ETHICS

Texas City Attorney's Association

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This paper is presented as a general statement of law for use by attorney, with a focus on selected federal, state and local law, and selected ethics principles. No specific legal advice is intended or should be inferred. Laypeople should consult a licensed attorney for assistance.

ETHICS

I. INTRODUCTION

The key to successful decisions on matters involving professional responsibility and ethics, is to remember the following advice:

THE IMPORTANT THING IS NOT TO WIN THE ETHICS WAR,
THE IMPORTANT THING IS TO AVOID THE ETHICS WAR.

Fighting an ethics war is a lose-lose proposition. This is true for practitioners in government service as well as in private practice. To avoid an ethics war, in addition to the ethics rules that apply to your situation, and in addition to local rules, court decisions and other applicable provisions, use common sense. Discuss matters, including expectations, with clients so that they have an opportunity to understand clearly what you can and cannot do for them, what it will cost, how long it should take, and whether it is both legal and ethical. Bombard your clients with paper, keeping them informed of what is happening, including letters explaining why nothing is happening. The client's file should almost duplicate your file. Never ignore telephone calls; return all telephone calls or have someone take them and return them for you. If you are unable to make telephone contact with the party, send correspondence to indicate that you tried to return the call. If things go sour or a case is lost, be honest and open with your client. Tell the client as rapidly as possible after you find out the result.

Cooperate fully with the next lawyer and the client if you are discharged or the subject of a disciplinary investigation. Respond immediately to communications from disciplinary boards or investigators. Offer immediate access to yourself and to your files. Keep in mind that it is possible that if you respond rapidly enough, a file will not be opened on the complaint. Keep accurate time records detailing what you did and when you did it. Retain old records, including notes and telephone calls and conferences until the statute of limitations for malpractice expires. Finally, read, re-read, and remember the rules of professional conduct.

Most ethics requirements are statutory. The rules change from time to time in an attempt to be responsive to the society that we serve. Although the rules may differ from body to body and from jurisdiction to jurisdiction, you owe it to the public, yourself, your family, your clients, others in your office, and most importantly to the legal system, to practice law ethically and professionally. You cannot follow the rules or change the rules if you do not know the rules. What you learned in law school may have been accurate when you were in law school, but that knowledge may not reflect the current rules issued by courts, administrative bodies, or in the case of government entities, those entities/departments that you represent. By remembering that it is an honor and a privilege to practice law, which privilege can be removed and taken away from you, you should take the ethical steps necessary to keep you hard-earned good name and reputation intact.

II. BACKGROUND

In providing legal counsel to a local government entity, what ethical considerations arise that do not pertain to non-government related clients? Two recent United States Supreme Court

decisions provide insight into these issues, and the difficult situations in which municipal attorneys may find themselves. In *Nevada Commission on Ethics v. Carrigan,* 131 S.Ct. 2343 (2011), the concern was how far a state may go in policing public officials who face a potential conflict of interest in conducting government business, and the advice given by the government attorney when faced with an inquiry from the official about what to do in the conflict situation. In *Filarsky v. Delia,* 132 S.Ct. 1657 (2012), the court dealt with not only the issue of whether qualified immunity applies to a private lawyer hired by a city to conduct an internal investigation into an employee's behavior, but also the application and scope of other situations when contractors are hired by a governmental entity. Both of these decisions provide serious ethical implications for the government lawyer, and for the government that retains the lawyer, whether the lawyer is an employee or is hired under contract for a discrete task.

III. RECENT SUPREME COURT DECISIONS

A. *Nevada Commission on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011).

In this case, the question presented was whether a recusal provision in the Nevada Ethics in Government Law was unconstitutionally overbroad in violation of the First Amendment. The key issue was whether legislators (in this case, a member of a city council) have a personal, First Amendment right to vote on any given matter. Michael Carrigan was first elected to the City Council for the City of Sparks, Nevada, in 1999, and has been twice reelected. During each of his election campaigns, Mr. Carrigan's longtime professional and personal friend, Carlos Vasquez, served as his campaign manager. Mr. Vasquez also worked as a consultant for the Red Hawk Land Company ("Red Hawk"), advising Red Hawk on various matters concerning the development of a hotel/casino project known as the Lazy 8.

In early 2005, Red Hawk submitted an application to the City of Sparks regarding the Lazy 8 project. The Sparks City council set the matter for a public hearing. Before the hearing, and in light of the longstanding relationship between Mr. Carrigan and Mr. Vasquez, Mr. Carrigan consulted the Sparks City Attorney for guidance regarding any potential conflict of interest issues. The City Attorney advised Mr. Carrigan to disclose, on the record, any prior or existing relationship with Mr. Vasquez before voting on the Lazy 8 project. Taking the City Attorney's advice, Mr. Carrigan made the following disclosure before casting his vote:

> I have to disclose for the record . . . that Carlos Vasquez, a consultant for Redhawk, . . . is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. [T]herefore, according to [NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue.

Mr. Carrigan voted to approve the project; the measure failed by a single vote.

A few weeks after Mr. Carrigan cast his vote, the Nevada Commission on Ethics ("Commission") received several complaints regarding a possible conflict of interest. The Commission reviewed the complaints and began an investigation. Upon completion of that investigation, the Commission issued a written decision finding that Mr. Carrigan had violated

the state's ethics law by not abstaining from voting on the Lazy 8 matter, and censuring Mr. Carrigan. The Commission determined that Mr. Carrigan's action did not constitute a willful violation of the state ethics law, and, therefore, did not impose a civil penalty.

The Commission found that Mr. Carrigan had improperly voted on the Lazy 8 matter "with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [his] commitment in a private capacity to the interest of others" (quoting the state ethics law). The Commission determined that the Nevada Legislature enacted the ethics law to cover commitments and relationships such as Mr. Carrigan's relationship with Mr. Vasquez. Mr. Carrigan filed a petition for judicial review with the state district court to challenge the Commission's decision. The district court denied the petition, finding that the state has a strong interest in having an ethical government. Mr. Carrigan then appealed to the Supreme Court of Nevada.

Mr. Carrigan challenged the constitutionality of the Commission's censure order on several grounds: overbreadth, vagueness, and an unconstitutional prior restraint on speech. More specifically as to the latter claim, Carrigan asserted a First Amendment challenge arguing that the state ethics law is an unconstitutional violation of his free speech rights. Mr. Carrigan asserted that voting by a public officer is protected speech and, therefore, the statute should be reviewed under a strict scrutiny analysis and, under that analysis, the statute must be declared unconstitutional because the statute is not narrowly tailored to meet a compelling government interest. In response, the Commission (and the Nevada Legislature, who was allowed to file an amicus brief in support of the Commission's position) asserted that the statute should be reviewed under a less strict standard, as outlined in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under that standard, the Commission argued that the interests of the state in preventing corruption outweigh Mr. Carrigan's free speech right to vote on an issue in which he has a disqualifying interest. Alternatively, the Commission argued that if strict scrutiny applies, the state ethics law is constitutional because: (1) Nevada has a compelling state interest in promoting ethical government and guarding the public from biased decision makers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitutes the least restrictive means available to further the state's compelling interest.

The Nevada Supreme Court reversed the district court's decision (which had ruled in favor of the Commission), and held that voting on a particular matter by an elected public officer is protected speech under the First Amendment, and that the ethics law was overbroad in violation of the First Amendment. The Nevada Ethics in Government Law is found in the Nevada Revised Statutes (NRS) 281A.420. NRS 281A.420(2)(c) requires that a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by his "*commitment in a private capacity to the interests of others*." The italicized phrase is defined in NRS 281A.420(8) as a commitment to a person:

(a) Who is a member of his household;
(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
(c) Who employs him or a member of his household;
(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(emphasis added). Central to the dispute in this case is the language in subparagraph (e). The Nevada Supreme Court, having found that voting on a matter by an elected public officer is protected speech under the First Amendment, the language in subparagraph (e) was subject to strict scrutiny (requiring the Commission to prove that the restriction on protected speech furthers a compelling interest and is narrowly tailored to achieve that interest). While agreeing that the Commission's interest in promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is a compelling state interest, the Nevada Supreme Court held that the definition in subparagraph (e) was too broad because it failed to sufficiently describe what relationships are included within the restriction (particularly focusing on the words "substantially similar" and called it improper "catch-all language" that is not narrowly tailored).

The Commission petitioned the United States Supreme Court for a writ of certiorari urging the following Question Presented:

> The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:
>
> Whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.

The Court granted certiorari, and held that the Nevada law did not violate Mr. Carrigan's First Amendment right to freedom of speech, and reversed the Nevada Supreme Court's decision (thereby upholding the Commission's censure of Mr. Carrigan). The key issue for the Court was whether legislators have a personal, First Amendment right to vote on any given matter. Finding that they do not have such a right under the First Amendment, the Court reasoned that restrictions on legislators' voting are not restrictions on legislators' protected speech. A legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislator casts his vote as trustee for his constituents, not as a prerogative of personal power. Further, voting is not a symbolic action, and the fact that it is the product of a deeply held or highly unpopular personal belief does not transform it into First Amendment speech. Even if the mere vote itself could express depth of belief (which, the Court held, it cannot), the Court has historically rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. The Court reversed the decision of the Nevada Supreme Court, and remanded the case for further proceedings not inconsistent with the Court's opinion. Interesting note: Mr. Carrigan was re-elected to the City Council (representing Ward 4) in 2010, and remains a councilmember.

B. *Filarsky v. Delia*, 132 S.Ct. 1657 (2012).

In *Filarsky v. Delia*, the question presented was whether a lawyer retained to work with government employees to conduct an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee. Mr. Filarsky, a private attorney, was retained by the City of Rialto, California's fire department to undertake an employment investigation of Mr. Delia. The City believed that Mr. Delia, a firefighter, was abusing his sick leave and had observed him purchase building materials while out on sick leave. During the course of the investigation, Mr. Delia was ordered to go to his house and remove the building materials purchased to show that they were not incorporated into the house. If Mr. Delia did that, the City stated that it would drop the investigation. Mr. Delia obeyed the order and produced the materials on his lawn while fire department officials observed from their vehicle.

Mr. Filarsky's involvement in the procurement of the order was disputed, but it is undisputed that Mr. Filarsky did not sign the order or observe the production of the building materials at Mr. Delia's home. Mr. Delia sued the City, the Fire Department, various Fire Department officials, and Mr. Filarsky for violation of his constitutional rights (Fourth and Fourteenth Amendments) under 42 U.S.C. § 1983. On summary judgment, the District Court found that the defendants were entitled to qualified immunity because there was no violation of a clearly established constitutional right. On appeal, the Ninth Circuit determined that there was no clearly established violation of a constitutional right and, therefore, affirmed the dismissal as to the City, the Fire Department, and its officials, but reversed as to Mr. Filarsky because it determined that categorically, as a private attorney, he was not entitled to qualified immunity. Further, although not entitled to qualified immunity, the Ninth Circuit held that Mr. Filarsky could still be liable to Mr. Delia for violations of the Fourth and Fourteenth Amendments if he acted as a government agent.

Filarsky petitioned the Supreme Court based on a circuit conflict, and proposed a new test to determine whether a temporarily-retained attorney should be entitled to assert qualified immunity: whether the attorney is the functional equivalent of a government employee based on: (i) the nature of the advisory or representative role the attorney performs, (ii) the control exercised by and close coordination with the government employees or officials, (iii) the role that the attorney's legal counsel plays in the execution of an essential governmental activity, and (iv) the immunity accorded to government employees performing the same role. The functional aspects of this test are based in the dissent by Justice Scalia in *Richardson v. McKnight*, 521 U.S. 399 (1997). Mr. Filarsky noted that the irony of the result in the Ninth Circuit is that it turns § 1983 on its head because, in a cause of action designed to hold governments accountable, the government employees and entities are dismissed while the private party is left holding the bag. On the other hand, Mr. Delia urged application of the test in *Richardson* that looks at both the history and the purposes that underlie qualified immunity.

The United States, in an amicus brief, asserted that Mr. Filarsky was entitled to qualified immunity based on the test and factors set forth in *Richardson*. The ABA filed an amicus brief in support of Mr. Filarsky that focused on the widespread nature of services that private attorneys provide governmental entities and the potential impact that the Ninth Circuit's decision could

have on the availability of qualified counsel. The ABA concluded that "[t]he loss of qualified immunity, however, would significantly impact the vital contributions that private attorneys make to effective government performance. On the other hand, ensuring qualified immunity would promote the strong public interest in the continuing representation of public entities by private counsel."

At oral argument, Mr. Filarsky's counsel argued that private attorneys are entitled to the same immunity as public attorneys, and proposed the new functional test. Justice Alito seemed concerned with the requirement for close coordination proposed by Mr. Filarsky, and wondered whether the outcome would be the same if there is no close coordination. Justice Roberts questioned whether the proposed test gave enough assurance or breathing room for attorneys to act. Justice Sotomayor struggled with the facts of the case, seemed concerned that Mr. Filarsky might be the most culpable of the actors, and did not seem inclined to abandon the *Richardson* test. Justice Kagan speculated on the balance between policy and historic factors.

The United States argued that when a private worker working side by side with a government worker is denied qualified immunity, it directly affects the ability of government employees to do their jobs. Justice Kagan raised the issue of market forces and their effect on whether qualified immunity should be afforded to private persons working for the government. In the market forces discussion, Justice Sotomayor noted that "there is a whole slew of unemployed lawyers who would be happy to take on any government service they can" and, therefore, questioned whether the absence of qualified immunity would chill the advice given by attorneys to their government clients because attorneys have independent fiduciary duties to their clients. In response, the United States maintained that the government lawyer faced the same dilemma, and is entitled to qualified immunity.

Mr. Delia's counsel argued that Mr. Filarsky's proposed test was unworkable, that the Court should apply the test announced in *Richardson*, and under that test there was no historical basis for qualified immunity, nor did the purposes for qualified immunity support affording it to Mr. Filarsky here. Justice Alito followed up by asking whether Mr. Delia was making a distinction between employees and private contractors, and Justice Scalia pressed Mr. Delia's counsel on the issue. Justice Breyer continued by asking if Abraham Lincoln would have qualified immunity if, in private practice, he were asked to prosecute a case. It appeared that Justice Alito, Justice Scalia and Justice Breyer were having difficulty with the distinction between public and private attorneys performing the same function. During this portion of the oral argument, Mr. Delia's counsel attempted to focus the Court on the lack of historical basis for immunity for a private attorney. In response, the Chief Justice noted that this case highlights "why the lawyer ought to have qualified immunity… [because] we don't want him to be worried about the fact he might be sued." Justice Ginsberg questioned the procedural posture of the case, and why there was not a cross-appeal on the Ninth Circuit's finding that ordering the production of the materials on the lawn was a violation of clearly established law. Mr. Delia's counsel agreed with Justice Kagan when she stated that there is no historic basis for immunity and that lawyers only had a malice defense at common law because the notion of qualified immunity developed in 1970. To say that there is no historic basis means, in effect, that private people never get to assert qualified immunity. Mr. Delia also agreed with Justice Alito that these cases are a mix of history and policy, and that absolute immunity has been recognized in situations

where it did not exist in the common law. Mr. Delia also agreed with Justice Scalia that the rule of malice applied to all lawyers at the common law.

On rebuttal, Mr. Filarsky's counsel emphasized the deterrence effect the Ninth Circuit's decision may have because outside government counsel frequently work at cut rates or even pro bono and that, although there may be warm bodies to fill their seats, those warm bodies may not be the most qualified for the job, and the government needs skilled attorneys of a high caliber. Since the individual decision to take on a governmental client may be a marginal one because of discounted rates and other issues, the Ninth Circuit's decision would further deter qualified attorneys from government service.

On April 17, 2012, the Court decided in Mr. Filarsky's favor, and held that a private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under §1983. The Court started its analysis by reviewing the general principles of immunities and defenses under common law, and the reasons the Court historically afforded protection from suit under §1983. The common law as it existed in 1871, when Congress enacted §1983, did not draw a distinction between full-time public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government at that time was smaller in both size and reach, had fewer responsibilities, and operated primarily at the local level. Government work was carried out to a significant extent by individuals who did not devote all their time to public duties but, instead, pursued private callings, as well. In according protection from suit to individuals doing the government's work, the common law did not draw distinctions based on the nature of a worker's engagement with the government. Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself. Common law principles of immunity were incorporated into §1983 and should not be abrogated absent clear legislative intent. Immunity under §1983, therefore, should not vary depending on whether an individual working for the government does so as a permanent or full-time employee, or on some other basis.

The Court's rationale noted the governmental interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business, which has been called "the most important special government immunity-producing concern" (*Richardson*, 521 U. S. at 409), which is equally implicated regardless of whether the individual sued as a state actor works for the government full-time or on some other basis. The Court further noted that affording immunity to those acting on the government's behalf serves to ensure that talented candidates [are] not deterred by the threat of damage suits from entering public service. The government in need of specialized knowledge or expertise may look outside its permanent workforce to secure the services of private individuals, but since those individuals are free to choose other work that would not expose them to liability for government actions, the most talented candidates might decline public engagements if they did not receive the same immunity enjoyed by their public employee counterparts. The Court recognized the public interest in ensuring performance of government duties free from the distractions that can accompany lawsuits, and whether those duties are discharged by private individuals or permanent government employees is not materially different. Finally, the Court observed that distinguishing among those who carry out the public's business based on their particular relationship with the government creates significant line-drawing problems and can deprive state actors of the ability to reasonably

anticipate when their conduct may give rise to liability for damages (citing *Anderson v. Creighton*, 483 U. S. 635, 646 (1987)).

Contrary to the argument of Mr. Delia, the Court's decision is not contrary to *Wyatt v. Cole*, 504 U. S. 158 (1992), or *Richardson v. McKnight*, 521 U.S. 399 (1997). *Wyatt* did not implicate the reasons underlying recognition of qualified immunity because the defendant in that case had no connection to government and pursued purely private ends. *Richardson* involved the unusual circumstances of prison guards employed by a private company who worked in a privately run prison facility. Nothing of the sort is involved here, nor is this the typical case of an individual hired by the government to assist in carrying out its work.

IV. LAND USE ETHICS

The issue of ethics has at least three dimensions in the land use context—legal ethics for the land use attorney who either represents a local government or a landowner, professional ethics for the land use planner or land use professional, and state law- or local law-mandated ethics codes for the local governmental official or employee who is involved in decision-making related to a land use application or request. The purpose of this portion of the paper is to address more practical ethics issues confronted at the local government level.

1. What state law governs a local government official's participation in a land use matter in which he/she may have a conflict of interest?

In the absence of a local ethics ordinance that is more stringent than applicable state law, the key provisions of state law relative to conflicts of interest is Chapter 171 of the Texas Local Government Code. This provision of state law is the "floor" of ethical conduct for local public officials.[1] Chapter 171 provides, in part, as follows:

§ 171.003. Prohibited Acts; Penalty.

(a) A local public official commits an offense if the official knowingly:

(1) violates Section 171.004;
(2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
(3) acts as surety on any official bond required of an officer of the governmental entity.

[1] According to § 171.001(1) of the Texas Local Government Code, a "'local public official' means "a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature." In the local government land use context, city employees, city councilmembers, planning and zoning commission members and members of a zoning board of adjustment all qualify as "local public officials" for conflict of interest purposes.

(b) An offense under this section is a Class A misdemeanor.

§ 171.004. Affidavit and Abstention From Voting Required.

(a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

A. Filing an Affidavit and Abstention

Based on the foregoing statutory provisions, any local public official who has a substantial interest in a business entity or real property must do the following: (1) file an affidavit describing the nature of the substantial interest (the affidavit usually is filed with the city secretary and kept on record) and (2) abstain from all participation in the matter.

On occasion, particularly when councilmembers are involved, the question arises regarding "participation." Some view it very narrowly—for example, the councilmember who is conflicted simply removes himself/herself from the council seat and stands in the back of the room and is free to discuss the matter with others as long as there is no participation in the city council's consideration of the land use matter. Others take a more expansive view of the prohibition and conclude that no "further participation" means absolutely no participation in the matter at any stage of the city's consideration of the matter, whether at the staff level, council level or with those seeking the land use decision. As a practical matter, due to the criminal penalties involved (a Class A misdemeanor), I certainly suggest the correct approach is the latter option. Therefore, I advise my clients that once it is determined that there is a conflict of interest

involving a councilmember, there is a complete divorce between the councilmember and the remaining members of the city council and the city staff and, out of an abundance of caution, between the councilmember and the members of the public or applicant who have an interest in the matter before the city and its governing body and/or commissions.

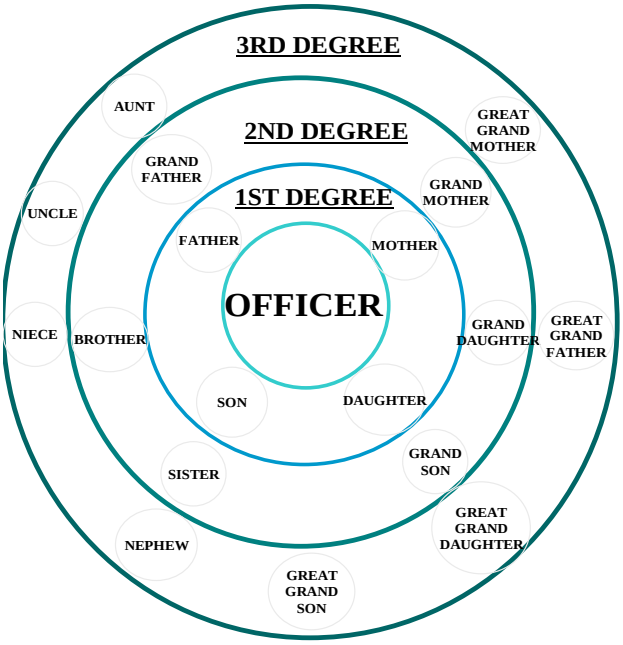
B. Substantial Interest

As a consequence of former law that generally held a local public official could not participate in a decision if he/she had an interest, direct or indirect, in a contract or other matter,[2] and the inherent ambiguity and difficulty in applying that standard to practical situations, Chapter 171 spells out what constitutes a "substantial interest" for conflict purposes. There are two aspects of "substantial interest": a substantial interest in real property and a substantial interest in a business entity.

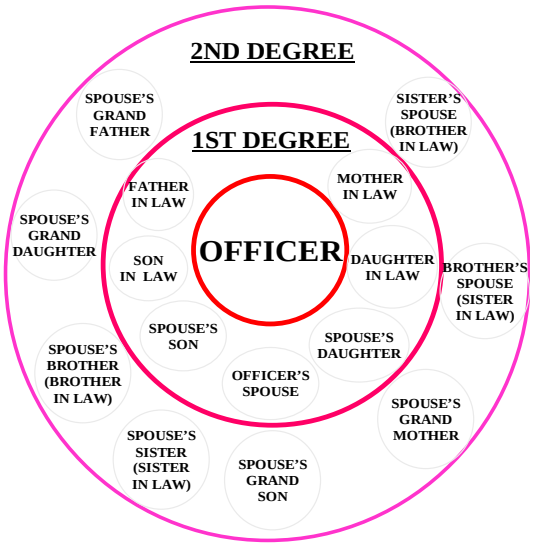
A local public official has a substantial interest in a business entity if: (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or $15,000 or more of the fair market value of the business entity; or (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year. Tex.Loc.Gov't Code, § 171.002(a). A local public official has a substantial interest in real property "if the interest is an equitable or legal ownership with a fair market value of $2,500 or more." *Id*., § 171.002(b). The applicable statute also provides that a local public official is considered to have a substantial interest for purposes of Chapter 171 of the Local Government Code "if a person related to the official in the first degree by consanguinity or affinity . . . has a substantial interest under this section." *Id*., § 171.002(c). Those relationships include the following relatives: parents, children [consanguinity relationships], spouse, spouse of parents or children, spouse's parents and spouse's children and stepparents or stepchildren [affinity relationships]. Be advised that the affinity relationships continue after divorce or death if there is a living child of the marriage. *See* Tex.Gov't Code § 573.024(b).

[2] Even though language about "direct or indirect" interest is not found in Chapter 171 of the Texas Local Government Code, many municipal charters still contain that prohibition. The ambiguity surrounding what may be considered an "indirect interest" should cause any municipal attorney a great deal of concern, since such a prohibited interest could result in forfeiture of office by the employee or officer.

Consanguinity Kinship Chart
(Relationship by Blood)



Affinity Kinship Chart
(Relationship by Marriage)



C. Special Economic Effect

One of the more problematic issues that occasionally arises during a city council's consideration of a land use matter (particularly in zoning cases) is whether a councilmember must abstain if he/she lives adjacent to or near the property under consideration for a zoning change. Section 171.004(a) of the Texas Local Government Code provides, in part, that a local public official has a substantial interest (i) in a business entity if "the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public" and (ii) in real property "if it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public." *Id.* Similarly, Texas Attorney General Opinion DM-130 (1992) addresses city councilmembers abstaining from participating in zoning decisions and voting if the zoning matter affects that councilmember's residence.

In Opinion DM-130, the Attorney General was asked to render an opinion whether a home-rule city councilmember "is barred from voting on a zoning matter affecting territory in which the member owns a residence." In response, in an opinion that I believe provides little substantive guidance, Attorney General Dan Morales wrote that Chapter 171 of the Local Government Code "would, in certain circumstances, bar a city council member's voting on a zoning matter affecting territory in which the member's residence is located." General Morales wrote that "a zoning matter affecting territory in which the member's residence was located would, we think, clearly 'involve' such 'real property,' within the meaning of section 171.004. A council member's interest in his residence would be a 'substantial interest' in 'real property' within the meaning of section 171.004 if his real property interest in the residence amounted to 'equitable or legal ownership with a fair market value of $2,500 or more." *Id.*, at 2. The

Attorney General further wrote that if the councilmember had a "substantial interest" in his residence, "he would be required to abstain from voting in the case of a zoning matter affecting territory in which the residence was located only if it was 'reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.'" *Id.* Additionally, the Attorney General "punted" on providing guidance to local governments in determining whether and how to apply the "special economic effect" test: "Whether it would be 'reasonably foreseeable' . . . that an action on a voting matter will have a 'special economic effect' on the value of the member's residence 'distinguishable from its effect on the public,' so as to trigger the affidavit and abstention requirements of [Chapter 171 of the Texas Local Government Code], would, of course, depend on the facts of the particular case."

With all due respect to the Attorney General's Office, this opinion does not provide local officials with much practical guidance in dealing with councilmember conflicts of interest. While it is obvious that a councilmember who is an applicant seeking a zoning change from the city cannot participate in the city council's consideration of his application, what if the councilmember lives within 200 feet of an area to be rezoned—will there be a "special economic effect" on his property different from the public as a whole? What if he resides 300 feet from the area to be rezoned? Will his property values go up, go down or will there be no effect? How do you make such a determination since the "special economic effect" of a zoning matter is at best speculative?

The foregoing questions cannot be answered because they involve speculation, since a councilmember may be at risk politically and criminally if a "wrong" decision is made, the key may be the adoption of an ethics code by the city that spells out those situations where a councilmember automatically has a conflict of interest and may not participate in a zoning decision. Indeed, many municipalities have adopted ordinances that specifically address this issue. Absent such an ordinance, providing similar advice (to avoid the appearance of impropriety) is recommended.

2. Are there specific rules for conflicts of interests for platting and subdivision matters?

Yes. Section 212.017(d) of the Texas Local Government Code provides that "[i]f a member of the municipal authority responsible for approving plats[3] has a substantial interest in a subdivided tract, the member shall file, before a vote or decision regarding the approval of a plat for the tract, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter. . . ." A "substantial interest," not unlike its counterpart in Chapter 171 of the Texas Local Government Code, is defined as follows:

> (b) A person has a substantial interest in a subdivided tract if the person:

[3] In Texas, plat approval is usually undertaken by either the city council or the city's planning and zoning commission.

(1) has an equitable or legal ownership interest in the tract with a fair market value of $2,500 or more;
(2) acts as a developer of the tract;
(3) owns 10 percent or more of the voting stock or shares of or owns either 10 percent or more or $5,000 or more of the fair market value of a business entity that:
  (A) has an equitable or legal ownership interest in the tract with a fair market value of $2,500 or more; or
  (B) acts as a developer of the tract; or
(4) receives in a calendar year funds from a business entity described by Subdivision (3) that exceed 10 percent of the person's gross income for the previous year.

Tex.Loc.Gov't Code, § 212.017(b). A local public official who has a substantial interest must file an affidavit stating the nature and extent of the interest and must abstain from further participation in the matter. *Id*., § 212.017(d). Anyone who violates Subsection (d) commits a Class A misdemeanor. *Id*., § 212.017(e). Further, one key distinction between Chapter 212 and Chapter 171 conflicts of interest is that a person who "acts as a developer" of property by law has a substantial interest in that property according to Chapter 212, whereas in Chapter 171, a developer would only have a substantial interest if he/she met the specific requirements related to "substantial interest" stated in that chapter.

3. May an applicant's attorney contact the mayor or a councilmember to discuss a pending land use matter before the city council?

No. While there is no prohibition against a non-attorney applicant contacting the mayor or a councilmember to discuss his/her pending application, an attorney for the applicant may run afoul of the rules of professional responsibility (and thus possibly be subject to a grievance being filed against him/her) if he/she contacts the mayor or a councilmember without contacting the local government's attorney. Specifically, in Texas, Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct addresses this issue:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
>
> . . .
>
> (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

An Ethics Committee Opinion is directly on point. In Ethics Opinion 474 (June 1991), the Texas Supreme Court Professional Ethics Committee was asked to determine the ethical issues associated with the following fact situation:

> Plaintiff has sued a municipality. The city attorney of the municipality represents the city and is engaged in settlement negotiations with plaintiff through plaintiff's counsel. Defendant, with the city counsel's [sic, council's] approval, has offered a certain sum in settlement. Plaintiff has taken the position that the amount offered is inadequate. Unbeknownst to the city attorney's office, plaintiff's counsel telephones an individual counsel [sic, council] member to express his disapproval of the city's settlement offer. When questioned about the propriety of such contact, plaintiff's counsel refuses to acknowledge that the prohibition of such contact with the opposition's client is applicable when the client is a municipality.
>
> Question Presented
>
> Is the communication by plaintiff's counsel with city counsel [sic, council] members described above a violation of Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct?
>
> Discussion
>
> Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides in part as follows:
>
> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
>
> (b) For the purpose of this rule, "organization or entity of government" includes:
>
> (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or
>
> (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.
>
> Conclusion
>
> Yes. These provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a

managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

4. Prior to voting on a land use matter, may members of a city council or planning and zoning commission go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

Yes, but caution also is advised in doing so. It is clear that in Texas the zoning or rezoning of property is a legislative act. *See Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.)(en banc), *cert. denied*, 475 U.S. 822 (1986). With such legislative authority comes absolute legislative immunity for the public officials exercising it. *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

While legally there may be little concern about the information a city councilmember, for example, receives before a council meeting about a specific case, the political aspects of that case may mandate more cautious behavior by the city councilmember. Thus, while talking to a neighbor opposed to the zoning case may be legally permissible, politically there may be an appearance of impropriety or predilection to reach a decision without going through the public hearing process. Further, Texas municipalities must follow the Texas Open Meetings Act (Tex. Gov't Code, ch. 551) and its prohibition of deliberation outside a properly noticed public hearing and meeting.

5. Prior to voting on a variance or other authorized land use matter, may members of a zoning board of adjustment go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

No. It is equally clear in Texas that members of a zoning board of adjustment act in a quasi-judicial capacity. Consequently, the ex parte receipt of information or opinions is unfair and may deprive an applicant of due process. As a noted commentary states, "[a] situation which presents the element of unfairness is for the views of one party to a proceeding before the board [of adjustment] to be presented to the board under circumstances which deprive the opposing party of the opportunity to know what was presented and the further opportunity to respond to it." Rathkopf's The Law of Zoning and Planning, § 57.68 at 57-136. Thus, to survive a constitutional procedural due process challenge, the following elements must be present: (1) an unbiased decision, (2) adequate notice of the hearing, (3) a hearing in which witnesses are sworn and in which there is an opportunity to present evidence and an opportunity for cross-examination, and (4) a decision based on the record supported by reasons and findings of fact. *See* Texas Municipal Zoning Law, § 6.006 at 6-11 (3d ed. 1999).

6. What is a good, basic checklist for local public officials as a protective strategy to ensure ethical compliance?

While every local government should consult with its attorney about ethical issues, every local government official should ask the following basic questions to ensure ethical compliance:

1. Have I reviewed Chapter 171 and § 212.017 of the Texas Local Government Code?

2. Have I reviewed my city's ethics code?

3. Do I engage in a business in any way related to issues which may come before me (as a councilmember, commissioner, board member, employee or other officer)?

4. Could my business potentially benefit or be harmed by a decision of the council, commission or board on which I serve?

5. Am I or a family member licensed or engaged in any of the following professions that may cause me, my firm or family member to appear before the council, commission or board on which I serve:

- architect
- attorney
- builder or developer
- engineer
- surveyor
- mortgage broker/agent
- realtor
- contractor or subcontractor
- title insurance company?

6. Do I have real estate investments that could cause a conflict of interest?

7. Do I have stock or other investments in any company or organization which may appear before the council, commission or board on which I serve?

8. Am I related to or in business with another municipal official that may result in a conflict of interest for me?

9 Do I know where to go if I find out that I have a conflict of interest?

V. MISCELLANEOUS CONFLICT QUESTIONS

1) Is a city attorney who is elected to office (or a county attorney, district attorney or attorney general) "a lawyer for a governmental agency"?

2) Does it matter if the attorney represents a home rule city instead of a general law city?

3) Does it matter if the attorney is appointed instead of elected?

4) Could a state constitution, statute or a city charter change the identity of a client or a governmental lawyer's client?

5) Is there a fundamental distinction in law between a municipal corporation and a private corporation? If so, does that distinction bear on the attorney-client relationship of the city attorney? Does the city attorney apply the same rules as a corporate attorney in identifying his or her client?

6) Does the city attorney apply the same rules as a corporate attorney in identifying his or her client?

7) Is there any reason why a municipal attorney should apply rules different from a lawyer working for S.E.C., the I.R.S. or some other governmental agency?

8) Do the same ethical rules apply to a city attorney who is a full-time public employee as to one who is a private practitioner who is a city attorney only part-time?

9) Is there a problem if a city attorney has simultaneous representation of a municipality and a county? Of multiple cities? Of a city and an agency (such as a private industry council or a housing authority)? Of a city and named employees of the city? Of a city and a person bringing an action against the city? Of a city and a plaintiff bringing an action against a city employee?

10) Can a city attorney represent the city in a condemnation suit if he or one of his assistants or partners owns part of the property to be condemned?

11) Can a city attorney or an assistant city attorney be a member of the board of a legal services corporation which brings suits against the city?

12) Can a city attorney be appointed by a court to represent a criminal defendant in a case in which a policeman must testify?

13) Can a city attorney and a judge share a telephone number in their respective law offices?

14) Can a city attorney act as a municipal court judge?

15) If a city attorney is a member of a law firm, can his partner appear before city boards or commissions represented by the city attorney? Can the partner exercise his inherent right of self-representation? Can a partner be a municipal court judge in the same city? Can a partner represent a corporation or other person in a conflict against the city? Can a partner serve as a member of a city board? Can a partner represent a city employee in a case in which the city is a party, even if the employee and the city are both defendants?

16) Does Rule 1.12, Organization as Client, apply to city attorneys? If so, who is the highest authority that can act in behalf of the organization as determined by applicable law? Is it the people? Never? Sometimes? Always?

17) Could a city attorney ever be obliged to call a press conference to inform the public that the Mayor or City Council is not acting in the best interest of the entity? Initiate a recall election?

18) Are there specific rules for conflicts of interest for platting and subdivision matters?

19) May an applicant's attorney contact the Mayor, a councilmember or a planning and zoning commission member to discuss a pending land use matter before the City Council or Planning and Zoning Commission?

20) Prior to voting on a land use matter, may members of the City Council or Planning and Zoning Commission go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

21) Prior to voting on a variance or other authorized land use matter, may members of a zoning board of adjustment go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code?

VI. SELECTED LAW AND RULES

A. Bar Rules

Note: *See Federal Deposit Ins. Corp. v. US. Fire Ins. Co.,* 50 F.3d 1304 (5th Cir. 1995)(federal courts will look to "national standards utilized by this circuit, which are: (1) local rules of the federal district; (2) the Texas Disciplinary Rules of Professional Conduct; (3) former Texas Code of Professional Responsibility; (4) the ABA Model Rules of Professional Responsibility; and (5) the Restatement of the Law Governing Lawyers").

1. ABA Model Code of Professional Responsibility - Selected Topics

    a. Cannons 1, 5, 9
    b. Ethical Considerations (EC) 5-14, 5-15, 5-16
    c. *See In re Dresser Indust., Inc.,* 972 F.2d 540 (5th Cir. 1992); *In re American Airlines, Inc.,* 972 F.2d 605 (5th Cir. 1992)

2. State Disciplinary Rules of Professional Conduct

3. Lawyer's Creed

B. Other Provisions - Examples

1. Dallas City Charter, Chapter VII

2. Dallas City Code, Chapter 12A

3. Dallas City Code, Chapter 31A

4. Ethics Opinions

5. Restatements
See the American Law Institute ("ALI") Restatement (Third) of the Law Governing Lawyers. This Restatement may be ordered by calling ALI at (215) 243-1600, or by visiting ALI online at http://www.ali.org.

C. State Law-Selected Statutory Examples

1. Texas Local Government Code, Section 180.002, Defense of Civil Suits Against Peace Officers, Fire Fighters and Emergency Medical Personnel:

(a) In this section, "peace officer" has the meaning assigned by Article 2.12, Texas Code of Criminal Procedure.

(b) A municipality or special purpose district shall provide a municipal or district employee who is a peace officer, fire fighter, or emergency medical services employee with legal counsel without cost to the employee to defend the employee against a suit for damages by a party other than a governmental entity if:

(1) legal counsel is requested by the employee; and

(2) the suit involves an official act of the employee within the scope of the employee's authority.

(c) To defend the employee against the suit, the municipality or special purpose district may provide counsel already employed by it or may employ private counsel.

(d) If the municipality or special purpose district fails to provide counsel as required by Subsection (b), the employee may recover from it the reasonable attorney's fees incurred in defending the suit if the trier of fact finds:

(1) that the fees were incurred in defending a suit covered by Subsection (b); and

(2) that the employee is without fault or that the employee acted with a reasonable good faith belief that the employee's actions were proper.

2. Texas Tort Claims Act

A. Tex.Civ.Prac. & Rem. Code, Section 102.002, Payment of Certain Tort Claims:

(a) A local government may pay actual damages awarded against an employee of the local government if the damages:

(1) result from an act or omission of the employee in the course and scope of his employment for the local government; and
(2) arise from a cause of action for negligence.

(b) The local government may also pay the court costs and attorney's fees awarded against an employee for whom the local government may pay damages under this section.

(c) Except as provided by Subsection (e), a local government may not pay damages awarded against an employee that:

(1) arise from a cause of action for official misconduct, or
(2) arise from a cause of action involving a willful or wrongful act or omission or an act or omission constituting gross negligence.

(d) A local government may not pay damages awarded against an employee to the extent the damages are recoverable under an insurance contract or a self-insurance plan authorized by statute.

(e) A local government that does not give a bond under Section 702(b), Texas Probate Code, shall pay damages awarded against an employee of the local government arising from a cause of action described by Subsection (c) if the liability results from the employee's appointment as guardian of the person or estate of a ward under the Texas Probate Code and the action or omission for which the employee was found liable was in the course and scope of the person's employment with the local government.

B. Tex.Civ.Prac. & Rem. Code, Section 102.004, Defense Counsel:

(a) A local government may provide legal counsel to represent a defendant for whom the local government may pay damages under this chapter. The counsel provided by the local government may be the local government's regularly employed counsel, unless there is a potential conflict of interest between the local government and the defendant, in which case the local government may employ other legal counsel to defend the suit.

(b) Legal counsel provided under this section may settle the portion of a suit that may result in the payment of damages by the local government under this chapter.

C. Tex.Civ.Prac. & Rem. Code, Section 101.103, Legal Representation:

(a) The attorney general shall defend each action brought under this chapter against a governmental unit that has authority and jurisdiction coextensive with the geographical limits of this state. The attorney general may be fully assisted by counsel provided by an insurance carrier.

(b) A governmental unit having an area of jurisdiction smaller than the entire state shall employ its own counsel according to the organic act under which the unit operates, unless the governmental unit has relinquished to an insurance carrier the right to defend against the claim.

D. Tex.Civ.Prac. & Rem. Code, Chapters 104, 108, 110.

3. Chapter 171, Texas Local Government Code.
(*See* discussion above in the Land Use Ethics portion of this paper)

VII. CONCLUSION

The ethical attorney should be on the alert to legal and ethical considerations concerning daily issues, and to the possible prejudice that multiple representation may cause a particular client in a litigation context. Such diligence mandates a serious investigation into the facts of each situation. At the least, such diligence should forestall an unhappy client arguing (on appeal, to a grievance committee, etc.) that he was denied competent counsel or a fair or just trial. Unfortunately, most ethical issues faced by local government lawyers and officials tend to be somewhat "gray" and rarely is it clear that a conflict indeed exists. Nevertheless, the safer course is to conclude that there is a conflict if indeed reasonable minds may differ. With a backdrop of criminal sanctions, attention should always be paid to fact situations that raise ethical concerns in all areas of local government practice.