

The Ethics Commission and YOU

Ten Points for Consideration



The Rundown

- Start with Why:
Motivations for Adopting an Ethics Commission
- Ordinance and/or Charter Restrictions
- Composition of the Commission
- What is the Commission Enforcing?
- The Ethics Complaint
- Vetting Improper or Frivolous Complaints
- Due Process, Procedures, and Training
- Enforcement Authority
- Conflict Counsel
- If You Build It, They Will Come



Start With Why



Start With Why

- Understanding your client's motivation will help you target the specific need
- Common reasons may include:
 - Political Pressure from Citizens
 - Desire to Enhance Public Trust and Confidence
 - Enforcing Previously Adopted Ethics Policy
 - The “Good Idea Fairy”

Start With Why

- Your client should understand that:
 - **An ethics commission typically is charged with nondiscriminatory enforcement of an adopted ethics policy**
 - Public officials, including members of city council, will be subject to its enforcement
 - **Commission should be quasi-independent**
 - The credibility of the commission and its actions will hinge on level of independence
 - **Commission's ordinance and procedures for enforcement should not be rushed**
 - Poorly worded ordinance and procedures make it difficult for commission to exercise authority and may conflict with existing ordinances
 - **Potential for abuse**
 - Expect frivolous complaints to be filed or attempted

Ordinance and/or Charter Restrictions



Ordinance and/or Charter Restrictions

- **Analyze existing authority contained in ordinances and/or charter**
 - This is particularly important when adopting an ethics commission
 - Avoid creating conflict and/or overlap of authority
- **Consider:**
 - Does ethics policy already exist? If yes, what does it contain? Adjustments needed?
 - Will commission enforce adopted ethics policy only, or have other type of authority (i.e., power to revise ethics policy)?
 - Will commission assess penalties for violations, or act only in advisory capacity?
 - Consider appeal process
 - Who or what will hear the appeal?
 - Will the commission oversee actions of city officials, employees, or both? How does its role affect an adopted personnel manual? How does it affect city administration?

Ordinance and/or Charter Restrictions

- **Identifying Overlap and/or Contradicting Authority**
 - Think through the authority of the commission, from its trigger (i.e., filing of a complaint) through investigation, determination and assessment of penalties (or issuance of a recommendation)
 - Walking through a hypothetical scenario is a great way to identify concerns with authority, but also will highlight any procedural kinks not identified when drafting the ordinance or procedures

Composition of Commission



Composition of Commission

- **Quasi-Independent Body**

- Appointed members
- Insulated from political process they are charged with regulating
- Protected from political pressures involving elected officials or candidates for office

- **Neutral Body**

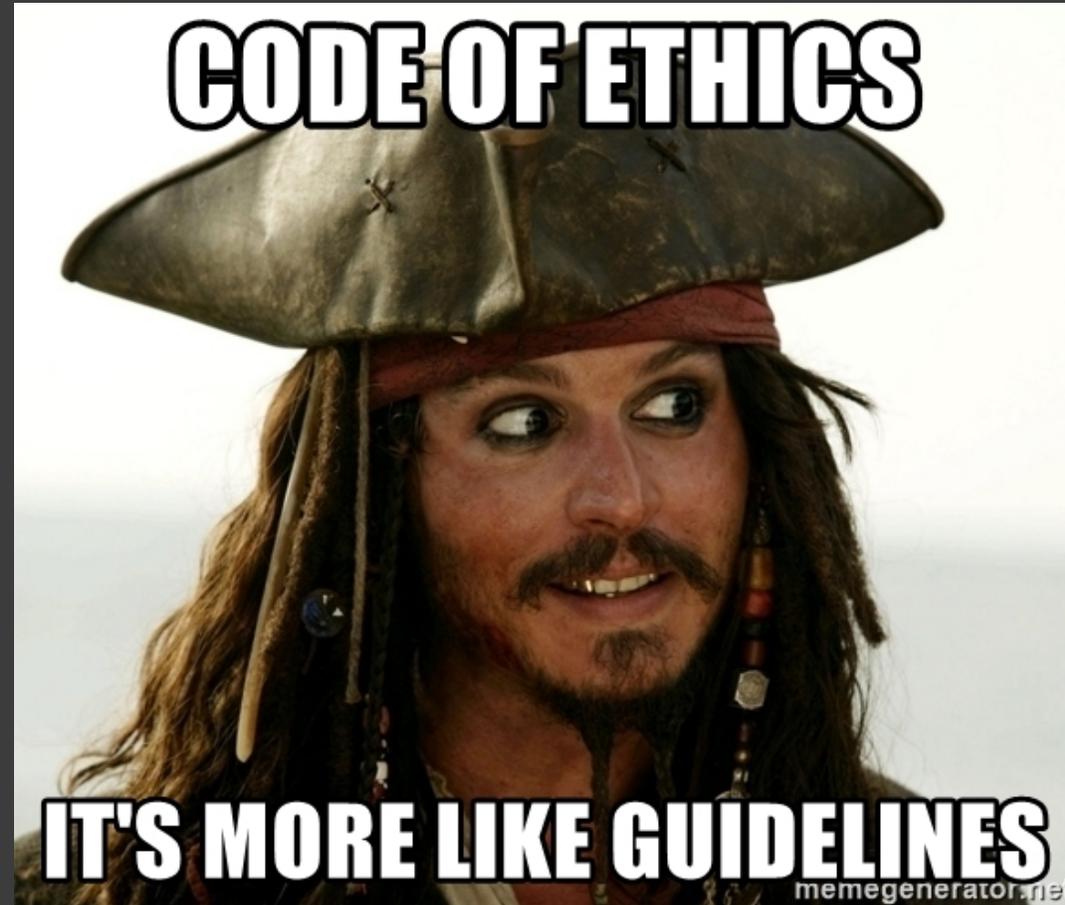
- Neutral in both appearance and practice
- Members should be independent of city officials and/or employees

- **An ethics commission serves the public interest, not the personal interests of any public official, employee, or member of a city's administration.**

Composition of Commission

- **Members should not be amongst the fertile ground in which the complaints they may consider arise.**
 - Implement qualifications for appointment to commission
- **Qualifications can:**
 - Increase the commission's neutrality in both appearance and in practice
 - Enhance commission's independence and insulate members from improper influence
 - Limit potential for conflicts of interest
- **However, qualifications can limit the pool of acceptable volunteers**

What is Commission Enforcing?



What is Commission Enforcing?

- “Ethics” – a nuanced word
- What makes an ethics policy enforceable?
 - Contains clear and unambiguous provisions
 - Sets forth objective standards and principles of conduct
 - Avoid language alluding to subjective moral components
 - Thoroughly explains an official’s or employee’s obligations
 - Does not contain subjective components

What is Commission Enforcing?

- **Before drafting, consider ethics policy first**
 - Review existing ethics policy (if there is one)
 - Does it inform officials and employees of their obligations?
 - Policy should clearly delineate conduct that is and is not compliant
 - Do any provisions need adjustment?
 - Ambiguous terms?
 - Subjective components?
- **If no adopted ethics policy, draft one first and draft it with enforcement in mind**

The Ethics Complaint



The Ethics Complaint

- **Triggers the Commission's authority to act**
- **Should be written and at minimum, include:**
 - Facts upon which it is based
 - Provisions of policy allegedly violated
 - Name the individual accused of violation
 - Name and signature of complainant
- **Other potential requirements:**
 - Complainant's mailing address, telephone number, e-mail address
 - List of witnesses and their basis for knowledge
 - Submission of evidence (i.e., documents, photos, videos, etc.)
 - Sworn complaint before a notary public or other authorized official, under penalty of perjury
 - To be filed within a specific time period from alleged incident (i.e., within six months, etc.)

The Ethics Complaint

- **Save a Headache - Adopt a Form**
- **An ethics complaint form can:**
 - Remove ambiguity
 - Confirm intent to trigger a formal ethics investigation
 - Allows city to specify information required outside of ordinance

Vetting Improper or Frivolous Complaints



Vetting Improper or Frivolous Complaints

- **Not all complaints are valid**
 - Scope of authority granted to ethics commission limited by authority contained in its governing ordinance and/or charter
 - Scope of authority important in assessing whether commission can consider specific allegations within a filed complaint
- **Vetting process should be implemented**
 - Filter out complaints that commission has no authority to consider

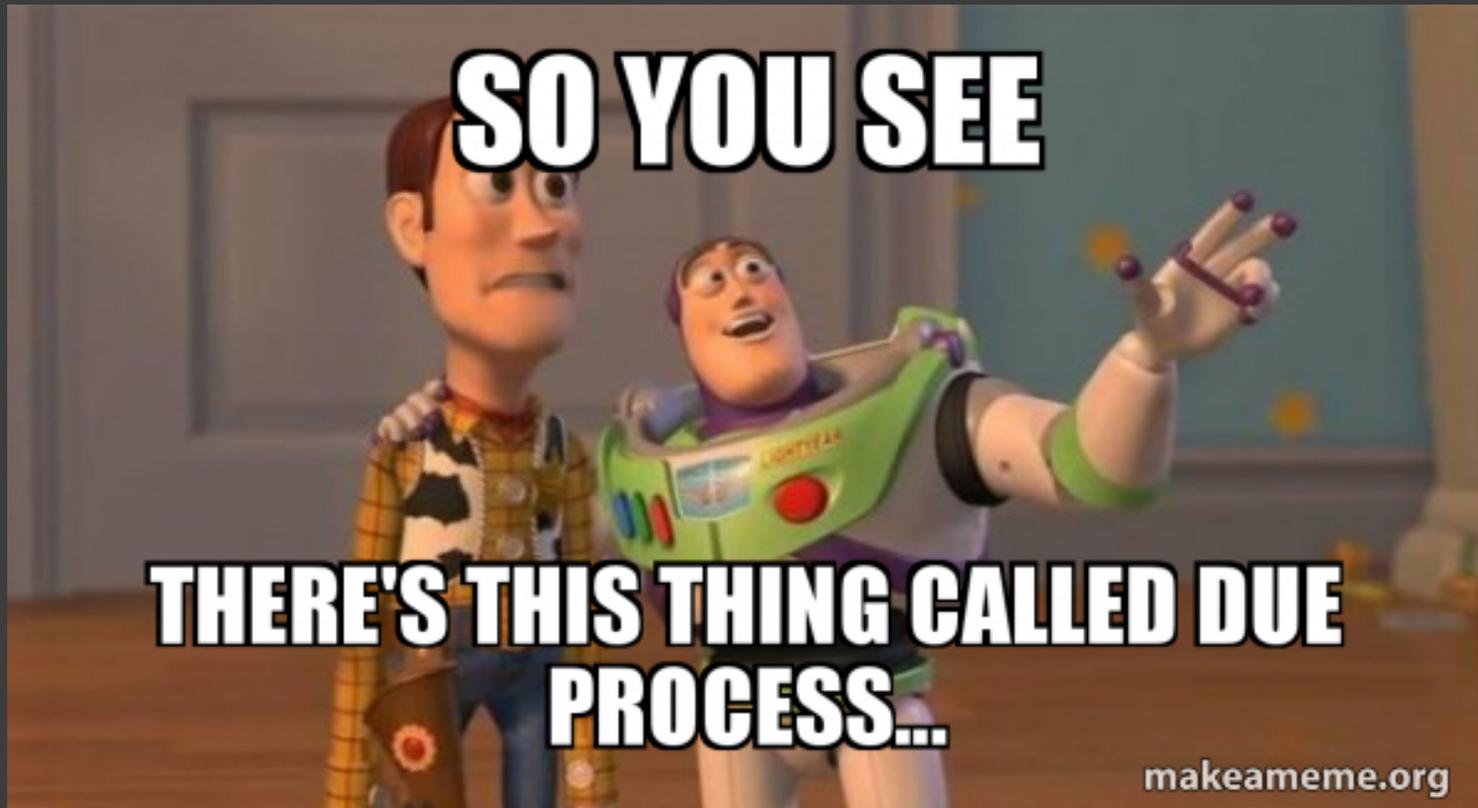
Vetting Improper or Frivolous Complaints

- **Vetting prevents waste of time, money, and resources**
 - Commission should not consider complaints that are frivolous or which it has no authority to investigate
- **Process usually handled by city attorney**
 - Can be delegated to another official
 - Consider complexity of adopted ethics policy before delegating
- **A legitimate ethics complaint alleges violations of an adopted ethics policy**
 - Will not merely identify generally unethical conduct

Vetting Improper or Frivolous Complaints

- **How should complaints be vetted?**
 - Assume the allegations are true: If so, do the allegations violate a provision of an ethics policy?
 - **If yes** → Commission launches formal investigation
 - Hearing
 - Review of evidence
 - Determination
 - **If no** → Complaint should be dismissed
 - Inform complainant in writing and specify reasons for dismissal
- **Adopted Complaint Form?**
 - Incomplete forms or those not compliant may also provide a basis for dismissal, but specify in ordinance

Due Process, Procedures, and Training



Due Process, Procedures, and Training

- **Remember: You Make The Rules**
 - State law does NOT control creation of ethics commission – BUT
 - Commission as a public body is subject to TOMA
 - Procedures and protocols must account for and meet minimum requirements of due process
- **Due Process = Fairness**
 - Guarantees the government cannot take a person's basic rights to "life, liberty, or property, without due process of law"
- **Minimum Requirements**
 - Notice to subject of complaint
 - Opportunity to be heard at a meaningful time and in a meaningful manner

Due Process, Procedures, and Training

- **Discretion of Commission**
 - Authorizing ordinance establishes framework of commission's authority
 - Some provision for commission's discretion helpful
 - Example: Allow commission to adopt its own procedures and protocols (within reason)
- **Allowing the commission to adopt its own procedures and protocols will:**
 - Increase its independence both in practice and appearance
 - Provide a sense of ownership among the members of the commission
 - Allow the commission to "customize" and "tailor" procedures and protocols to the members of the commission
 - Allow for adjustments and amendments to be made without the need for Council involvement
- **Any provision you, or your clients want to "set in stone" should be included in ordinance**

Due Process, Procedures, and Training

- **Training Is Advisable**

- The ethics commission's task is difficult
 - Members should feel confident and prepared in exercising their authority
- Once procedures are adopted, either by ordinance or by resolution, members of the commission should be trained on how to perform their duties
- Practice: From filed complaint, through investigation, to determination
 - Process of exercising authority will be easier when the time comes

Enforcement Authority



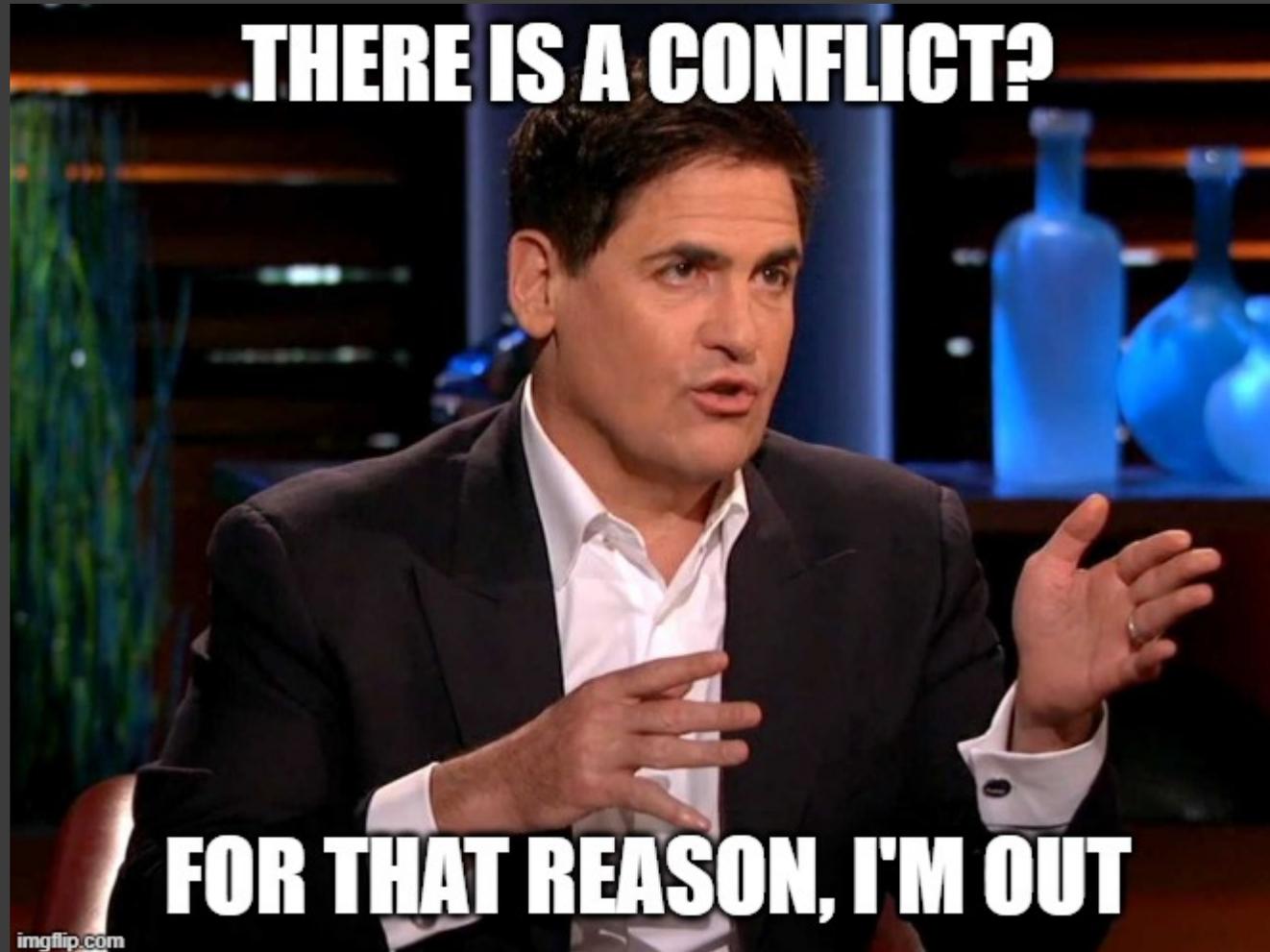
Enforcement Authority

- Independent enforcement of ethics policy requires enforcement mechanisms that may include:
 - Civil fines
 - Letters of admonishment
 - Letters of reprimand
 - Order mandatory ethics training
 - Order compliance with an ethics policy

Enforcement Authority

- **What if someone sues?**
- **Standard of Review**
 - Likely, court would use “Substantial Evidence Rule”
 - Slight variations exist, but:
 - Generally, court looks only at the record made before the administrative body and determines if its findings are reasonably supported by substantial evidence
 - To avoid the default rule, specify one in the commission’s authorizing ordinance
- **Evidence matters**
 - Commission’s determinations must be supported by evidence presented
- **Keep a Record**
 - Keep a record of all evidence presented to commission
- **Determinations in writing**
 - Any determination by a commission should in writing

Conflict Counsel



Conflict Counsel

- **Conflict counsel may be required...**
 - If the city attorney (you) is:
 - Implicated in a complaint,
 - Witness to actions on which a complaint is based, or
 - Identify a personal conflict of interest
- **Manage client expectations:**
 - City Attorney (you) cannot advise commission or City Council on matters related to issue that created the conflict
 - Likelihood of cost increases

If You Build It, They Will Come



If You Build It, They Will Come

- Once an ethics commission is created, it will be used
- Potential for abuse if not set up correctly
- Must be structured for public benefit:
 - Independent in both appearance and practice
 - Avoid abuse by citizens
 - Protect and provide due process rights
 - Hold individuals accountable for unethical actions