

CONFLICT OF INTEREST IN PUBLIC CONTRACTS IN CALIFORNIA†

No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.¹

The concept that a man cannot serve two masters has found expression in California in the statutory doctrine that no public officer shall be interested in any contract made by him or by any body or board of which he is a member. The questions of what constitutes interest and what are the sanctions for having such interest involve a complicated system of statutes and case law. This comment attempts to analyze the present law in terms of the interest prohibited and the sanctions for violation. This is followed by proposed legislation, coupled with a discussion of each proposal.

In considering the present law and recommendations for change, two conflicting policy considerations should be kept in mind. The primary policy consideration is that the public is entitled to have every public officer be guided solely by public interest, rather than by any personal interest, when acting upon contracts in his official capacity.² And public interest is more than merely obtaining a fair and reasonable contract, it includes the concept that it is not fair to permit public officers to obtain an advantage over their competitors by reason of their positions, even though a particular contract involving interest is fair and reasonable.³ Because of their inability to cope effectively with the fact problems in cases where public officers have been found to have an interest, the courts have held that the fact of interest, regardless of the extent of the interest and good faith and fairness of the contract,⁴ vitiates the contract.⁵ Advisory opinions by the California Attorney General and by the various county and city counsels have been

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These men are not responsible for nor do they necessarily endorse anything contained in this comment.

¹ MATTHEW 6:24; LUKE 16:13. See also JOSHUA 24:15; JAMES 1:8; I KINGS 18:21; REVELATIONS 3:15, 16; ROMANS 6:16.

² See *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924).

³ Cf. 15 OPS. CAL. ATT'Y GEN. 123 (1950). See also LOS ANGELES COUNTY COUNSEL OPINION p. 3 (Nov. 13, 1951).

⁴ *Berka v. Woodward*, 125 Cal. 119, 128, 57 Pac. 777, 780 (1899).

⁵ *Moody v. Shuffleton*, 203 Cal. 100, 262 Pac. 1095 (1928); *Berka v. Woodward*, 125 Cal. 122, 57 Pac. 777 (1899). Also see text at note 58 *infra*.

almost uniformly conservative,⁶ generally advising that a prohibited interest exists if the case is even slightly doubtful.⁷

On the other hand, there is the argument that we need competent men in the public service and that to prohibit all interest is to defeat or discourage that purpose. The men most qualified to be community leaders are most often those engaged in business or in the professions. With the present state of the law, many persons otherwise qualified and willing to serve the public are discouraged from serving because of the possibility of public disgrace and criminal penalties.⁸ Furthermore, the public interest in getting the best possible contract from the standpoint of quality and economy must also be considered. A contract in which a public officer is interested might be the best possible contract for the public. Finally, uncertainty as to the law may tend to discourage competent contractors from entering contracts with governmental units.

I. THE PRESENT CALIFORNIA LAW⁹

Multiplicity of Statutory Provisions

At the present time there are numerous provisions regulating private interest of public officers in official matters. These provisions are scattered throughout the several codes, such as the Government Code,¹⁰ Education Code,¹¹ Health and Safety Code,¹² Penal Code,¹³ Public Utility Code¹⁴ and Water Code,¹⁵ to name the most important.¹⁶ They are in many cases overlapping,¹⁷ but some sections appear to be designed to meet a particular

⁶ Letter from Mr. Richard Carpenter, dated May 23, 1956: "I will agree absolutely with you that there are few, if any, hardship cases reported in California. Unfortunately, in 999 out of 1000 cases it is the Attorney General, the District Attorney or the City Attorney who is asked for an opinion, and because of dicta, politics, etc., the attorney's ruling is needlessly conservative and any statute that is devised must take this into consideration as well as the decisions which have been rendered on the subject."

⁷ See note 52 *infra*.

⁸ Copies of many letters to this effect, from persons concerned with the problem, are on file with the California Law Review. Example: "For many years, persons engaged in construction—architects, engineers and suppliers of building materials have been discouraged from seeking or accepting public office." See LOS ANGELES COUNTY COUNSEL OPINION pp. 6-7 (Nov. 13, 1951); Note, *Temptation and Tradition in the California School Board*, 5 STAN. L. REV. 61 (1952).

⁹ For a good survey of the California law prior to the 1955 legislative changes, see Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 SO. CALIF. L. REV. 335 (1955). See also *Temptation and Tradition in the California School Board*, 5 STAN. L. REV. 61 (1952). Reference may also be made to LOS ANGELES COUNTY COUNSEL OPINIONS (Nov. 13, 1951) and (Dec. 4, 1951).

¹⁰ CAL. GOVT. CODE §§ 1090-1097, 1223, 3060, 36525-36528. Cf. CAL. GOVT. CODE §§ 19250-19251, 23006, 24054, 25008, 25042, 26003.

¹¹ CAL. ED. CODE §§ 1011-6, 11025.

¹² CAL. HEALTH & SAFETY CODE §§ 5730.35, 33236-33237, 32108.

¹³ CAL. PEN. CODE §§ 99-100. Cf. CAL. PEN. CODE §§ 68, 70, 77, 165.

¹⁴ CAL. PUB. UTIL. CODE §§ 12722, 12392. Cf. CAL. PUB. UTIL. CODE § 303.

¹⁵ CAL. WATER CODE §§ 8573-5, 21195-6. Cf. CAL. WATER CODE §§ 152, 154, 188.

¹⁶ See also CAL. BUS. & PROF. CODE § 19423; CAL. CORP. CODE § 25305; CAL. FIN. CODE §§ 234, 5209-10; and CAL. INS. CODE § 12901.

¹⁷ E.g., CAL. HEALTH & SAFETY CODE §§ 5730.35, 32108; CAL. PEN. CODE §§ 99-100; CAL. WATER CODE § 21195.

problem.¹⁸ Apparently some state administrative agencies have internal regulations dealing with the interest problem.¹⁹ In addition, many cities and counties have charter provisions or local ordinances dealing with the subject.²⁰

It should be parenthetically stated that the validity of the various city and county provisions is at least open to question.²¹ The general rule is that charter cities, where "municipal affairs" are concerned, may make and enforce laws and regulations subject only to their charters.²² Cities of the sixth class (general law cities), however, are subject to the Government Code,²³ as are non-charter counties.²⁴ As to counties with charters, the state constitution provides that a charter supersedes the general laws of the legislature "as to matters for which . . . it is competent to make provisions in such charter . . ."²⁵ The question is: as to charter cities, what is a "municipal affair," and as to charter counties, what is a provision "competent" for a county to include in its charter? It is generally stated that where there is a conflict between state law and a county or municipal charter provision, the local law prevails except where the intent of the state law is to establish a state policy.²⁶ "The difficult question in such cases is whether the state law was intended to occupy the entire field,"²⁷ for if the state law was intended to occupy the entire field, then any local law dealing with the same subject matter might well be deemed to be in conflict with the state law. The strong public policy behind the state conflict of interest statutes, coupled with the identity or close similarity of many charters and ordinances, might result in a holding that the state law had occupied the field to the exclusion of the local law.²⁸ However, a local law imposing stricter

¹⁸ E.g., CAL. HEALTH & SAFETY CODE § 33236; CAL. FIN. CODE §§ 5209-5210; CAL. INS. CODE § 12901.

¹⁹ See 23 OPS. CAL. ATT'Y GEN. 204 (1953), upholding the validity of a proposed regulation of the State Board of Equalization dealing with interest of enforcement officers in licenses.

²⁰ E.g., CHARTER OF THE CITY OF LOS ANGELES §§ 28, 28.1.

²¹ See Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 SO. CALIF. L. REV. 335, 336-37 (1955).

²² CAL. CONST. art. XI, § 6.

²³ CAL. GOVT. CODE §§ 36500, 36525-36528.

²⁴ CAL. CONST. art. XI, § 11: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." See Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution*, 32 CALIF. L. REV. 341 (1944); and see Peppin, *Municipal Home Rule in California I and II*, 30 CALIF. L. REV. 1, 272 (1941, 1942).

²⁵ CAL. CONST. art. XI, § 7½ ("Effect of Charter").

²⁶ Shean v. Edmonds, 89 Cal. App.2d 315, 324, 200 P.2d 879, 885 (1948).

²⁷ Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 485 (1942). See Grant, *Municipal Ordinances Supplementing Criminal Laws*, 9 SO. CALIF. L. REV. 95 (1936).

²⁸ Apparently the question of the validity of the local provisions has never been squarely considered in a California appellate court. See Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 SO. CALIF. L. REV. 335, 336-37 (1955) and 26 OPS. CAL. ATT'Y GEN. 111 (1955). See also Grant, *Penal Ordinances in California*, 24 CALIF. L. REV. 123, 142 (1936). In the leading case of Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal. App. 592, 597-98, 229 Pac. 1020, 1022 (1924), the court based its decision involving a municipal officer entirely on the Charter of the City of Stockton, considering the Penal and Political (now Government) Codes as reflecting "the general policy of the state . . . and that policy will always afford more or less aid in construing statutory and charter provisions upon the same

penalties or defining interest more narrowly than the state law might possibly be upheld.²⁹

The Government Code and the Education Code

This comment deals mainly with Government Code sections 1090, 1091, 1092 and 1097,³⁰ and Education Code sections 1011, 1011.1, 1011.2, 1011.3, 1012 and 1013.³¹ Of the numerous conflict of interest statutes, these appear to have the greatest state-wide application.

subject where such provisions are phrased in language which is not altogether clear as to its real meaning or intent and scope." In the case of *In re Shaw*, 32 Cal. App.2d 84, 89 P.2d 161 (1939), a local provision making a certain offense a misdemeanor was held to be invalid in the face of a state statute making the same offense a felony.

²⁹ Cf. *Markus v. Justice's Court*, 117 Cal. App.2d 391, 396, 255 P.2d 883, 886 (1953). See 25 OPS. CAL. ATT'Y GEN. (1954), discussing a stricter provision than the state law in the Sacramento County Charter. This charter provision, which prohibited persons from serving on boards or commissions if such persons sell fire insurance to the county as agents or brokers was considered to be valid by the Attorney General. See also Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 So. CALIF. L. REV. 335, 336 (1955). However, the California Supreme Court has stated that "local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute." *Tolman v. Underhill*, 39 Cal.2d 708, 712, 249 P.2d 280, 282 (1952).

³⁰ CAL. GOVT. CODE § 1090: "Members of the Legislature, state, county, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, judicial district, and city officers be purchasers at any sale or vendors at any purchase made by them in their official capacity."

CAL. GOVT. CODE § 1091: "An officer shall not be deemed to be interested in a contract if his interest is:

- (a) The ownership of less than 3 percent of the shares of a corporation for profit; or
- (b) That of a nonsalaried officer of a nonprofit corporation; or
- (c) That of an officer in being reimbursed for his actual and necessary expenses incurred in the performance of official duty."

CAL. GOVT. CODE § 1092: "Every contract made in violation of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by the board or body of which he is a member."

CAL. GOVT. CODE § 1097 is set forth in note 68 *infra*. The provisions of §§ 1093, 1094, 1095, and 1096 also deal with conflict of interest problems, but are more specialized. No revision of these latter sections appears necessary.

³¹ CAL. ED. CODE § 1011: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

CAL. ED. CODE § 1011.1: "Except as provided in Section 1011.2, no contract or other transaction entered into by the governing board of any school district is either void or voidable under the provisions of Section 1011, nor shall any member of such board be disqualified or deemed guilty of misconduct in office under said provisions, if the circumstances specified in the following subdivisions exist:

- (a) The fact of such interest is disclosed or known to the governing board and noted in the minutes, and the governing board thereafter authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such interested member or members, and
- (b) The contract or transaction is just and reasonable as to the school district at the time it is authorized or approved."

CAL. ED. CODE § 1011.2: "The provisions of Section 1011.1 shall not be applicable if the circumstances specified in any of the following subdivisions exist:

- (a) The contract or transaction is between the school district and a member of the governing board of that district.
- (b) The contract or transaction is between the school district and a partnership or un-

The general scope of these sections is to prohibit any "officer" from being "interested" in any "contract" made by him (or the public body of which he is a member) in his official capacity. The effect on the contracts made in violation of this general prohibition is total invalidity. The effect on the officers violating the prohibitions is criminal sanction and forfeiture of office.

For purposes of discussion, the recent legislative changes are considered separately. Therefore, that body of law which existed prior to the 1953 and 1955 changes will be first considered, and then the effect of the changes on that body of law will be discussed.

Meaning of the Term "Officer"

No attempt will be made in this comment to consider at any length the meaning of the word "officer." The term is construed to exclude mere employees, and the question of whether a person is an officer is primarily a question of functions performed and powers granted to the person involved.³²

incorporated association of which any member of the governing board of that district is a partner or in which he is the owner or holder, directly or indirectly, of a proprietorship interest.

- (c) The contract or transaction is between the school district and a corporation in which any member of the governing board of that district is the owner or holder, directly or indirectly, of five percent (5%) or more of the outstanding common stock.
- (d) A board member is interested in a contract or transaction within the meaning of Section 1011, and without first disclosing such interest to the governing board at a public meeting of the board, influences or attempts to influence another member or members of the board to enter into the contract or transaction.

CAL. ED. CODE § 1011.3: "The question of the validity or invalidity of a contract or other transaction entered into by the governing board of any school district where a member of the governing board of that district is interested in such contract or transaction, as well as the question of disqualification or misconduct in office of such interested member, shall be exclusively governed by the provisions of the Education Code which are hereby declared to and shall supersede (1) any and all provisions of law contained in any code or law of this State, except those which specifically refer to members of the governing board or school districts and which might otherwise be applicable and (2) any and all provisions of law contained in any charter or ordinance of a city, county, or city and county, which might otherwise be applicable."

CAL. ED. CODE § 1012: "In a school district which during the preceding fiscal year had an average daily attendance of 70 or less, a member of the governing board may receive a reasonable compensation from the district for necessary work and labor performed by him for the district in repairing the schoolhouse, fences, and other property belonging to the district, or in furnishing wood or other necessary supplies. In all such cases the requisition drawn in his favor in payment of services or supplies shall be signed by the other members of the governing board and shall be subject to approval by the county superintendent of schools."

CAL. ED. CODE § 1013: "Any contract made in violation of Sections 1011 or 1012 is void."

CAL. ED. CODE §§ 1014, 1015 and 1016 deal with bribery and corruption and do not require any revision. CAL. ED. CODE § 11025 is discussed in note 34 *infra*. Some revision of this section would be desirable, but because of the special problems involved the question was felt to be beyond the scope of this comment. The section involves transactions by school board members with their and other school boards and was restrictively construed in 19 OPS. CAL. ATT'Y GEN. 80 (1952).

³² See Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 So. CALIF. L. REV. 335, 337 (1955), and *Southlands Co. v. City of San Diego*, 211 Cal. 646, 297 Pac. 521 (1931). In general, see David, *The Tort Liability of Public Officers: Part I*, 12 So. CALIF. L. REV. 127, 130-36 (1939). Cf. Jarrett, *DeFacto Public Officers: The Validity of Their Acts and Their Rights to Compensation*, 9 So. CALIF. L. REV. 189, 191-211 (1936). Cases in

Nature of the Prohibition

It should be noted that what is prohibited is a private interest in a contract made by the public officer (or public board or body of which he is a member) in his official capacity. There is apparently no general disqualification from holding office because of potential interest adverse to the public.³³

Since the officer in his official capacity must make or participate in the making of the contract in which he is privately interested, an officer may validly contract with other public officers or boards.³⁴ For example, a county officer may contract with the county through a purchasing agent,³⁵ and a member of the legislature may contract with the state through the Department of Finance.³⁶ In effect the purchasing agent or Department of Finance acts as insulation between the officer and the governmental unit he represents.³⁷

Finally, in determining the nature of the prohibition, it should be noted that the interest must be in a "contract." There are apparently "no California cases in which the doctrine of prohibited interest has been applied to a transaction which did not arise out of the usual and accepted definition of a contract, *i.e.*, a voluntary agreement,"³⁸ whether express or implied.

which the particular individual concerned was held not to be an officer include *Kennedy v. City of Gustine*, 199 Cal. 251, 248 Pac. 910 (1926); *Raisch v. Sanitary Dist. No. 1*, 108 Cal. App.2d 878, 240 P.2d 48 (1952); *Staheli v. City of Redondo Beach*, 131 Cal. App. 71, 21 P.2d 133 (1933); *Pacific Finance Corp. v. City of Lynwood*, 144 Cal. App. 509, 1 P.2d 520 (1931). On the other hand, a special attorney to the Compton City Council was held to be an officer in *Schaefer v. Berinstein*, 140 A.C.A. 289, 295 P.2d 113 (1956).

³³ See 24 OPS. CAL. ATT'Y GEN. 119 (1954) where the Attorney General opined that while a legislature might make potential adverse interest a ground for disqualification from office, the California legislature had not yet done so. For a well reasoned argument supporting the view that potential adverse interest might constitute disqualification from holding office, see OPINION OF GEORGE W. PHILLIPS, JR., Counsel to the Board of Directors, Eden Township Hospital District, Alameda County (1954).

³⁴ *Title Guarantee and Trust Co. v. Woody*, 63 Cal. App.2d 209, 146 P.2d 252 (1944); 17 OPS. CAL. ATT'Y GEN. 44 (1951) (school board). *But see* 19 OPS. CAL. ATT'Y GEN. 80 (1952), wherein the opinion is given that under CAL. ED. CODE § 11025, a member of a school board is prohibited from doing business in his own behalf or on the behalf of others relating to the introduction of any personal property in any public school in the state, or from receiving any gift or reward for recommending such property. In this connection, see *Temptation and Tradition in the California School Board*, 5 STAN. L. REV. 61 (1952); and 1 OPS. CAL. ATT'Y GEN. 557 (1943) where the opinion is given that a supervisor from Sacramento County could not make a contract with a hospital when the controlling body of that hospital was composed of one supervisor from each of several counties, including one from Sacramento County. Compare this opinion with 6 OPS. CAL. ATT'Y GEN. 206 (1945).

³⁵ 3 OPS. CAL. ATT'Y GEN. 188 (1944).

³⁶ 14 OPS. CAL. ATT'Y GEN. 78 (1949).

³⁷ *Cf.* 3 OPS. CAL. ATT'Y GEN. 188 (1944) and 14 OPS. CAL. ATT'Y GEN. 78 (1949). See also 21 OPS. CAL. ATT'Y GEN. 90 (1953); *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869 (1895); *Title Guaranty and Trust Co. v. Woody*, 63 Cal. App.2d 209, 146 P.2d 252 (1944) (deputy county auditor could buy land at tax sale from county tax collector and in turn sell to the county auditor). *But see* 19 OPS. CAL. ATT'Y GEN. 72 (1952) for a questionable opinion somewhat to the contrary of the point expressed in the text.

³⁸ *Kennedy and Beck, Interest of Public Officers in Contracts Prohibited by Law*, 28 So CALIF. L. REV. 335 (1955).

On the other hand, claims by public officers against the governmental unit, such as claims for expenses incurred in the scope of employment, tort claims, and welfare claims, are apparently not considered to be within the meaning of the term "contract."³⁹

Nature of the Interest

"Interest" has been construed to mean private financial or pecuniary interest, direct or indirect,⁴⁰ although dicta in a few cases are in broader terms.⁴¹

Interest has been held or said to include such "direct" interests in the contract being made by the officer (or by the public body of which he is a member) as being sole proprietor of a firm making a contract with a governmental unit,⁴² being a partner in a partnership making such a contract,⁴³ or being a stockholder in a corporation making such a contract.⁴⁴

The "indirect" interest includes situations where the public officer concerned bears one of the following relationships to the person making the contract with the governmental unit: (1) employee of a sole proprietorship,

³⁹ LOS ANGELES COUNTY COUNSEL OPINION pp. 25-36 (Nov. 13, 1951). *Accord*, 26 OPS. CAL. ATT'Y GEN. 287 (1955).

⁴⁰ Apparently the general American law is in accord with the present California law. See RHYNE, *THE LAW OF MUNICIPAL CONTRACTS* 33-35 (1952). See 10 McQUILLIN, *MUNICIPAL CORPORATIONS* 388 (3d ed. 1949); 2 DILLON, *MUNICIPAL CORPORATIONS* 1146 (5th ed. 1911).

⁴¹ *E.g.*, Schaefer v. Berinstein, 140 A.C.A. 289, 295 P.2d 113, 121 (1956). For a good discussion of the criteria used see Miller v. City of Martinez, 28 Cal. App.2d 364, 82 P.2d 519 (1938); Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 Pac. 145 (1930); Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal. App. 592, 229 Pac. 1020 (1924).

⁴² Berka v. Woodward, 125 Cal. 119, 57 Pac. 777 (1899); Domingos v. Board of Supervisors, 51 Cal. 608 (1877); County of Marin v. Messner, 44 Cal. App.2d 577, 112 P.2d 731 (1941); County of Shasta v. Moody, 90 Cal. App. 519, 265 Pac. 1032 (1928); 26 OPS. CAL. ATT'Y GEN. 281 (1956) (contract made by school district with member of governing board for rental of temporary housing); 26 OPS. CAL. ATT'Y GEN. 5 (1955) (member of board of supervisors of Amador County who owns property under consideration as one of two possible locations for county road cannot participate in prior deliberations and decisions as to location of such road [24 OPS. CAL. ATT'Y GEN. 119 (1954), cited in note 33 *supra*, appears contra on principle] and may not sell property to the county; but such property could be acquired by the county by condemnation proceedings); 4 OPS. CAL. ATT'Y GEN. 261 (1944).

In a recent case, Schaefer v. Berinstein, 140 A.C.A. 289, 295 P.2d 113 (1956), the special attorney for the Compton City Council was held to be an officer and to have a prohibited interest in purchases of city property from the city.

⁴³ In Osborn v. Stone, 170 Cal. 480, 490, 150 Pac. 367, 372 (1915), the court held that an allegation in a complaint alleging invalidity of a public contract with a law partnership was not demurrable where a member of such partnership was also a member of the board making the contract.

⁴⁴ Finch v. Riverside & A. Ry., 87 Cal. 597, 25 Pac. 765 (1891) (city trustee votes to approve street car franchise, said trustee being at the same time a subscriber to stock in the street car company); Miller v. City of Martinez, 28 Cal. App.2d 364, 82 P.2d 519 (1938) (shareholder in Shell Oil Co. as well as being office manager of a branch office of Shell Oil Co.). *Cf.* 3 OPS. CAL. ATT'Y GEN. 265 (1944) (school board member would receive a percentage of premiums paid to an association seeking to handle insurance for a school district).

partnership or corporation;⁴⁵ (2) husband, wife or minor child;⁴⁶ (3) principal or agent;⁴⁷ (4) landlord;⁴⁸ (5) salaried officer of a non-profit association to which the building contractor seeking the contract belonged;⁴⁹ (6) attorney;⁵⁰ (7) creditor.⁵¹ This list should not be considered as exhaustive of the possibilities.⁵²

On the other hand, where the interest was non-pecuniary, such as

⁴⁵ No cases or opinions were found involving the employee of a sole proprietorship or partnership. The following cases all involved employees of corporations: *City of San Diego v. San Diego & L.A. R.R.*, 44 Cal. 106 (1872); *Miller v. City of Martinez*, 28 Cal. App.2d 364, 82 P.2d 519 (1938); *Hobbs, Wall & Co. v. Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924). See 24 OPS. CAL. ATT'Y GEN. 200 (1954) (funds of district agricultural association may not be deposited in bank where member of board of directors of the association is also an officer of the board); *RIVERSIDE COUNTY COUNSEL OPINION 54-128* (April 26, 1954) (school board advised not to contract with a church for rental of classroom space because one of school trustees was pastor of the church).

⁴⁶ *Nielsen v. Richards*, 75 Cal. App. 680, 232 Pac. 480 (1925) (rationale: husband and wife have mutual duty of support, so employment of wife as a teacher by school superintendent-husband would directly add funds for support of the wife (husband's responsibility) and indirectly add a sum for his support). See 26 OPS. CAL. ATT'Y GEN. 287 (1955), where a distinction is drawn between a school board's decision to reimburse the wife of a school board member for transportation already furnished (under CAL. ED. CODE § 16255) and a contract to furnish such transportation. See text at note 39 *supra*. The Attorney General in 26 OPS. CAL. ATT'Y GEN. 281 (1955) refused to consider CAL. ED. CODE §§ 1011.1, 1011.2 and 1011.3 as permitting a wife of a school board member to contract with the school board. A literal reading of the new provisions favors the opposite result. See text at note 88 *infra*, and 5 OPS. CAL. ATT'Y GEN. 6 (1945) (school trustees cannot employ minor child of trustee as janitor; rationale: earnings of child belong to parent under California community property law). See also note 53 *infra*.

⁴⁷ *Cf. People v. Becker*, 112 Cal. App.2d 324, 246 P.2d 103 (1952). Defendant, a member of the Los Angeles Board of Education, as an insurance broker shared in commissions on insurance required to be obtained by the company that contracted for furnishing transportation to the schools.

⁴⁸ *People v. Darby*, 114 Cal. App.2d 412, 250 P.2d 743 (1952), *appeal dismissed*, 345 U.S. 937 (1953) (facts supported inference that defendant-landlord had agreed to accept the contractor as a tenant prior to the action of the school board, of which defendant was a member, in entering into the contract). *Cf. RIVERSIDE COUNTY COUNSEL OPINION 53-141* (Oct. 5, 1953), where county counsel indicated that school board could not enter into a contract with the Carnation Company, for the reason that one trustee was a stockholder (and officer) in a frozen food locker plant which leased space to the Carnation Company. This decision is doubtful.

⁴⁹ 26 OPS. CAL. ATT'Y GEN. 111 (1955).

⁵⁰ *People v. Elliott*, 115 Cal. App.2d 410, 252 P.2d 661 (1953). See *Oakland v. California Const. Co.*, 15 Cal.2d 573, 104 P.2d 30 (1940). *Cf. Johnston v. Board of Supervisors of Marin County*, 31 Cal.2d 66, 187 P.2d 686 (1947).

⁵¹ *Cf. Moody v. Shuffleton*, 203 Cal. 100, 262 Pac. 1095 (1928).

⁵² For instance, it was the opinion of the Attorney General that neither a county, hospital district, nor school district may enter into a contract with a dairy producer's cooperative for the purchase of dairy products if a member of the governing board of the governmental unit involved is also a member of such cooperative. The theory was that such member would have a direct financial interest in any contract so made by reason of sharing in the profits of such contract, and that because of the fiduciary nature of the governing body of the cooperative, a member who was also a public officer participating in the making of a contract with the cooperative would in effect be a purchaser at his own sale. 27 OPS. CAL. ATT'Y GEN. 254 (1956). It is such decisions as this that point up the need for statutory reform. It is to be noted, however, that the new disclosure provisions of the Education Code were not considered by the Attorney General to be sufficient to permit such a contract, which shows the danger of judicial and administrative defeat of remedial statutes.

friendly or merely familial,⁵³ no violation of the codes is involved. In the absence of a prior express or implied agreement between a public officer and a person contracting with a governmental unit,⁵⁴ public officers are permitted to enter into contractual relationships with persons who themselves have contracts with the governmental unit.⁵⁵ That is, having obtained a contract with a governmental unit, the contractor may hire or subcontract with an officer who participated in the awarding of the contract to the contractor, provided there was no previous agreement relating to the subcontract. Interest of a public officer in a public utility is generally considered as no bar to the making of a valid contract by the governmental unit with the public utility, if the contract relates to services which the public utility is required by law to furnish to everyone.⁵⁶ Finally, certain interests which the officers have in common with others, such as being within a special assessment district, are not within the prohibition.⁵⁷

Effect on the Contract of Violation of the Prohibition

The effect of a direct or indirect interest on the part of any officer making a contract in his official capacity is to make the contract absolutely void.⁵⁸ Persons who have delivered goods or rendered services under such contracts are denied any recovery.⁵⁹ Recovery may not be had in quasi-contract.⁶⁰ Furthermore, the governmental unit is entitled to recover back amounts paid under such contract,⁶¹ without the necessity of tendering or

⁵³ 21 OPS. CAL. ATT'Y GEN. 228 (1953) (school district may legally employ adult daughter of member of board of trustees). See RIVERSIDE COUNTY COUNSEL OPINION 52-157 (June 26, 1952) (son-in-law). For a discussion of the problem of familial relationship, see 21 OPS. CAL. ATT'Y GEN. 228 (1953); Annot., 74 A.L.R. 792 (1931).

⁵⁴ *People v. Deysher*, 2 Cal.2d 141, 40 P.2d 259 (1934) (jury finding of implied prior agreement upheld).

⁵⁵ *County of Contra Costa v. Soto*, 138 Cal. 57, 70 Pac. 1019 (1902); *Escondido Lumber, Hay & Grain Co. v. Baldwin*, 2 Cal. App. 606, 84 Pac. 284 (1906). Cf. *People v. Deysher*, 2 Cal.2d 141, 40 P.2d 259 (1934). See *Oakland v. California Const. Co.*, 15 Cal.2d 576, 104 P.2d 30 (1940); *Martin Bros. Inc. v. City of Concord*, 110 Cal. App.2d 215, 242 P.2d 406 (1952); RIVERSIDE COUNTY COUNSEL OPINION 55-134 (Oct. 26, 1955).

⁵⁶ *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869 (1895); *Hotchkiss v. Moran*, 109 Cal. App. 321, 293 Pac. 148 (1930); cf. *Hobbs & Wall Co. v. Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); 3 OPS. CAL. ATT'Y GEN. 201 (1944). See *Santa Ana Water Co. v. Town of San Buenaventura*, 65 Fed. 323 (C.C.S.D. Calif. 1895).

⁵⁷ *United Real Estate and Trust Co. v. Barnes*, 159 Cal. 242, 113 Pac. 167 (1911); *Raisch v. Sanitary Dist. No. 1 of Marin County*, 108 Cal. App.2d 878, 240 P.2d 48 (1952); *Beale v. City of Santa Barbara*, 32 Cal. App. 235, 162 Pac. 657 (1916).

⁵⁸ Although CAL. GOVT. CODE § 1092 is in terms of voidability, the courts have held that contracts made in violation thereof are void, for the reason that the statutes provide a penalty for the making of a prohibited contract. *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777 (1899); *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924). See 15 OPS. CAL. ATT'Y GEN. 123 (1950) (relying in part on CAL. CIV. CODE § 1667(2)), and see CAL. GOVT. CODE § 23006 (contracts made by county supervisors in violation of law are void). Note that CAL. ED. CODE § 1013 specifically provides that contracts made in violation of the Education Code conflict of interest provisions are void.

⁵⁹ *Domingos v. Board of Supervisors*, 51 Cal. 608 (1877).

⁶⁰ *Moody v. Shuffleton*, 203 Cal. 100, 262 Pac. 1095 (1928).

⁶¹ Suit may be brought by the public body or by a taxpayer: *Osburn v. Stone*, 170 Cal. 480, 150 Pac. 367 (1915); *Miller v. City of Martinez*, 28 Cal. App.2d 364, 82 P.2d 519 (1938). Cf. *Raymond v. Bartlett*, 77 Cal. App.2d 283, 175 P.2d 288 (1946) (taxpayers suit for injunc-

offering to tender back value received.⁶² The fact that the contract is fair⁶³ or that it was awarded on the basis of the best bid⁶⁴ does not mitigate the consequences. Nor is it any defense that the party who made the contract with the governmental unit acted innocently or in good faith.⁶⁵ These results apparently follow even though the official is unaware of his interest, or being aware of his interest, makes disclosure⁶⁶ or abstains from voting⁶⁷ (subject to the 1955 changes discussed below).

Effect on the Officer of Violation of the Prohibition

Government Code section 1097⁶⁸ is the basic provision regarding sanctions for violation of the interest statutes. The sanctions are a fine of \$1,000 or up to five years imprisonment. Conviction under Government Code section 1097 "forever [disqualifies the] officer from holding any office in this state." Prior to 1955 the section appeared to be applicable even to unknowing violations, for it provided that "every officer or person prohibited by the laws of this State from making or being interested in contracts . . . who violates any of the provisions of such laws is punishable . . ."⁶⁹ The statute

tion to prevent payment by the governmental unit denied on the merits). *Rescission* is also available: *Shakespear v. Smith*, 77 Cal. 638, 20 Pac. 294 (1888); *City of San Diego v. San Diego & L.A. R.R.*, 44 Cal. 106 (1872); *City of Los Angeles v. Watterson*, 8 Cal. App.2d 331, 48 P.2d 87 (1935). *Statute of limitations and laches*: see *Schaefer v. Berinstein*, 140 A.C.A. 289, 295 P.2d 113 (1956) (in action by taxpayer alleging fraud, 3-year statute of limitations set up by CAL. CODE CIV. PROC. § 338(4) runs from time of discovery of fraud); *County of Marin v. Messner*, 44 Cal. App.2d 577, 112 P.2d 731 (1941) (in action by district attorney to recover money paid by board of supervisors without authority, 3-year statute of limitations of CAL. CODE CIV. PROC. § 338(1) controls; laches or equitable estoppel not operative against the county [see the comment by H. Helmut Loring, entitled "Estoppel Against the Government in California" immediately preceding this comment]). *Collateral attack*: *Southlands Co. v. City of San Diego*, 211 Cal. 646, 297 Pac. 521 (1931) (action to enjoin work on a bridge); *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 (1893) (action by contractor to enforce lien of assessment for street work—successfully defended on ground of invalidity of construction contract); *Finch v. Riverside & A. Ry.*, 87 Cal. 597, 25 Pac. 765 (1891) (action of ejectment based on invalidity of franchise).

⁶² *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777 (1899); *Miller v. City of Martinez*, 28 Cal. App.2d 364, 82 P.2d 519 (1938); *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App.2d 592, 229 Pac. 1020 (1924).

⁶³ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 (1893). Cf. 15 OPS. CAL. ATT'Y GEN. 123 (1950); *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law*, 28 So. CALIF. L. REV. 335, 345 (1955).

⁶⁷ *Salada Beach Pub. Util. Dist. v. Anderson*, 50 Cal. App.2d 306, 123 P.2d 86 (1942); *Stockton Plumbing and Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924).

⁶⁸ CAL. GOVT. CODE § 1097: "Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who wilfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding office in this State." [This provision was formerly CAL. PEN. CODE § 71 (repealed Cal. Stat. 1943, c. 134, p. 1010)].

⁶⁹ See text at note 82 *infra* for a discussion of the effect of the addition of the word "wilful" to § 1097 in 1955.

in that form was applied in two cases and held to be constitutional,⁷⁰ but in both cases the facts were sufficient to support a finding of wilful and knowing violation of the law.⁷¹ It was also held that the penal provisions of section 1097 were applicable to violations of the Education Code, even though the Education Code at the time did not specifically provide for criminal penalties.⁷²

Aside from the criminal penalties provided by section 1097, Government Code sections 3060 to 3073⁷³ provide a procedure for removal from office of certain officers guilty of wilful or corrupt misconduct in office. This procedure has been used in two cases involving conflict of interest. In *People v. Becker*,⁷⁴ the court admitted the "unquestioned honesty and integrity" of the defendant, but held that "'wilful and corrupt misconduct in office' does not necessarily imply corruption or criminal intention. It means 'simply a purpose or willingness to commit the act'; . . . 'The mere doing of an act forbidden by the statute is the sum total of the judgment against him.'"⁷⁵ The terms "wilfully" and "corruptly" are defined in the Penal Code.⁷⁶ In the other case, *People v. Elliott*,⁷⁷ the facts were held to warrant a conviction of both wilful and corrupt misconduct, and section 3060 was held applicable to school board members.

Effect of Recent Amendments

In 1951 a comprehensive revision of the Government Code sections passed both the California assembly and senate,⁷⁸ only to be vetoed by the

⁷⁰ *People v. Deysher*, 2 Cal.2d 141, 40 P.2d 259 (1934); *People v. Darby*, 114 Cal. App.2d 412, 250 P.2d 743 (1952), *appeal dismissed* 345 U.S. 937 (1953).

⁷¹ *People v. Deysher*, 2 Cal.2d 141, 151, 40 P.2d 259, 263 (1934); *People v. Darby*, 114 Cal. App.2d 412, 429, 250 P.2d 743, 755 (1952), *appeal dismissed* 345 U.S. 937 (1953).

⁷² *Id.* at 423, 250 P.2d at 751.

⁷³ CAL. GOVT. CODE § 3060: "An accusation in writing against any officer of a district, county, or city, including any member of the governing board of a school district, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer is elected or appointed. An accusation may not be presented without the concurrence of at least 12 grand jurors."

CAL. GOVT. CODE § 3072: "Upon a conviction and at the time appointed by the court it shall pronounce judgment that the defendant be removed from office. To warrant a removal, the judgment shall be entered upon the minutes, and the causes of removal shall be assigned therein."

⁷⁴ 112 Cal. App.2d 324, 326, 246 P.2d 103, 104 (1952). For another aspect of this case (effect of resignation from office prior to trial), see *People v. Becker*, 108 Cal. App.2d 764, 239 P.2d 898 (1952).

⁷⁵ *People v. Becker*, 112 Cal. App.2d 324, 326, 246 P.2d 103, 104 (1952).

⁷⁶ CAL. PEN. CODE § 7: ". . . The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: 1. The word 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage; . . . 3. The word 'corruptly' imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person; . . . 5. The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission; . . ."

⁷⁷ 115 Cal. App.2d 410, 252 P.2d 661 (1953).

⁷⁸ Cal. Senate Bill 370 (1951).

governor.⁷⁹ The changes in general would have established a bidding procedure whereby the lowest responsible bid could have been accepted, even though a public officer might have been directly interested in the contract. Certain other changes would have been made, which were later enacted into law in 1955.

In 1953, certain technical changes were made.⁸⁰ Many important changes were made in 1955 to the Government Code and Education Code conflict of interest sections. Dealing first with the Government Code, section 1091 was amended to provide that an officer should not be deemed to be interested in a contract if his interest was the ownership of less than three percent (3%) of the shares of a corporation for profit, or that of a non-salaried officer of a non-profit corporation.⁸¹ The reimbursement for expense provision enacted in 1943 was retained. In addition, the word "wilful" was added to section 1097, so that the penal provisions now operate only in case of "wilful" violation of the prohibition.⁸² Section 1097, as well as section 3060,⁸³ were made specifically applicable to members of the governing board of a school district, thus codifying the holdings to that effect in *People v. Darby*⁸⁴ and *People v. Elliott*.⁸⁵

The most significant changes were made to the Education Code by the addition of sections 1011.1, 1011.2, and 1011.3,⁸⁶ which distinguish between "direct" and "indirect" interests. It is provided that contracts are void where one of the board members is a contracting sole proprietor, or a partner in a contracting firm, or a greater than five percent (5%) shareholder in a contracting corporation. For more remote interest relationships, the contract is not void or voidable because of interest if (1) the interested member discloses his interest to the board, (2) the vote approving the contract is sufficient for such purpose without counting the vote of the interested officer, (3) the contract is just and reasonable at the time it was authorized or approved, and (4) prior to disclosure the member did not influence or attempt to influence his fellow board members. No provision is made for "innocent" non-disclosure. Section 1011.3 declares that the question of the validity or invalidity of a contract or other transaction entered into by the school board, involving interest, is exclusively governed by the Education Code. Declared to be superseded are all other

⁷⁹ Cal. Senate Journal, vol. 3, p. 2790 (1951).

⁸⁰ CAL. GOVT. CODE §§ 1090 and 1091 as they then existed were consolidated into § 1090, and a new § 1091 was enacted which exempted from the operation of § 1090 claims of public officers for reimbursement of actual and necessary expenses incurred in the performance of official duty. The last sentence of § 1092 as it presently reads was also added. Cal. Stat. 1953, c. 1081. Parallel amendments were made by the same bill to the CAL. GOVT. CODE §§ 36525-36527, governing sixth class (general law) cities.

⁸¹ Cal. Stat. 1955, c. 1325. CAL. GOVT. CODE § 36526 was similarly amended by the same chapter.

⁸² Cal. Stat. 1955, c. 1125. See note 76 *supra*.

⁸³ *Ibid.*

⁸⁴ 114 Cal. App.2d 412, 250 P.2d 743 (1952), *appeal dismissed* 345 U.S. 937 (1953).

⁸⁵ 115 Cal. App.2d 410, 252 P.2d 661 (1953).

⁸⁶ Cal. Stat. 1955, c. 1125. See 26 OPS. CAL. ATT'Y GEN. 281 (1955) and 27 OPS. CAL. ATT'Y GEN. 254 (1956), construing the new sections narrowly.

code provisions except those which specifically refer to members of school boards (*i.e.*, Government Code sections 1097 and 3060)⁸⁷ and all provisions contained in any local charter or ordinance, which might otherwise be applicable.

Conclusion as to Present California Law

There is an unnecessary and confusing multiplicity of statutes, charters and ordinances regulating conflict of interest in public contracts. Harsh results follow from the failure to treat indirect interests differently from direct interests. The only comprehensive scheme differentiating between direct and indirect interests is found in the Education Code, which has but limited application. Moreover, the Education Code is deficient in its failure to provide for the effect of "innocent" non-disclosure and in its failure to provide relief for "good faith contractors."⁸⁸ Finally, the criminal provisions are not sufficiently specific as to the intent required for violation, and the penalties are so severe that they are seldom used.

II. PROPOSED LEGISLATION

Introduction

It seems clear that some change in the present law would be desirable. Because of the general failure of the law to recognize that certain interests on the part of public officers may be so remote as to substantially negate any implication of undivided loyalty, the law is being applied alike to both very direct and very remote interests. As a result, many people are worried about the possibility of competent men being not only unwilling to serve, but in a practical sense ineligible to serve in public office. This is the primary evil which the proposed statutes have set about to correct.

A number of different approaches to the problem are possible. In the following pages two proposed statutes are set forth, representing substantially different viewpoints.⁸⁹

⁸⁷ See notes 68 and 73 *supra*.

⁸⁸ See the comment in this issue entitled "Estoppel Against the Government in California," by H. Helmut Loring, for one method of protecting good faith contractors.

⁸⁹ Both proposed statutes proceed on the theory that Government Code §§ 1090 through 1097 should be repealed entirely, and that new Government Code sections, starting with § 1100, should be enacted to take the place of the repealed sections. By repealing the old sections and starting with a new series of section numbers, any possible confusion of the present Government Code sections with the proposed sections will be minimized. The new section numbers fall within the same article as the present sections, and the new numbers have apparently never been used before. In order that all persons affected by the changes might have sufficient notice, it would be desirable to delay the effective date until the January following the changes. (Statutes in California ordinarily become effective 90 days after the final adjournment of the legislative session in which the amendment was enacted. CAL. CONST. art. IV, § 1.)

As previously noted, aside from the problem of conflicting and duplicatory charters and ordinances, there is a great deal of unnecessary duplication within the various California codes. It is therefore recommended that a number of these provisions be amended or repealed:

As indicated, CAL. GOVT. CODE §§ 1090-1097 should be repealed and new GOVT. CODE provisions starting with § 1100 enacted. CAL. GOVT. CODE § 36525 (dealing with general law cities) should be amended to read: "The provisions of Sections 1100 through 1108 [or 1110] of the

*Statute "A"*⁹⁰

The first alternative statute, Statute "A", is primarily designed to minimize the possibility that public officers will, while acting in their official capacities, be guided by their private interest in a contract rather than by the public interest. However, if a governmental board, acting in good faith and wholly in the public interest, enters into a contract it would make no difference whatsoever that one of its members is incidentally interested in or derives profit from that contract. Therefore, this statute would permit in general contracts in which public officers are interested to be entered into if certain procedures are followed.

Statute "A" is also based on the premise that the problems involved in entering into and in acting upon contracts for local governments are primarily of local and not state concern.

A state law which precludes the formation of a contract because of an interest is to a large degree arbitrary since it may be that despite any interest therein the contract is one highly beneficial to the local government. The local governing body is in a far better position to determine whether under a given set of circumstances a specific contract best serves the local public interest.

It should therefore to the largest extent possible be given authority commensurate with its responsibility. A corollary to this proposition is that control of the conduct of local governmental officials should be as far as possible left to the people of each local government. The most important function of a state statute is to insure that the fact of interest be disclosed to the public so that it can register its approval or dissent at the polls, or press for laws regulating the interest at the local level.

Proposed Statute "A", therefore, is an attempt to establish procedures whereby dangers of partiality due to interest, dangers of discouraging competent men from public service, and dangers of interference with public

Government Code apply with equal force to this article." CAL. GOVT. CODE §§ 36526, 36527 and 36528 should be repealed.

CAL. ED. CODE § 1013 (dealing with members of boards of education) should be amended to read: "The provisions of Sections 1100 through 1108 [or 1110] of the Government Code apply with equal force to this article." CAL. ED. CODE §§ 1011, 1011.1, 1011.2, 1011.3, and 1012 should be repealed.

CAL. PEN. CODE §§ 99 and 100 should be repealed, to remove certain provisions dealing with the superintendent of state printing, which is redundant in the face of the Government Code.

CAL. HEALTH & SAFETY CODE §§ 5730.35 and 32108 should be repealed. They deal with officers of municipal sewage districts and directors of hospital districts, respectively. The Government Code provisions would be adequate to cover these officers.

CAL. PUB. UTIL. CODE § 12722 should be repealed. This section deals with officers of municipal utility districts, and the Government Code provisions would adequately cover this officer.

CAL. WATER CODE §§ 8573, 8574, 21195 and 21196, as well as the title to article 6 of Chapter 1 of Part 3 of Division 11 of the Water Code should be repealed. These sections deal with officers of reclamation boards and irrigation districts, respectively. The Government Code sections will be adequate.

⁹⁰ This statute was drafted by David L. Norman and Eugene E. Reynolds, Jr.

officials in their attempt to obtain the best possible contracts for the government, are all reduced to a minimum.

The text of Statute "A", proposed as an addition to the Government Code, follows:

§ 1100. **Definitions.** As used in this act—

(a) "Governmental unit" shall mean all governmental organizations having a legislative body and existing under the authority of the constitution and laws of this state, including but not limited to counties, cities (general law or chartered), consolidated cities and counties, service districts (such as hospital and water districts), school districts, and the State of California.

(b) "Board or body" shall mean legislative bodies and administrative boards having the power to contract on behalf of any governmental unit, but shall not include the State legislature.

(c) "Governing board or body" shall mean any board or body of a governmental unit which has the overall responsibility of governing.

(d) "Subordinate board or body" shall mean any board or body of a governmental unit which is not the governing board or body.

(e) "Purchasing agent" shall include any person having the power, while acting in his official capacity but not as a member of a board or body, to purchase or sell, to negotiate, approve or enter into contracts, to approve claims, specifications, terms or conditions of contracts, or to inspect, approve or accept the performance of a contract on behalf of any governmental unit.

Comment: These definitions are primarily illustrative. Since they are determinative of the coverage of the statute, they are extremely important, but adequate drafting would involve policy considerations beyond the scope of this comment and also can only be done by an expert in state and local government organization.

§ 1101. **Duties and Prohibitions.** (a) If a member of a board or body of any governmental unit has any interest, direct or indirect, in any contract or proposed contract which is the subject matter of consideration by that board or body or of any committee thereof;

(1) he shall, as soon as practicable after learning that a contract or proposed contract in which he has an interest is the subject matter of consideration by that board or body, disclose the fact of such interest to the other members of that board or body and cause such disclosure to be entered into the official minutes of that board or body; and

(2) he shall not influence or attempt to influence any vote, or himself vote on, or (except as provided in subsection (c) of this section or except to inform the board of his interest) take part in the consideration or discussion of any question with respect to such contract or proposed contract; and

(3) he shall, after any contract in which he has an interest is authorized, approved or ratified by that board or body or any final action is taken by that board or body respecting the terms or conditions of a contract or proposed contract in which he has an interest, execute a certificate under penalty of perjury stating that he has complied with all the requirements of this section, and such certificate shall be incorporated into the official minutes of that board or body.

Comment: This subsection represents the heart of the statute. In essence it imposes a duty upon the "interested" member of a board to disclose his interest and to refrain from participation in the consideration of "his" contract. The disclosure requirement is to enable the public to maintain a close check on the conduct of its

officers. If the public is convinced that an officer is using his position for private gain rather than for good public service, it can bring very effective pressures either to remove the officer or at least to curb the practice. If the "interested" officer is honestly convinced that "his" contract will be highly beneficial and in the best interest of the public, he will not hesitate to disclose his interest and to withdraw from participation in the consideration of the contract. If he is dishonest and therefore chooses not to disclose, he will be subject to criminal liability when the fact is discovered.

After disclosure, the "interested" member officer is not permitted to participate. This is to remove the possibility that in acting upon his own contract, he may be guided by his private rather than the public interest. It is to be noted that this section applies as well to existing contracts which are the subject of consideration by the board or body. It would seem possible that under the present provisions of the Education Code, a man becoming a member of a board after having contracted with it may keep his interest secret and freely participate in matters arising under the contract without liability.

By the use of the term "proposed contracts" in this section, the requirements are made applicable to preliminary proceedings involving, for example, decisions as to what specifications are to be required in accepting bids. But the section is not intended to apply to initial decisions as to whether a school building ought to be erected for which a contract will later be entered into, or to proceedings involving contracts with business competitors of any member of the board who is not otherwise interested in such contract.

The present requirement of the Education Code that the contract be "just and reasonable" in order to be valid has been omitted because those terms are hopelessly vague and because it is unwise to subject every contract to the scrutiny of the courts to be judged on its merits according to a vague standard—a function which is more properly administrative or legislative. The normal remedy for unreasonable contracting is at the polls. This subsection guarantees public access to the information relating to the private interests of its officials in public contracts. While this statute does not so provide, it may be desirable in the interest of governmental efficiency to exempt from the operation of section 1100 contracts below a certain minimal amount. But it would not be desirable to exempt contracts let to the lowest responsible bidder in view of the discretion remaining in the board to determine specifications for such contracts and the most responsible bidder.

§ 1101(b). Except as provided in Section 1104 of this code, no board or body shall enter into a contract if any member of that board or body has an interest in such proposed contract arising because the parties thereto would be:

- (1) the governmental unit for which the board or body acts, and
- (2) (i) such member or an agent of such member; or
(ii) a partnership or other unincorporated association in which such member is a partner or owner directly or indirectly of any proprietary interest; or
(iii) a corporation in which such member is an owner directly or indirectly of more than five percent of the total capital stock issued by that corporation; or
(iv) a corporation, partnership or other organization or association of which such member is a director, president, general manager, or other similar executive officer. *Provided* that the provisions of subsection (b) of this section shall not be applicable where the partnership, corporation, organization or association is not organized for profit.

Comment: This subsection, specifying "direct" interest, is designed primarily to curb the practice of "logrolling." It proceeds on the assumption that where a member of a board has a substantial and direct interest in a proposed contract, his fellow board members might well be guided by his private interest rather than by public interest in entering into contracts. Therefore, a duty of non-participation is imposed upon all the members of the board where one or more of the specified direct interests are involved. It is not intended to affect in any way the validity of

the contract if it is nevertheless entered into. Criminal penalties are imposed in a later section upon board members who knowingly enter into such a contract, but in case of violation or in case the board lacked the knowledge of the interest involved, the validity of the contract is unaffected. Later in this statute there is a provision for avoidance of such contracts in limited situations, but this section does not affect the contract.

§ 1101(c). Nothing in this section shall prevent any interested member, after having disclosed his interest, from answering specific questions directed to him in an open meeting of the board or body by other members of that board or body whenever in their judgment it would be in the public interest to solicit some special information from such interested member; *provided* that each question and answer is to be entered into the minutes of the meeting.

Comment: To the largest extent possible the officials charged with responsibility for running any governmental unit should be the ones who make the decisions with respect to public contracts for that governmental unit. However, to some extent the interest statute proposed has resulted in a "half-a-councilman" situation. Under the provisions of § 1101(a) a member of a board possessing an interest is precluded from participating in the consideration and vote leading to a decision, yet it may be that this member was chosen for the public position he holds, because of some special skill, experience or knowledge which would be most valuable in making that very decision. This provision is designed to allow the governmental unit the benefit of the membership of such person but still safeguard the public interest in absolute impartiality.

§ 1101(d). Except as provided in Section 1104 of this code, no purchasing agent (as defined in Section 1100 of this code) shall in his official capacity enter into or act upon any contract or proposed contract in which he is interested directly or indirectly.

§ 1101(e). In the case of married persons the interest of one spouse shall be deemed for purposes of this section to be also an interest of the other spouse; and for purposes of subsection (b) of this section the term member shall include the spouse of a member.

§ 1102. **Validity of contracts.** (a) Contracts made in violation of subsections (b) or (d) of Section 1101 of this code shall not be void but may be avoided by the governmental unit which is a party thereto or on behalf of such governmental unit by any owner of real property which is located within any area subject to the jurisdiction of such governmental unit unless such property owner is an interested person in such contract. Except for contracts avoided pursuant to this subsection, the validity of any contract entered into by a governmental unit shall not be affected by an interest which any person may have therein, unless expressly provided otherwise by statute, charter or ordinance.

Comment: Contracts entered into in violation of subsections (b) and (d) of section 1101 are per se extremely "suspect" and in order to furnish the greatest inducement to public officers to comply with the statutory safeguards provided for these situations, the governmental unit should be allowed to avoid such contracts solely because of the "interest" involved, *if* it would be to the advantage of such unit to do so. However, no private contractor should be able solely because of his "interest" to avoid a contract which has turned out to be a bad bargain for him. This section limits the persons who can avoid government contracts to those having a very high interest in seeing to it that each contract situation is resolved in a manner most advantageous to the governmental unit involved.

§ 1102 (b). If any contract shall be avoided pursuant to subsection (a) of this section, any party who entered into such contract in good faith and without knowledge of the existence of any prohibited interest therein may recover from the governmental unit the reasonable value of any benefits which he has conferred

upon such governmental unit in good faith reliance upon such contract. *Provided* that such recovery shall not exceed the actual costs incurred by him in good faith reliance on such contract or the total original contract price, whichever is lower.

§ 1103. **Criminal Sanctions.** (a) If any person fails to comply with any of the provisions of Section 1101 of this code, unless he proves that he did not know that a contract or proposed contract in which he had an interest was the subject of consideration by the board or body of which he is a member or that he did not know of his interest at the time he or the board or body of which he is a member acted upon such contract, he is guilty of a misdemeanor. Conviction shall work a forfeiture of office.

Comment: This section provides that lack of knowledge is a defense and therefore places the burden of proof in this respect upon the defendant. The felony penalty imposed by the present code is too harsh, and prosecutors hesitate to bring criminal proceedings. Therefore, the reduction to a misdemeanor should result in more frequent as well as more just enforcement.

§ 1103 (b). If any member of a board or body of any governmental unit votes other than pursuant to Section 1104 of this code to enter into any contract knowing that another member thereof has, in such contract, an interest of the type enumerated in subsection (b) of Section 1101 of this code, he is guilty of a misdemeanor. Conviction shall work a forfeiture of his office.

§ 1104. **Referral systems.** (a) (1) The governing board or body of each governmental unit is hereby authorized to establish procedures whereby any purchasing agent or board subordinate to such governing board or body, disqualified from acting upon any contract or proposed contract under the provisions of Section 1100 of this code, may refer the matter to such governing board or body. If, after consideration in public meeting, such governing board or body shall determine that the public interest would be served thereby, it may remove such disqualification and may, upon such terms and conditions as it may see fit to impose, authorize the purchasing agent or subordinate board to proceed to act upon the contract or proposed contract notwithstanding any disclosed interest the purchasing agent or member of the subordinate board may have therein. *Provided*, however, that no contract or proposed contract shall be referred under the provisions of this section to the state legislature or any committee thereof.

(2) Whenever such governing board or body shall remove any disqualification pursuant to subsection (2) (1) of this section, such board or body shall incorporate into the minutes of the meeting of that board or body at which such action has been taken a statement setting forth the reasons why such board or body considers such removal to be in the public interest and any terms or conditions which it may have imposed in connection with such removal.

(3) Where no governing board or body exists to which a purchasing agent or a subordinate board may refer any contract or proposed contract pursuant to this section, then such matter may be referred to the Governor who may, if in his judgment it would be in the public interest, remove such disqualification and may, upon such terms and conditions as he may see fit to impose, authorize such purchasing agent or subordinate board to act upon such contract or proposed contract notwithstanding any interest the purchasing agent or member of the subordinate board may have therein.

Comment: This subsection is designed to permit the entering into and acting upon contracts which could not otherwise be done by reason of the prohibitions of section 1101. The policy of Statute "A" is to promote the entering into contracts which are

in the public interest. The referral system insulates the interested officers from the process of making the decision as to whether the contract or proposed action thereon is in the public interest. This device has the advantage of utilizing an existing disinterested board and keeping the matter on a local level as far as practicable, while at the same time leaving the responsibility of actually making the contract with those charged to do so. Disclosure provides an added safeguard against abuse.

§ 1104 (b) (1). The board of supervisors of each county is hereby authorized to create by ordinance a Board of Referred Powers.

(2) Whenever any governing board or body of any governmental unit located in whole or in part within a county in which a board of referred powers has been established in accordance with this section is disqualified from acting upon any contract or proposed contract by reason of Section 1101 of this code, such governing board or body may refer the matter to the Board of Referred Powers for that county. Such Board of Referred Powers is hereby authorized, acting in public session, to remove such disqualification subject to such terms and conditions as it may see fit to impose, whenever in its judgment the public interest requires such removal.

(3) The county board of supervisors shall provide by ordinance for all matters relating to the appointment and number of members, the functioning of the Board of Referred Powers and the procedure applicable in referring matters to it. Provided that:

(i) the services of such Board of Referred Powers shall be made available to all governmental units which are in whole or in part within the county; and

(ii) whenever any Board of Referred Powers shall remove any disqualification pursuant to this subsection it shall submit a written statement to the board or body from which the matter was referred and to the board of supervisors which created such Board of Referred Powers, setting forth in detail the reasons why such removal would be in the public interest and any terms and conditions it may have imposed in connection with such removal. Such statement is to be read at the next regular meeting of each board to whom it is submitted and become a part of the minutes of each meeting at which read.

Comment: Because of restrictions imposed by section 1101, certain contracts could never be entered into or considered where, for example, so many members of a board have an interest in a proposed contract that their disqualification would make it impossible to act upon it, or where any member of the board has a "direct" interest in a contract. Yet in these situations it may be highly beneficial to the governmental unit to enter into the contract despite the interest therein. The referral board of this section is designed to provide a method whereby such contracts may nevertheless be considered and acted upon notwithstanding such interest. If the public interest would best be served by permitting the primary board to go ahead on a contract, the referral board is authorized to remove the disqualification imposed by this code. Such removal in effect confers upon the members immunity from prosecution and at the same time insures that the contract itself may not be avoided due to such interest.

This "immunizing" referral system avoids all the legal problems involved in shifting the power to contract to a separate, independent, outside board—problems which might occur if the referral board were given authority to make absolute recommendations respecting the entering into of such contracts. This method would also seem preferable as a matter of good administrative and political policy.

In order to avoid to the greatest extent possible the problem of political favoritism, collusion, and "log-rolling" between the members of the primary board and the referral board, this section requires disclosure of the grounds upon which the referral board decides that it is in the public interest to remove a disqualification. This again reflects one of the assumptions underlying this whole statute—that publicity is the most effective safeguard against the misconduct of public officials.

It is to be noted that this section permits a county board of supervisors to utilize the referral board which it has itself appointed. While this may tend to jeopardize the complete impartiality of the referral board, the disclosure provision should be adequate to mitigate the dangers of improper practices.

This section leaves to the boards of supervisors much discretion in the matter of who should be appointed to the referral board and for what terms. As alternatives, the statute might specifically provide, for example, that the referral board members are to be elected for fixed terms, or that the positions on the board should be occupied by the holders of other specific offices.

§ 1105. [This would be present CAL. GOVT. CODE § 1093.]

§ 1106. [This would be present CAL. GOVT. CODE § 1094.]

§ 1107. [This would be present CAL. GOVT. CODE § 1095.]

§ 1108. [This would be present CAL. GOVT. CODE § 1096.]

Comment: No revision of these sections is necessary. See note 89 *supra*. However, a penalty provision somewhat the same as present CAL. GOVT. CODE § 1097 would seem to be required to cover those latter sections as reenacted under proposed statute "A."

Statute "B"⁹¹

The second alternative statute, Statute "B", retains the present statutory scheme of first making a general prohibition against interest, and then making exceptions to this general prohibition. This approach assumes that the present policy is correct in demanding the undivided loyalty of public officers, but recognizes that there is an evil in the failure of the law to differentiate between very direct and very remote interests—competent men are being deterred from public service. While it is therefore desirable to change the law in some respects, the policy of undivided loyalty should be kept in mind and no more changes should be made than are needed to achieve the correction of the evil involved; a new policy should not be written into the law.

The Statute "B" provides for disclosure of indirect interests, and in certain cases provides for restitutionary relief for "good faith contractors." But contracts involving direct interests are void *ab initio*, and no relief is provided for the "good faith contractor" in such case. While the rule may be arbitrary, the public is entitled to protect itself against chicanery.

Finally, Statute "B" reflects the viewpoint that personal interest of all public officers, state or local, in contracts made by them in their official capacity is a matter of state concern, and that state law should occupy the field to the total exclusion of local charters and ordinances.

The text of Statute "B", proposed as an addition to the Government Code, follows:

§ 1100. Except as otherwise provided in this article, no public officer shall be directly or indirectly interested in any contract made by him in his official capacity, or by any body or board of which he is a member, nor shall any public officer be purchaser at any sale or vendor at any purchase made by him in his official capacity, or by the body or board of which he is a member.

Comment: This is a restatement of present CAL. GOVT. CODE § 1090. The words "directly or indirectly" have been added. No attempt is made to legislatively define terms; many decades of litigation have given the word "officer," "direct or indirect," "interest" and "contract" accepted meaning. The statute is intended to apply to *all* public officers, whether state, regional, or local. The term "body or board" is intended to embrace the legislature, boards of supervisors, city councils, school boards, plan-

⁹¹ This statute was drafted by Paul A. Peterson.

ning commissions, regional boards and state boards and commissions—in short, all public bodies having the power to contract are intended to be within the scope of the statute.

§ 1101. A public officer shall not be deemed to be interested in a contract if his interest is that of being reimbursed for his actual or necessary expenses incurred in the performance of official duty.

Comment: This is a reenactment of CAL. GOVT. CODE § 1091(c). It should be read in connection with CAL. GOVT. CODE § 1223, authorizing certain contracts involving reimbursement to be made.

§ 1102. Except as provided in Section 1103, no contract entered into by any body or board is either void or voidable under the provisions of Section 1104, nor shall any officers be subject to the provisions of Section 1109 or 3060 or this code, if all of the circumstances specified in the following subdivisions exist:

(a) The fact of the officer's interest is disclosed or known to the body or board of which the officer is a member and noted in the minutes or record; and

(b) The officer neither influences nor attempts to influence another officer to enter into the contract, and a certificate to such effect, executed under penalty of perjury, is within a reasonable time after such contract is entered into placed on file with the clerk of the body or board; and

(c) The officer abstains from voting on the contract and it is entered into in good faith by a sufficient vote for the purpose by the body or board in spite of the absence of such vote; and

(d) The contract is just and reasonable at the time it is entered into.

Comment: This provision is based on present CAL. ED. CODE §§ 1011.1 and 1011.2. As will be seen from § 1103, the disclosure provisions are applicable only to situations involving "indirect" interest, and there is no provision for disclosure in a case where the contract is made by a single officer, such as a purchasing agent, as opposed to contracts made by a body or board. Direct interest is prohibited, and contracts involving direct interest are void. The Statute "B" also adopts the Education Code requirement that the contract be just and reasonable at the time it is entered into. There have been no cases dealing with this provision, but the provision gives the court authority to balance the equities in case a particular contract is contested. The requirement of justness and reasonableness seems necessary. The section is framed in such a way that the burden of proving compliance would be on the officer interested in the contract in case of a public or taxpayers' suit seeking to invalidate a contract. Statute "B" is applicable only to contracts actually entered into. There appears to be no good reason why an officer should be precluded from voting *against* a contract in which he is interested.

§ 1103. The provisions of Section 1102 shall not be applicable if the circumstances specified in any of the following subdivisions exist:

(a) The contract was entered into by a public officer in his official capacity other than as a member of a body or board; or

(b) The contract was entered into by the body or board with a member or agent of that body or board, or a spouse or minor child of a member of that body or board; or

(c) The contract is entered into by the body or board with a partnership or unincorporated association of which any member of the body or board is a partner or in which he is the owner or holder, directly or indirectly, of a proprietorship interest; or

(d) The contract is entered into by the body or board with a corporation in which any member of the body or board is the owner or holder, directly or indirectly, of five percent (5%) or more of the total capital stock of such corporation.

Comment: It will be noted that this section is in terms of exclusion from the operation of the preceding "disclosure" section. Subdivision (a) makes it clear that such officers as purchasing agents are not covered by any exception from the general prohibition against interest, even in case of indirect interest. The referral board procedure of Statute "A" might provide a satisfactory solution of this problem, although it is doubtful whether the conflict of interest problem with respect to professional public administrators is of much importance. It is to be noted that the spousal interest is by subdivision (b) placed within the definition of "direct" interest; the same is true with respect to minor children. This seems proper because of the community property laws.

§ 1104. Any contract made in violation of the provisions of this article is void; provided, however, that if the contract is not within any of the subdivisions of Section 1103, the contract is not void as against a good faith contractor who without knowledge of the existence of any prohibited interest on the part of an officer furnished goods or rendered services in reliance on the contract. In such case, such good faith contractor may recover from the governmental unit involved the reasonable value of any goods furnished or services rendered in reliance on the contract up to the amount of the original contract price.

Comment: This section in effect provides that "direct" interest contracts are void; and that "indirect" interests contracts are void if the requirements of Section 1102 are not fully complied with. However, in the case of indirect contracts the "good faith contractor" is entitled to quasi-contractual recovery and the contract is not void as to such "good faith contractor." Whether a contractor is in good faith will be primarily a question of fact, and the burden will rest on him to prove his good faith. No recovery is allowed to a "good faith contractor" where there is a direct interest involved.

§ 1105. [This would be present CAL. GOVT. CODE § 1093.]

§ 1106. [This would be present CAL. GOVT. CODE § 1094.]

§ 1107. [This would be present CAL. GOVT. CODE § 1095.]

§ 1108. [This would be present CAL. GOVT. CODE § 1096.]

Comment: No revision of these sections is necessary. See note 89 *supra*.

§ 1109. Every public officer who knowingly and wilfully violates any of the provisions of this article, and every public officer who, as a member of a body or board, knowingly and wilfully fails to disclose any interest in a proposed contract, is punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not more than one year, or both. Conviction under this section shall work a forfeiture of office.

Comment: Criminal liability for the officer is predicated upon knowing and wilful violation. CAL. PEN. CODE § 7 defines "knowingly" and "wilfully," and is set forth in part in note 76 *supra*. The effect of this proposed section is to place a fairly high standard of care upon the officer, but this appears to be consonant with the policy of prohibition of interest. It is to be noted that this section imposes a penalty for failure to disclose interest, and this includes non-disclosure of direct interest as well as non-disclosure of indirect interest, and includes not only contracts finally entered into but also all proposed contracts. If an officer other than the officer having the interest were to vote in favor of a prohibited contract, if the case were appropriate for criminal prosecution, CAL. GOVT. CODE § 3060, set forth in note 73 *supra*, would appear to be adequate to cover the case.

§ 1110. The question of the validity or invalidity of a contract entered into by any public officer or by any body or board, where interest of an officer is in issue, as well as the question of disqualification from holding office or imposition of criminal penalties, shall be exclusively governed by the provisions of the Gov-

ernment Code, which are hereby declared to and shall supersede any and all provisions of law contained in any charter or ordinance of a city, county, or city and county, which might otherwise be applicable. Except as otherwise specifically provided, the provisions of the Government Code apply with equal force to officers whose duties and powers are defined by other codes or statutes.

Comment: By this provision it is hoped to reduce the unnecessary duplication of provisions, and to thereby create uniformity throughout the state, to the extent possible. Conflict of interest is a matter of state, not local, concern. Provisions in other codes dealing with particular problems of interest are not affected by this provision.

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