

# **BEYOND THE SMELL TEST:**

## **Ethics & Open Government**

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## AUTHORS' BIOGRAPHIES

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*"Light is the only thing that can sweeten our political atmosphere  
and open to view the innermost chambers of government."  
-Woodrow Wilson<sup>1</sup>*

## INTRODUCTION

Every year there are multiple cases and attorney general opinions focusing on the ethical conduct of local government officials.

Ethics and ethical conduct at the local government level are difficult issues.

There is no constitutional manual, treatise, or national newsletter devoted solely to the topic, nor is there a website where recent cases and opinions on the topic are summarized and discussed.<sup>2</sup> This fact, combined with the reality that many ethical issues arise from changing community standards, makes it necessary for local government officials and their attorneys to be vigilant in seeking out and providing training and updates in an effort to stay informed about ethics in local government.

As elected officials and employees working for and with government entities, you must also remain aware of how the principles of Open Government are creating interesting challenges for the public sector. Of particular interest is the ever-swaying balance between the democratic imperative that government business be conducted in the open, and the often-countervailing need for public decision makers to avail themselves of the benefits of legal representation.

### **"If we're being elected to look good, I'd rather not be there."**

San Antonio City Councilman Enrique "Kike" Martin, 38, a former first-term councilman who was indicted on bribery charges in state and federal court in October 2002. According to an article in the San Antonio Express News, on Saturday, February 1, 2003, Martin stated that he is concerned by an emerging attitude on the council that he said is more concerned about image and appearances than making the right decisions.

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1 WOODROW WILSON, Committee or Cabinet Government? 3 OVERLAND MONTHLY 17-33 (Jan. 1884), reprinted in THE PAPERS OF WOODROW WILSON, 614, 629 (Arthur S. Link ed. 1967), as cited in Christopher W. Deering, Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After (Dunn v. Alabama State University Board of Directors), 28 CUMB. L. REV. 361 (1997-1998).

2 See Patricia E. Salkin, Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers, 14 BYU J. Pub. L. 209, 210-11 (2000).

*Judge not according to the appearance,  
but judge righteous judgment.  
- John 1:24*

## CONFLICTS OF INTEREST

Many municipal ethics issues revolve around conflicts of interest problems. Often, these issues are born out of a conflict of interest relating to personal financial gain, employment or special consideration for family members. Texas has a statute that governs conflicts of interest as they pertain to local public officials.<sup>3</sup> The general purpose of the statute is to prevent public officials (e.g., city council members, members of a planning and zoning commission)<sup>4</sup> from using their positions for hidden personal benefit and for the benefit of their relatives.

The Texas Local Government Code prohibits a local public official from knowingly participating in a vote or decision on a matter involving a business entity in which the official has a **substantial interest** if it is reasonably foreseeable that an action on the matter would confer an **economic benefit** on the business entity.<sup>5</sup> If there will be a special economic effect, the statute requires the official to file an **affidavit** stating the nature and extent of the interest before a vote or decision on any matter involving the matter.<sup>6</sup> The affidavit must be filed with the official record keeper of the governmental entity (e.g., city secretary).<sup>7</sup> In addition to filing an affidavit, the public official is required to **abstain** from further participation in the matter.<sup>8</sup> Where a council member is disqualified from voting, the number of members is reduced prior to determining whether any required majority or super-majority is achieved.<sup>9</sup> If the official fails to abstain, any action is voidable only if the measure would not have passed without the vote of the person who had a conflict.<sup>10</sup> A person has a substantial interest if, at the time when the governmental body takes up the matter, the person:

- (1) owns 10% or more of the voting shares of the business;
- (2) owns either 10 % or more, or \$15,000 or more of the fair market value of the business;
- (3) receives more than 10 % of the person's gross income from the business; or

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3 See Tex. Loc. Gov't Code § 171.001. This statute preempts the common law of conflict of interests and establishes the standard for determining the existence of a conflict of interest for local public officials in Texas. The provisions of chapter 171 are cumulative of municipal charter and ordinance provisions.

4 See Tex. Loc. Gov't Code § 171.001 (defining "public official"); Op. Tex. Att'y Gen. DM-309 (1994) (stating that members of a planning and zoning commission are local public officials). The conflicts of interest statute does not apply to 4B Economic Development Corporations. See Op. Tex. Att'y Gen. No. JC-338 (2001).

5 See John Mixon et al., Texas Municipal Zoning Law § 11.907 (3d ed. 1999).

6 See Tex. Loc. Gov't Code § 171.004(a).

7 See id. § 171.004(b).

8 See id. § 171.004(a).

9 See *Hannan v. City of Coppell*, 583 S.W.2d 817, 818 (Tex. Civ. App.-Dallas 1979, writ ref'd n.r.e.).

10 Tex. Loc. Gov't Code. § 171.006.

(4) has an equitable interest in real property with a fair market value of \$2,500 or more.<sup>11</sup>

For example, in a situation where a city council member owned property in an area considered for tax abatement, the council member's property could not receive the abatement and the member was not able to vote on the tax abatement plan where the property still received a special economic benefit from the plan.<sup>12</sup>

A public official is also considered to have a substantial interest in a matter if a person related to the official in the first degree by consanguinity (blood) or affinity (marriage), has a substantial interest in the business or real property.<sup>13</sup> Thus, if the daughter of a local public official earns a small income, yet it is substantial to her as it exceeds 10% of her gross income, then her father, as a local public official, must file an affidavit before any action can be taken that will have a special effect on the business that employs the daughter.<sup>14</sup>

There are special procedural requirements for budgetary matters when a conflict of interest exists, beyond the filing of the affidavit and abstention. Members of the governing body must vote separately on any item involving a budget item specifically dedicated to a contract with a business entity in which the official has a substantial interest.<sup>15</sup> However, if a budget item does not include the specific day-to-day expenditures that involve the conflict, then no conflict exists unless the governmental body later approves the individual invoices.<sup>16</sup>

Compliance with the conflict of interest provisions is important as a violation of chapter 171 is a criminal act punishable as a Class A misdemeanor.<sup>17</sup> The Texas Supreme Court has said that the rule prohibiting public officials from conflicted transactions should be scrupulously enforced.<sup>18</sup>

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11 See Tex. Loc. Gov't Code §171.002.

12 See Op. Tex. Att'y Gen. No. JC-0155 (1999).

13 See Tex. Loc. Gov't Code § 171.002.

14 See Op. Tex. Att'y Gen. No. JC-0063 (1999).

15 See Tex. Loc. Gov't Code Ann. § 171.005.

16 See Tex. Att'y Gen. LO-98-112 (1998).

17 See Tex. Loc. Gov't Code Ann. § 171.003(b).

18 See *City of Edinburgh v. Ellis*, 59 S.W.2d 99, 100 (1933).

### **Plats & Subdivision Regulation**

A separate statutory provision exists for conflicts of interest regarding plats. If a member of the municipal authority responsible for approving plats has a substantial interest in a subdivided tract, the member must file an affidavit stating the nature and extent of the interest and abstain from further participation in the matter. The affidavit must be filed with the municipal secretary or clerk before a vote or decision regarding the approval of a plat for the tract.<sup>19</sup>

Under this section, "subdivided tract" means a tract of land, as a whole, that is subdivided. The term does not mean an individual lot in a subdivided tract of land. 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 (f.m.v.) of \$2,500 or more;
- (2) acts as a developer of the tract;
- (3) owns 10 % or more of the voting stock or shares of or owns either 10 % or more or \$5,000 or more of the f.m.v. of a business entity that:
  - (A) has an equitable or legal ownership interest in the tract with a f.m.v. 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 that exceed 10 % of the person's gross income for the previous year.

A person is considered to have a substantial interest in a subdivided tract if the person is related in the first degree by consanguinity or affinity to another person who has a substantial interest in the tract. An offense under this subsection is a Class A misdemeanor. The finding by a court of a violation of this section does not render *voidable* an action of the municipal authority responsible for approving plats unless the measure would not have passed the municipal authority without the vote of the member who violated this section.<sup>20</sup>

## **GIFTS, TRAVEL, MEALS & LODGING**

Public officials, their counsel, and those seeking to influence public business should be aware of the statutes governing the giving and receiving of gifts, meals, travels, and lodging.

Title 8 of the Texas Penal Code sets forth offenses against public administration. The Penal Code creates four separate offenses that prohibit an individual from attempting to

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<sup>19</sup> Tex. Loc. Gov't Code § 212.017(d).

<sup>20</sup> Tex. Loc. Gov't Code § 212.017.

unlawfully influence a public official: Bribery<sup>21</sup>; Coercion of Public Servant or Voter<sup>22</sup>; Improper Influence<sup>23</sup>; and Offering Gift to Public Servant<sup>24</sup>. The law also criminalizes certain behavior by public officials, to wit: Acceptance of Honorarium<sup>25</sup> and Gift to Public Servant by Person Subject to His Jurisdiction.<sup>26</sup>

However, most officials and their counsel find themselves asking what they are *allowed* to receive. The answer to this question is found, in part, in Penal Code 36.10, which lists the exemptions to the established prohibitions. A public servant may accept the following:

- A fee prescribed by law to which the public servant is entitled or for which he give legitimate consideration in a capacity other than as a public servant;
- A gift conferred on account of a pre-existing relationship;
- A benefit required to reported on the official's Personal Financial Statement or on a campaign finance report;
- A political contribution;
- A gift, award or memento required to be reported by a registered lobbyist;
- **An item with a value of less than \$50 (but not cash);**
- **Food, lodging, transportation, or entertainment lawfully reported by either the donor or donee.**

## ETHICS ORDINANCES

Municipalities may choose to pass ordinances regulating the conduct of city officers, and those who lobby city hall. These restrictions may mirror or go beyond the requirements of state law. These regulations may take the form of charter provisions, ordinances, resolutions, or policies. In enacting ethics ordinances, remember that city officials retain their constitutional rights, such as the right to free speech,<sup>27</sup> and the right to privacy.<sup>28</sup> However, courts have recognized the authority of cities to impose certain restrictions on these freedoms for the purpose of effectuating good government.

As has often been noted, written codes are helpful, but they are not enough if the goal is to maintain the public trust. Enacting ethics codes is simply the first step in a long process that moves government officials and the organization from mere compliance

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<sup>21</sup> Tex. Penal Code 36.02

<sup>22</sup> Tex. Penal Code 36.03

<sup>23</sup> Tex. Penal Code 36.04

<sup>24</sup> Tex. Penal Code 36.09

<sup>25</sup> Tex. Penal Code 36.07

<sup>26</sup> Tex. Penal Code 36.08

<sup>27</sup> *Price v. City of San Marcos*, 744 S.W.2d 349 (Tex. App.--Austin 1988, writ denied).

<sup>28</sup> *City of San Antonio v. Rankin*, 905 S.W.2d 427 (Tex. App.--San Antonio 1995, no writ) (ethics ordinance required annual financial disclosure statements).

toward a commitment to integrity. Only then can we ensure that good intentions are transformed into performance that promotes trust.<sup>29</sup> Below is a sample of various ethical provisions that have been adopted by Texas cities.<sup>30</sup> These excerpts have been compiled from the most recent versions of the materials kept on file by the Texas Municipal League and by visiting selected city websites.

Local lobbying or ethics ordinances cover a wide range of topics, including: political activity by city employees; who is required to register as a lobbyist; registration requirements and fees; which officials or staff are subject to lobby restrictions; conflicts of interest for board members and staff; financial and ethical disclosures; nepotism; the acceptance of gifts or honoraria; enforcement by local ethics review boards; and penalties for violating the ordinance.

## OPEN RECORDS

Our states' Open Government laws have ethical implications for government officials and attorneys who interact with government agencies. Like Texas, a great majority of states have adopted statutes providing for public access to government records. While each state's statutes may be uniquely drafted, there is a degree of commonality stemming from the fact that most statutes were drafted using the federal Freedom of Information Act as model.<sup>31</sup>

### E-mail

Electronic mail regarding public business can be "public information." The term "public information" is very broad and specifically includes a magnetic, optical, or a solid-state device that can store an electronic signal or be held in computer memory.<sup>32</sup> The Office of the Attorney General ("AG") has specifically stated that Texas recognizes that work-related e-mail is information that may be subject to public disclosure.<sup>33</sup> Even e-mail transmitted from *home* through a *personal computer* via a private internet account might be still be considered "public."<sup>34</sup>

Municipal leaders and staff members should be particularly careful with e-mail. For lawyers who sit on city councils or represent municipal organizations, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued the following opinion in 1999:

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29 Randy G. Pennington, FROM ETHICS TO INTEGRITY: How to Make Doing What's Right a Way of Life, Management Exchange, (TCMA, December 1995).

30 For compositional purposes, the author has paraphrased many of the ordinances.

31 Roger A. Nowadazky, A Comparative Analysis of Public Records Statutes, 28 URB. LAW. 65, 65-66 (1996).

32 Tex. Gov't Code § 552.002.

33 Tex. Att'y Gen. ORD-654 (1997).

34 Tex. Att'y Gen. OR2001-1790.

A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct...because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.<sup>35</sup>

Nonetheless, attorneys still must exercise reasonable care when transmitting communications to clients. Those who fail to evaluate the following three factors set out by the ABA Committee on Ethics may encounter challenges to assertions of privilege and possible malpractice liability for the ill-advised use of e-mail

- (1) Sensitivity of the communication;
- (2) Costs of disclosure; and
- (3) Security of the medium of communication.

*"The right of freely examining public characters and measures, and of free communication among the people thereon... is the only effectual guardian of every other right." - U.S. Supreme Court<sup>36</sup>*

## OPEN MEETINGS

City officials need to understand the Texas Open Meetings Act, which has ethical implications. Discussed below are some current topics.

### **Lobbyists and Agents**

A person who acts independently to urge individual members of a governing body to place an item in the board's agenda or vote a certain way on an item on the agenda does not necessarily commit an offense, even if he or she informs particular board members of other members' views on the matter. Although a person who is not a member of the governing body may be charged with violation of section 551.143 or 551.144 of the Open Meetings Act, under sections 7.01 and 7.02 of the Penal Code, that person does not commit an offense under these provisions unless, acting with intent, he or she aids or assists a member or members who knowingly act to violate the OMA.<sup>37</sup>

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35 ABA Comm. On Ethics and Prof'l Responsibility; Formal Op. 99-413 (1999), cited in Mitchel L. Winick, Brian Burris, and Y. Danae Bush, *Playing I Spy With Client Confidences: Confidentiality, Privilege, and Electronic Communications*, TEX. TECH. L. REV. 1225, 1249 (2000).

36 *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) quoting 4 ELLIOT'S DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554 (1888), as cited in 28 CUMB. L. REV. 361 (1997-1998).

37 *Id.*

While the OMA may permit attorneys to lobby individual city council members, beware of the Disciplinary Rules of Professional Conduct in regards to communications with government entities that are represented by legal counsel, which is discussed later.

### **Consultation with Attorneys**

Governing bodies may confer with their attorney behind closed doors for the purposes of receiving advice about: (a) pending or contemplated litigation; (b) a settlement offer; (c) administrative hearings; or (d) matters in which the duty of the attorney to the governmental body under the Texas Rules of Professional Conduct of the State Bar of Texas clearly conflicts with the Open Meetings Act (*i.e.*, when necessary to protect the attorney-client privilege).<sup>38</sup> This exception applies strictly to *legal matters*, not to other issues such as financial considerations or the policy merits of a particular project.<sup>39</sup>

Remember that this consultation is considered a “meeting” that must be properly posted and otherwise comply with the requirements of the OMA.<sup>40</sup> Although the government is not required to disclose its litigation strategy, it cannot totally conceal the subject matter of a major lawsuit that is pending. Accordingly, the OMA requires a governing body to give notice of the subject of its meetings, including a consultation with its attorney in executive session.<sup>41</sup>

### **Practical Pointers**

Some steps that the municipal officials should consider in order to make sure that communications with the client are not compromised include:

- (1) Evaluate the purpose and subject matter of meetings (including informal gatherings) and determine who should attend, and in some cases, who should be excluded.
- (2) Include only those individuals who are essential to the decision-making and who have a commonality of interests.
- (3) Gather as many facts as early as possible in order to evaluate any legal or factual matters that will be discussed.
- (4) Define your role. Are you a problem-solver, informal mediator, legal advisor, or merely a member of an executive department?
- (5) Identify your client and be cognizant of the difference between a client and a potential witness.
- (6) Identify the affected parties and their motivations.
- (7) Carefully consider who you are talking to, particularly if being asked to offer preliminary assessments as to whether any law has been violated or anything improper or unethical has occurred.

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38 Tex. Gov’t Code § 551.071.

39 Op. Tex. Att’y Gen. No. JC-233 (2000).

40 Op. Tex. Att’y Gen. No. JC-57 (1999).

41 *Cox Enterprises, Inc. v. Board of Trustees of Austin I.S.D.*, 706 S.W.2d 956, 959 (Tex. 1986) (school board was required to post adequate notice that it would discuss “a major desegregation lawsuit”).

(8) Do not say anything you do not want repeated.<sup>42</sup>

## PROFESSIONAL ETHICS

The legal profession is one of the few remaining self-regulated professions in Texas. The State Bar of Texas polices its members through the Office of the Chief Disciplinary Counsel and the Commission on Lawyer Discipline.<sup>43</sup> The disciplinary system is governed by the Texas Disciplinary Rules of Professional Conduct (ethics rules) and the Texas Rules of Disciplinary Procedure (procedural rules).<sup>44</sup> The ethics rules define the proper conduct for purposes of professional discipline, while the procedural rules provide the mechanism for enforcement.<sup>45</sup>

Significant changes to the rules in 2004 were made pursuant to the legislature's Sunset Review of the State Bar in 2002. Recommendations of the Sunset Commission led to revisions of the State Bar Act and the adoption of the current rules by the Supreme Court of Texas.<sup>46</sup>

During the past year, the State Bar handed down a total of 344 disciplinary sanctions, including 38 disbarments. The vast majority of these cases were handled by local grievance committees.<sup>47</sup> The most common allegations found in grievances involved charges of neglect and failure to communicate. Most disbarments stem from a misappropriation or conversion of client funds.

### Communicating with a Represented Party

Mayors, councilmembers, managers, and other city employees should understand that they are not necessarily required to communicate directly with attorneys representing private parties. If the city has a City Attorney, private lawyers are ethically obligated to go through the City Attorney's Office, and cannot lobby directly. Attorneys are urged to observe established agency protocol when contacting elected officials and staff while representing parties before municipal and county agencies. Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides, in part:

- (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate the subject of the representation with a person, organization or *entity of government* the lawyer knows to be represented by

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<sup>42</sup> 48 DRAKE L. REV. 655.

<sup>43</sup> Tex. Gov't Code, Sec. 81.071

<sup>44</sup> State Bar of Texas, Commission for Lawyer Discipline Annual Report, June, 1 2005 – May 31, 2006

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

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.<sup>48</sup>

Thus, before attorneys representing private parties go lobbying the city council door to door, it would be wise for them to contact the attorney for the government entity in order to obtain permission to deal directly with agency staff or elected officials.

### **Organization as Client**

Rule 1.12(a) of the Texas Disciplinary Rules of Conduct states that a lawyer retained by an organization, including a governmental entity, represents the entity, and requires the lawyer to act in the organization's best interest without unreasonably disrupting the organization or revealing information to outside persons. A lawyer must take reasonable remedial actions whenever the lawyer learns that: (1) a person within the organization has violated or intends to violate the law; (2) the violation is like to substantially injure the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.<sup>49</sup> However, unless legally required to disclose such a violation, a lawyer should first try to resolve a violation internally, usually by asking for reconsideration of the matter, seeking a separate legal opinion, or referring the matter to a higher authority within the organization.<sup>50</sup>

It should also be noted that when a member of the organizational client individually seeks counsel in that person's official capacity, those communications are governed by the applicable confidentiality rules.<sup>51</sup> If a member's interests become adverse to the organization, the lawyer should take care to explain that he cannot represent the individual's interests.<sup>52</sup> If a lawyer represents both the organization and one of its members, he should ensure that such arrangement does not violate the State Bar rules regulating conflicts of interest.<sup>53</sup>

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<sup>48</sup> See Tex. Comm. on Prof'l Ethics, Op. 474, V. 55 TEX. B.J. 882 (1992).

<sup>49</sup> Tex.Disc.R.Conduct 1.12(b)

<sup>50</sup> Tex.Disc.R.Conduct 1.12(c)

<sup>51</sup> Tex.Disc.R.Conduct 1.12, Comment 3

<sup>52</sup> Tex.Disc.R.Conduct 1.12, Comment 4

<sup>53</sup> Tex.Disc.R.Conduct 1.12, Comment 5

## **Representing the Entity, Not Individual Officials**

Ethical conflicts can arise when the municipal lawyer is confronted with criminal charges or other actions that have been brought against individual members of the governing body. It is generally recommended that municipal lawyers warn the city council members at the outset that they attorney represents the government entity, not the individual officials.<sup>54</sup>

## **Conflicting Interests Facing the Public Attorney**

### ***Impact on Deliberations***

Attorneys who serve on public boards and commissions need to exercise caution when considering potential conflicts that may arise between the actions undertaken in their public capacity and the attorney's obligations to current and former clients. This warning should be of particular interest to attorneys/public officials who are associated with law firms.

In a recent case, a development company brought an action for malpractice and breach of fiduciary duty against an attorney and the attorney's law firm.<sup>55</sup> The basis of the suit was that the attorney, who was also a member of a city council, and the firm breached their duty of loyalty to the client when neither the attorney nor the law firm disclosed that the attorney, as a member of the city council, would or could take positions that would affect the real estate transactions in which the firm represented the client.

Beginning in 1992, the firm represented the developer in its formation and business activities of acquiring, developing, and selling 239 acres located in a master-planned community located in the Dallas-Fort Worth metroplex. At a special council meeting in 1994, the attorney on the city council, who was also a partner in the law firm, made the motion to adopt a moratorium on the building of apartments. The council passed the ordinance unanimously. On or about that same date, because of the city's moratorium, the purchasers rejected a contract with the developer for the sale of an eleven-acre apartment tract.

The trial court granted summary judgment in favor of the attorney and the firm. The Court of Appeals reversed and remanded, but the Texas Supreme Court overturned the Court of Appeals and reinstated the summary judgment. The Supreme Court held the following:

- When the duty of an attorney conflicts with the duty of a public servant, legislative immunity shields lawyer-legislators from civil liability for activities within their legislative capacity.<sup>56</sup>

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<sup>54</sup> Lance Cole, *The Government-Client Privilege after Office of the President v. Office of the Independent Counsel*, 22 J. LEGAL PROF. 15, 28 (1998).

<sup>55</sup> *Joe v. Two Thirty-Nine Joint Venture* (Tex.) 145 S.W.3d 150.

<sup>56</sup> *Id.* at 154.

- Legislative immunity shields both the lawyer-legislator and his firm from liability for any conflict created by legitimate legislative functions undertaken in connection with the position of councilperson.<sup>57</sup>
- In reaching its decision, the Supreme Court also considered the scope of representation between the client and the firm, specifically whether the representation involved appearing before the City Council.<sup>58</sup>
- The Court concluded that the summary judgment evidence showed that the councilman acted in objective good faith and within the scope of his authority as a councilman, and was therefore entitled to official immunity.<sup>59</sup>

### ***Representing Private Clients before Municipal Courts & Boards***

In order to place the Dallas court's decision in context, the reader may find it interesting to learn that the decision has some basis in the former Canon of Ethics. In two 1960s opinions, the former Commission on the Interpretation of the Canon of Ethics concluded that a member of a law firm may not serve as chairman of a city board while the chairman's law partner accepts employment to represent clients with interests before the board. In its opinion, the Commission held that such a situation would not be ethical or proper, and would violate Canon 6.<sup>60</sup>

Remember the basic rule: a lawyer generally is not permitted to represent conflicting interests (except in some instances with the consent of all parties.) The lawyer who is a member of the board is representing the city in a fiduciary, representative capacity. For him/her to represent an individual or company before the board while he/she is a member of the board would likely constitute a prohibited conflict. Also, when a lawyer is prohibited from handling a legal matter, generally all partners of that lawyer are likewise barred.<sup>61</sup>

In a subsequent matter, the former Commission on the Interpretation of the Canon of Ethics again cited Canon 6 in its determination that no member of a law firm, of which the Mayor of a city is a member, may represent clients before the city's municipal court, the judge of which is appointed by and removable at the will of the City Commission.<sup>62</sup>

### ***Representing Private Clients before Other Courts***

The Professional Ethics Committee of the State Bar of Texas recently ruled that a lawyer who serves as a county judge has a conflict of interest in representing private clients in the justice of the peace, statutory county, and district courts of the county in which the

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<sup>57</sup> Id at 158, 159.

<sup>58</sup> Id at 160.

<sup>59</sup> Id at 163, 164.

<sup>60</sup> State Bar of Tex., Rules and Canon of Ethics, Canon 6. Note that after January 1, 1990, the professional conduct of licensed attorneys in Texas is governed by the Texas Rules of Professional Conduct, which were promulgated by the Texas Supreme Court on October 17, 1989.

<sup>61</sup> Comm. On Interpretation of the Canon of Ethics, State Bar of Tex., Op. 197 (June 1960).

<sup>62</sup> Comm. On Interpretation of the Canon of Ethics, State Bar of Tex., Op. 272 (November 1963).

lawyer serves as county judge.<sup>63</sup> The Ethics Committee found that the conflict exists because the lawyer is adversely limited in his representation as a result of his responsibilities to the county, his responsibilities to the private client, and by his personal interests as both a lawyer and public official.<sup>64</sup>

The Committee reasoned that the conflict was created by the county judge's duties as chief budgetary officer and presiding officer of the county commissioner's court, which sets the salary of the justice of the peace and county court-at-law judges, and has influence over the compensation of all court personnel and the personnel of the district attorney's office.<sup>65</sup>

In the above opinion, the Ethics Committee referenced a 1994 opinion in which the question was whether an attorney who is also a city commissioner or his law partner may represent private parties in the following situations:

- (a) persons charged with criminal offenses in the county and district courts where the city police department participates in the investigation and/or arrest of the defendant.
- (b) persons charged with criminal offenses in the county and district courts where members of the city police department are victims (i.e., assault on a peace officer).
- (c) persons charged with criminal offenses in the county and district courts where the arrest and/or search warrant in the case is issued by the city judge.<sup>66</sup>

The Committee concluded that neither lawyer could represent the private clients in these situations unless all parties give appropriate consent after consultation and full disclosure pursuant to Disciplinary Rule 1.06(c).<sup>67</sup>

Although the attorney/commissioner does not exercise control over the day-to-day operations of the city police department, as a city commissioner, he appoints the city manager, who ultimately directs the activities of the police department. Certainly, the actions of police officers within a city reflect upon the city commissioners. By representing a person charged with criminal offenses where the city police department participates in the investigation and/or arrest of the defendant, or where the police officers are victims of a crime, the attorney/commissioner places himself in a conflict between protecting the city's (and since he is a commissioner, his) interests and in protecting the interests of his client. This situation would also place the police officers in the awkward position of performing their job duties while dealing with a city commissioner who is acting as an attorney in the case.

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63 Tex. Comm. on Prof'l Ethics, Op. 540 (February 2002).

64 Id.

65 Id.

66 Tex. Comm. on Professional Ethics, Op. 497, V. 57 Tex. B.J. 1136 (1994).

67 Id.

A city commissioner exercises even more control over the city judge than he does over the police officers. The city commission actually hires the city judge. The actions of the city judge in executing the arrest and/or search warrant, and any other action taken by the judge would necessarily affect the welfare of the attorney/commissioner's client. However, if the judge did not perform his job properly, the welfare of the city, and hence that of the city commission which is the personal interest of the attorney/commissioner, would be affected.

The attorney who serves as a city commissioner is a public officer, and, as such, is held to a high standard of integrity (Comment 7, Rule 8.04). Having an attorney who is a city commissioner involved in representation of criminal defendants in which employees of the city are involved creates a conflict between the client's interests and the city's interests, as well as the attorney's own interests. Such representation violates Disciplinary Rule 1.06(b)(2). Further, since the attorney/commissioner may not represent these criminal defendants, neither can his law partner. However, Rule 1.06(c) provides for the affected parties to consent to such representation.

### **DISCLOSURES UNDER LGC CHAPTER 176**

In 2005, the Legislature enacted Chapter 176 of the Local Government Code, which attempts to address conflicts of interest between local officials and those seeking to do business with local entities. It affects all Texas cities and most city officials, and needs your immediate attention if the City has not already sought to comply with Ch. 176. A summary follows of an Attorney General's opinion interpreting the new law, portions of which were supplied by the TML legal department.

**Background:** In the 2005 session, Representative Beverly Woolley, of Houston, introduced H.B.914, which was intended to provide more protection to the public against local government officials having conflicts of interest. The bill was enacted, despite opposition from cities, and was codified as Chapter 176, Local Government Code.

The bill became effective in June 2005, and required compliance by January 1, 2006. However, the bill was extremely broad and confusing, and so many questions arose about its meaning that in February and March, 2006, Representative Woolley, as well as the Commissioner of Education and the Chair of the Committee on Insurance, requested an opinion from the Attorney General on how the bill should be interpreted, asking a total of 19 questions about what it means. In response, the Attorney General issued Opinion No. GA-0446 on August 2, 2006.

**The AG's Opinion:** The Attorney General's office summarized the difficulty with interpreting such an unwieldy statute:

We recognize that a plain language construction of chapter 176 will have a significant impact on Texas local governments and their communities. While the proffered arguments suggesting that chapter 176 be construed to include some minimum thresholds or *de minimis* exceptions might be reasonable, we are constrained by the language of the statute as enacted. We must follow the directive of the Supreme Court of Texas that:

[c]ourts must take statutes as they find them. They should search out carefully the intent of a statute, giving full effect to all its terms. But they must find its intent in its language and not elsewhere. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.

**Complying with Ch. 176:** The law requires mayors, council members, city managers or administrators, and certain other city officials to file a “**conflicts disclosure statement**” with a city’s records administrator within seven days of becoming aware of either of the following situations:

- A city officer or a member of the officer’s family has an employment or business relationship, resulting in taxable income, with a person who has contracted with the city or with whom the city is considering doing business.
- A city officer or a member of the officer’s family member received and accepted one or more gifts with an aggregate value of \$250 in the preceding 12 months from a person who conducts business or is being considered for business with the city.

The bill also requires a vendor who wishes to conduct business or be considered for business with a city to file a “**conflict of interest questionnaire.**” The conflicts disclosure statement (FORM CIS) and the conflict of interest questionnaire (FORM CIQ) were created by the Texas Ethics Commission (TEC) and are available online at [www.ethics.state.tx.us](http://www.ethics.state.tx.us)

In answering the 19 separate questions, the Attorney General concluded that:

- Chapter 176 does not include a *de minimis* exception. The law applies to contracts involving small and/or routine purchases.
- A city officer has a “business relationship” with a vendor when the officer has a connection to a vendor based on the commercial activity of one of them. For

example, if a city official has an interest-yielding checking account with a bank that yields two dollars interest per year, the official has a business relationship with the bank. If that bank holds city funds, the requirements of Chapter 176 are triggered.

- Statements or questionnaires that are filed with the city must be maintained in accordance with the city's records retention schedule.
- Neither Chapter 176 nor the state's model records retention schedule provide for a specific time period during which a city must retain the statements and questionnaires and/or leave statements and questionnaires on its Web site. Thus, presumably, these must be retained and posted for eternity unless and until the law is changed.
- A city must post a vendor's questionnaire on its Web site, even if the questionnaire indicates that no conflict is present according to the bill.
- A city has no affirmative duty to require a vendor to comply with Chapter 176. In addition, a city has no duty to cease doing business with a noncompliant vendor.
- A contract that existed prior to January 1, 2006, does not trigger the requirement for a vendor to file a questionnaire, unless the contract is amended after that date.
- Family members may be considered vendors under the terms of the bill. For example, if a councilmember's spouse does work for the city, and the spouse gives the councilmember a \$400 suit for a gift, that gift triggers the disclosure requirements of the law.
- "Professional services" such as attorneys, engineers, and architects, are covered by the bill.

Many critics of the law, including TML, argued to the Attorney General that Local Government Code Chapter 171 (the "conflict of interest" chapter) already mandates reporting and abstention for true conflicts of interest. However, the attorney general's office had no authority to advise local governments to either ignore the new law or to re-write some of its provisions.

## **TEXAS ETHICS COMMISSION**

The Texas Ethics Commission can consider alleged violations of state ethics laws by local officials. The Ethics Commission was established in 1991 by the voters of Texas, who approved a constitutional amendment creating the agency. The Commission itself is bipartisan, with commissioners appointed by the Governor, Lieutenant Governor, and Speaker of the House.<sup>68</sup> The Ethics Commission is charged with administering and enforcing laws relating to political expenditures and contributions, legislative and political advertising, the conduct of state employees and officers, and the practice of lobbying.<sup>69</sup>

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<sup>68</sup> Tex. Const'n, Art. 3, Sec. 24(a)

<sup>69</sup> Tex. Gov't Code, Sec. 571.061

Upon receiving a sworn allegation of a violation of relevant statutes, the Ethics Commission conducts a confidential trial to determine the merits of an allegation, and may find that a violation has occurred and assess a civil penalty.<sup>70</sup> In 2006, the Ethics Commission received 267 sworn complaints, of which 100 were settled short of trial and 77 were found to have violated the law after a hearing.<sup>71</sup> One of the most common complaints is the misuse of public funds to promote a measure, specifically the use of city or school district funds to advocate passage of a bond issue. State law prohibits the use of public funds for political advertising, but allows such funds to be used to factually describe the purpose of a measure without advocating passage or defeat.<sup>72</sup> Public lawyers should use caution when advising entities about the use of public funds. It is safer to form a special purpose political action committee,<sup>73</sup> avoiding any controversy over the use of public funds.

The Ethics Commission was also statutorily charged with creating the conflict of interest forms to be used by localities, but enforcement of the provisions of LGC Chapter 176 remains the duty of local prosecutors.

The Ethics Commission has issued numerous advisory opinions interpreting the laws governing when a public servant can accept gifts, travel, meals and lodging. The advisory opinions, as well as Commission rules, can be found on the agency's website at <http://www.ethics.state.tx.us/main/research.htm>.

## CONCLUSION

When governing, and when advocating on behalf of the regulated community, it is wise to keep in mind the state and local ethical regulations that may apply to your activities. Mayors, Councilmembers, municipal employees, staff attorneys and lawyers/lobbyists are often be subject to disclosure requirements and limitations on certain types of communications. All of these have the potential to lead to local penalties, state prosecution, civil litigation, or professional disciplinary action.

*This paper is presented for educational purposes only and in no way should be considered to constitute legal advice.*

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<sup>70</sup> Tex. Gov't Code Sec. 571.121

<sup>71</sup> Texas Ethics Commission Biennial Report for 2005-2006, December 2006

<sup>72</sup> Tex. Elec. Code, Sec. 255.003

<sup>73</sup> Tex. Elec. Code, Title 15, Chap. 251