

**ETHICAL REQUIREMENTS FOR
OFFICERS AND EMPLOYEES OF
PUBLIC ENTITIES IN TEXAS**

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Before the Norman conquest of England in 1066 by William the Conqueror, justice was administered in England in shires, or what is today known as counties. The shires were presided over by the church bishop and the shire reeve (sheriff) exercising both church and civil jurisdiction. The English government was more complex than the Norman system and, other than collect land taxes and swing the sphere of English ties from Scandinavia to France, William made few changes in the English system other than provide more central oversight.

In 1154, Henry II became the first Plantagenet king. Henry created a system of law "common" to the country by incorporating and elevating local custom to the national level, by eliminating some local peculiarities and arbitrary remedies, and by providing for a jury system in all counties—citizens sworn on oath to investigate criminal accusations and civil claims. In particular, Henry developed the practice of sending judges from the king's central court to hear various disputes throughout the country. The king's judges would then return to London, and discuss their cases and the decisions they had made with the other judges. These decisions were recorded and filed.

In time, a rule, known as *stare decisis* developed, whereby a judge would be bound to follow the decision and apply the same principles promulgated by that of an earlier judge if the two cases had similar facts to one another. Once judges began to regard each other's decisions to be binding precedent, the customs and law varying in each locality was replaced by a system that was (at least in theory) common throughout the whole country, hence the name "common law." Henry's creation of a powerful and unified court system brought him into conflict with the Church, but Judge-made common law operated as the primary source of law for several hundred years.

At common law, a trustee or public officer was impliedly bound to exercise the power conferred on him with disinterested zeal and diligence, and primarily for the benefit of the ward or the public, respectfully. According a violation of that common law could unwind a transaction in which the officer had received any special economic benefit. Alexander Hamilton, writing about Indian Affairs in 1774, described the rule regarding officers' conflicts:

The plain inference from this is, that the public officer who has an agency in making those contracts *shares in the profit of them*, and that a part of the money which is expended *flows into his coffers*. ... If it is his meaning, then he owes it to the public to answer the following questions: Does he know by what public officer the contracts for supplying the army are made? Has he any ground to believe that that officer ever advised a single step which has led to the present Indian war? Does he know what his official conduct has been with regard to it? Does he know what his private character has been as to pecuniary affairs? Is he acquainted with a single *fact* or even *circumstance* which can justify a suspicion that he has ever been directly or indirectly interested in any contract in which he has had an agency?

Similarly, in 1795 persons seeking various English government offices, such as that regulating fishing permits, were required to execute an oath that they would “faithfully and honestly, according to the best of (their) skill and judgment, execute the several powers and trust ..., and that (they were) not, directly or indirectly, concerned as an adventurer in the White Herring Fishery, or in any other fishery, or as a curer of fish, and that (they would) not be concerned therein, either directly or indirectly, during the time (of their office). Parliamentary Papers, House of Commons and Command, Volume 31, page 47.

TEXAS COMMON LAW RULE AND CODIFICATION

In 1836, the Republic of Texas adopted a Constitution that provided, in part, that Congress should as early as practicable introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require, and in all criminal cases the common law shall be the rule of decision. Texas Constitution Article IV, Section 13 (1836). Texas adopted its first penal code in 1856, and it provided that any person who is an officer (of the public land office) who shall, directly or indirectly be interested in a land transaction would be removed from office and fined \$500.00. Texas Penal Code Chapter VI, Art. 244 (1856)¹. In 1868 the Texas Constitution was amended to provide that no member of the Legislature shall be “interested, either directly or indirectly, in any contract with the state, or any county thereof.” Texas Constitution Art. III, Section 18 (1868).

In 1874, the Texas Legislature amended the Texas Penal Code to punish “any officer of any county, city or town, who shall contract directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasury”. Texas Penal code Art. 248; *Read, Executor v. Smith*, 60 Tex. 379, 1883 WL 9342 (Tex.) (county scrip); *Rigby v. State*, 10 S.W. 760 (Tex.App. 1889) (Goliad commissioner convicted for selling County two mules for \$200). The Legislature was, consistent with the move away from common law to a codified or statutory law, incorporating the common law within the general statutory framework of the State. These statutes paralleled similar fiduciary duties imposed by other governmental entities upon their officers and employees and upon the officers, employees and trustees of banks, estates, railroads, and other entities, effectively codifying the common law rule of fidelity. *See, e.g.* Napoleon Code art. 798; *Astor v. Winter*, 1820 WL 1302 (La. 1820); *Appeal of City of Philadelphia*, 1878 WL 13254 (Pa. 1878).

The Texas Legislature also adopted the General Act of 1875 authorizing the incorporation under general law for cities. The General Act, consistent with the Constitution and the Penal Code, prohibited a city council member from holding any other city employment or becoming interest in any city “work, business or contract,” or being a surety on and performance or official bond.” *See Texas Anchor Fence Co. v. City of San Antonio*, 71 S.W. 301 (Tex.Civ.App.-San Antonio 1902) (fence and gate); Brooks, 22 TEXAS PRACTICE, Municipal Law and Practice, § 3.12. From 1925 through the 1983, the conflict of interest provision for general law cities was codified as Article 988b of the Texas Revised Civil Statutes: “No member of the city council, or any other officer of the corporation, shall be directly or indirectly

¹ The 1874 conflict of interest penal statute was repealed in 1973 as part of the recodification of the Texas Penal Code.

interested in any work, business or contract, the expense, price or consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council.” See *Dallas County Flood Control District No. 1 v. Cross*, 815 S.W.2d 271 (Tex.Civ.App.-Dallas 1991) (discussion of Art. 988b; purchase of real property from commissioner); *Woolridge v. Folsom*, 564 S.W.2d 471 (Tex.Civ.App.-Dallas 1978) (statute prohibiting conflicts of interest involving city officers was inapplicable to home rule cities).

PROGRESSIVE MOVEMENT CONTINUES

The National Municipal League, organized in New York in 1894, published the first model city charter in 1897. National Municipal League, A MUNICIPAL PROGRAM (1897). Article V Section 4 of the first charter provided that no counselor (sic) should “be interested directly or indirectly in any contract with the City or be in the employ of any person having any contract with the City.” Id. In 1915, the League revised the model program with a city charter that incorporated the city manager form of government, and included a provision that provided, in part, that “no member of the council nor any officer or employee of the City shall have a financial interest, direct or indirect, in any contract with the city, or be financially interested, directly or indirectly, in the sale to the city of any land, materials, supplies or services, except on behalf of the city as a member of the council, officer or employe (sic)...”. National Municipal League, A MODEL CITY CHARTER AND MUNICIPAL HOME RULE at page 53 (1915).

The common law rule regarding conflict of interest, consistent with the prior Texas law, became part of municipal charters in Texas (and other states) and specific statutory offices in Texas (and other states). See e.g., City of Cleveland City Charter Section 8.01 (personal interest in city contract); City of Edna City Charter Article 10 Section 7 (personal interest in contracts); City of Kaufman City Charter Section 3.14 (auditor shall have no personal interest, direct or indirect, in fiscal affairs of the City); City of Lufkin City Charter Art. 11, Section 11 (no member of council or any officer or employee of the City shall be directly interested in any work, business or contract, paid from the city treasury); City of Sweeny City Charter Section 10.10 (no member of council, or any officer or employee of the City shall have a pecuniary interest in any contract paid by the City treasury unless in compliance with the applicable laws of the State of Texas).

Additionally some cities and the Texas Legislature adopted ordinances and statutes incorporating the common law rule with regard to specific officers and employees. See, e.g. City of Houston Code of Ordinances § 15-2 (collusion in bidding on public work); Texas Local Government Code § 81.002(a) (commissioners court oath); Texas Local Government Code § 321.027 (park commissioners and employees); Texas Local Government Code § 352.102 (county fire marshal); Texas Occupations Code Section 2071.401 (public surveyors). Accordingly, the common law ethical requirement of disinterested zeal in public office is buried deep in the statutory and legal framework of many public entities.

Finally the common law conflict of interest standard sometimes creeps into local government transactions by contract. For example, the Department of Housing and Urban Development has entered into grant agreements with a city in which the city (grant recipient) warranted that “no member, officer or employee of the Recipient, or its designees, or agents, no

consultant ... and no other public official of the Recipient, who exercises or has exercised any functions or responsibilities with respect to the Project during his or her tenure, shall have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with the Project or in any activity, or benefit therefrom, which is part of this Project.” See Tex. Att’y Gen. Op. – No. MW-477 (1982) (whether city official can participate in federal grant as merchant). Under the common law rule in Texas, if a public official directly or indirectly had a pecuniary interest in a contract, no matter how honest he may be, and although he may not have been influenced by the interest, such a contract so made is violative of the spirit and letter of the law, and against public policy: i.e., it was void. Id.

AFFIDAVITS DISCLOSING INTERESTS REQUIRED²

At common law the public officer had no specific duty to disclose a possible conflict of interest, only a duty to perform the duties of the office or position with disinterested zeal. In 1983 the Texas Legislature required that public officials publicly disclose any conflict of interest before an action was taken on the matter. Tex.Loc.Gov’t Code § 171.004. Chapter 171 then provides that any person required to file an affidavit must “abstain from further participation in the matter if ... the action on the matter will have a special economic effect” favorable to the official or the person, business or property related to the official.” Id.

Prior to a local government taking any action on any matter in which an officer or the officer’s relatives has a substantial interest, the officer must file an affidavit disclosing that substantial interest to the public. A “substantial Interest” means ownership of 10% or more of the voting shares of a business, or ownership of \$15,000.00 or more of the fair market value of the business, or receipt of 10% or more of one’s gross income from the business, or ownership of an equitable or legal interest in real property worth more than \$2,500. Id. § 171.002(a) and (b). Relatives mean the official, or persons related to the official within the first degree of consanguinity (child or parent) or first degree of affinity (spouse, mother-in-law, father-in-law, son in-law, daughter-in-law, stepson, stepdaughter, stepmother or stepfather). Id. § 171.002(c). Unlike common law, the filing of an affidavit and abstention do not preclude the entity from proceeding with the matter or approving the matter even if there is a conflict of interest.

COMMON LAW PREEMPTED BUT OTHER LAWS CUMULATIVE

The state disclosure law expressly “preempts the common law of conflict of interests as applied to local public officials.”³ Texas Local Government Code § 171.007(a). Chapter 171 is also “cumulative of municipal charter provisions and municipal ordinances⁴ defining and prohibiting conflicts of interests.” Id. 171.007(b). Accordingly, the more stringent of Chapter

² Chapter 572 (Person Financial Disclosure, Standards of Conduct, and Conflict of Interest), and Chapter 575 (Acceptance of Gift by State Agency) of the Texas Government Code generally proscribe the state’s policies regarding state officers or employees who may have an direct or indirect interest in any adverse interest that may affect the proper discharge of their official duties.

³ “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.”

⁴ An ethics policy adopted by resolution only may not be effective.

171, other state laws, a local or municipal charters or other local or municipal laws will apply to any conflict of interest situation. If a local entity had as part of its charter documents or local laws adopted the common law conflict of interest rule, then the common law rule continues to be applicable to the entity and its officers and employees.

The Texas Legislature has adopted various amendments or limitations to Chapter 171 and scattered them around the State's codes. For example, Section 81.002 of the Texas Local Government Code provides that "(s)ubject to the provisions of Chapter 171" .. a county judge or commissioner may serve as "an officer or director of an entity that does business with the county." Chapter 49 of the Texas Water Code provides that Chapter 171 of the Texas Local Government Code applies to the District, but it also requires that a water and reclamation district adopt in writing a code of ethics for the district's board of directors. To the extent that the Board may adopt a more stringent code, then those rules would apply. Texas Water Code §§ 49.058, 49.199. The Texas Tax Code also contains special rules for appraisal district board members and the chief appraiser (6.035 and 6.036), appraisal review board members (6.412 and 6.413) and tax increment board members (311.009(g)(1). This list is exhausting, but not exhaustive. See, e.g., Texas Special Districts Code § 8505.060 (conflict of interest; penalty); Texas Transportation Code § 366.260 and 370.260.

MORE DISCLOSURES REQUIRED

In 2005, the Texas Legislature added more disclosure requirements for public officials and for persons contracting or seeking to contract with a public entity by that adoption of Chapter 176 of the Texas Local Government Code. Like Chapter 171, Chapter 176 requires the filing of paperwork. The forms required under the Chapter 176 are generated by the Texas Public Ethics Commission and are called Conflict of Interest Statements (CIS FORMS) and Conflict of Interest Questionnaires (CIQ FORMS). These forms must be filed with the public entity and the county clerk if there is a potential conflict between a local government officer and a contractor or vendor of the local government. Tex.Loc.Gov't Code §§ 176.001-176.006. Additionally the local government is required to post the disclosures on its website. Tex.Loc.Gov't Code 176.009.

CIS FORMS: A local government officer⁵ must file a conflicts disclosure statement (CIS form) for any person or entity (referred to in the statute caption as a vendor) who enters into a contract, or seeks to enter into a contract with the local government if that local government official has any employment or business relationship with that vendor by which the local government official, or any member of his or her family, receives more than \$2,500 in taxable income, other than investment income, during the preceding 12-month period, or if the vendor has given the officer or his or her family any gift or gifts that aggregate more than \$250 in value. Tex.Loc.Gov't Code §§ 176.003 and 176.004.

CIQ FORMS. Additionally the vendor who may have a relationship with officer must also file a disclosure statement of that relationship. Tex.Loc.Gov't Code § 176.006. For example, if Olson & Olson gave a local government officer football tickets with a face value of more than \$250 during a football season, then both the officer and Olson & Olson would be

⁵ Local government officer is defined at Tex.Loc.Gov't Code § 176.001(4).

required to file disclosure forms documenting that relationship. A gift given to the officer as a family member, or as food, lodging or transportation accepted as a guest (i.e., accompanied by the vendor) does not count. Tex.Loc. Gov't Code §§ 176.003 (a-1)(1) and (3).

NEPOTISM

Although Chapters 171 and 176 require the disclosure of matters that affect both the officer and his family, state law also prohibits nepotism. Texas Government Code Ch. 573 (Degrees of Relationship; Nepotism Prohibitions); *see generally* Texas Attorney General Nepotism Laws Made Easy (2012). In general, a public official may not appoint a person to be compensated from public funds if the individual is related to the person within the third degree of consanguinity or second degree by affinity.

OTHER CRIMINAL STATUTES PROHIBIT BENEFITING FROM PUBLIC SERVICE

Other state laws govern conduct in public office, such as bribery, coercion of public servants, improper influence, gifts to public servants, abuse of official capacity, official oppression, and misuse of official information. *See generally* Texas Penal Code Chapter 36-39; Texas Attorney General TEXAS ETHICS, GIFT & HONORARIUM LAWS MADE EASY (2012). For example, the bribery statute provides that “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 ... any benefit ... as consideration for the recipient’s decision, opinion, recommendation, vote, or other exercise of discretion as a public servant. Texas Penal Code § 36.02. Accordingly, it would be unlawful for a member of a governing body to accept a benefit (i.e., cash placed in the trunk of his car parked outside a governmental meeting), as consideration of his vote (i.e., to approve a contract at the governmental meeting). Similarly, no local official should accept or solicit any gift, favor or service that might reasonably tend to influence the public officer in the discharge of official duties, or that the officer knows or should have known was offered to influence the officer’s official conduct. Texas Penal Code Chapter 36. State laws also prohibit the use or disclosure of confidential information held by the government except for the governmental entity’s business. Texas Penal Code § 39.06. A public officer should not make personal investments that could reasonably be expected to create a conflict of interest between the officer’s private interest and the interest of the governmental entity, or permit any unauthorized use of government-owned or government controlled equipment, materials, supplies or property. Texas Penal Code Chapter 39.

DUAL OFFICE HOLDING WARNING

For those local government officers who may have political ambitions beyond the position they currently hold, the officer should be aware that there is a potential conflict of interests in public positions. *See generally* Texas Attorney General Dual Office Holding Laws Made Easy (2012). If an officer receives compensation or a “per diem” for public service, then they are deemed to hold an office of compensation or emolument. The Texas Constitution and the Chapter 574 of the Texas Government Code prohibit a person from holding two offices of emolument. Texas Constitution Article XVI Section 40. If a public officer accepts or declares an intention to seek another office of emolument, that action could result in an automatic

termination of the first office. Accordingly, before accepting or declaring for any other public office, any public officer should consult with their attorney to discuss the possible consequences.

CAMPAIGN AND OFFICEHOLDER CONTRIBUTIONS

A candidate for office and well as an officeholder must comply with disclosure laws showing contributions received and expenditures made on behalf of the candidate or officeholder. See generally Texas Election Code Title 15 (ch. 251 – 258, esp. 254-255); Texas Ethics Commission CAMPAIGN FINANCE GUIDE FOR CANDIDATES AND OFFICEHOLDERS WHO FILE WITH LOCAL FILING AUTHORITIES (2013) (limits the acceptance and use of campaign contributions). A person who knowingly and wilfully takes affirmative action for the purpose of gaining nomination or election to public office or for the purpose of satisfying financial obligations incurred by the person in connection the campaign for nomination or election must file an “APPOINTMENT OF A CAMPAIGN TREASURER BY A CANDIDATE (FORM CTA) even if the person does not intent to accept campaign contributions or make campaign expenditures. The Texas Ethics Commission is generally charged with enforcing the laws regarding political advertising and political expenditures.

THE CLIENT

Most often the public entity will have to rely on its officer or the person dealing it to identify when a conflict of interest exists. The public official or public employee should know his or her business and family best, and the attorney for the entity must necessarily rely on the official or employee to know if facts arise that may cause a potential conflict of interest. When a potential conflict of interest exists, the attorney for the entity may have a conflict of interest with the person serving as the entity’s officer of employee. *See generally* Texas Rules of Professional Conduct Rule 1, especially Rule 1.12. If the official or employee violates a statute related to conflict of interest, the public entity’s risk is that the deal may be unwound or voided. The public official or employee, however, risks a criminal penalty, including fine or jail. It may be prudent for a public officer or employee to consult with his or her own attorney to discuss potential conflicts of interest, especially since information provided to the entity’s attorney may belong to the entity.

CONCLUSION

Each public official and employee should serve their public entity with disinterested zeal. If a public officer or public employee, or a person related to the officer or employee, has an interest, direct or indirect, in any contract, work or business being considered by the public entity, then the officer or employee should carefully consider the laws applicable to the situation to determine whether some affidavit, disclosure or abstention is required.

Attachments:

Affidavit Disclosing Interest

CIS Form

CIQ Form

POWERPOINT

1. William Conqueror, John and Henry II
2. Direct or Indirect Interest
3. Affidavits and Participation
4. More Disclosures – Vendors
5. CIQ and CIS Forms
6. Nepotism and Dual Office Holding
7. Client – Penalties