest Code. The request is submitted on the grounds that the Commission would have no designated employees were a Conflict of Interest Code to be adopted. The request is drafted to meet the requirements of FPPC Regulations Section 18751(c) which provides:

(c) A request for exemption under subsection (b)(1) shall be signed by the chief executive officer or a legal representative of the agency and shall be accompanied by:

(1) A list of every position in the agency, including each officer, employee, member and consultant with the agency;

(2) A copy of the job description for each position listed in subsection (1) above;

(3) A copy of the statutory authority under which the agency was created with specific citations to the provisions setting forth the duties and responsibilities of the agency;

(4) Identification of the person or body to whom the agency reports;

(5) A copy of the last annual or regular report submitted by the agency to the person or body to whom the agency reports;

(6) A detailed justification of the request for exemption including an explanation of why none of the positions listed in subsection (1) above, are designated employees. In preparing this justification, particular note should be taken of Government Code Section 82019.

Government Code Section 82019, in relevant part, provides:

82019. "Designated employee" means any officer, employee, member or consultant of any agency whose position with the agency

. . . .

(c) Is designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.

. . . .

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION

REQUEST FOR EXEMPTION FROM PROVISIONS OF GOVERNMENT CODE SECTION 87300
REQUIRING ADOPTION AND PROMULGATION OF A CONFLICT OF INTEREST CODE

Pursuant to Fair Political Practices Commission Regulation Section 18751, the California Law Revision Commission requests an exemption from the provisions of Government Code Section 87300 which requires the adoption and promulgation of a Conflict of Interest Code. The Law Revision Commission at its meeting on November 11, 1976, determined to request an exemption on the ground stated in FPPC Regulations Section 18751(b)(1):

That if the agency requesting the exemption were to adopt a Conflict of Interest Code, there would be no "designated employee," within the meaning of Government Code Sections 82019 and 87302(a), subject to its provisions

DUTIES AND RESPONSIBILITIES OF LAW REVISION COMMISSION

The Law Revision Commission was created by the enactment of Chapter 1445 of the Statutes of 1953. See Govt. Code §§ 10300-10340 attached hereto as Exhibit 1. The primary objective of the Law Revision Commission is to study the statutory and decisional law of California to discover defects and anachronisms and to recommend legislation to make needed reforms. Govt. Code § 10330(a), (d). In carrying out this function, the Law Revision Commission may study only the topics which the Legislature, by concurrent resolution, refers to it for study. Govt. Code § 10335. The Law Revision Commission is also directed to receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, and other learned bodies, and suggestions from judges, public officials, lawyers, and the public generally. Govt. Code § 10330(b), (c). By statute, the Law Revision Commission is required to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court. Govt. Code § 10331.

The Law Revision Commission assists the Legislature in keeping the law up to date by:

- (1) Intensively studying complex and controversial subjects;
 - (2) Identifying major policy questions for legislative attention;
 - (3) Gathering the views of interested persons and organizations;
- and
- (4) Drafting recommended legislation for legislative consideration.

The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems in preparing background studies, working out intricate legal problems, and drafting needed legislation. The Commission thus enables the Legislature to accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time. In some cases, the Commission's report demonstrates that no new legislation on a particular topic is needed, thus relieving the Legislature of the need to study the topic.

Employees of the Law Revision Commission and Commissioners appointed by the Governor are restricted by statute from actively advocating measures relating to topics assigned to the Commission for study.

Government Code Section 10308 provides:

10308. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 10335, advocate the passage or defeat of any such legislation by the Legislature or the approval or veto of any such legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairman. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his official capacity as such employee or member.

The Law Revision Commission is also given express authority to contract with educational institutions and individuals for research purposes (Govt. Code § 10340) and to employ an Executive Secretary and staff members (Govt. Code §§ 10304, 10305).

The Law Revision Commission submits its reports and recommendations to the Governor and the Legislature. Recommended legislation contained

in a recommendation is submitted for consideration by the Legislature. A copy of the Commission's last Annual Report summarizing the activities of the Commission is attached hereto.

POSITIONS IN LAW REVISION COMMISSION

Commissioners

The Law Revision Commission consists of the following:

1. A Member of the Senate appointed by the Committee on Rules.
2. A Member of the Assembly appointed by the Speaker.
3. Seven Commissioners appointed by the Governor with the advice and consent of the Senate.
4. The Legislative Counsel who is an ex officio nonvoting Commissioner.

(See Govt. Code § 10301.)

The voting Commissioners exercise the authority of the Law Revision Commission. The Commissioners are provided with background studies prepared by consultants and the staff; and at meetings of the Commission, usually held monthly, make the decisions which may culminate in the submission of a recommendation to the Legislature. The Commissioners make the final decision on major contract matters such as the hiring of full-time members of legal staff and consultants, the purchase of expensive office equipment, and the lease of office space.

The legislative members of the Commission generally handle the legislative business of the Commission. The Executive Secretary and other staff members assist the legislative members (or other members of the Legislature) in presenting bills recommended by the Commission.

The Legislative Counsel receives Commission materials but does not otherwise participate in Commission activities.

Consultants

The Law Revision Commission generally retains consultants who are experts in the particular subjects on the Commission's calendar of topics for study. In recent years, the Commission has retained three consultants on eminent domain, two on creditors' remedies, one on partition of real and personal property, two on nonprofit corporations, one

on evidence, and two on child custody and adoption. These consultants are either law professors or practitioners who specialize in a particular field.

A typical contract with a consultant provides that the consultant is to attend meetings of the Commission and provide expert advice and assistance to the Commission in the preparation of a recommendation pertaining to the subject under consideration. The consultant agrees to provide consultation and written memoranda at the request of the Commission or the staff. Other consultants are employed primarily for the purpose of preparing an extensive background study before the Commission and its staff begin work on the subject.

Staff

The legal staff consists of the following:

1. The Executive Secretary. (See Govt. Code § 10304.)
2. The Assistant Executive Secretary.
3. Two Staff Counsels.
4. Intermittent legal counsel, on occasion.

The nonlegal staff consists of the following:

1. The Administrative Assistant.
2. Three Clerk-Typists.
3. Intermittent secretarial help, on occasion.

The Executive Secretary plans, organizes, and directs all phases of the legal and administrative work of the Commission; reviews suggestions received by the Commission for changes in the laws of California and makes or directs preliminary studies of such suggestions; assists the Commission in the selection of topics for study; contacts research consultants and makes arrangements for specific legal studies which have been approved by the Commission and authorized by the Legislature; presents staff and research consultant reports to the Commission and to legislative committees; works with State Bar committees and other interested persons in identifying and working out questions and objections which may be raised concerning the Commission's reports and recommendations; prepares or assists in preparing reports and bills in final form for the consideration of the Commission and presents bills to committees of the Legislature.

The Assistant Executive Secretary assists the Executive Secretary in carrying out the responsibilities just discussed, acts in the Executive Secretary's absence, and exercises the authority to approve contracts where the Executive Secretary is precluded from acting.

The other members of the legal staff conduct research and draft reports and recommendations under the direction of the Executive Secretary, and perform other tasks delegated to them, which may include working with State Bar committees and other interested persons on subjects under study by the Commission and participating in presenting bills to committees of the Legislature.

Under the direction of the Executive Secretary, the Administrative Assistant directs the day-to-day operations of the clerical staff, performs various administrative tasks primarily relating to personnel, payroll, budget, and purchase of supplies, and performs miscellaneous clerical tasks.

The clerk-typists perform clerical tasks under the ultimate direction of the Executive Secretary.

GROUNDS FOR REQUEST FOR EXEMPTION

The Law Revision Commission concludes that there are no positions within the Commission which involve the making or participation in the making of decisions which may foreseeably have a material effect on a financial interest, as these concepts are defined or used in the Political Reform Act of 1974 (Govt. Code § 81000 et. seq.) and the regulations, opinions, and interpretations of the Fair Political Practices Commission-- in other words, that there are no "designated employees" in the Commission who would be subject to a Conflict of Interest Code if one were adopted. Accordingly, the Commission requests an exemption from Government Code Section 87300 requiring adoption and promulgation of a Conflict of Interest Code.

Certain positions may be excluded from the category of "designated employee" without detailed analysis:

1. Legislative members of the Commission are specifically excluded from the definition of "designated employee" by the last sentence of Government Code Section 82019.

2. The Legislative Counsel is excluded because he is an ex officio nonvoting member of the Commission and as such does not make or participate in the making of Commission decisions. See Govt. Code §§ 82019(c), 87302(a).

3. Consultants are excluded by force of FPPC Regulations Section 18700(a)(2) defining "consultant" for the purposes of the Political Reform Act of 1974. Commission consultants satisfy the specific criteria set forth in paragraphs (A) and (B) of FPPC Regulations Section 18700(a)(2).

4. Clerk-typists perform only secretarial and clerical tasks and thus are excluded by FPPC Regulations Section 18700(d)(1) which interprets "making or participating in the making of a governmental decision."

The determination that Commissioners appointed by the Governor, the legal staff, and the Administrative Assistant are not designated employees requires a more lengthy and detailed discussion. The Commission believes that the following analysis shows that it is not to be reasonably anticipated that a decision made by a Commissioner (who is appointed by the Governor), by a member of the legal staff, or by the Administrative Assistant will have either a reasonably foreseeable effect on a "financial interest" or a material effect on a "financial interest"--in short, the two issues to be considered are the materiality and the foreseeability of the financial effect of decisions made by Commission personnel.

The types of decisions that could conceivably have an effect on a private financial interest may be divided into legal decisions (studying topics and making recommendations to the Legislature) and contract decisions (procurement of equipment and supplies, lease of office space, hiring of employees and consultants).

Legal Decisions

Materiality

Once a Commission recommendation has been passed by the Legislature, approved by the Governor, and become operative, it will probably at some time have an effect on some private financial interests. Under Government Code Section 87103 and FPPC Regulation Section 18703, the

determination of whether an official has a financial interest in a decision depends in part on whether the effect of the decision is distinguishable from its effect on the public generally or a significant segment thereof. Generally, the effect on Commissioners and on the legal staff of a statute enacted on recommendation of the Commission would be indistinguishable from its effect on the public generally or a significant segment thereof by virtue of the fact that the laws apply throughout the state. For example, if the Commission's Recommendation Relating to Wage Garnishment is enacted, it would have some financial effect on judgment debtors, judgment creditors, employers of judgment debtors, and lawyers and others involved in collecting judgments. Obviously, there are large numbers of persons in these categories and, if a Commissioner or legal staff member were in the position of judgment creditor, judgment debtor, or employer, he would be subject to the law the same as anyone else. Similar examples could be culled from other subjects under consideration by the Commission--child custody, creditors' remedies, eminent domain, evidence, inverse condemnation, lease law, liquidated damages, and nonprofit corporations.

It may be said with assurance that, in the vast majority of situations where a Commission bill incidentally affects financial interests, the effect will not be "material." Although the Commission does recommend substantive changes in the law, it does not recommend special interest legislation; the recommendations of the Commission are generally designed to revise and refine procedural provisions to make the law uniform and more efficient and to reorganize statutory law and codify case law. In some areas, the Commission drafts legislation to correct constitutional defects in the statutes in response to court decisions. (It should be noted, however, that the 1976 legislative session authorized the Commission to study the topic of tort liability. However, it is the Commission's understanding that this study will be made by the Joint Legislative Committee on Tort Liability, and the Commission does not plan to study the topic.)

The task of showing that, in each of the possible permutations involving the various financial interests of Commissioners and members of the legal staff and the legion of issues that may arise during the course of study on the general topics that come before the Commission

for study, there would be no material effect on a financial interest is clearly impossible. Even with the benefit of hindsight, we have been unable to think of a situation in the past where it is clear that a financial interest of a Commissioner or of a member of the legal staff has been materially affected by a provision in a bill enacted by the Legislature on recommendation of the Commission.

It is possible, however, to contrive a case where a material financial effect could occur. For example, the Commission will be considering exemptions from enforcement of money judgments. Suppose that a Commissioner holds a money judgment against a debtor who has only one significant asset--a \$15,000 interest in a homestead for which an exemption has not been filed. If the Commission should recommend, for example, that the homestead exemption be reduced to \$5,000, clearly there would be a material effect on the Commissioner's financial interests if such a recommendation became law and could be applied to collection of the particular judgment. We recognize, therefore, that it is conceivable that, in an unusual case, a decision made or participated in by a Commissioner or staff member could have a material financial effect. However, are such conceivable cases foreseeable?

Foreseeability

In its opinion in the Thorner case (FPPC Opinion No. 75-089, December 4, 1975), the Fair Political Practices Commission analyzed the specific facts of the case in great detail to arrive at the conclusion that there was a foreseeable material effect on a financial interest. In the FPPC Statement of Policy concerning "foreseeably," the FPPC suggests using a Thorner-type analysis to determine designated positions for purposes of a Conflict of Interest Code and recognizes the difficulty of applying the term in the abstract. Accordingly, in preparing this request, we have attempted to rely on hindsight to gauge the materiality of the effect of Commission decisions on financial interests of Commissioners and staff members. However, inasmuch as no cases of past material effect come to mind, we have been unable to apply a Thorner-type analysis to determine the foreseeability of any past material financial effects.

It has been recognized that, in an unusual case, such as the example discussed supra, a material financial effect could conceivably occur. However, we do not believe that it is foreseeable at this time that such situations would occur. Nor is it likely, if a Conflict of Interests Code were adopted, that the occurrence of a material financial effect would be foreseeable to a person attempting to comply with the code at the time designated for filing financial statements.

The Commission recognizes that, even though it would be an unusual case in which a decision could have a material financial effect, each Commissioner and staff member is required by Government Code Section 87100 to disqualify himself from participation in the making of a decision that would have a material financial effect should the occasion arise.

Contract Decisions

Contract decisions fall into two classes: (1) procurement of equipment and supplies and the lease of office space, and (2) the employment of staff members and consultants.

The Executive Secretary, Assistant Executive Secretary, and the Administrative Assistant exercise the authority to contract for the Commission in most instances. In the case of a major decision such as the purchase of expensive office equipment or the lease of office space, the Commissioners make the final decision. It is clear that the financial effect of contracts made by this agency can have no material effect because of the amounts involved. The Commission's budget for 1976-1977 allocates \$15,490 for general operating expense, \$8,424 for the lease of office space from Stanford University, and \$4,363 for the purchase of equipment (primarily payment on the installment purchase of a MAG Card typewriter from IBM). The remaining purchases are of a much smaller nature and are generally made through Central Stores, a part of the Office of Procurement of the Department of General Services.

The Commissioners, the Executive Secretary, and the Assistant Executive Secretary make the decisions concerning the hiring of staff members and consultants. It is not foreseeable that a spouse of a Commissioner or staff member would be hired as a member of the staff or

as a consultant or that an institution which is a source of income to the Commissioner or a staff member (such as a university, research institution, or law firm) would be hired as a consultant.

Respectfully submitted,

John H. DeMouilly,
Executive Secretary
California Law Revision Commission

Chapter 2

CALIFORNIA LAW REVISION COMMISSION

Article 1

GENERAL

§ 10300. **Creation.** There is created in the State Government the California Law Revision Commission.

§ 10301. **Membership, terms, powers and duties.** The commission consists of one Member of the Senate appointed by the Committee on Rules, one Member of the Assembly appointed by the Speaker, and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel shall be an ex officio nonvoting member of the commission.

The Members of the Legislature appointed to the commission shall serve at the pleasure of the appointing power and shall participate in the activities of the commission to the extent that such participation is not incompatible with their respective positions as Members of the Legislature. For the purposes of this chapter, said Members of the Legislature shall constitute a joint interim investigating committee on the subject of this chapter and as such shall have the powers and duties imposed upon such committees by the Joint Rules of the Senate and Assembly.

The members appointed by the Governor shall be appointed for a term of four years and shall hold office until the appointment and qualification of their successors. The terms of the members first appointed shall not commence earlier than October 1, 1953, and shall expire as follows: four on October 1, 1955, and three on October 1, 1957. When a vacancy occurs in any such office filled by appointment by the Governor, he shall appoint a person to such office, who shall hold office for the balance of the unexpired term of his predecessor.

§ 10302. **Compensation, per diem, expenses.** The members of the commission shall serve without compensation, except that each member appointed by the Governor shall be paid a per diem of twenty dollars (\$20) for each day's attendance at a meeting of the commission. In addition, each member shall be allowed actual expenses incurred in the discharge of his duties, including travel expenses.

§ 10303. **Chairman.** The commission shall select one of its members chairman.

§ 10304. Executive secretary. The commission may appoint an executive secretary and fix his compensation, in accordance with law.

§ 10305. Assistants. The commission may employ and fix the compensation, in accordance with law, of such professional, clerical and other assistants as may be necessary.

§ 10306. State library; state agencies and organizations. The material of the State Library shall be made available to the commission. All state agencies, and other official state organizations, and all persons connected therewith shall give the commission full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.

§ 10307. Assistance of bar governors. The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties.

§ 10308. Legislation; advocacy of passage or defeat by legislature or approval or veto by governor. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 10335, advocate the passage or defeat of any such legislation by the Legislature or the approval or veto of any such legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairman. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his official capacity as such employee or member.

Article 2

DUTIES

§ 10330. Defects and anachronisms in the law, consideration of proposed changes, recommendations as to changes. The commission shall, within the limitations imposed by Section 10335 of this code:

(a) Examine the common law and statutes of the State and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of

Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this State into harmony with modern conditions.

§ 10331. Recommendations as to repeals. The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

§ 10333. Reports and recommendations, submission, distribution. The commission shall submit its reports, and its recommendations as to revision of the laws, to the Governor and the Legislature, and shall distribute them to the Governor, the Members of the Legislature, and the heads of all state departments.

§ 10334. Legislative measures to effect adoption of revision; exhibits, index. The commission may, within the limitations imposed by Section 10335 of this code, include in its report the legislative measures proposed by it to effect the adoption or enactment of the proposed revision. The reports may be accompanied by exhibits of various changes, modifications, improvements, and suggested enactments prepared or proposed by the commission with a full and accurate index thereto.

§ 10335. Report, topics for study. The commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic which the Legislature, by concurrent resolution, refer to it for study.

§ 10336. Printing of reports, exhibits, and proposed legislation. The reports, exhibits, and proposed legislative measures shall be printed by the State Printing Office under the supervision of the commission. The exhibits shall be so printed as to show in the readiest manner the changes and repeals proposed by the commission.

§ 10337. Conference and cooperation with legislative committees; contracts. The commission shall confer and cooperate with any legislative committee on revision of the law and may contract with any such committee for the rendition of service, by either for the other, in the work of revision.

§ 10338. Cooperation with bar and other associations. The commission may cooperate with any bar association or other learned, professional, or scientific association, institution or foundation in any manner suitable for the fulfillment of the purposes of this chapter.

§ 10340. Contracts, research. The commission may, with the approval of the Director of General Services, enter into, amend and terminate contracts with colleges, universities, schools of law or other research institutions, or with qualified individuals for the purposes of research.