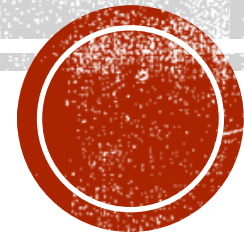


THE ETHICS OF WRITING ETHICS POLICIES

TCAA Summer Conference 2024 – South Padre



ETHICS OF WRITING ETHICS POLICIES

Hands down the most “meta” presentation I have ever done

- Preparation
- Structure
- Enforcement



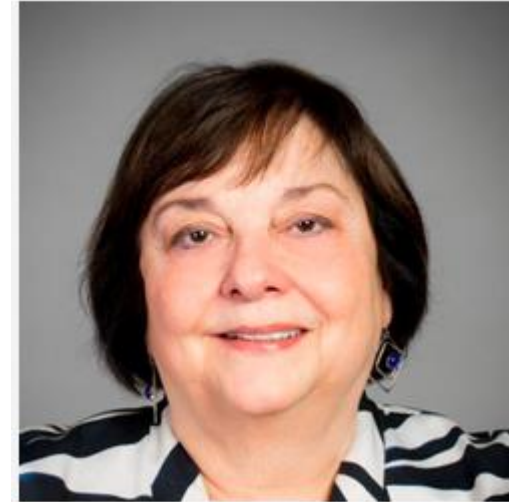
- Side bars with ethics credit where it seemed to make sense



SOUND ADVICE

“These rules represent a floor; the bare minimum standard we expect all lawyers to meet. Highly ethical lawyers should strive to meet a higher standard.”

ish....it's been 19 years and the quote may not be exact



Linda Eads a/k/a my
favorite prof. from
SMU Law School

Former chair of the Texas State Bar’s committee that studied possible changes in the disciplinary rules, rec’d the State Bar’s President’s Award for this work—highest award given by SBT.

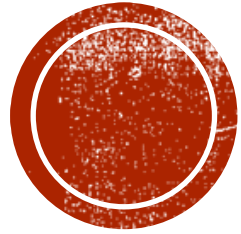




← **Bad**

Good →





PREPARATION

Saddle up buttercup, it's gonna be a bumpy ride.

PREPARING TO WRITE A POLICY



- Client calls you and says “We need an ethics policy.”
- First question:



PREPARING TO WRITE A POLICY

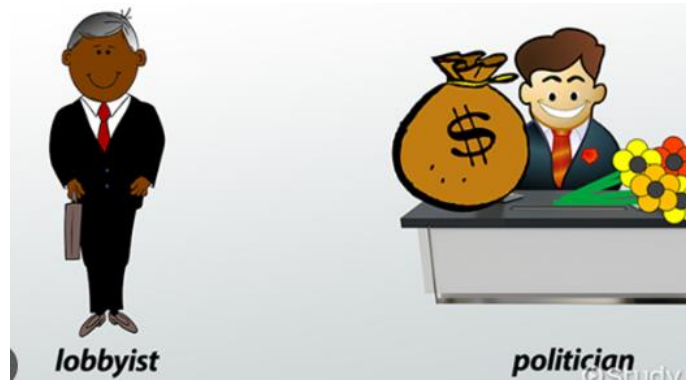
Questions your client will need to answer

- Who will it apply to?
- What issues are you addressing?
- Who are the stakeholders?



WHO DOES IT APPLY TO?

- Council
- City staff
- Council appointees
- Lobbyists
- Vendors/Contractors



EXAMPLE PROVISIONS

Sec. 2.421. – Policy and purposes

(a) General policy statement. It is the policy of the city that all city officials and employees shall conduct themselves both inside and outside the city's service so as to give no occasion for distrust of their integrity, impartiality or devotion to the best interest of the city and the public trust which the city holds.

This policy will address mayor and council relations, council and staff relations, and council and media relations. By adopting these guidelines for elected officials, we acknowledge our responsibility to each other, to our professional staff, and to the public.



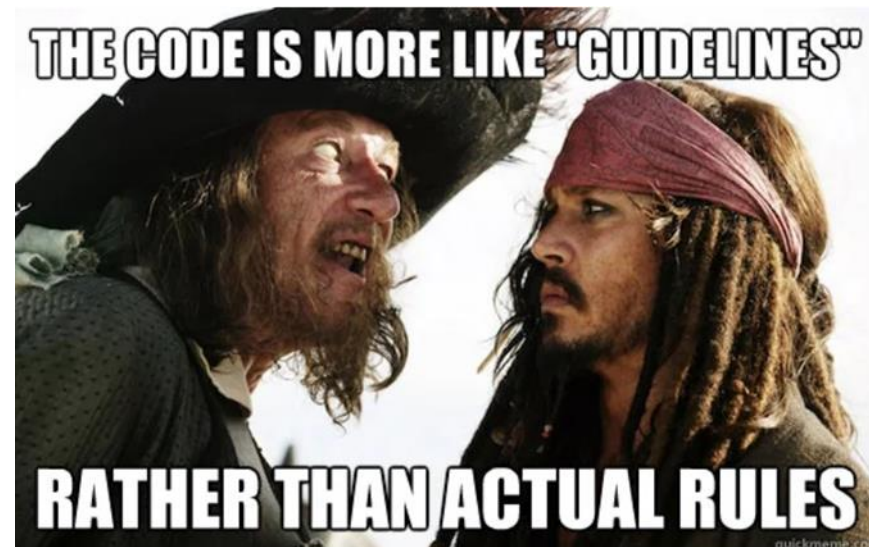
PURPOSE OF AN ETHICS POLICY

- Control, i.e. enforceable
- Political Ammunition
- Just to have one



EXAMPLE PURPOSE OF AN ETHICS POLICY

(c) *Purpose and effect.* The statements of purpose and principles that introduce this policy are for guidance only. They are not intended to create binding obligations, to serve as a basis for disciplinary action, or to create any private cause of action.



THE STAKEHOLDERS

Who is pushing for the policy?

Council members?

Professional staff: city attorney, city secretary, and city manager?

The general public?



WHERE TO START

- Use existing policy, if there is one
- Look to charter provisions
- Look at state law
- Search for samples



“Good writers borrow from other writers. Great writers steal from them outright.” Sam Seaborn



LIMITATIONS ON ETHICS POLICIES

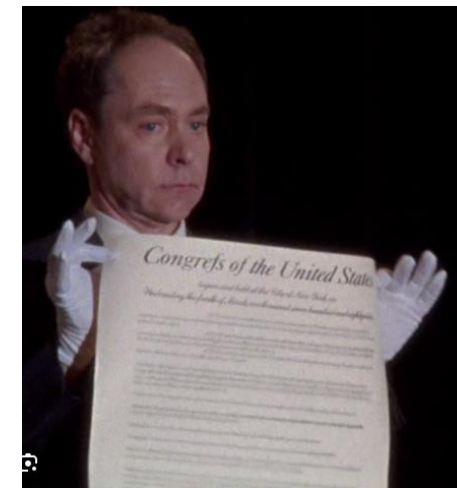
Not a magic bullet

Governing body can impose rules on itself, appointees, staff, etc., but consequences will differ.

Elected officials can only be removed as provided by charter (recall) or state law (LGC Ch. 21), and have inherent authority that cannot be completely stripped

Employees are protected by employment laws, whistleblower statute, etc.

First Amendment Considerations



LAWYER AS ELECTED OFFICIAL LOYALTY

Rule 1.10 Successive Government and Private Employment

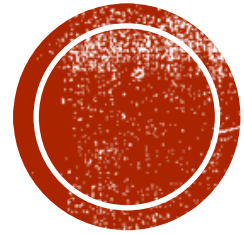
- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

Cmt. 1. This Rule prevents a lawyer from exploiting public office for the advantage of a private client.



TFW you can tell a super annoying prospective client to pound sand because of conflict of interest rules

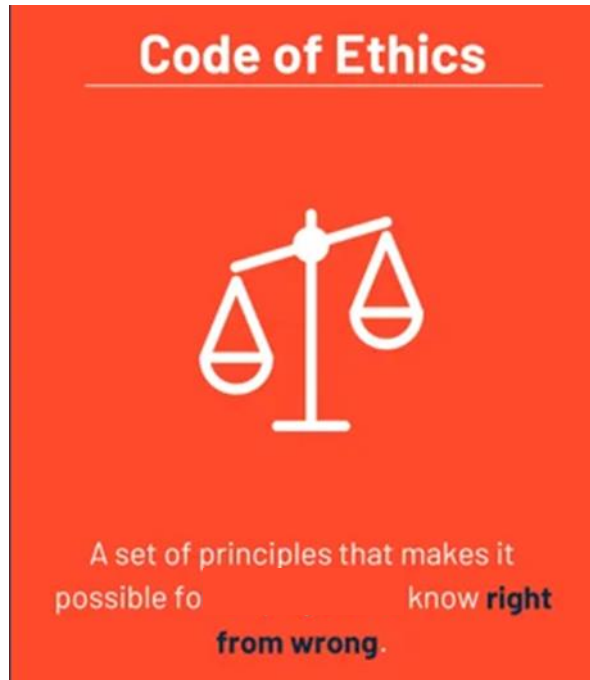




STRUCTURE OF A POLICY

Are we having fun yet?

WHAT TO INCLUDE IN ETHICS POLICY



Ethics in City Gov't

- Fairness
- Loyalty
- Transparency
- Objectivity



eth·ics

/ˈeθɪks/

noun

1. moral principles that govern a person's behavior or the conducting of an activity.
"medical ethics also enter into the question"

Similar: moral code, morals, morality, moral stand, moral principles



WHAT TO INCLUDE CONT'D

Code of Conduct



A set of rules that guides
behavior within a business.

Conduct of Public Officials

- Confidentiality
- Follow Robert's Rules
- Don't abuse City resources
- Decorum



WHAT TO INCLUDE CONT'D

Restatement of State laws:

- Nepotism
- Bribery
- Conflicts of Interest



OMA

PIA



Restatement of Charter provisions –

- Purchasing
- Appointment
- Decorum



WHAT TO INCLUDE CONT'D



Expansion of State Law

Legal Standard

- Local official, relative 1st degree
- Substantial interest in property
- Abstain from discussion and voting
- No gift over \$50

Higher standard

- Relative 2nd degree, business partner
- Personal interest (e.g. grandma's house)
- Leave dais; Body language
- No gift over \$10 if...



WHAT TO INCLUDE CONT'D

Expansion of the law – example

A. General Rule. An officer or employee shall not solicit, accept, or agree to accept for themselves or a relative, the following:

- (3) Any gift from any lobbyist registered under chapter 2.94 of this code, of which the known or readily apparent value for each separate gift exceeds ten dollars (\$10) in value.



WHAT TO INCLUDE CONT'D

Expansion of the law – example

Sec. 2-219 – Additional Standards

(c) No member of the city council, the planning and zoning commission, or board of adjustment shall participate in, or vote on, any land use matter (e.g. zoning, variances, plats, permits) in which such officer has a substantial interest in any real property within two hundred (200) feet of the real property, the subject of the land use matter.



LAWYER AS ELECTED OFFICIAL CONFIDENTIALITY

Rule 1.08 (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

This is why a council member who is an attorney should not represent a third party on a matter before the city council or other boards/commissions.



I have good news, bad news, and worse news. Good news is you got your permit. Bad news is your check cleared. Worse news, is I was lying about the permit.



CONFLICTING INTERESTS

Elected officials may have ethical obligations based on their profession.

Banker – fiduciary duty as trustee to beneficiaries

Realtor – duty to disclose information to buyers/sellers

Medical provider, clergy – duty of confidentiality

And.....



Lovely, I know.
Quick heads up,
someone was
murdered here
like yesterday.



LAWYER AS ELECTED OFFICIAL

Rule 1.06 Conflict of interest

Cmt. 16. A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors.

Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.



According to this, I'm free to serve on P&Z starting the 5th of never.



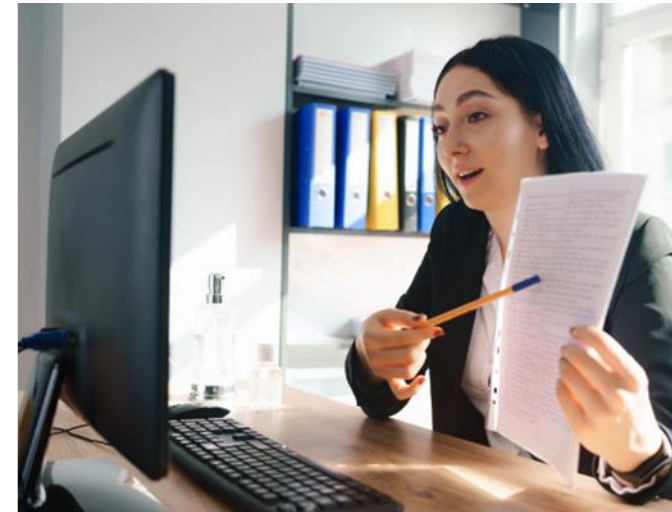
LAWYER AS ELECTED OFFICIAL

Rule 1.05 Confidential information

A lawyer shall not knowingly use privileged information of a client for the advantage of the lawyer or of a third person unless the client consents after consultation.

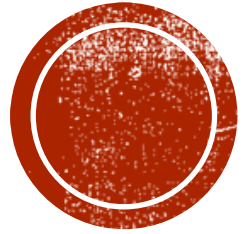
Conflicting Ethics Rule: Duty of loyalty

Example: P&Z commissioner who has pertinent information relating to a client's planned use



As you can see here, everything you want to do violates zoning rules I helped write.





ENFORCEMENT

This is where the “fun” begins

PROCESS FOR ENFORCEMENT

Complaints

Who can file
Where to file
Requirements



Investigation

Who conducts
Report to whom

Consequences



What kinds
Who decides
Appeal



COMPLAINTS

All complaints or allegations of a violation of this code of ethics against an officer shall be made in writing on a form provided by the city, sworn to before a notary public, and filed of record with the city secretary.

Format and substance requirements

Who receives

Limitations – 3 months, 1 year, etc.

Complaints must be filed with within three (3) months of the alleged violation. Complaints against [officials] that are running for public office may not be filed during the election cycle for any City election, being the first day of filing for candidacy and the day the results of the election, or run-off as applicable, are canvassed.



CITY ATTORNEY AS COMPLAINANT

Preamble, Scope

13. The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory and common law, may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.

They also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so.

Rule 1.05

(c) A lawyer may reveal confidential information:

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.



CITY ATTORNEY AS COMPLAINANT

Rule 1.12. Organization as a Client

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.



CITY ATTORNEY AS COMPLAINANT

These are just for soundproofing now

Rule 1.12. Organization as a Client cont'd

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules (e.g. child abuse), a lawyer shall first attempt to resolve a violation by taking measures within the organization.

In determining the internal procedures, actions or measures that are reasonably necessary a lawyer shall consider:

- the seriousness of the violation and its consequences,
- the scope and nature of the lawyer's representation,
- the responsibility in the organization and the apparent motivation of the person involved,
- the policies of the organization concerning such matters, and
- any other relevant considerations



CITY ATTORNEY AS COMPLAINANT

Rule 1.12. Organization as a Client cont'd

Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.



WHO HANDLES THE INVESTIGATION

- Ethics Board
- Subcommittee
- City Manager
- City Attorney



CITY ATTORNEY INVESTIGATION

Rule 1.12. Organization as a Client cont'd

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Upjohn warning

Garrity Warning



CITY ATTORNEY INVESTIGATION

Rule 1.12. Organization as a Client - Cmt 4

[W]hen the organization's interest [are] adverse to those of...its constituents...lawyers should advise any constituent...of the conflict ... that the lawyer cannot represent [them], and [they] may wish to obtain independent representation.

[Discussions] may not be privileged insofar as that individual is concerned.



CITY ATTORNEY INVESTIGATION

Pre Tip: If a city council member or any city official with whom you work regularly (e.g. city manager/secretary) is accused...



Appoint outside counsel



CONSEQUENCES

Removal from appointed positions

Censure/formal reprimand

Verbal reprimand

Fines

LGC 54.001 – gov't body may enforce ea. rule, ord, or regulations and may punish same

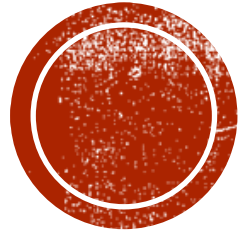


Different words, different meanings

Censure: to express severe disapproval of someone in a formal statement

Censor: to suppress or delete objectionable material





THE END

Thank you for your attention, it's time to get ready for the reception