

ETHICS

**Texas City Attorney's Association
Fall Meeting
November 15, 2012**

Presented By:

Edwin P. Voss, Jr.

Brown & Hofmeister, L.L.P.

740 East Campbell Road, Suite 800

Richardson, Texas 75081

(214) 747-6100

FAX (214) 747-6111

www.bhlaw.net

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

Nevada Comm'n on Ethics v. Carrigan,
131 S.Ct. 2343 (2011)

- ▶ Carrigan: member of Sparks City Council
- ▶ First elected in 1999, twice re-elected
- ▶ Vasquez is his campaign manager, and close personal friend
- ▶ Vasquez also is a consultant for developers

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ 2005 development project for Lazy 8 hotel/casino; it is Vasquez's project.
- ▶ Carrigan consulted Sparks City Attorney before public hearing/voting on project.
- ▶ Nevada Ethics Law apply to potential conflict of interest?

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ Sparks City Attorney's advice: publicly disclose relationship before voting on the project.
- ▶ Law: A public officer shall not vote on or advocate for a matter in which 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."

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ "Commitment in a private capacity to the interests of others" means:
 - ▶ household member
 - ▶ related by blood, adoption or marriage within 3rd degree of consanguinity or affinity
 - ▶ employed by him/member of household
 - ▶ substantial/continued business relationship ...

Nevada Comm'n on Ethics v. Carrigan (cont.)

or

- ▶ “Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.”
- ▶ Carrigan gave a public statement and then voted for the project
- ▶ Project failed to pass anyway

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ Statement: I have to disclose for the record that Carlos Vasquez, a consultant for [developer] 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. Therefore, according to [Nevada Ethics Law] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue.

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ Complaints about vote to Commission
- ▶ Investigation resulted in finding that Carrigan violated Nevada Ethics Law
- ▶ Sanctioned, but not fined (because he sought legal advice)
- ▶ Carrigan brought suit in district court

Nevada Comm'n on Ethics v. Carrigan (cont.)

- ▶ District Court affirmed Commission's finding
- ▶ Nevada Supreme Court reversed
- ▶ Supreme Court granted certiorari.
- ▶ What about Sparks City Attorney's advice?
What about City Attorney's representation of Carrigan in suit?

Nevada Comm'n on Ethics v. Carrigan (cont.)

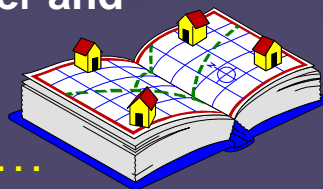
- ▶ Does a legislator have a First Amendment right to vote?
- ▶ Is the Nevada Ethics Law an improper restriction on a legislator's First Amendment speech rights?
- ▶ No. No.
- ▶ Legislator's vote is commitment of his apportioned share of his power to the passage or defeat of the proposal. That power is not personal to the legislator, but instead belongs to the people. Legislator has no personal right to it.
- ▶ Effect on Carrigan: None.

Conflicts Of Interest

- Local Government Code Chapter 171 (The "Floor")
- Cumulative of City Charter and Ordinances

The official shall file, before a vote or decision on any matter. . .

And shall abstain from further participation in the matter.



Whose Interest?

“Local Public Official” includes mayor and councilmembers, P&Z members, Board of Adjustment members, municipal employees and relatives.



Substantial Interest

Does the official have a “substantial interest” in the business entity or real property?



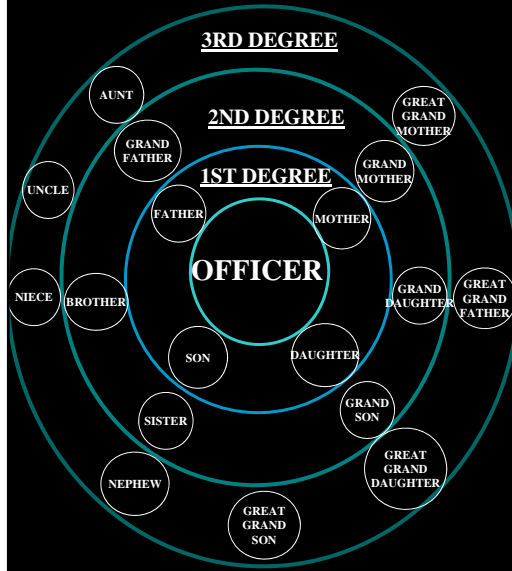
What is a “Substantial Interest”?

- Ownership of 10% or more of the voting stock or shares of the business entity.
- Ownership of 10% or more or \$15,000 or more of the fair market value of the business entity.
- Funds received from the business entity exceed 10% of the person’s gross income for the previous year.
- Equitable or legal ownership in real property with a fair market value of at least \$2,500.

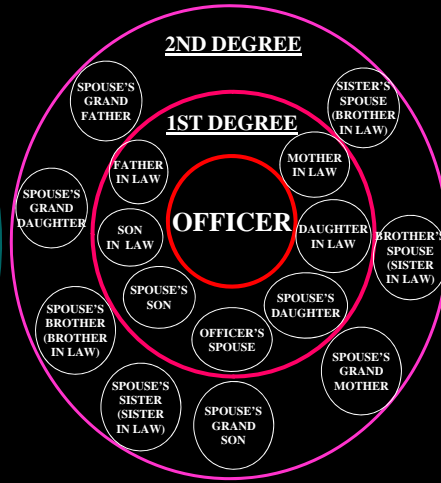
Application to Relatives

- 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 [§ 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].
- Affinity relationships continue after divorce or death if there is a living child of the marriage. See Tex. Gov’t Code § 573.024(b).

**Consanguinity Kinship Chart
(Relationship by Blood)**



**Affinity Kinship Chart
(Relationship by Marriage)**



Conflicts of Interest

**Does the matter before the body
"involve" the business entity or real
property?**

**A zoning matter that affects territory in
which the member's residence is located
is a matter that involves that real
property. DM-130 (1992)**

Special Economic Effect

Even so, is it “reasonably foreseeable that an action on the matter will have a special economic effect on the value of the” member’s business entity or real property “that is distinguishable from its effect in the public?”

Fact question for the member.

Conflicts of Interest

If all answers are “yes,” you must file an affidavit and abstain from further participation in the matter.

When? “Before the vote” but best to do it very early since “participation” is also prohibited.

Conflicts of Interest



What if I'm not sure?

Particularly given the criminal sanctions, "it might, indeed, be advisable for a member to comply with the affidavit and abstention requirements if he is in doubt whether his failure to do so will place him in violation."

DM-130 (1992)

Public Official Checklist

1. Have I reviewed Chapter 171 of the Texas Local Government Code?
2. Have I reviewed the City's ethics code?
3. Do I engage in a business in any way related to issues which may come before me as a city official?
4. Could my business potentially benefit or be harmed by a decision of the council or commission or board on which I serve?

Public Official Checklist

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 or commission or board on which I serve:

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

Public Official Checklist

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 or commission or board on which I serve?

Public Official Checklist

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?

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

- Delia is a firefighter for City of Rialto, CA
- Suspicions regarding Delia's extensive absences resulted in IA investigation; attorney Filarsky was hired to assist the city in the investigation.
- Delia purchased insulation and building supplies; doing work on home while out on sick leave?

Filarsky v. Delia (cont.)

- Allow fire dept. officials to enter home and view materials? Delia refused.
- Bring materials out on lawn?
- Delia complied; then sued alleging 4th and 14th Amendment violations.
- D. Ct. granted SJ: qualified immunity.
- 9th Cir. affirmed, except for Filarsky

Filarsky v. Delia (cont.)

- Question presented: Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a “private” lawyer rather than a government employee.

Filarsky v. Delia (cont.)

- Numerous amicus briefs filed
- ABA SLG Amicus Brief
- The loss of qualified immunity 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.

Filarsky v. Delia (cont.)

- Question answered: A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983.

Filarsky v. Delia (cont.)

Postscript:

There appears to be a level of animosity between Mr. Filarsky and Mr. Delia.



***Bullard v. Chrysler Corp.,
925 F.Supp. 1180 (E.D. Tex. 1996)***

Never put down in writing what you don't want the whole world to see.

Bullard v. Chrysler Corp.

- Application of Fed.R.Civ.P. 11 to motion to withdraw as counsel.
- Co-counsel objected to motion after court had granted withdrawal.



Bullard v. Chrysler Corp.

- Objection: withdrawal would indeed be prejudicial to Plaintiff's case.
- Court then set aside the withdrawal order and ordered show cause hearing.



Bullard v. Chrysler Corp.

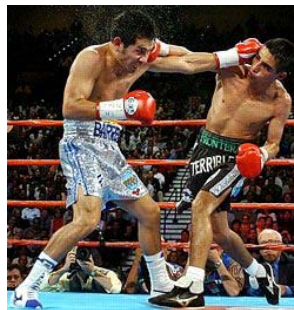
Issues:

1. Was motion to withdraw presented for improper purpose?
2. Was there evidentiary support for allegation that withdrawal would not prejudice plaintiff's rights?
3. Was there evidentiary support of conflict between plaintiff's lawyer and plaintiff?

Bullard v. Chrysler Corp.

Answers:

1. No; improper purpose not found.
2. No; prejudice indeed existed.
3. Yes, conflict did exist.



Bullard v. Chrysler Corp.

- Conflict with plaintiff by plaintiff's lawyer:
 - Rule 1.06 of Texas Rules of Disciplinary Conduct
 - Personal interests vs. client's interests



Bullard v. Chrysler Corp.

- Chrysler's threat to Plaintiff's lawyer: drop this case or else no settlements on all other cases – will go to trial instead.
- Plaintiff's lawyer's response:





Bullard v. Chrysler Corp.

“Upon further discussions with Chrysler, they simply have me by the _____. I cannot bite the hand that feeds me so well, especially since I have so many good Chrysler cases that are being held up due to *Bullard*. Accordingly, I must withdraw from *Bullard*.”



Bullard v. Chrysler Corp.

“This may be cowardly on my part but with my new practice, Tort Reform looming and the uncertainties of the future, I have no choice. This is a purely business/economic decision.”

Bullard v. Chrysler Corp.

Court's observations at show cause hearing:

- Addressed the lawyer's credibility
- "... Demeanor and manner of answering both the Court's questions and those of other counsel has been evasive, elusive and shifty."



Bullard v. Chrysler Corp.

- Sanctions found:
 1. Fine of \$2,500.00
 2. Public reprimand
 3. 10 additional hours ethics CLE
 4. Referral to State Bar disciplinary committee
- What about Chrysler's lawyers?

Dueling Opinions

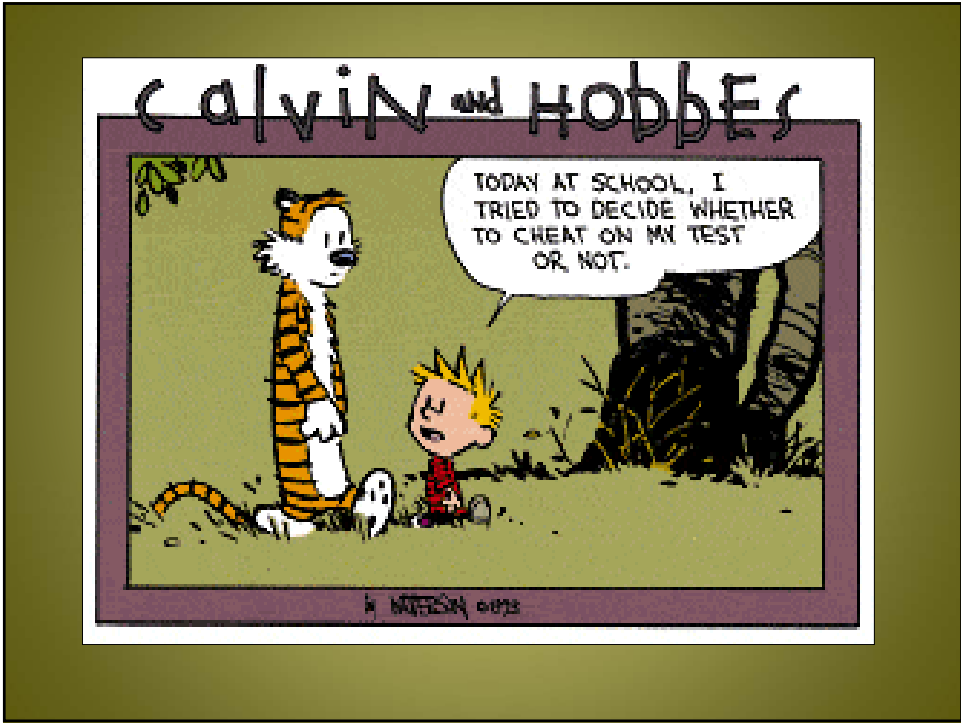


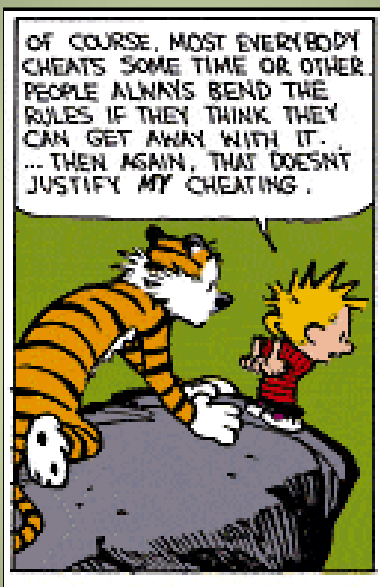












THEN I THOUGHT. LOOK,
CHEATING ON ONE LITTLE TEST
ISN'T SUCH A BIG DEAL. IT
DOESN'T HURT ANYONE.

...BUT THEN I WONDERED IF
I WAS JUST RATIONALIZING
MY UNWILLINGNESS TO ACCEPT
THE CONSEQUENCE OF NOT
STUDYING.



STILL, IN THE REAL WORLD,
PEOPLE CARE ABOUT SUCCESS,
NOT PRINCIPLES.

... THEN AGAIN,
MAYBE THAT'S
WHY THE WORLD
IS IN SUCH A
MESS.

WHAT A DILEMMA!

SO WHAT DID
YOU DECIDE?

NOTHING.
I RAN OUT
OF TIME AND
I HAD TO
TURN IN A
BLANK PAPER.





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