

4/21/80

Memorandum 80-45

Subject: Conflict of Interest Code

At the last meeting, the staff reported that the Fair Political Practices Commission (FPPC) had finally denied the Commission's request for an exemption from the requirement of filing a conflict of interest code. Several approaches to drafting a proposed code were discussed at the meeting. The staff has conferred with the FPPC staff concerning an acceptable approach for drafting the Commission's conflict of interest code. The approach most acceptable to the FPPC staff seems to be one in which the Commission and the staff would analyze the foreseeable areas of conflict involved in making decisions relative to the topics on the Commission's agenda. This recommended approach is explained in more detail below.

In order to present the limited disclosure standard to the FPPC for approval, it is necessary to adopt a proposed code under the Administrative Procedure Act. See Gov't Code § 87311. This requires that 30 days' notice of the Commission meeting concerning adoption of a proposed conflict of interest code be published in a newspaper of general circulation and in the Administrative Register. See Gov't Code § 11423. Accordingly, the staff will arrange for publication of the requisite notice before the May meeting in order to satisfy the Administrative Procedure Act. Full consideration of the proposed conflict of interest code must take place at the June meeting, prefatory to submission to the FPPC before the June 30, 1980, deadline.

The Commission's conflict of interest code will incorporate FPPC regulations setting forth boilerplate code provisions, except for two matters to be included in an appendix to the conflict of interest code: the list of designated employees and the delineation of financial interest disclosure categories.

As you consider the following material, you should keep in mind the following standards set forth in Government Code Section 87309:

87309. No Conflict of Interest Code or amendment shall be approved by the code reviewing body [FPPC] or upheld by a court if it:

(a) Fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented;

(b) Fails to provide to each affected person a clear and specific statement of his duties under the Code; or

(c) Fails to adequately differentiate between designated employees with different powers and responsibilities.

Designated Employees

Designated employees are persons whose positions entail the making or participation in the making of decisions which may foreseeably have a material financial effect on a reportable financial interest. The Legislative Counsel (an ex officio member), legislative members of the Commission (covered by other law), clerical employees (excluded by statute), and consultants (excluded, we think, by virtue of an FPPC regulation) are not designated employees. The Commissioners (other than legislative members) and the legal staff are designated employees subject to disclosure rules. (See Exhibit 1 for details concerning the authority and duties of Commission personnel.) The treatment of consultants is uncertain at this point since the FPPC is currently reviewing its consultant regulations. However, the staff is fairly confident that under current regulations and alternatives discussed with the FPPC staff, Commission consultants will not be designated employees required to file financial statements.

Disclosure Categories

We anticipate that the Commission's conflict of interest code will establish two disclosure categories--one applicable to persons making policy decisions and the other applicable to persons making contract decisions. Some designated employees will be required to disclose in one or the other category, and some will be required to disclose in both categories.

Legal Policy Decisions

Under the staff proposal, there would be four classes of interests to be reported by designated employees in this disclosure category. Commission members (other than legislative members) and the legal staff

would be subject to this disclosure category. It should be remembered that the interests to be reported are subject to statutory and regulatory limits regarding the amount, source, and type of the interest. (Relevant statutes are attached hereto as Exhibit 2.) The disclosable interests would be further limited depending upon the foreseeability of an affect resulting from consideration of particular topics on the Commission's agenda as indicated below. (A list of these topics is attached hereto as Exhibit 3. You should examine this list and suggest any further additions to the interests listed below at the May meeting. The likelihood of obtaining approval of the restricted disclosure will be improved as we expand the scope of disclosure.)

1. Investments or interest in real property. We suggest that this category of disclosure be unrestricted. For the details concerning disclosure of real property interests, see Government Code Sections 87206 and 87206.5 in Exhibit 2.

2. Personal income. This category of disclosure should be limited to income from the entities listed below. This list has been prepared after a lengthy discussion by the staff of interests which might be affected by enactment of a Commission recommendation concerning a topic on the Commission's agenda. Disclosure of income from the following sources is subject to qualifications in Government Code Sections 82030 and 87207.

--Banks, savings and loan associations, credit union, and other financial institutions.

--Mortgage brokers.

--Any business entity with a significant number of collectable accounts receivable that are collected by judicial procedures.

--Collection agencies.

--Any entity whose primary activity is the making of secured or unsecured loans.

--Any entity whose primary activity is the leasing of real or personal property.

--Insurance companies.

--Any public entity, so long as the income is not excluded by Government Code Section 82030(b)(2).

--Title insurance companies.

--Newspapers.

--Corporate sureties.

--Adoption agencies and persons engaging in private placing of adoptions as a primary activity.

--Privately owned utilities.

3. Business entity income. Under the staff proposal, disclosure of income of a business entity in which the designated employee has the requisite interest (see Gov't Code §§ 82030 and 87207 in Exhibit 2) would be limited to income of business entities from a source listed in item 2 above.

4. Business positions. Under the staff proposal, disclosure of business positions would be limited to positions in business entities listed in item 2 above. This class of disclosable interests is set forth in Government Code Section 87103(d) in Exhibit 2.

Contract Decisions

It is highly doubtful that anyone with contracting authority for the Commission would have a conflict of interest arising in the exercise of that authority. But since the Commission and certain staff members do make contracts with consultants and for supplies, equipment, and office space, there may be a need to include a provision governing such disclosure in any conflict of interest code proposed to the FPPC. Designated employees in this category would include Commission members (other than legislative members), the Executive Secretary, the Assistant Executive Secretary, and the Administrative Assistant. (For further discussion concerning the authority of Commission personnel, see Exhibit 1.) The following disclosure standard is based on conflict of interest codes adopted by other agencies:

A designated employee in this disclosure category shall report the following financial interests: (1) investments in any business entity, (2) income from any source, and (3) his or her status as a director, officer, partner, trustee, employee, or holder of a position of management in any business entity, if any such business entity or source of income may foreseeably be affected materially by a contract which was made within the last two years or foreseeably may be made in the future with the Commission for supplies, services, equipment, maintenance, or office space.

As an alternative, the Commission may wish to omit this disclosure category on the grounds that there is no possibility that a contract decision would have a material financial effect. Most of our supplies are ordered from the Supply Catalog issued by the Central Stores, a part of the Office of Procurement of the Department of General Services, and the Supply Catalog does not list brand names. Even in the case of the major purchases of this agency, such as IBM typewriters and a Xerox machine, or in the case of the lease of office space, it is clear that the magnitude of our contracts is not material. It would appear then that a material effect could only result if a designated employee's spouse or firm were to be hired as a consultant. This has not occurred in the Commission's history. Perhaps the Commission could adopt an explicit policy forbidding contracting with a spouse or firm of a designated employee and thereby eliminate any need for this disclosure category. Of course, if this disclosure category is included in the conflict of interest code, a spouse or firm of a Commissioner or staff member could be hired as a consultant if the person with a conflict complies with the disqualification requirements.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

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 Gov't Code § 10301.)

The voting Commissioners--those appointed by the Governor and the legislative members--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 major office equipment, and the lease of office space.

The legislative members of the Commission generally introduce the recommended legislation. The Executive Secretary and other staff members assist the legislative members (or other members of the Legislature) in presenting bills recommended by the Commission to legislative committees.

The Legislative Counsel receives Commission materials and very rarely attends meetings but does not otherwise participated 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. 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 Gov't Code § 10304.)
2. The Assistant Executive Secretary.
3. Two staff attorneys.
4. Intermittent legal counsel, on occasion.

The nonlegal staff consists of the following:

1. The Administrative Assistant.
2. Two Word Processing Technicians.
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; and exercises the authority to make routine contracts for the Commission.

The Assistant Executive Secretary assists the Executive Secretary in carrying out the responsibilities just discussed, and acts in the Executive Secretary's absence.

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 Word Processing Technicians perform clerical tasks under the ultimate direction of the Executive Secretary.

Exclusions From Designated Employees

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 Gov't 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. Word Processing Technicians 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."

EXHIBIT 2

[Gov't Code §§ 82030, 87103, 87206, 87206.5,
and 87207]

82030.

(a) "Income" means, except as provided in subsection (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in income of a spouse. Income also includes an outstanding loan. Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. "Income," other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.

(b) "Income" also does not include:

- (1) Campaign contributions required to be reported under Chapter 4 of this title;
- (2) Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from bona fide educational, academic or charitable organization;

(3) Any devise or inheritance;

(4) Interest, dividends or premiums on a time or demand deposit in a financial institution, shares in a credit union or any insurance policy, payments received under any insurance policy, or any bond or other debt instrument issued by any government or government agency;

(5) Dividends, interest or any other return on a security which is registered with the Securities and Exchange Commission of the United States government.

(6) Redemption of a mutual fund.

(7) Alimony or child support payments.

(8) Any loan or loans from a commercial lending institution which * * * are made in the lender's regular course of business on terms available to members of the public without regard to official status if:

(A) Used to purchase the principal residence of filer; or

(B) The balance owed does not exceed ten thousand dollars (\$10,000).

(9) Any loan from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, uncle, aunt, or first cousin or the spouse of any such person, provided that a loan from any such person shall be considered income if the lender is acting as an agent or intermediary for any person not covered by this paragraph.

(10) Any indebtedness created as part of a retail installment or credit card transaction if made in the lender's regular course of business on terms available to members of the public without regard to official status, so long as the balance owed to the creditor does not exceed ten thousand dollars (\$10,000).

87103.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made; or

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, by any business entity controlled by the public official or by a trust in which he has a substantial interest. A business entity is controlled by a public official if the public official, his agents, spouse and dependent children hold more than 50 percent of the ownership interest in the entity. A public official has a substantial interest in a trust when the official, his spouse and dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

§ 87206. Investment or interest in real property; statement; contents

When an investment or an interest in real property is required to be disclosed under this article, the statement shall contain:

(a) A statement of the nature of the investment or interest;

(b) The name of the business entity in which each investment is held, and a general description of the business activity in which the business entity is engaged;

(c) The address or other precise location of the real property;

(d) A statement whether the fair market value of the investment or interest in real property exceeds ten thousand dollars (\$10,000), and whether it exceeds one hundred thousand dollars (\$100,000). This information need not be provided with respect to an interest in real property which is used principally as the residence of the filer;

(e) In the case of an investment which constitutes fifty percent or more of the ownership interest in a business entity, disclosure of the investments and interests in real property of the business entity;

(f) In the case of a statement filed under Sections 87203 or 87204, if the investment or interest in real property was partially or wholly acquired or disposed of during the period covered by the statement, the date of acquisition or disposal.

§ 87206.5 Principal residence of filer excluded from "interest in real property"

For purposes of this article "interest in real property" does not include the principal residence of the filer.

87207.

(a) When income is required to be reported under this article, the statement shall contain, except as provided in subsection (b):

(1) The name and address of each source of income aggregating two hundred fifty dollars (\$250) or more in value, or twenty-five dollars (\$25) or more in value if the income was a gift, and a general description of the business activity, if any, of each source;

(2) A statement whether the aggregate value of income from each source, or in the case of a loan, the highest amount owed to each source, was greater than one thousand dollars (\$1,000), and whether it was greater than ten thousand dollars (\$10,000);

(3) A description of the consideration, if any, for which the income was received;

(4) In the case of a gift, the amount and the date on which the gift was received;

(5) In the case of a loan, the annual interest rate and the security, if any, given for the loan.

(b) When income of a business entity, including income of a sole proprietorship, is required to be reported under this article, the statement shall contain:

(1) The name, address, and a general description of the business activity of the business entity;

(2) In the case of a business entity which provides legal or brokerage services, the name of every person who paid fees to the business entity if the filer's pro rata share of fees from such person was equal to or greater than one thousand dollars (\$1,000);

(3) In the case of a business entity not covered by paragraph (2), the name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from such person was equal to or greater than ten thousand dollars (\$10,000) during a calendar year.

Note. In *Hays v. Wood*, 25 Cal.3d 772 (1979), the court held that the \$1,000 income reporting threshold applicable only to attorneys and brokers under Government Code Section 87207(b)(2) was unconstitutional since the level was set at \$10,000 for other officials. The court held that the \$10,000 threshold should apply to all affected public officials. The court rejected the argument that the disclosure of the names of clients violates the attorney-client privilege, noting that the FPPC regulations set up a procedure for preserving the anonymity of clients where it is warranted.

CALENDAR OF TOPICS FOR STUDY

[From 1979 Annual Report]

Topics Under Active Consideration

Creditors' remedies. Whether the law relating to creditors' remedies including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, and related matters should be revised.

Child custody, guardianship, and related matters. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.⁴

Eminent domain. Whether the law relating to eminent domain should be revised.⁵

Marketable Title Act and related matters. Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use, should be revised.⁶

Possibilities of reverter and powers of termination. Whether the law relating to possibilities of reverter and powers of termination should be revised.⁷

Civil Code Section 1464. Whether Section 1464 of the Civil Code should be revised or repealed.⁸

Community property. Whether the law relating to community property should be revised.⁹

Quiet title actions. Whether the law relating to quiet title actions should be revised.¹⁰

Abandonment or vacation of streets and highways. Whether the law relating to the abandonment or vacation of public streets and highways by cities, counties, and the state should be revised.¹¹

Evidence. Whether the Evidence Code should be revised.¹²

Other Topics Authorized for Study

Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised.¹³

Class actions. Whether the law relating to class actions should be revised.¹⁴

Offers of compromise. Whether the law relating to offers of compromise should be revised.¹⁵

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.¹⁶

Involuntary dismissal for lack of prosecution. Whether the law relating to involuntary dismissal for lack of prosecution should be revised.¹⁷

Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.¹⁸

Topics Continued on Calendar for Further Study

Arbitration. Whether the law relating to arbitration should be revised.¹⁹

Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised.²⁰

Unincorporated associations. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised.²¹

Partition. Whether the law relating to partition should be revised.²²

Modification of contracts. Whether the law relating to modification of contracts should be revised.²³

Governmental liability. Whether the law relating to sovereign or governmental immunity in California should be revised.²⁴

Inverse condemnation. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to liability for damages resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised.²⁵

Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.²⁶

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised.²⁷

Parol evidence rule. Whether the parol evidence rule should be revised.²⁸

Powers of appointment. Whether the law relating to powers of appointment should be revised.²⁹

[From Assembly Concurrent Resolution 107 (1980 Session)]
[Introduced February 5, 1980]

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature approves for study by the California Law Revision Commission the following new topics:

(1) Whether a summary procedure should be provided by which property owners can remove doubtful or invalid liens from their property, including a provision for payment of attorney fees to the prevailing party;

(2) Whether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code;

(3) Whether the laws governing special assessments for public improvements should be simplified and unified; and

(4) Whether the law relating to pleading in civil actions and proceedings should be revised and be it further