

# **ETHICS IN MUNICIPAL LAW**

**Texas City Attorney's Association**

**Summer Conference**

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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 IN MUNICIPAL LAW

### 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 your hard-earned good name and reputation intact.

### II. ETHICS STATUTORY PROVISIONS

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 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.<sup>1</sup> 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.
- (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.

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<sup>1</sup> 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 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) 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

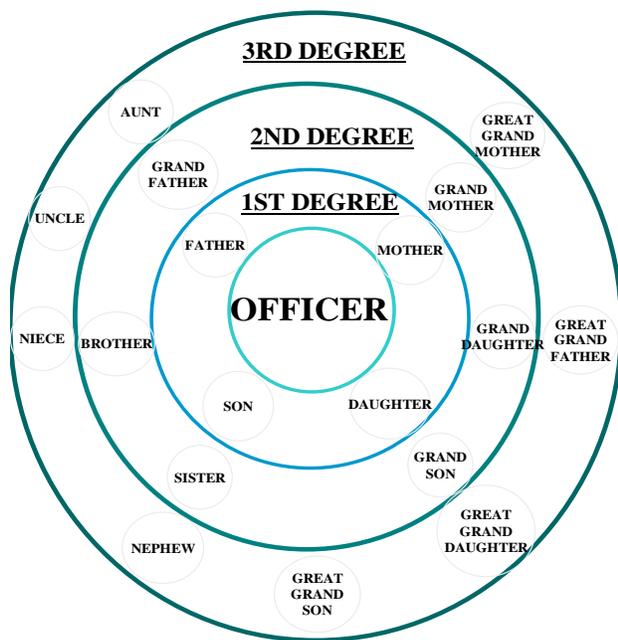
As a consequence of former law that generally held a local public official could not participate in a decision if he/she had an interest, direct or indirect, in a contract or other matter,<sup>2</sup> and the inherent ambiguity and difficulty in applying that standard to practical situations, Chapter 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.

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<sup>2</sup> 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.

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).

**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 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<sup>3</sup>] 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:

- (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 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:

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<sup>3</sup> In Texas, plat approval is usually undertaken by either the city council or the city’s planning and zoning commission.

(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:

(a) Have I reviewed Chapters 171 and 176 of the Texas Local Government Code, and other ethics statutes?

(b) Have I reviewed my city’s ethics code?

(c) 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)?

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

(e) 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?

(f) Do I have real estate investments that could cause a conflict of interest?

(g) 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?

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

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

D. Other Statutory Provisions:

**1. Texas Local Government Code, Chapter 176: Disclosure of Certain Relationships with Local Government Officers; Providing Public Access to Certain Information.**

Sec. 176.001. DEFINITIONS. In this chapter:

(1) "Agent" means a third party who undertakes to transact some business or manage some affair for another person by the authority or on account of the other person.

(1-a) "Business relationship" means a connection between two or more parties based on commercial activity of one of the parties. The term does not include a connection based on:

(A) a transaction that is subject to rate or fee regulation by a federal, state, or local governmental entity or an agency of a federal, state, or local governmental entity;

(B) a transaction conducted at a price and subject to terms available to the public; or

(C) a purchase or lease of goods or services from a person that is chartered by a state or federal agency and that is subject to regular examination by, and reporting to, that agency.

(1-b) "Charter school" means an open-enrollment charter school operating under Subchapter D, Chapter 12, Education Code.

(1-c) "Commission" means the Texas Ethics Commission.

(1-d) "Contract" means a written agreement for the sale or purchase of real property, goods, or services.

(2) "Family member" means a person related to another person within the first degree by consanguinity or affinity, as described by Subchapter B, Chapter 573, Government Code, except that the term does not include a person who is considered to be related to another person by affinity only as described by Section 573.024(b), Government Code.

(2-a) "Goods" means personal property.

(2-b) "Investment income" means dividends, capital gains, or interest income generated from:

(A) a personal or business:

(i) checking or savings account;

(ii) share draft or share account; or

(iii) other similar account;

- (B) a personal or business investment; or
- (C) a personal or business loan.

(3) "Local governmental entity" means a county, municipality, school district, charter school, junior college district, or other political subdivision of this state or a local government corporation, board, commission, district, or authority to which a member is appointed by the commissioners court of a county, the mayor of a municipality, or the governing body of a municipality. The term does not include an association, corporation, or organization of governmental entities organized to provide to its members education, assistance, products, or services or to represent its members before the legislative, administrative, or judicial branches of the state or federal government.

(4) "Local government officer" means:

- (A) a member of the governing body of a local governmental entity;
- (B) a director, superintendent, administrator, president, or other person designated as the executive officer of the local governmental entity; or
- (C) an employee of a local governmental entity with respect to whom the local governmental entity has, in accordance with Section 176.005, extended the requirements of Sections 176.003 and 176.004.

(5) "Records administrator" means the director, county clerk, municipal secretary, superintendent, or other person responsible for maintaining the records of the local governmental entity or another person designated by the local governmental entity to maintain statements and questionnaires filed under this chapter and perform related functions.

(6) "Services" means skilled or unskilled labor or professional services, as defined by Section 2254.002, Government Code.

**Sec. 176.002. APPLICABILITY TO CERTAIN VENDORS AND OTHER PERSONS.**

(a) This chapter applies to a person who:

- (1) enters or seeks to enter into a contract with a local governmental entity; or
- (2) is an agent of a person described by Subdivision (1) in the person's business with a local governmental entity.

(b) A person is not subject to the disclosure requirements of this chapter if the person is:

- (1) a state, a political subdivision of a state, the federal government, or a foreign government; or
- (2) an employee of an entity described by Subdivision (1), acting in the employee's official capacity.

Sec. 176.003. CONFLICTS DISCLOSURE STATEMENT REQUIRED.

(a) A local government officer shall file a conflicts disclosure statement with respect to a person described by Section 176.002(a) if:

(1) the person enters into a contract with the local governmental entity or the local governmental entity is considering entering into a contract with the person; and

(2) the person:

(A) has an employment or other business relationship with the local government officer or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12-month period preceding the date that the officer becomes aware that:

(i) a contract described by Subdivision (1) has been executed; or

(ii) the local governmental entity is considering entering into a contract with the person; or

(B) has given to the local government officer or a family member of the officer one or more gifts that have an aggregate value of more than \$250 in the 12-month period preceding the date the officer becomes aware that:

(i) a contract described by Subdivision (1) has been executed; or

(ii) the local governmental entity is considering entering into a contract with the person.

(a-1) A local government officer is not required to file a conflicts disclosure statement in relation to a gift accepted by the officer or a family member of the officer if the gift is:

(1) given by a family member of the person accepting the gift;

(2) a political contribution as defined by Title 15, Election Code; or

(3) food, lodging, transportation, or entertainment accepted as a guest.

(b) A local government officer shall file the conflicts disclosure statement with the records administrator of the local governmental entity not later than 5 p.m. on the seventh business day after the date on which the officer becomes aware of the facts that require the filing of the statement under Subsection (a).

(c) A local government officer commits an offense if the officer knowingly violates this section. An offense under this subsection is a Class C misdemeanor.

(d) It is an exception to the application of Subsection (c) that the person filed the required conflicts disclosure statement not later than the seventh business day after the date the person received notice from the local governmental entity of the alleged violation.

Sec. 176.004. CONTENTS OF DISCLOSURE STATEMENT. The commission shall adopt the conflicts disclosure statement for local government officers. The conflicts disclosure statement must include:

(1) a requirement that each local government officer disclose:

(A) an employment or other business relationship described by Section 176.003(a), including the nature and extent of the relationship; and

(B) gifts accepted by the local government officer and any family member of the officer from a person described by Section 176.002(a) during the 12-month period described by Section 176.003(a)(2)(B) if the aggregate value of the gifts, excluding gifts described by Section 176.003(a-1), accepted by the officer or a family member from that person exceed \$250;

(2) an acknowledgment from the local government officer that:

(A) the disclosure applies to each family member of the officer; and

(B) the statement covers the 12-month period described by Section 176.003(a); and

(3) the signature of the local government officer acknowledging that the statement is made under oath under penalty of perjury.

Sec. 176.005. APPLICATION TO CERTAIN EMPLOYEES.

(a) The local governmental entity may extend the requirements of Sections 176.003 and 176.004 to any employee of the local governmental entity who has the authority to approve contracts on behalf of the local governmental entity, including a person designated as the representative of the local governmental entity for purposes of Chapter 271. The local governmental entity shall identify each employee made subject to Sections 176.003 and 176.004 under this subsection and shall provide a list of the identified employees on request to any person.

(b) A local governmental entity may reprimand, suspend, or terminate the employment of an employee who knowingly fails to comply with a requirement adopted under this section.

(c) An employee of a local governmental entity commits an offense if the employee knowingly violates requirements imposed under this section. An offense under this subsection is a Class C misdemeanor.

(d) It is an exception to the application of Subsection (c) that the person filed the required conflicts disclosure statement not later than the seventh business day after the date the person received notice from the local governmental entity of the alleged violation.

Sec. 176.006. DISCLOSURE REQUIREMENTS FOR VENDORS AND OTHER PERSONS; QUESTIONNAIRE.

(a) A person described by Section 176.002(a) shall file a completed conflict of interest questionnaire if the person has a business relationship with a local governmental entity and:

(1) has an employment or other business relationship with an officer of that local governmental entity, or a family member of the officer, described by Section 176.003(a)(2)(A); or

(2) has given an officer of that local governmental entity, or a family member of the officer, one or more gifts with the aggregate value specified by Section 176.003(a)(2)(B), excluding any gift described by Section 176.003(a-1).

(a-1) The completed conflict of interest questionnaire must be filed with the appropriate records administrator not later than the seventh business day after the later of:

(1) the date that the person:

(A) begins discussions or negotiations to enter into a contract with the local governmental entity; or

(B) submits to the local governmental entity an application, response to a request for proposals or bids, correspondence, or another writing related to a potential contract with the local governmental entity; or

(2) the date the person becomes aware:

(A) of an employment or other business relationship with a local government officer, or a family member of the officer, described by Subsection (a); or

(B) that the person has given one or more gifts described by Subsection (a).

(b) The commission shall adopt a conflict of interest questionnaire for use under this section that requires disclosure of a person's business relationships with a local governmental entity.

(c) The questionnaire adopted under Subsection (b) must require, for the local governmental entity with respect to which the questionnaire is filed, that the person filing the questionnaire:

(1) describe each employment or business relationship the person has with each local government officer of the local governmental entity;

(2) identify each employment or business relationship described by Subdivision (1) with respect to which the local government officer receives, or is likely to receive, taxable income, other than investment income, from the person filing the questionnaire;

(3) identify each employment or business relationship described by Subdivision (1) with respect to which the person filing the questionnaire receives, or is likely to receive, taxable income, other than investment income, that:

(A) is received from, or at the direction of, a local government officer of the local governmental entity; and

- (B) is not received from the local governmental entity; and
- (4) describe each employment or business relationship with a corporation or other business entity with respect to which a local government officer of the local governmental entity:
  - (A) serves as an officer or director; or
  - (B) holds an ownership interest of 10 percent or more.
- (d) A person described by Subsection (a) shall file an updated completed questionnaire with the appropriate records administrator not later than the seventh business day after the date of an event that would make a statement in the questionnaire incomplete or inaccurate.
- (e) Repealed by Acts 2009, 81st Leg., R.S., Ch. 87, Sec. 15.005, eff. September 1, 2009.
- (f) A person commits an offense if the person knowingly violates this section. An offense under this subsection is a Class C misdemeanor.
- (g) It is an exception to the application of Subsection (f) that the person filed the required questionnaire not later than the seventh business day after the date the person received notice from the local governmental entity of the alleged violation.
- (h) A local governmental entity does not have a duty to ensure that a person described by Section 176.002 files a conflict of interest questionnaire.
- (i) The validity of a contract between a person described by Section 176.002 and a local governmental entity is not affected solely because the person fails to comply with this section.

Sec. 176.007. LIST OF GOVERNMENT OFFICERS. The records administrator for a local governmental entity shall maintain a list of local government officers of the entity and shall make that list available to the public and any person who may be required to file a questionnaire under Section 176.006.

Sec. 176.008. ELECTRONIC FILING. The requirements of this chapter, including signature requirements, may be satisfied by electronic filing in a form approved by the commission.

Sec. 176.009. POSTING ON INTERNET.

(a) A local governmental entity that maintains an Internet website shall provide access to the statements and to questionnaires required to be filed under this chapter on that website. This subsection does not require a local governmental entity to maintain an Internet website.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 847, Sec. 3(b), eff. January 1, 2014.

Sec. 176.010. REQUIREMENTS CUMULATIVE. The requirements of this chapter are in addition to any other disclosure required by law.

Sec. 176.011. MAINTENANCE OF RECORDS. A records administrator shall maintain the statements and questionnaires that are required to be filed under this chapter in accordance with the local governmental entity's records retention schedule.

Sec. 176.012. APPLICATION OF PUBLIC INFORMATION LAW. This chapter does not require a local governmental entity to disclose any information that is excepted from disclosure by Chapter 552, Government Code.

## **2. Texas Penal Code, Chapter 36: Bribery and Corrupt Influence**

Sec. 36.01. DEFINITIONS. In this chapter:

(1) "Custody" means:

(A) detained or under arrest by a peace officer; or

(B) under restraint by a public servant pursuant to an order of a court.

(2) "Party official" means a person who holds any position or office in a political party, whether by election, appointment, or employment.

(3) "Benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.

(4) "Vote" means to cast a ballot in an election regulated by law.

Sec. 36.02. BRIBERY.

(a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding;

(3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official; or

(4) any benefit that is a political contribution as defined by Title 15, Election Code, or that is an expenditure made and reported in accordance with Chapter 305, Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of

evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision.

(b) It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or he lacked jurisdiction or for any other reason.

(c) It is no defense to prosecution under this section that the benefit is not offered or conferred or that the benefit is not solicited or accepted until after:

(1) the decision, opinion, recommendation, vote, or other exercise of discretion has occurred; or

(2) the public servant ceases to be a public servant.

(d) It is an exception to the application of Subdivisions (1), (2), and (3) of Subsection (a) that the benefit is a political contribution as defined by Title 15, Election Code, or an expenditure made and reported in accordance with Chapter 305, Government Code.

(e) An offense under this section is a felony of the second degree.

#### Sec. 36.03. COERCION OF PUBLIC SERVANT OR VOTER.

(a) A person commits an offense if by means of coercion he:

(1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty; or

(2) influences or attempts to influence a voter not to vote or to vote in a particular manner.

(b) An offense under this section is a Class A misdemeanor unless the coercion is a threat to commit a felony, in which event it is a felony of the third degree.

(c) It is an exception to the application of Subsection (a)(1) of this section that the person who influences or attempts to influence the public servant is a member of the governing body of a governmental entity, and that the action that influences or attempts to influence the public servant is an official action taken by the member of the governing body. For the purposes of this subsection, the term "official action" includes deliberations by the governing body of a governmental entity.

#### Sec. 36.04. IMPROPER INFLUENCE.

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

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

#### Sec. 36.05. TAMPERING WITH WITNESS.

(a) A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding, or he coerces a witness or a prospective witness in an official proceeding:

(1) to testify falsely;

(2) to withhold any testimony, information, document, or thing;

(3) to elude legal process summoning him to testify or supply evidence;

(4) to absent himself from an official proceeding to which he has been legally summoned; or

(5) to abstain from, discontinue, or delay the prosecution of another.

(b) A witness or prospective witness in an official proceeding commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a).

(c) It is a defense to prosecution under Subsection (a)(5) that the benefit received was:

(1) reasonable restitution for damages suffered by the complaining witness as a result of the offense; and

(2) a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.

(d) An offense under this section is a felony of the third degree, except that if the official proceeding is part of the prosecution of a criminal case, an offense under this section is the same category of offense as the most serious offense charged in that criminal case.

(e) Notwithstanding Subsection (d), if the most serious offense charged is a capital felony, an offense under this section is a felony of the first degree.

(e-1) Notwithstanding Subsection (d), if the underlying official proceeding involves family violence, as defined by Section 71.004, Family Code, an offense under this section is the greater of:

(1) a felony of the third degree; or

(2) the most serious offense charged in the criminal case.

(e-2) Notwithstanding Subsections (d) and (e-1), if the underlying official proceeding involves family violence, as defined by Section 71.004, Family Code, and it is shown at the trial of the offense that the defendant has previously been convicted of an offense involving family

violence under the laws of this state or another state, an offense under this section is the greater of:

- (1) a felony of the second degree; or
- (2) the most serious offense charged in the criminal case.

(e-3) For purposes of Subsection (a), a person is considered to coerce a witness or prospective witness if the person commits an act of family violence as defined by Section 71.004, Family Code, that is perpetrated, in part, with the intent to cause the witness's or prospective witness's unavailability or failure to comply and the offense is punishable under Subsection (e-1) or (e-2), as applicable.

(f) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

#### Sec. 36.06. OBSTRUCTION OR RETALIATION.

(a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act:

(1) in retaliation for or on account of the service or status of another as a:

(A) public servant, witness, prospective witness, or informant; or

(B) person who has reported or who the actor knows intends to report the occurrence of a crime; or

(2) to prevent or delay the service of another as a:

(A) public servant, witness, prospective witness, or informant; or

(B) person who has reported or who the actor knows intends to report the occurrence of a crime.

(b) In this section:

(1) "Honorably retired peace officer" means a peace officer who:

(A) did not retire in lieu of any disciplinary action;

(B) was eligible to retire from a law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the officer's employment with the agency; and

(C) is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the officer does not offer a pension or annuity to its employees.

(2) "Informant" means a person who has communicated information to the government in connection with any governmental function.

(3) "Public servant" includes an honorably retired peace officer.

(c) An offense under this section is a felony of the third degree unless the victim of the offense was harmed or threatened because of the victim's service or status as a juror, in which event the offense is a felony of the second degree.

Sec. 36.07. ACCEPTANCE OF HONORARIUM.

(a) A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.

(b) This section does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event.

(b-1) Transportation, lodging, and meals described by Subsection (b) are not political contributions as defined by Title 15, Election Code.

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

Sec. 36.08. GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO HIS JURISDICTION.

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.

(g) A public servant who is a hearing examiner employed by an agency performing regulatory functions and who conducts hearings in contested cases commits an offense if the public servant solicits, accepts, or agrees to accept any benefit from any person who is appearing before the agency in a contested case, who is doing business with the agency, or who the public servant knows is interested in any matter before the public servant. The exception provided by Sec. 36.10(b) does not apply to a benefit under this subsection.

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

(i) A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

#### Sec. 36.09. OFFERING GIFT TO PUBLIC SERVANT.

(a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.

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

Sec. 36.10. NON-APPLICABLE. (a) Sections 36.08 (Gift to Public Servant) and 36.09 (Offering Gift to Public Servant) do not apply to:

(1) a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient;

(3) a benefit to a public servant required to file a statement under Chapter 572, Government Code, or a report under Title 15, Election Code, that is derived from a function in honor or appreciation of the recipient if:

(A) the benefit and the source of any benefit in excess of \$50 is reported in the statement; and

(B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision;

(4) a political contribution as defined by Title 15, Election Code;

(5) a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code;

(6) an item with a value of less than \$50, excluding cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code;

(7) an item issued by a governmental entity that allows the use of property or facilities owned, leased, or operated by the governmental entity;

(8) transportation, lodging, and meals described by Section 36.07(b); or

(9) complimentary legal advice or legal services relating to a will, power of attorney, advance directive, or other estate planning document rendered:

(A) to a public servant who is a first responder; and

(B) through a program or clinic that is:

(i) operated by a local bar association or the State Bar of Texas; and

(ii) approved by the head of the agency employing the public servant, if the public servant is employed by an agency.

(b) Section 36.08 (Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

(c) Section 36.09 (Offering Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donor is required by law to report those items, reported by the donor in accordance with that law.

(d) Section 36.08 (Gift to Public Servant) does not apply to a gratuity accepted and reported in accordance with Section 11.0262, Parks and Wildlife Code. Section 36.09 (Offering Gift to Public Servant) does not apply to a gratuity that is offered in accordance with Section 11.0262, Parks and Wildlife Code.

(e) In this section, "first responder" means:

(1) a peace officer whose duties include responding rapidly to an emergency;

(2) fire protection personnel, as that term is defined by Section 419.021, Government Code;

(3) a volunteer firefighter who performs firefighting duties on behalf of a political subdivision and who is not serving as a member of the Texas Legislature or holding a statewide elected office;

(4) an ambulance driver; or

(5) an individual certified as emergency medical services personnel by the Department of State Health Services.

### **3. Texas Penal Code, Chapter 39: Abuse of Office**

Sec. 39.01. DEFINITIONS. In this chapter:

(1) "Law relating to a public servant's office or employment" means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly:

(A) imposes a duty on the public servant; or

(B) governs the conduct of the public servant.

(2) "Misuse" means to deal with property contrary to:

(A) an agreement under which the public servant holds the property;

(B) a contract of employment or oath of office of a public servant;

(C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or

(D) a limited purpose for which the property is delivered or received.

Sec. 39.015. CONCURRENT JURISDICTION TO PROSECUTE OFFENSES UNDER THIS CHAPTER. With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this chapter.

Sec. 39.02. ABUSE OF OFFICIAL CAPACITY.

(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

(1) violates a law relating to the public servant's office or employment; or

(2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor.

(c) An offense under Subsection (a)(2) is:

(1) a Class C misdemeanor if the value of the use of the thing misused is less than \$20;

(2) a Class B misdemeanor if the value of the use of the thing misused is \$20 or more but less than \$500;

(3) a Class A misdemeanor if the value of the use of the thing misused is \$500 or more but less than \$1,500;

(4) a state jail felony if the value of the use of the thing misused is \$1,500 or more but less than \$20,000;

(5) a felony of the third degree if the value of the use of the thing misused is \$20,000 or more but less than \$100,000;

(6) a felony of the second degree if the value of the use of the thing misused is \$100,000 or more but less than \$200,000; or

(7) a felony of the first degree if the value of the use of the thing misused is \$200,000 or more.

(d) A discount or award given for travel, such as frequent flyer miles, rental car or hotel discounts, or food coupons, are not things of value belonging to the government for purposes of this section due to the administrative difficulty and cost involved in recapturing the discount or award for a governmental entity.

(e) If separate transactions that violate Subsection (a)(2) are conducted pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the value of the use of the things misused in the transactions may be aggregated in determining the classification of the offense.

(f) The value of the use of a thing of value misused under Subsection (a)(2) may not exceed:

(1) the fair market value of the thing at the time of the offense; or

(2) if the fair market value of the thing cannot be ascertained, the cost of replacing the thing within a reasonable time after the offense.

### Sec. 39.03. OFFICIAL OPPRESSION.

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) In this section, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

(d) An offense under this section is a Class A misdemeanor, except that an offense is a felony of the third degree if the public servant acted with the intent to impair the accuracy of data reported to the Texas Education Agency through the Public Education Information Management System (PEIMS) described by Section 42.006, Education Code, under a law requiring that reporting.

**Sec. 39.04. VIOLATIONS OF THE CIVIL RIGHTS OF PERSON IN CUSTODY; IMPROPER SEXUAL ACTIVITY WITH PERSON IN CUSTODY.**

(a) An official of a correctional facility, an employee of a correctional facility, a person other than an employee who works for compensation at a correctional facility, a volunteer at a correctional facility, or a peace officer commits an offense if the person intentionally:

(1) denies or impedes a person in custody in the exercise or enjoyment of any right, privilege, or immunity knowing his conduct is unlawful; or

(2) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with an individual in custody or, in the case of an individual in the custody of the Texas Youth Commission, employs, authorizes, or induces the individual to engage in sexual conduct or a sexual performance.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor. An offense under Subsection (a)(2) is a state jail felony, except that an offense under Subsection (a)(2) is a felony of the second degree if the offense is committed against:

(1) an individual in the custody of the Texas Youth Commission; or

(2) a juvenile offender detained in or committed to a correctional facility the operation of which is financed primarily with state funds.

(c) This section shall not preclude prosecution for any other offense set out in this code.

(d) The Attorney General of Texas shall have concurrent jurisdiction with law enforcement agencies to investigate violations of this statute involving serious bodily injury or death.

(e) In this section:

(1) "Correctional facility" means:  
(A) any place described by Section 1.07(a)(14); or  
(B) a "secure correctional facility" or "secure detention facility" as defined by Section 51.02, Family Code.

(2) "Custody" means the detention, arrest, or confinement of an adult offender or the detention or the commitment of a juvenile offender to a facility operated by or under a contract with the Texas Youth Commission or a facility operated by or under contract with a juvenile board.

(3) "Sexual contact," "sexual intercourse," and "deviate sexual intercourse" have the meanings assigned by Section 21.01.

(4) "Sexual conduct" and "performance" have the meanings assigned by Section 43.25.

(5) "Sexual performance" means any performance or part thereof that includes sexual conduct by an individual.

(f) An employee of the Texas Department of Criminal Justice, the Texas Youth Commission, or a local juvenile probation department commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with an individual who the employee knows is under the supervision of the department, commission, or probation department but not in the custody of the department, commission, or probation department.

(g) An offense under Subsection (f) is a state jail felony.

(h) It is an affirmative defense to prosecution under Subsection (f) that the actor was the spouse of the individual at the time of the offense.

#### Sec. 39.05. FAILURE TO REPORT DEATH OF PRISONER.

(a) A person commits an offense if the person is required to conduct an investigation and file a report by Article 49.18, Code of Criminal Procedure, and the person fails to investigate the death, fails to file the report as required, or fails to include in a filed report facts known or discovered in the investigation.

(b) A person commits an offense if the person is required by Section 501.055, Government Code, to:

(1) give notice of the death of an inmate and the person fails to give the notice; or

(2) conduct an investigation and file a report and the person:

(A) fails to conduct the investigation or file the report; or

(B) fails to include in the report facts known to the person or discovered by the person in the investigation.

(c) An offense under this section is a Class B misdemeanor.

Sec. 39.06. MISUSE OF OFFICIAL INFORMATION.

(a) A public servant commits an offense if, in reliance on information to which he has access by virtue of his office or employment and that has not been made public, he:

(1) acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information;

(2) speculates or aids another to speculate on the basis of the information; or

(3) as a public servant, including as a principal of a school, coerces another into suppressing or failing to report that information to a law enforcement agency.

(b) A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that:

(1) he has access to by means of his office or employment; and

(2) has not been made public.

(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:

(1) the public servant has access to by means of his office or employment; and

(2) has not been made public.

(d) In this section, "information that has not been made public" means any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552, Government Code.

(e) Except as provided by Subsection (f), an offense under this section is a felony of the third degree.

(f) An offense under Subsection (a)(3) is a Class C misdemeanor.

**4. Texas Government Code, Chapter 573, Degrees of Relationship; Nepotism Prohibitions.**

SUBCHAPTER A

Sec. 573.001. DEFINITIONS. In this chapter:

(1) "Candidate" has the meaning assigned by Section 251.001, Election Code.

(2) "Position" includes an office, clerkship, employment, or duty.

(3) "Public official" means:

(A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;

(B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or

(C) a judge of a court created by or under a statute of this state.

Sec. 573.002. DEGREES OF RELATIONSHIP. Except as provided by Section 573.043, this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.

#### SUBCHAPTER B. RELATIONSHIPS BY CONSANGUINITY OR BY AFFINITY

Sec. 573.021. METHOD OF COMPUTING DEGREE OF RELATIONSHIP. The degree of a relationship is computed by the civil law method.

Sec. 573.022. DETERMINATION OF CONSANGUINITY.

(a) Two individuals are related to each other by consanguinity if:

- (1) one is a descendant of the other; or
  - (2) they share a common ancestor.
- (b) An adopted child is considered to be a child of the adoptive parent for this purpose.

Sec. 573.023. COMPUTATION OF DEGREE OF CONSANGUINITY.

(a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on.

(b) If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:

(1) the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and

(2) the number of generations between the relative and the nearest common ancestor.

(c) An individual's relatives within the third degree by consanguinity are the individual's:

- (1) parent or child (relatives in the first degree);
- (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and
- (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).

Sec. 573.024. DETERMINATION OF AFFINITY.

(a) Two individuals are related to each other by affinity if:

- (1) they are married to each other; or

(2) the spouse of one of the individuals is related by consanguinity to the other individual.

(b) The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

(c) Subsection (b) applies to a member of the board of trustees of or an officer of a school district only until the youngest child of the marriage reaches the age of 21 years.

#### Sec. 573.025. COMPUTATION OF DEGREE OF AFFINITY.

(a) A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

(b) An individual's relatives within the third degree by affinity are:

(1) anyone related by consanguinity to the individual's spouse in one of the ways named in Section 573.023(c); and

(2) the spouse of anyone related to the individual by consanguinity in one of the ways named in Section 573.023(c).

### SUBCHAPTER C. NEPOTISM PROHIBITIONS

Sec. 573.041. PROHIBITION APPLICABLE TO PUBLIC OFFICIAL. A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within a degree described by Section 573.002; or

(2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

#### Sec. 573.042. PROHIBITION APPLICABLE TO CANDIDATE.

(a) A candidate may not take an affirmative action to influence the following individuals regarding the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of another individual related to the candidate within a degree described by Section 573.002:

- (1) an employee of the office to which the candidate seeks election; or
- (2) an employee or another officer of the governmental body to which the candidate seeks election, if the office the candidate seeks is one office of a multimember governmental body.

(b) The prohibition imposed by this section does not apply to a candidate's actions taken regarding a bona fide class or category of employees or prospective employees.

Sec. 573.043. PROHIBITION APPLICABLE TO DISTRICT JUDGE. A district judge may not appoint as official stenographer of the judge's district an individual related to the judge or to the district attorney of the district within the third degree.

Sec. 573.044. PROHIBITION APPLICABLE TO TRADING. A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position in which the individual's services are under the public official's direction or control and that is to be compensated directly or indirectly from public funds or fees of office if:

- (1) the individual is related to another public official within a degree described by Section 573.002; and

- (2) the appointment, confirmation of the appointment, or vote for appointment or confirmation of the appointment would be carried out in whole or partial consideration for the other public official appointing, confirming the appointment, or voting for the appointment or confirmation of the appointment of an individual who is related to the first public official within a degree described by Section 573.002.

#### SUBCHAPTER D. EXCEPTIONS

Sec. 573.061. GENERAL EXCEPTIONS. Section 573.041 does not apply to:

- (1) an appointment to the office of a notary public or to the confirmation of that appointment;

- (2) an appointment of a page, secretary, attendant, or other employee by the legislature for attendance on any member of the legislature who, because of physical infirmities, is required to have a personal attendant;

- (3) a confirmation of the appointment of an appointee appointed to a first term on a date when no individual related to the appointee within a degree described by Section 573.002 was a member of or a candidate for the legislature, or confirmation on reappointment of the appointee to any subsequent consecutive term;

- (4) an appointment or employment of a bus driver by a school district if:

- (A) the district is located wholly in a county with a population of less than 35,000; or
- (B) the district is located in more than one county and the county in which the largest part of the district is located has a population of less than 35,000;
- (5) an appointment or employment of a personal attendant by an officer of the state or a political subdivision of the state for attendance on the officer who, because of physical infirmities, is required to have a personal attendant;
- (6) an appointment or employment of a substitute teacher by a school district;
- (7) an appointment or employment of a person by a municipality that has a population of less than 200; or
- (8) an appointment of an election clerk under Section 32.031, Election Code, who is not related in the first degree by consanguinity or affinity to an elected official of the authority that appoints the election judges for that election.

Sec. 573.062. CONTINUOUS EMPLOYMENT.

(a) A nepotism prohibition prescribed by Section 573.041 or by a municipal charter or ordinance does not apply to an appointment, confirmation of an appointment, or vote for an appointment or confirmation of an appointment of an individual to a position if:

- (1) the individual is employed in the position immediately before the election or appointment of the public official to whom the individual is related in a prohibited degree; and
- (2) that prior employment of the individual is continuous for at least:
  - (A) 30 days, if the public official is appointed;
  - (B) six months, if the public official is elected at an election other than the general election for state and county officers; or
  - (C) one year, if the public official is elected at the general election for state and county officers.

(b) If, under Subsection (a), an individual continues in a position, the public official to whom the individual is related in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees.

SUBCHAPTER E. ENFORCEMENT

Sec. 573.081. REMOVAL IN GENERAL.

(a) An individual who violates Subchapter C or Section 573.062(b) shall be removed from the individual's position. The removal must be made in accordance with the removal

provisions in the constitution of this state, if applicable. If a provision of the constitution does not govern the removal, the removal must be by a quo warranto proceeding.

(b) A removal from a position shall be made immediately and summarily by the original appointing authority if a criminal conviction against the appointee for a violation of Subchapter C or Section 573.062(b) becomes final. If the removal is not made within 30 days after the date the conviction becomes final, the individual holding the position may be removed under Subsection (a).

#### Sec. 573.082. REMOVAL BY QUO WARRANTO PROCEEDING.

(a) A quo warranto proceeding under this chapter must be brought by the attorney general in a district court in Travis County or in a district court of the county in which the defendant resides.

(b) The district or county attorney of the county in which a suit is filed under this section shall assist the attorney general at the attorney general's discretion.

Sec. 573.083. WITHHOLDING PAYMENT OF COMPENSATION. A public official may not approve an account or draw or authorize the drawing of a warrant or order to pay the compensation of an ineligible individual if the official knows the individual is ineligible.

#### Sec. 573.084. CRIMINAL PENALTY.

(a) An individual commits an offense involving official misconduct if the individual violates Subchapter C or Section 573.062(b) or 573.083.

(b) An offense under this section is a misdemeanor punishable by a fine not less than \$100 or more than \$1,000.

### III. 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?

#### IV. SELECTED LAW AND RULES

##### A. Bar Rules

Note: See *Federal Deposit Ins. Corp. v. US. Fire Ins. Co.*, 50 F.3d 1304 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 1992); *In re American Airlines, Inc.*, 972 F.2d 605 (5<sup>th</sup> 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.

## V. 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.