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Regulating the "Initiative Industrial Complex:"

Is SB 168's proposed prohibition of per-signature payment an unconstitutional restriction on core political speech?

*By Steven Miller**

I. INTRODUCTION

Californians have a conflicted relationship with the initiative process. On the one hand, the initiative is an almost sacred constitutional right fundamental to our democratic process.[1] On the other hand, many decry the "initiative industrial complex," fearing that the initiative's ideal of direct democracy is increasingly compromised by special interest groups.[2] Robert Stern, President of the Center for Governmental Studies, has written that initiatives leave voters "overwhelmed and bewildered by poor drafting, misleading campaigns, look-alike counter-initiatives and highly technical policy details."[3] Yet despite the criticisms of the initiative process, and the fact that most initiatives do not pass, use of the initiative process has not diminished. As of this writing, six initiatives have either been submitted to the Attorney General, are in the process of qualifying, or have already qualified for the 2012 ballot.[4]

The calls for reform of the initiative process are almost as common as initiatives themselves. Some seek to reduce the number of measures that qualify for the ballot, for instance by providing for legislative action that could alter, adopt, and subsequently remove an initiative measure from the ballot. Others would like to make it easier for grassroots, un-monied organizations to qualify a measure, either by increasing the time permitted for collecting qualifying signatures, reducing the number of signatures required to qualify a measure for the ballot, or allowing online signature collection.

This article focuses on one particular initiative reform effort embodied in a current legislative proposal, SB 168, authored by Senate Majority Leader Ellen Corbett (D-San Leandro).[5] SB 168 on its face is not designed to make it easier or harder to qualify an initiative for the ballot. Rather, SB 168 is targeted at reducing fraud in the initiative process by removing the incentive to forge signatures or otherwise improperly amass the number of signatures needed to qualify a measure. It purports to achieve

Inside this Issue

Government Code 1090 – When No Really Means No

By Roy Hanley*

I am the part owner of a small office building on a single commercial lot. Our parking lot is near another larger commercial center. We were having difficulty with patrons of the nearby center parking in our lot. We tried putting up a sign stating that parking was for patrons of our building only. That sign did not work. We then put up a sign that said no parking for tenants of the commercial building next door. Seeing one patron of that other building parked directly in front of our sign, I felt compelled to ask him why. He looked at me incredulously, and stated to me that the sign clearly said he could park there for the building next door. I asked the obvious question, "What part of no did you not understand?" He admitted he understood, but thought if he moved quickly he would get away with parking where he was not supposed to park. We installed bollards.

Just like our feeble attempt to protect our parking lot with the word "no," Government Code section 1090 appears to be the law's attempt to keep public officials and consultants from either appearing to act in their own self-interest, or in fact doing so. The code section is fairly simple and clear, much like the word "no," and yet public officials, and perhaps their lawyers, continually look for a way to redefine "no" in order to justify entering into what is in actuality a forbidden contract.

In pertinent part Government Code section 1090 reads as follows: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members...." Section 1090 has been around, in one form or another, since 1851.[1] Section 1090 "codifies the long-standing common-law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities."[2] The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time.[3] Consequently, section 1090 is designed to apply to any situation that "would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the public entity concerned."[4]

The concept seems simple. If you are a public official make sure that in regards to contracts you do not raise the appearance that you are self-dealing, and more particularly, do not self-deal. It is amazing how often public officials look to redefine the language of section 1090 to allow them to enter into a contract when the spirit of the section most clearly prohibits it and, with a little research, the wording of the statute does so as well.

The consequences of violating section 1090 can be severe. Just ask Bill Honig, California's former State Superintendent of Schools. Mr. Honig is the subject of the case of *People v. Honig.*[5] As Superintendent of Schools he participated in having grants awarded to a non-profit corporation that his wife worked for. He made two big mistakes in doing so. First, he took the position that the "grant" was not a contract.[6] The court rejected that argument, stating: "We will not so construe those transactions simply to enable defendant to avoid the legal consequences dictated by sections 1090 and 1097. In order to do so we would be required to ignore the form the contracts took, the procedures by which they were made, and their substance, in order to construe them to be something for which we find no legal authority in the first place .... Sections 1090 and 1097 are not to be applied in a narrow and technical manner that would limit their scope and defeat their legislative purpose."[7] Second, he tried to parse the meaning of "financial interest," and met with similar success.[8]

There are more recent examples of public officials looking to parse words and definitions in attempts to enter into contracts they should not. In *People v. Chacon,*[9] the defendant, while a member of the City Council, sought and obtained appointment as City Manager.[10] The councilmember alleged that she had sought the advice of the city attorney and that the city attorney had told her there was no conflict. (This defense is called "entrapment by estoppel.") The appellate court rejected the attempt to defend such a violation by the receipt of erroneous advice. So you can't ask your lawyer to redefine no for you and enter into a contract in violation of section 1090.

On January 25, 2010, former Los Angeles Superior Court Judge Roosevelt Dorn pled guilty to a misdemeanor charge admitting a violation of Government Code section 1090. According to a story in the *Metropolitan News Enterprise,*[11] Dorn was charged because of a low interest loan he obtained through the City of Inglewood in 2004 while serving on the city council. Even though Dorn had been a practicing attorney and a sitting judge for 18 years, he claimed he relied on the advice of city administrators that it was okay to enter into the contract.

It is embarrassing enough as a public agency lawyer to hear fellow public agency lawyers be blamed for their client's failure to adhere to the provisions of section 1090. More embarrassing, and the inspiration for the energy to write this article, is a situation I faced recently. A consultant was hired by one of my public agency clients to design a project. After design was complete the project was put out to bid. I opined to staff that the consultant who designed the project should not bid on the project. The consultant bid on the project anyway. As luck would have it, the consultant who designed the project turned out to be the low bidder. I then told staff and the consultant that the consultant would be violating section 1090 if awarded the contract. The consultant retained a lawyer with public agency experience to tell my client that I was wrong, and that a consultant was not an employee and therefore 1090 did not apply. Happily, as we will discuss more fully later, the California Attorney General's Office agrees with my reading.[12] In addition, the appellate court has ruled clearly that a consultant under these circumstances is covered by the definition of employee as intended in section 1090.[13] Note that in spite of the fact that the Attorney General Opinion had been around for 42 years, the defendant in that case was still trying to parse the word "employee" in order to engage in conduct that violated section 1090.

In all of these circumstances, the parties, and sometimes the lawyers, were looking for novel arguments to allow the creation of contracts that certainly would have violated the spirit of section 1090 in the vain hope that the novelty of the argument would prevent the imposition of the harsh consequences that follow the violation of section 1090. Instead, we should all be looking to follow the spirit of the law, and not serve as tools to circumvent it with a novel legal argument.

What do we need to know about section 1090? "The conflict-of-interest statutes are based upon 'the truism that a person cannot serve two masters simultaneously' ... which is regarded as 'self-evident truth, as trite and impregnable as the law of gravitation ...' The duties of public office demand absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office ... Yet it is recognized 'that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.' ... Consequently, our conflict-of-interest statutes ... are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance ... [and] '... to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision.'"[14]

You can't avoid section 1090 by trying to obscure the contract date with the dates of service of the interested employee. In *Stigall v. City of Taft*,[15] a financially interested councilperson attempted to avoid the imposition of section 1090 by participating in the process leading up to the contract and then resigning before the contract was actually signed. The court "interpreted section 1090's imposition of liability for any "contract made" by financially interested officials to cover preliminary matters, such as negotiations, discussions, reasoning, [and] planning." The fact that the contract was publicly bid was likewise no defense. Similarly, in the matter of *Thomson v. Call*,[16] the interested public official, most certainly upon his attorney's advice, set up a series of successive but related agreements. The ultimate agreement, involving the transfer of land for some $300,000, was not a contract per se between the financially interested public official and the city. However, the court "explained that applying the general rule that a contract is not "made" until the parties mutually agreed would frustrate section 1090's purposes. Accordingly, in construing section 1090 in any particular situation we must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern. the vital facts."[17]

Thomson v. Call is instructive on several other points of interest in regard to section 1090. Too many public officials try and use common sense instead of the law in evaluating their own conduct. This leads them to believe that if they are pure of heart and have only good motives what they're doing must be ethical and could not be considered a conflict of interest. It was clear in the *Thomson* case that the interested public official was pure of heart. He saw a need for his city to obtain property it could not afford for recreational purposes. The official purchased the property and held onto it for the time it took for the city to be in a position to pay for the property. He then sold the property to the city at cost. He essentially lost any money he spent on holding costs and did the city a favor. He was rewarded with a finding that he had violated section 1090. His pure heart was no defense. It is not a defense to a violation of section 1090 that the contract was fair or even beneficial to the public agency. What the public official received for his efforts was a court ruling that the city retained the property but the interested public official had to disgorge the $300,000. That might be penalty enough for most to discourage violations of section 1090, but for those who need more incentive, violation of section 1090 can be a felony and can lead to a lifetime ban against serving in public office. [18]

For many years there were attempts to forestall the application of section 1090 to independent contractors. The California State Attorney General's office opined many years ago that the proscriptions contained in section 1090 would apply to consultants in a position to influence public agency conduct even if the consultants were independent contractors.[19] In 2007 the appellate court agreed with that argument. In *California Housing Finance Agency v. Hanover/California Mgmt. & Accounting Center, Inc.*,[20] the trial court instructed the jury that the "officer or employee" language must be interpreted broadly. The fact that someone is designated an independent contractor is not determinative; the statute applies to independent contractors who perform a public function. The defendant, who was an independent contractor, argued that this was not a correct application of the law. The appellate court upheld the jury instruction.

The court held that the word employment must be construed with particular reference to the history and fundamental purposes of the statute being interpreted. Section 1090 places responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity. Quoting from the previously referenced California Attorney General Opinion the court said "it seems clear that the legislature ... intended to apply the policy of the conflicts of interest law ... to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees."[21] Those of us who work as highly compensated consultants for public agencies cannot rely upon the independent nature of our work, nor even the temporary nature of such consulting work to negate the very reality that if the work did not carry the potential to exert influence over the contracting decisions of a public agency they would not be hiring us in the first place. It is that potential to exert contracting influence that has mandated the application of section 1092, preventing us from even appearing to take advantage of that consulting work to give us an advantage on future contracts the agency may enter as a result of the consultation.

This is not an easy area of law to navigate. In many of the above-referenced cases the violating official consulted with an attorney. In others, the attorney himself violated section 1090. In *Campagna v. City of Sanger*,[22] an associate of a law firm acting as city attorney negotiated with the city for a written contingency fee agreement with his own firm in association with another. Other examples of lawyers violating section 1090 include *Shaefer v. Berenstein*[23] and *Terry v. Bender*.[24]

Section 1090 does not prohibit everything. The relevant codes do provide exceptions for remote interests,[25] non-interests,[26] and other exceptions. If a public official has a remote interest that meets the definitions in the code, the official may be able to file the appropriate declaration and refuse to participate in the decision-making process, and the public agency may still enter into a contract without the official filing a 1090. If the official has a non-interest the prohibition does not apply. However, the exceptions are strictly construed, while the prohibition is construed liberally, so tread carefully and get an Attorney General opinion where feasible. There are also limited situations where the rule of necessity would require a public official to exercise official capacity in the contract situation.[27] An analysis of those exceptions to the application of section 1090 is beyond the scope of this article.

If you do work for a public agency, make yourself aware of section 1090 and how it works. If your work for that agency is such that you have the ability to influence the nature of a future contract, even if you do not influence the vote, you are likely forbidden from receiving that future contract. If in your workforce agency you see employees (including consultants) working on formulating the necessary specifications, etc., for a future contract, explain to them how section 1090 works. Given enough lead time it is even possible to obtain an Attorney General opinion on whether or not section 1090 applies to a particular situation.[28] In the absence of a favorable opinion from the Attorney General, please treat section 1090 as a "no parking" sign that applies to you, even if you park with a pure heart. An excellent source of material on conflicts of interest in contracts is "Conflicts of Interest," 2010, California Attorney General's Office Chapter

VII. It can be found online at http://oag.ca.gov/conflicts-of-interest.

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Endnotes

1 Stats. 1851, ch 136 Section 1 p. 522

2 *Lexin v. Superior Court (People)* (2010) 47 Cal.4th 1050, 1072.

3 *Thomson v. Call* (1985) 38 Cal.3d 633, 647.

4 *Land Value 77, LLC et al. v. Board of Trustees of the California State University* (2011) 193 Cal.App.4th 675.

5 *People v. Honig* (1996) 48 Cal. App. 4th 289.

6 *Id.* at p. 349.

7 *Id.* at p. 353.

8 *Id.* at p. 322.

9 *People v. Chacon* (2007) 40 Cal. 4th 558.

10 *Id.* at p. 561.

11 See *Metropolitan News Enterprise*, January 26, 2010, available at http://www.metnews.com/articles/2010/dorn012610.htm

12 46 Ops. Cal. Atty. Gen. 74 (1965).

13 *California Housing Finance Agency v. Hanover/California Mgmt. & Accounting Center, Inc.* (2007) 148 Cal.App. 4th 682.

14 *People v. Honig, supra*, at p. 314.

15 *Stigall v. City of Taft* (1962) 58 Cal.2d. 565.

16 *Thomson v. Call, supra*, 38 Cal.3d 633.

17 *California Housing, supra*, at p. 691 [citing *Thomson v. Call*].

18 Gov. Code Section 1097.

19 46 Ops. Cal. Atty. Gen. 74 (1965).

20 *California Housing, supra*, 148 Cal.App. 4th 682.

21 *Id.* at p. 693.

22 *Campagna v. City of Sanger* (1996) 42 Cal. App.4th 533.

23 *Schaefer v. Berinstein* (1956) 140 Cal. App.2d 278.

24 *Terry v. Bender* (1956) 143 Cal.App.2d 198.

25 Gov. Code Section 1091.

26 Gov. Code Section 1091.5.

27 73 Ops. Cal. Atty. Gen. 191 (1990).

28 *See, e.g.*, Cal. Atty. Gen. Opinion No. 05-416.

The Evolving Understanding of the Scope of California Local Government Powers to Regulate Medical Marijuana Businesses

*By Robert Mahlowitz**

Over the past 18 months, the courts and state legislature have continued to refine the rules concerning the powers of California local governments to regulate medical marijuana businesses. A new state statute took effect January 1, 2011, expressly authorizing local governments to regulate more stringently than the state. A January 2011 Court of Appeal decision upheld Los Angeles County's medical marijuana dispensary regulations, confirming that local governments have broad discretion to regulate in the field, adding to the existing body of law that recognizes the right of local governments to rely on land use powers to bar these types of businesses. Finally, in a case involving a medical marijuana criminal ban by the City of Anaheim, the California Court of Appeal rejected arguments that federal laws preempt and prohibit local governments from allowing medical marijuana businesses to operate. Federal preemption had been a long-favored argument by those seeking to enact local bans. That same decision, additionally, imprecisely restated prior case law in a way that could be used to suggest that a local government's reliance on its land use powers to ban medical marijuana businesses has not been fully adjudicated by the Courts. Such an application of the case is not likely reasonable, but practitioners should be alert to the issue.

I. STATE LAWS REGARDING MEDICAL MARIJUANA

In 1996, California voters adopted Proposition 215, the "Compassionate Use Act" ("CUA").[1] The stated purpose of the CUA is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana;" ensure that persons who use medical marijuana pursuant to the CUA are not subject to criminal penalties; and