

Overview of Censure

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Introduction

This memorandum provides a broad overview of censure and the options available to a City (the “City”) in addressing certain behaviors of its City Councilmembers. The following topics are discussed herein:

- The definition and purpose of censure as it relates to elected councilmembers.
- Conduct and behaviors of councilmembers typically subject to censure.
- The appropriate procedure for censuring a councilmember.
- Alternative or additional measures that may be imposed on a councilmember.
- Potential theories of liability for censuring a councilmember.

I. Censure.

The term ‘censure’ broadly refers to “[a]n official reprimand or condemnation; an authoritative expression of disapproval or blame; [or] reproach.”¹ It is commonly used by legislative, administrative, or other governing bodies to publicly denounce the inappropriate or unlawful behavior of one of their members.

Elected officials, including city councilmembers, cannot be terminated or removed from office by action of their colleagues. As such, censure is an established form of self-policing within all levels of government and is often regarded as one of the harshest measures that may be taken against an elected official absent a recall election or other grounds for removal from office.

Though censure does not remove the subject councilmember from office, nor does it carry any legal consequences, it does send a message to the public that the other councilmembers find certain behavior unacceptable and distances council from that behavior. Censure can also serve as a deterrent, discouraging other councilmembers from engaging in similar or other prohibited conduct. In some circumstances, a vote of censure can put pressure on the councilmember to resign from office.

¹ Black’s Law Dictionary (11th ed. 2019).

II. Censurable Conduct: Law and Application.

An act of censure is independent of any criminal or civil liability that may result from the councilmember's conduct. Moreover, it is not a prerequisite that conduct be unlawful or constitute a ground for removal from office for it to be censurable. Many cities provide for censure when a councilmember violates any provision in the city's code of conduct, ethics or similar policy.² There have also been instances where a councilmember was censured with no apparent basis for censure in local legislation.

In California, councilmembers have been censured for a wide range of objectionable behavior, e.g., making racist remarks about their constituents, bullying or intimidating city staff, acting unprofessionally, and incurring felony criminal charges. There is no statute delineating the types of censurable conduct, and seems to be almost entirely left to the governing body to determine what conduct should be censured.

Further, the U.S. Supreme Court has held that mere verbal reprimand, especially concerning the conduct of public office, is itself a form of protected speech under the First Amendment. (*Houston Community College System v. Wilson* (2022) 142 S.Ct 1253, 1261.) As such, placing restrictions on the type of conduct that may be censured could infringe on the other members' own constitutional rights.

Below are examples of local laws and their application to provide a sense of how and when censure is typically imposed on city councilmembers in California.

1. Los Angeles

City Charter, § 209 (Code of Conduct of Elected Officials; Censure)

All elected officials of the City are expected to conform to the highest standards of personal and professional conduct. The Council shall have the power to adopt, by a two-thirds vote, a resolution of censure with respect to any member of the Council whose actions constitute a gross failure to meet such high standards, even if the action does not constitute a ground for removal of office under the Charter.

Application

October 2022: Three city councilmembers censured for making racist comments and other incendiary remarks about their constituents and proposed gerrymandering to suppress those who had voted for political opponent (leaked audio).³

2. Ventura

City Council Protocols, § V.2.C.

The professional and personal conduct of officials must be above reproach ... [City Council] Members shall refrain from abusive conduct, personal charges, or verbal attacks upon the character or motives of City Council; Council Advisory Boards, Commissions, and Committees; the public; and staff. ... [T]he City Council and each of its members will act respectfully at all times.

Application

June 2023: City council voted in closed session to censure one of its members for unprofessional, hostile, and bullying conduct towards city staff members after the staff made a formal complaint.

An independent investigations firm found that the councilmember used a “harsh tone” and “repetitive style of questioning” towards one of the complainants during a council meeting, and called out the complainant by name for alleged involvement in the misuse of city funds.

However, at a subsequent public meeting to confirm the censure vote, several people expressed their anger over the censure, leading council to impose a less severe measure.⁴

Notably, the City of Ventura does not seem to have any mention of censure in its Charter or Municipal Code. In a staff report recommending censure and proposed resolution for censure, the above provision of the City Council Protocols is the sole identified authority for imposing the measure.⁵

3. Cypress

³ Smith, D. and Zahniser, D. *City Council censures De León, Cedillo, Martinez after police clear out demonstrators*. LOS ANGELES TIMES. (Oct. 26, 2022). Article attached as [Exhibit A-1](#).

⁴ Brown, T. *UPDATED: Ventura council votes to ‘admonish’ council member after complaint*. OJAI VALLEY NEWS. (Jun. 9, 2023). Article attached as [Exhibit B-1](#).

⁵ City of Ventura, City Council Staff Report re Censure of Councilmember Mike Johnson. (June 2, 2023). Report attached as [Exhibit B-2](#).

Cypress City Code, § 2-2.15(a)(2) (Council meetings – Decorum)

A violation of these rules of decorum or the adopted civility, conduct and governance policy by a council member shall be subject to the below enforcement provisions. Any council member may make a motion for a vote to censure or for a vote for removal or ejection as set forth herein.

Application

June 2022: Councilwoman censured for allegedly: (1) violating the CPRA by failing to respond to a public records request; (2) publicly disclosing closed session information; (3) violating the city’s civility, conduct and governance policy, code of conduct, and the city charter.

Other councilmembers claimed that she had been harassing city staff, creating a hostile work environment, and repeatedly made unsubstantiated allegations against the city manager, council and staff of “illegal and immoral conduct.”⁶

4. Tracy

Tracy City Council Code of Conduct, § 3.6.1 (Code of Conduct Compliance and Enforcement)

A request for censure of a member of the City Council may be submitted pursuant to section 4.3 of the Meeting Protocols. It is the intent of the City Council that a request for censure be used only for significant and/or repeated violations of this Code of Conduct and not a means to address politically or personally motivated disagreements amongst City Council Members.

Application

June 2023: Mayor/councilmember censured for repeated violations of the city’s Code of Conduct, including bullying city staff and attacking the character, motivations and intentions of the majority of the City Council by alleging they were a ‘coup’ and ‘corrupt,’ were being racially discriminatory, had an ‘anti-black agenda,’ and seeking a ‘power grab.’

⁶ Hicks, A. and Hosam E. *Cypress City Council Censures Councilwoman Frances Marquez*. VOICE OF OC. (Jun. 29, 2022). Article is attached as Exhibit C-1.

Other councilmembers stated they witnesses her causing staff to cry and break down, and personally received reports of her bullying.

Dissenting councilmembers of the censure vote stated they did not feel her conduct rose to the level of censure.⁷

The above examples barely scratch the surface of California city councilmembers whose conduct prompted at least consideration of censure in recent years. The following table provides a brief description of other cities who have censured or attempted to censure their city councilmembers.

<u>City</u>	<u>Year</u>	<u>Censured Conduct</u>
Brentwood	2023	[Censure has not been voted on yet] Angry outburst during council meeting.
California City	2023	[Censured] Disclosing closed session information to former city manager.
Dunsmuir	2023	[Censured; two members] One for berating and threatening city staff after city's car-towing policy was enforced on him. The other for sending a series of unprofessional, demeaning, profanity-laced and derogatory messages to city staff and councilmembers.
Greenfield	2023	[Censured] Abusing position to intimidate landlord and avoid paying rent.
Moreno Valley	2022	[Censured] Making threatening and intimidating comments and belittling the city clerk by ignoring her.
Red Bluff	2023	[Censured]

⁷ Brownne, B. *Council votes to censure mayor*. TRACY PRESS. (Jun. 23, 2023). Article attached as Exhibit D.

		Harassing behavior towards fellow councilmembers, including posts on Facebook with defamatory, slanderous, misleading, or unprofessional content.
Sacramento	2022	[Request for censure; unclear if ever voted on] A series of racially insensitive incidents.
San Bernardino (mayor)	2021	[Censured; mayor] Among other things, misusing public funds, failing to report contributions, and making improper requests for reimbursement.
South Lake Tahoe	2015	[Censured] Abusive, bullying and intolerant behavior, including use of inappropriate language when talking to others she disagreed with, belittling people who spoke out at council meetings, and threatening to take funding away from programs, and other issues in her dealings with city staff.

III. How to Censure a City Councilmember: Procedural Requirements and Common Practices.

Procedural due process requirements when censuring a councilmember depends on the basis for the censure and the deprived interest at stake.

An individual does not have a constitutionally protected interest in his reputation under either the federal or California constitution. (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 283-284.) However, if allegations are made that “would have a tendency to stigmatize” his reputation and “impair his ability to take advantage of other employment opportunities,” a protected liberty interest is implicated and, at a minimum, due process requires notice and an opportunity to refute the charges. (*Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.)

Censure by itself, and even when accompanied with a de minimis deprivation of privileges or titles, generally only requires this minimum level of due process (notice and hearing). (See, e.g., *Westfall v. City of Crescent* (N.D. Cal. 2011) 2011 WL 4024663 at *6 (unreported); and *Rodriguez v. Jurupa Unified School Dist.* (2010) 2010 WL 3135386 at * 12 (unreported).)

The hearing should be held in open session. (See 61 Ops.Cal.Atty.Gen. 10 (1978).) It is unclear whether the accused member is entitled to vote on their own censure. Some local laws expressly permit all members present at the meeting to vote, with the accused often being the sole dissenting vote.⁸ However, preventing the accused member from voting could give rise to a claim for a First Amendment violation to the extent it may be considered an interference with his ability to perform his job or denies him a privilege of office. (See *Houston Community College System v. Wilson*, 142 S.Ct at 1261.)

Local jurisdictions that have adopted censure procedures generally tend to follow the same process.⁹ First, a member submits a request for censure to an identified member of city staff or a city official, who notifies the accused of the charges.

Second, a pre-hearing is held by an ad hoc or established board/committee which either investigates the allegations itself or refers the investigation to an independent third party and, based on its findings, makes a recommendation to council on a proposed course of conduct.

Third, the matter is placed on the agenda just as any regular item for consideration.

Fourth, a hearing is held where the accused can present a defense, submit evidence, and be represented by an attorney, and members of the public may provide comment.

Fifth, the council votes on a disciplinary measure.

Finally, the board adopts a resolution of censure (or other form of disapproval, as applicable).

IV. Less Severe Alternatives to Censure.

There is generally considered to be a tiered system in the censure framework, which some cities codify in their ethics policies or other laws.¹⁰ Censure, as has been discussed herein, is always regarded as the harshest measure.

⁸ See Exhibit C-1 (accused was sole dissenting vote); Exhibit C-2 (all councilmembers permitted to vote).

⁹ See Rules of the Los Angeles City Council, Rules 87-88 (Exhibit A-2); City of Brentwood Ethics and Conduct Policy, Rule 4.2(a) (Exhibit E); and Cypress, California City Code, § 2-2.15(1)(2)(i) (Exhibit C-2).

¹⁰ See City of Brentwood Ethics and Conduct Policy, Rule 4.2(b) (Exhibit E); and City of San Jose Memorandum, Framework Regarding Censure Policy (Exhibit F); see also Exhibit B-1 (article on Ventura City Councilmember censure, ultimately admonishing the member rather than censuring).

Some cities reserve censure for significant or repeated violations and impose a slightly less formal measure for violations that are not sufficiently serious to warrant censure. This second-tier measure tends to operate the same as a censure, though it may serve to avoid the stigma of the word “censure.”

The least severe measure is some sort of warning or admonition, typically directed to all members, reminding them that certain behaviors violate city policy and if found to have occurred, could subject the member to a harsher measure.

Though these alternative measures could reduce or eliminate procedural due process requirements, the circumstances and the ultimate effect of the action taken must be considered in each case. In practice, a less severe measure is often imposed after the appropriate procedures have been followed for censure and the city council determines the conduct does not sufficiently rise to the level warranting censure.

V. Heightened Penalties that May Accompany Censure.

As stated throughout this memorandum, censure is typically regarded as the harshest measure the city council can take to address a member’s objectionable behavior, absent grounds for a recall election or removal from office.

Many legislative bodies – local, state, and federal – also permit a variety of penalties when a member is censured. Common among them are removal from positions on external boards, committees, or commissions, de minimis fines (~\$100), and revocation of special privileges such as cutting access to public funds or suspension of official travel.¹¹

VI. The City’s Potential Exposure to Liability for Censure of a Councilmember.

There are three primary areas of concern when censuring a public official. First, whether the councilmember was afforded adequate due process. (See Section III, *supra*). Second, whether censure infringes on the councilmember’s First Amendment rights. Third, whether the censure is otherwise unlawful (e.g., defamatory or procedure violated the Brown Act).

Censure as Violation of First Amendment Rights. The U.S. Supreme Court recently made a narrow ruling that when (1) a member of an elected body (2) is censured by

¹¹ See Exhibits B-2 (proposed resolution of council) and C-2 (statutory penalties).

other members of the same body, (3) the censure does not involve any other form of punishment (i.e., involves only a public reprimand), (4) relates to the conduct of official business, and (5) was issued in the discharge of their own public duties, then there is no First Amendment violation. (*Houston Community College System v. Wilson*, 142 S.Ct at 1263-64.)

Censure of a public official accompanied by additional penalties, however, is more closely scrutinized as a First Amendment violation. If, as a result of engaging in protected activity, the public official is subjected to “materially adverse action” that would chill an ordinary person from continuing to engage in the activity, there is a First Amendment claim. (*Id.* at 1261.) The Ninth Circuit has indicated that penalties that deprive an elected official of the authority enjoyed by virtue of the popular election and those that prevent an elected official from performing their duties will generally rise to the requisite level of materiality. (*Boquist v. Courtney* (9th Cir. 2022) 32 F.4th 764, 783.)

In *Boquist*, a rule preventing the censured member from entering the Capitol for any purpose without at least 12-hours-notice a plausible First Amendment claim because it prevented him from enjoying the authority he had by virtue of his election (“timely access to the physical seat of government where ‘governmental debates’ take place”) and interferes with his ability to do his job by preventing him from meeting with constituents, officials, and others on short notice at the capitol building. (*Id.* at 784.)

In another Ninth Circuit case, removal of a censured member from his titular role as Vice President did not support to a First Amendment claim because it did not affect his authority as a member of the board. (*Blair v. Bethel School Dist.* (9th Cir. 2010) 608 F.3d 540, 544.)

Therefore, in imposing penalties along with censure, the City should be mindful of it rising to a “material” adverse action that would chill the exercise of free speech, and ensure it does not affect the councilmember’s ability to perform his elected functions or enjoy the rights and privileges of elected office.

Other Unlawful Uses or Applications of Censure. After due process and First Amendment violations, defamation is one of the most common theories of liability for censure. These claims are difficult for the plaintiff to prevail, however, as censure essentially expresses the other members’ opinion and criticisms of their censured colleague and, “[i]n this country, we expect elected representatives to should a degree of criticism about their public service from their constituents and their peers.” (*Houston Community College System v. Wilson*, 142 S.Ct at 1261.)

Another common theory of liability for censuring a public official in California is violations of the Brown Act. In *Acker v. City of Ontario*, a councilmember sued the city after she was censured alleging, among other things, that the city violated the Brown Act by taking action in improper closed session and excluding her from some closed session meetings. (*Acker v. City of Ontario* (2006) 2006 WL 540888 at *7 (unreported).) The court denied the city's anti-SLAPP motion on this cause of action finding the councilmember's claim had merit. (*Id.*)

Ongoing issues with the Brentwood City Council draw attention to another section of the Brown Act that may be implicated by censure proceedings. In Brentwood, a city councilmember must raise possible grounds for censure and submit a request for censure to the mayor, city manager, or senior councilmember, depending on who the subject of the complaint is.¹² This rule has been the subject of many council meetings, as a councilmember can accidentally violate the Brown Act prohibition against serial meetings by having premature discussions about a possible censure with another councilmember before submitting a complaint. (Gov. Code § 54952.2(c).)

Conclusion

The actions available to City Council in addressing the objectionable behavior of one of its fellow members are limited. Absent grounds for recall or removal, censure is one of the only measures at council's disposal. A councilmember may be censured for any conduct that violates a city's ethics policy and it is generally within the city's discretion to impose enhanced penalties along with a public reprimand.

When censuring a councilmember, City Council should take particular care in ensuring due process is satisfied and that the procedures employed do not violate the Brown Act. Further, if City Council opts to impose enhanced penalties, such penalties cannot be so material that they would chill the exercise of free speech. Finally, any enhanced penalties cannot impair or inhibit the councilmember's ability to do his job or enjoy the privileges of office.

¹² See Exhibit G.