

AAPA Commissioners' Seminar

San Diego, CA

June 22-24, 2010



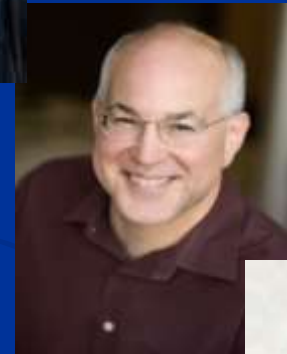
Current Legal and Liability Issues For Ports and Governing Boards

**David Alexander
Port Attorney
Port of Oakland**

You want to be a Port Commissioner



Port of Oakland Board of Port Commissioners





We Want To Make It SAFER

Security

Accountability

Fidelity

Ex-culpability

Responsibility



Security





Nash v. Ports of New York and New Jersey



- February 26, 1993
 - Terrorist Attack/Bombing in Garage of World Trade Center
 - Six Killed
 - Hundreds Injured
- April 28, 2008
 - Supreme Court of New York affirms finding that Ports of New York/New Jersey are 68% negligent



massport

Logan Airport

Security and Risk Management

- **Know and obey the applicable regulations**
- **Consider an independent risk assessment and security compliance audit and educational seminars**
- **Build and design to applicable standards**
- **Control access to plans and specifications**
- **Require security clearances from contract personnel**
- **Draft contract language requiring compliance by tenants and contractors**
- **Consider insurance, if available**

Around the Corner

- **Facts are overwhelming the law**
- **Juries are unsympathetic**
- **Judges are unsympathetic**
- **Legal costs are high**
- **Protect yourself with insurance**

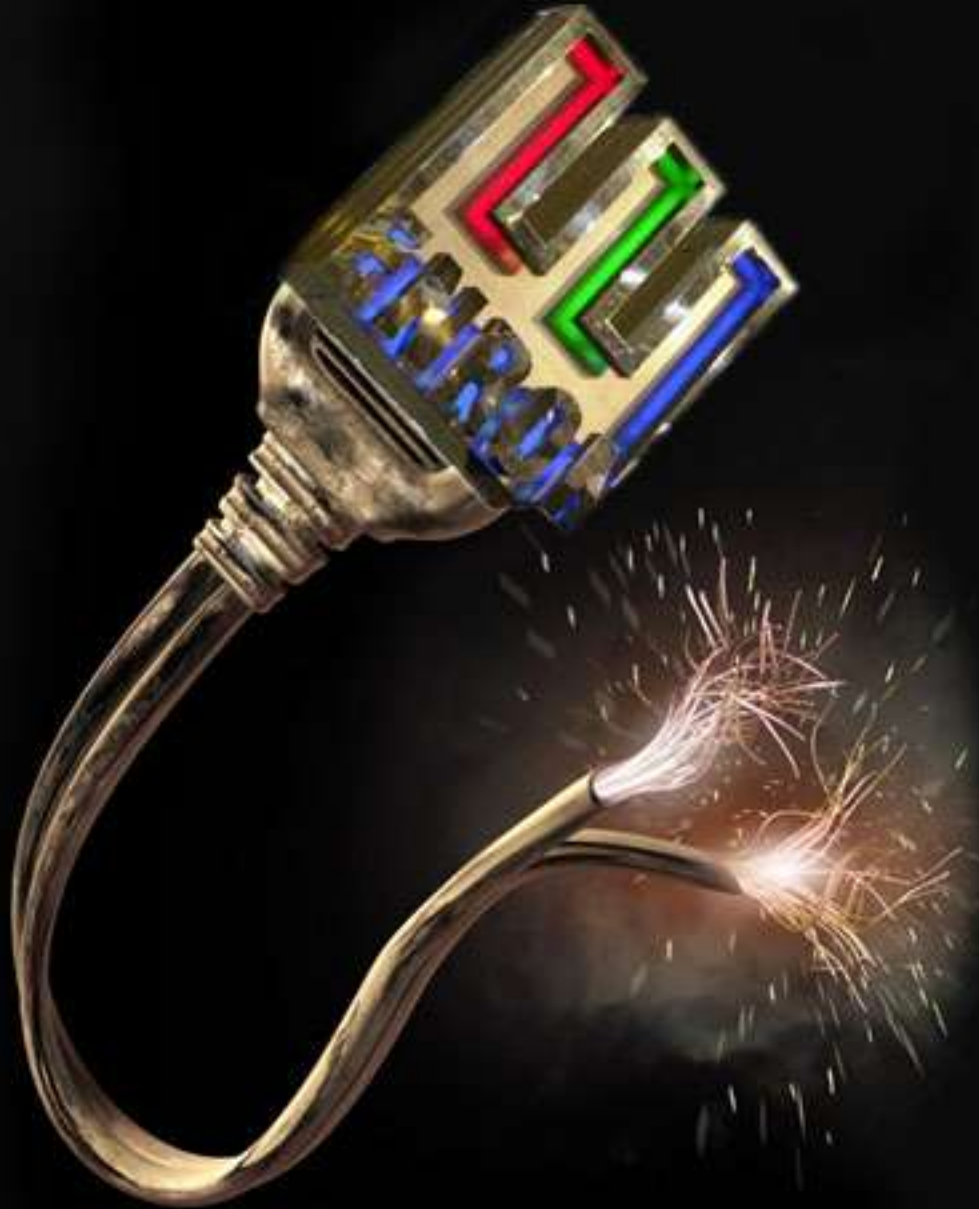
Terrorism Insurance

- TRIA
- AFTER 9/11 could not be purchased
- Covers attacks deemed by government as terrorist attacks
- Soft Market:

\$200M.....\$15,000

War coverage distinguished

ACCOUNTABILITY



Federal Law Authorities

- **Securities Exchange Act of 1933: prohibits false or misleading statement in the offer and sale of securities**
- **Securities and Exchange Act of 1934, Rule 10b-5: "it shall be unlawful ...To make any untrue statement of a material fact or to omit to state a material fact..."**



Increasing Scrutiny of Public Governing Boards and Securities

“A public official who approves the issuance of securities and related disclosure documents may not authorize disclosure that the public official knows to be materially false or misleading; nor may the public official authorize disclosure while recklessly disregarding facts that indicate there is a risk that the disclosure may be misleading”

Report of SEC Investigation in the Matter of County of Orange, California – 1996

When an issuer of municipal bonds “releases information to the public that is reasonably expected to reach investors and the trading markets, those disclosures are subject to the anti-fraud provisions. The fact that they are not published for purposes of informing the securities market does not alter the mandate that they not violate antifraud proscriptions”

SEC Release # 33-7049;34-33741, 1994



Culture of Disclosure and Accountability

Sarbanes-Oxley

- Private Corporations only

Federal Sentencing/Prosecution Guidelines

- Applies to public entities
- Timely and Voluntary Disclosure of Wrongdoing
- Internal Compliance Programs with Independent Review and Diligence by Agency Board
- Organization's Remedial Actions

Federal Sentencing/Prosecution Guidelines

Assess whether organization maintains effective compliance program to prevent and detect violations of law

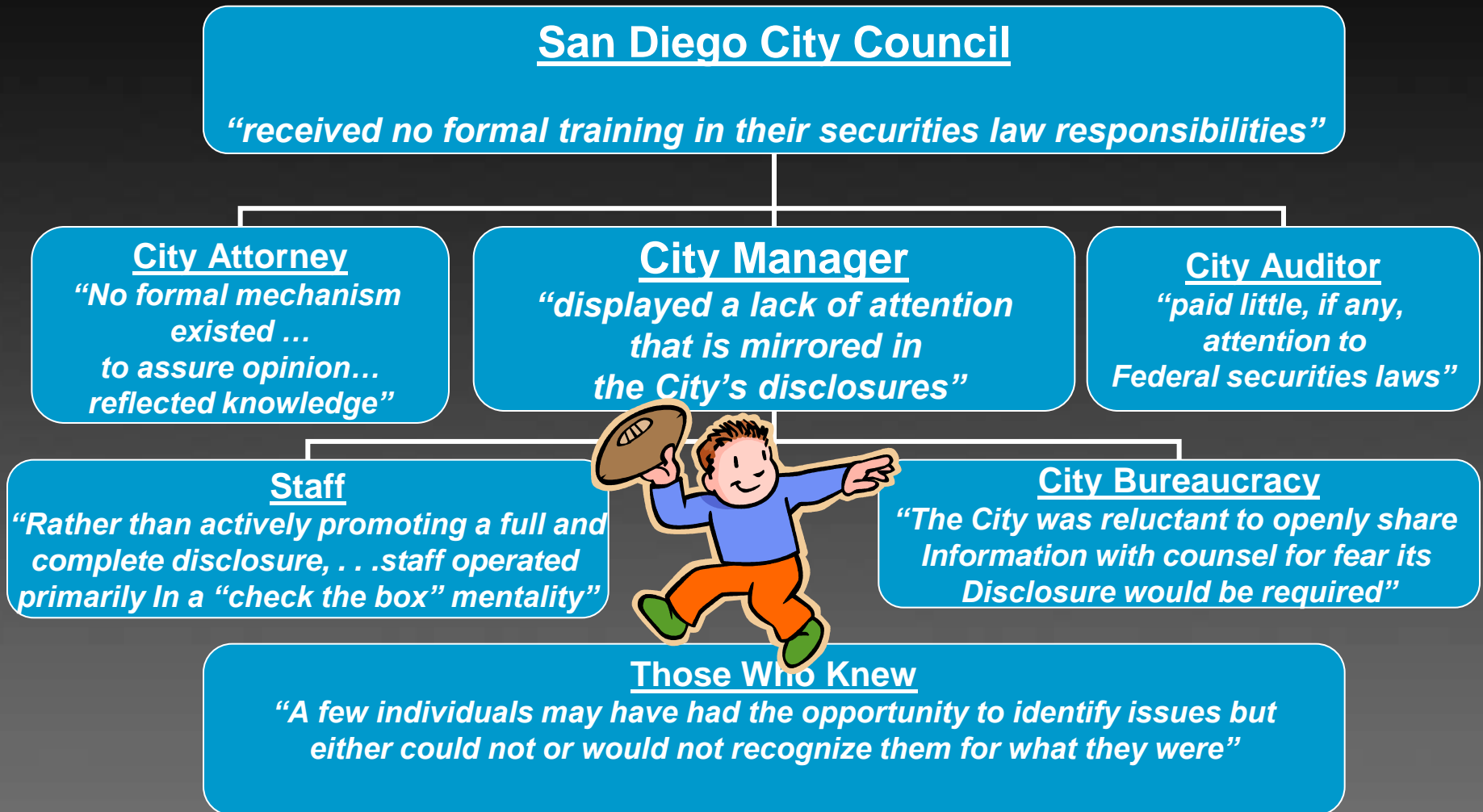
Assess whether organization within reasonable time after becoming aware of wrongdoing reported it to appropriate officials

Assess whether organization fully cooperated with government investigators



Due Diligence Scenario #3

Pass the buck, go to Jail?



San Diego Disclosure Crisis

While much of the responsibility for the inadequate disclosure was placed on the City Manager and City Auditor, the City Council also failed to fulfill its fiduciary duties

As the legislative body of a governmental entity, the City Council is ultimately responsible for ensuring that adequate disclosure procedures are in place

Mayor narrowly re-elected over write-in candidate, but soon thereafter resigned amid the controversy

San Diego Recommendations

- 1. Establish Independent Financial Reporting Oversight Board**
- 2. Create staff Disclosure Practices Working Group**
- 3. Designated Deputy City Attorney for finance**
- 4. Staff certification to City Council of accurate disclosure**
- 5. City Council approve debt offering as discussion item, not consent item**
- 6. City Manager plays central role in disclosure**

FIDELITY



FIDELITY





Port of Los Angeles

Harbor Department to help the City authorized payment of \$60 Million for "historical services"

Because this payment may be a breach of fiduciary duties the Commissioners requested indemnification from the City

State Lands Commission and shipping companies filed lawsuit for illegal transfer of trust funds

City settles by agreeing to repay all sums plus interest

Contingent liability

Fidelity Owed—Lessons Learned

- **It is not your Money**
- **It is your Duty**
- **It may be your Liability**

Fiduciary

One often in a position of authority who obligates himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor, and loyalty in fulfilling the obligation.

EX-CULPABILITY

I'm Innocent!



EX-CULPABILITY?

- **I didn't know**
- **It's not my job**
- **The Finance people did it**
- **I just followed the recommendations of staff**

EX-CULPABILITY!

THERE IS NO EXCUSE! Well, maybe...

- **Prompt Disclosure of Wrongdoing**
- **Quick and Thorough Investigation**
- **Independent Outside Audit**
- **Cooperation with Government Investigators**
- **Effective Internal Compliance Program**
- **Follow Advice of Legal Counsel**



NATIONAL BESTSELLER

A business classic,
hailed as the unofficial
GE leadership handbook

CONTROL
YOUR DESTINY
OR SOMEONE
ELSE WILL

Fully revised, with two new chapters
by the authors, an interview with
Jack Welch, plus the complete set of
Welch's GE annual report letters

NOEL M. TICHY
STRATFORD SHERMAN

"You cannot delegate
that which is not ultimately
your responsibility."

Jack Welch

former CEO, General Electric

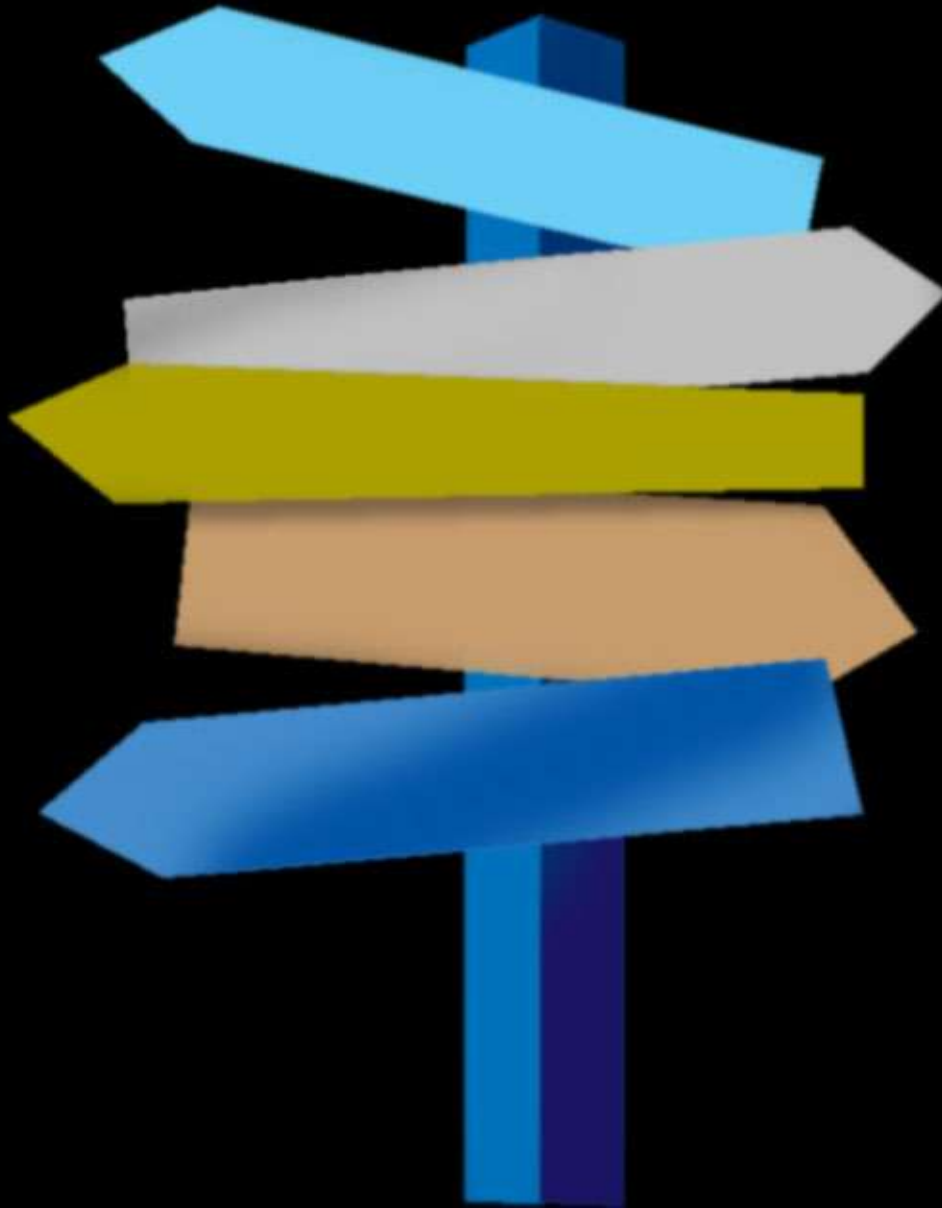
RESPONSIBILITY



PORT OF OAKLAND

**So you really want to become
a Port Commissioner ?**

Conflict of Interest



Conflict of Interest

Financial interest in agency contracts

- contract is void
- criminal penalties
- ban from holding public office

Financial interest in agency decisions

- material financial effect on member or member's financial interests

Incompatible activities

Common law—it just doesn't look right

Albany Hill Case Council Member Hubert Call

- **Use Permit granted if open space provided**
- **Call sold open space parcel to developer after receiving advice from City Attorney**
- **Developer conveyed parcel to City as open space**
- **Single Multi-party transaction in which Call had a financial interest**
- **Transaction was void—City retained the parcel & recovered from Call the \$258,000 purchase price the developer paid Call**

Financial Disclosure Laws

Statement of Economic Interests—Annual Filing

Report of Financial Interests

- Investments
- Real Property
- Income, Loans & Business Positions
- Gifts
- Becomes a matter of public record

Gifts and Honoraria

Gifts valued at \$50 or more must be reported on annual filing

Gifts aggregating \$360 or more in past 12 months create disqualification in decisions effecting donor

Gifts valued at \$360 or more in calendar year are prohibited

Honoraria is prohibited

Travel

Complimentary and discounted travel from a transportation company is prohibited

Penalty is forfeiture of office

Liability of Agency Members

Indemnification & Defense by Agency

Exceptions for actions outside scope of office or motivated by actual fraud, corruption or malice

Public Officials Liability Insurance

Director's and Officer's Liability Insurance

- \$500M.....Banks
- \$100 to \$200M.....Corporations
- \$10M to \$15M..... Public Entities

Get more

David L. Alexander Rules



Never, ever, ever. . .

- **Material facts must be shared**
- **Remember that staff now has a duty to act and report**
- **Special scrutiny and liability for Board members with special knowledge and information**
- **Beware of special meetings**
- **NOTHING is ever off the record**



**You Want to be a
Port Commissioner**

For the Greater Good



Security

