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PITFALLS & PERILS  
OF PUBLIC OFFICE

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## INTRODUCTION

In Texas, there are a number of laws restricting the actions of public officials, appointees, and employees. This publication discusses five of the areas where a county official, appointee, or employee may encounter a legal prohibition or requirement related to his or her actions: conflicts of interest, dual office-holding, ethics, nepotism, and resign to run.<sup>1</sup> These laws and regulations are intended to ensure that public officials work for the public and not for their own self-interest. The laws often use slightly different terminology to refer to the person who is required to comply. For example, the different laws use “public official,” “public servant,” “public officer,” and “local public official” to describe the impacted person.

Texas courts, the attorney general, the Texas Ethics Commission, and various state committees have interpreted the laws described in this publication. References to the relevant authorities as of the date of publication has been included to enable you to review the source authority. If you have an issue related to one of these topics, you should consult with your county or district attorney or other legal counsel.

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<sup>1</sup> This publication includes changes adopted by the 85<sup>th</sup> Legislature during the Regular Session (2017).

# CONFLICTS OF INTEREST

## THE GENERAL POLICY

**Public Officials Must Put the Peoples' Interests Above Their Own.** Conflict of interest rules are intended to prevent a public official from using his or her authority for personal gain. Under the common law, courts applied conflict of interest rules to city and county officers, finding that allowing a person with a direct or indirect monetary interest in a public contract to act on the contract is against public policy. Local Government Code Chapter 171 expressly preempts the common law of conflicts of interest as applied to local public officials and codifies the rules.<sup>2</sup>

Chapter 171 applies to transactions between a county and the county judge or a county commissioner.<sup>3</sup> It also applies to other "local public officials," which means any officer, whether elected, appointed, paid or unpaid, who exercises responsibilities beyond those that are advisory in nature.<sup>4</sup> The focus of the discussion below relates primarily to the commissioners court members. However, the same restrictions and requirements apply to any other county official or employee who exercises independent authority over contract or other county business.

## SUBSTANTIAL INTERESTS

**Substantial Interest in a Business Entity.** A person is considered to have a substantial interest in a business entity if he or she: (1) owns 10 percent or more of the voting stock or shares of the business entity; (2) owns 10 percent or \$15,000 or more of the fair market value of the business entity; or (3) receives funds from the business entity that exceed 10 percent of his or her gross income for the previous year.<sup>5</sup> For example, a county auditor employed as the executive director of a private, nonprofit housing corporation that receives funds from the county must comply with Chapter 171 if his income from the corporation exceeds 10 percent of his gross income for the previous year.<sup>6</sup> In deciding whether a public official has a substantial interest in a business entity, a court may consider indirect payments to the official if the business entity participated in causing the funds to reach the official.<sup>7</sup>

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<sup>2</sup> Loc. Gov't Code §171.007

<sup>3</sup> Tex. Att'y Gen. Op. No. JM-1090 (1989)

<sup>4</sup> Loc. Gov't Code §171.001(1)

<sup>5</sup> Loc. Gov't Code §171.002(a)

<sup>6</sup> Tex. Att'y Gen. Op. No. DM-0303 (1994)

<sup>7</sup> *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271 (Tex. Civ. App. – Dallas, 1991, writ den.)

For the purposes of Chapter 171, a “substantial interest” in a business entity or real property is an interest in existence when the county takes up the matter that will affect the business entity or real property.<sup>8</sup> A person’s substantial interest in a business entity based solely on ownership is terminated after the person has fully divested himself or herself from the ownership interest.<sup>9</sup> An interest based on receipt of income from a business entity continues if the person receives funds in excess of 10 percent of his or her income during the twelve-month period before the date the county takes up the matter that will affect the business entity.

**Business Entity Defined.** For the purposes of Chapter 171, a “business entity” may be a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.<sup>10</sup> A political subdivision, such as an emergency services district, is not a business entity under Chapter 171.<sup>11</sup> A person may be concurrently employed by a county juvenile department and serve as the presiding member of the independent school district without creating a conflict under Chapter 171.<sup>12</sup>

**Substantial Interest in Real Property.** A person is considered to have a substantial interest in real property if he or she has an equitable or legal ownership interest with a fair market value of \$2,500 or more.<sup>13</sup>

**Special Economic Effect.** If a county official determines that he or she has a substantial interest in a business entity or real property, the person must then determine if the proposed action will have a special economic effect on the business entity or real property distinguishable from the effect on the public.<sup>14</sup>

**Interests of Family Members.** A county official is considered to have a substantial interest in a business entity or real property if a person who is related to the official within the first degree of consanguinity (blood) or affinity (marriage) has a substantial interest in the involved real property or business entity.<sup>15</sup> These family members

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<sup>8</sup> Tex. Att’y Gen Op. No. JC-0063 (1999)

<sup>9</sup> Tex. Att’y Gen Op. No. JC-0063 (1999)

<sup>10</sup> Loc. Gov’t Code §171.001(2)

<sup>11</sup> Tex. Att’y Gen Op. No. GA-0360 (2005)

<sup>12</sup> Tex. Att’y Gen. Op. No. GA-1083 (2014)

<sup>13</sup> Loc. Gov’t Code §171.002(b)

<sup>14</sup> Loc. Gov’t Code §171.004(a)

<sup>15</sup> Loc. Gov’t Code §171.002(b)-(c)

include an official's spouse, father, mother, son, daughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.<sup>16</sup> In calculating the "gross income" of a county official, the earnings of a minor child or dependent are not considered.<sup>17</sup> However, a family member has a substantial interest in a business entity resulting from income if the income constitutes more than 10 percent of his or her income for the previous year.

**Practice of Law.**<sup>18</sup> A member of the commissioners court engaged in the private practice of law has a substantial interest in a business entity if he or she has entered a court appearance or signed court pleadings in a matter related to the business entity.<sup>19</sup> A county judge or commissioner with a substantial interest in a client's business must file an affidavit with the county clerk. After complying with the requirements of Chapter 171, a member of the commissioners court may practice law in the courts located in his or her county. However, the judge of a constitutional county court may not enter a court appearance or sign court pleadings in a matter before the court over which the judge presides or any court over which the judge's court exercises appellate jurisdiction.<sup>20</sup>

**County May Contract With Official's Business Under Certain Circumstances.** For example, a business entity in which the county judge owns a substantial interest may sell products to the county only if he files an affidavit and abstains from participating in deliberation or a vote in compliance with the law.<sup>21</sup> The attorney general has also found that the conflict of interest provisions do not prohibit a county constable from owning and operating a wrecker service that is on the county sheriff's wrecker rotation list.<sup>22</sup>

**County Depository.** Local Government Code §131.903 imposes special conflict of interest requirements for the selection of the county's depository. The county may still contract with a bank if one or more members of the commissioners court is an officer or director or owns or has a beneficial interest, individually or collectively, in 10 percent or less of the outstanding capital stock of the bank if the interested member complies with Chapter 171 and a majority of the commissioners court votes to select the bank as a

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<sup>16</sup> Gov't Code §§573.023, 573.025

<sup>17</sup> Tex. Att'y Gen Op. No. JC-0063 (1999)

<sup>18</sup> Lawyers are subject to the Texas Disciplinary Rules of Professional Conduct, which include conflict of interest provisions. Judges are additionally subject to the conflict of interest restrictions in the Code of Judicial Conduct and Article V, Section 11 of the Texas Constitution.

<sup>19</sup> Loc. Gov't Code §171.010

<sup>20</sup> Loc. Gov't Code §171.010(c)

<sup>21</sup> Loc. Gov't Code §171.004; Tex. Att'y Gen. Op. No. GA-0136 (2004)

<sup>22</sup> Tex. Att'y Gen. Op. No. GA-0510 (2007)

depository. The county may also contract with a bank if a county officer or employee not on the commissioners court is an officer, director or shareholder in the bank.

## **AFFIDAVIT AND ABSTENTION REQUIRED**

**Affidavit Must be Filed with the County Clerk.** If a member of the commissioners court determines that he or she has a substantial interest in a business entity or real property related to a matter before the court and that there will be a special economic effect, the person must file an affidavit with the county clerk stating the nature and extent of the interest.<sup>23</sup> The affidavit must be filed before a vote is taken or a decision is made by the commissioners court; failure to do so is an offense.<sup>24</sup>

**Person with Substantial Interest May Not Participate.** A member of the commissioners court is prohibited from participating in a matter related to a business entity or real property in which the member has a substantial interest. Participation includes discussion, deliberation or a vote or decision.<sup>25</sup> A person must avoid deliberating by exchanging written communication or communicating through a third party.<sup>26</sup> However, a person does not “participate” in a matter by merely attending a meeting, including an executive session, related to the matter in which he or she has a substantial interest.<sup>27</sup> However, it would be wise for the interested official to avoid attending meetings that address the matter related to the conflict.

**Exception.** The only exception to the prohibition against voting on a matter related to a conflict is when the majority of the commissioners court have filed an affidavit disclosing a substantial interest. Under this limited circumstance, the members with a substantial interest are not required to abstain from discussion or a vote on the matter.<sup>28</sup>

## **PREEMPTION OF OATHS**

**Commissioners Court Oath.** Local Government Code §81.002 includes a requirement that the county judge and county commissioners file a written oath stating that they will not have a direct or indirect interest in a contract with the county. However, the Attorney General has opined that this language has been modified by Local

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<sup>23</sup> Loc. Gov't Code §171.004(a) and (b); Tex. Att'y Gen. Op. No. GA-0796 (2010). A sample affidavit is attached as Appendix A.

<sup>24</sup> *Marra v. State*, 399 S.W.3d 664 (Tex. Civ. App. – Corpus Christi, 2013)

<sup>25</sup> Tex. Att'y Gen. Op. No. JM-0379 (1985)

<sup>26</sup> Tex. Att'y Gen. Op. No. JC-0307 (2000)

<sup>27</sup> Tex. Att'y Gen. Op. No. GA-0334 (2005)

<sup>28</sup> Loc. Gov't Code §171.004(c)

Government Code Chapter 171 and that a county official may contract with the county if he or she complies with the requirements of that chapter.<sup>29</sup> Nevertheless, transactions that are not subject to Chapter 171 are still subject to §81.002 and are prohibited.<sup>30</sup> The county judge or a county commissioner may not receive compensation from the county for employment in any capacity other than that as a member of the commissioners court.<sup>31</sup> Nor may a member of the commissioners court act as a surety or have an interest in a bail bond.<sup>32</sup>

**Auditor's Oath.** Local Government Code §84.007 requires the county auditor to submit a written oath that he or she will not be personally interested in a contract with the county. Local Government Code Chapter 171 prevails over this provision to the extent of any conflict.<sup>33</sup> If a county auditor enters into a contract with the county without having complied with Chapter 171, he or she has violated §84.007 and the violation may not be cured by the auditor's subsequent action.<sup>34</sup>

## VOTING ON THE BUDGET

**Must Vote Separately on Items With Conflicts.** The commissioners court must take a separate vote on any budget item specifically dedicated to a contract with a business entity in which a member has a substantial interest.<sup>35</sup> The person with the conflict may not participate in the separate vote but may vote on the final budget if he or she has complied with Chapter 171 and the item related to the conflict has been decided by the court.<sup>36</sup>

## NONPROFIT CORPORATIONS

**Serving on Non-Profit Board.** Local Government Code §81.002 permits a member of the commissioners court to serve as an officer or director of an entity that does business with the county if the official complies with the provision of Chapter 171.<sup>37</sup> However, this provision does not apply to a publicly traded corporation or a subsidiary, affiliate

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<sup>29</sup> Tex. Att'y Gen. Op. Nos. DM-0279 (1993), GA-0090 (2003), GA-0671 (2008)

<sup>30</sup> Tex. Att'y Gen. Op. No. JM-1090 (1989)

<sup>31</sup> Tex. Att'y Gen. Op. No. GA-0645 (2008) (no compensation for employment in sheriff's department); Tex. Att'y Gen. Op. No. JC-0061 (1999) (no payment for driving an ambulance for county emergency medical services department)

<sup>32</sup> Tex. Att'y Gen. Op. No. JC-0121 (1999)

<sup>33</sup> Tex. Att'y Gen. Op. No. DM-0303 (1994)

<sup>34</sup> Tex. Att'y Gen. Op. No. GA-0442 (2006)

<sup>35</sup> Loc. Gov't Code §171.005(a)

<sup>36</sup> Loc. Gov't Code §171.005(b)

<sup>37</sup> Loc. Gov't Code §81.002(c)

or subdivision of the corporation. A member of the commissioners court may not accept compensation or other remuneration from a nonprofit corporation or entity related to service on its board of directors.<sup>38</sup> The person serving as an uncompensated director is not required to follow the recusal procedures in Chapter 171.<sup>39</sup>

## VIOLATIONS AND PENALTIES

**Offenses.** A member of the commissioners court commits an offense if he or she fails to file an affidavit and abstain from participation.<sup>40</sup> The county judge and commissioners are also prohibited from acting as a surety for a business entity that contracts with the county or on the official bond required by the county. An offense under Chapter 171 is a Class A misdemeanor punishable by a fine not to exceed \$4,000, a jail term not to exceed one year, or both a fine and confinement.<sup>41</sup> A county judge's conviction for knowingly failing to file an affidavit of substantial interest in business entity owned by his son-in-law and to abstain from decision to purchase supplies from the entity was upheld.<sup>42</sup>

A person who fails to comply with Chapter 171 may also be charged with abuse of official capacity.<sup>43</sup> If charged with violating a law related to the person's office or employment, the offense is a Class A misdemeanor. A violation involving the misuse of government property, services, personnel or other thing of value belonging to the county may result in charges ranging from a Class C misdemeanor to a first degree felony depending on the value of the thing misused.

**Contract is Voidable.** If a member of the commissioners court with a direct or indirect interest in a contract casts the deciding vote, the contract would be against public policy and null and void.<sup>44</sup> A contract between a governmental body and a private entity in which a member of the governmental body has a monetary interest was voidable.<sup>45</sup>

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<sup>38</sup> Loc. Gov't Code §171.009

<sup>39</sup> Tex. Att'y Gen. Op. No. GA-0068 (2003)

<sup>40</sup> Loc. Gov't Code §171.003

<sup>41</sup> Penal Code §12.21

<sup>42</sup> *Walk v. State*, 841 S.W.2d 430 (Tex. Civ. App. – Corpus Christi, 1992, rehearing overruled, pet. ref'd)

<sup>43</sup> Penal Code §39.02

<sup>44</sup> *Bexar County v. Wentworth*, 378 S.W.2d 126 (Tex. Civ. App. – San Antonio, 1964, pet. ref. n.r.e.); Loc. Gov't Code §171.006

<sup>45</sup> Tex. Att'y Gen. Op. No. JM-0424 (1986)

## DISCLOSURE OF CERTAIN BUSINESS RELATIONSHIPS

**Other Disclosure Requirements.** In addition to the requirements of Chapter 171, a county officer is required to electronically file a conflicts disclosure statement with the county clerk under Local Government Code Chapter 176 under certain circumstances.<sup>46</sup> A county officer subject to the requirements of Chapter 176 consists of the members of the commissioners court and any third party, including an employee, who exercised discretion in the planning, recommending, selecting, or contracting of a vendor.<sup>47</sup>

**Conflict of Interests Disclosure Statement Required.** A county officer must file a conflicts disclosure statement if he or she has an employment or other business relationship with a vendor and received taxable income that exceeds \$2,500 during the 12-month period preceding the date the officer becomes aware of the contract or the county considers entering into a contract with the vendor.<sup>48</sup> The official must also file a conflicts disclosure statement if he or she has received one or more gifts with an aggregate value of more than \$100 in the same 12-month period. Both of these requirements also apply if the vendor's relationship is with certain family members related to the officer, requiring the officer to file the statement if the requisite amount is exceeded.<sup>49</sup>

**Exception.** A county officer is not required to file a conflicts disclosure statement if he or she accepts a gift if it is a political contribution or food accepted as a gift.<sup>50</sup>

**Vendor Conflict of Interest Questionnaire Required.** The person who contracts or seeks to contract with the county must also file a completed questionnaire with the county clerk disclosing the person's affiliation or business relationship with each member of the commissioners court.<sup>51</sup> A corporation, partnership or other corporate entity is a "person" subject to Chapter 176.<sup>52</sup>

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<sup>46</sup> Copies of the Texas Ethics Commission Forms CIS, Local Government Officer Conflicts Disclosure Statement, and CIG, Conflict of Interest Questionnaire, are attached as Appendix B.

<sup>47</sup> Loc. Gov't Code §176.001(4)

<sup>48</sup> Loc. Gov't Code §176.003

<sup>49</sup> Disclosure of taxable income applies to family members related in the first degree of consanguinity or affinity. Disclosure of gifts applies to family members related in the third degree of consanguinity or the second degree of affinity. See chart attached as Appendix C.

<sup>50</sup> Loc. Gov't Code §176.003(a-1)

<sup>51</sup> Loc. Gov't Code. §176.006

<sup>52</sup> Tex. Att'y Gen. Op. No. GA-0446 (2006)

The county does not have an affirmative duty to require vendors to comply with Chapter 176.<sup>53</sup> Nor is the county required to inform a vendor of its disclosure requirements.

**Conflicts Disclosure Forms Must be Filed with County Clerk.** A county officer must file the conflicts disclosure statement with the county clerk not later than 5 p.m. on the seventh business day after the date the officer becomes aware of facts that require its filing.<sup>54</sup> Similarly, a vendor is required to file a conflicts of interest questionnaire with the county clerk not later than the seventh business day after the later of the date the vendor begins discussion to enter into a contract with the county, submits something in writing related to a potential contract, or becomes aware of an employment or other business relationship with or the presentation of a gift to a county officer or family member that would require the official to file a conflicts disclosure statement.<sup>55</sup>

The county clerk is required to maintain a publically available list of all county officers and any vendor who may be required to file a question of interest questionnaire.<sup>56</sup> The clerk is also required to maintain any statements or questionnaires filed under Chapter 176 in accordance with the county's records retention schedule.

**Website Posting Required.** Counties are not required to maintain a website. However, if a county does maintain a website, it must provide access to statements and questionnaires required under Chapter 176.<sup>57</sup>

**Offenses and Penalties Under Chapter 176.** A county officer commits an offense under Chapter 176 if he or she is required to file a conflicts disclosure statement and knowingly fails to timely file the form.<sup>58</sup> It is an exception to an offense if the county official files the required conflicts disclosure statement not later than the seventh business day after he or she received notice from the county of the alleged violation.<sup>59</sup> A vendor commits an offense under Chapter 176 if it is required to file a questionnaire and knowingly fails to timely do or knowingly fails to timely file an updated questionnaire.<sup>60</sup> It is an exception to an offense if a vendor files the required questionnaire not later than the seventh business day after the date the vendor receives

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<sup>53</sup> *Id.*

<sup>54</sup> Loc. Gov't Code §176.003(b)

<sup>55</sup> Loc. Gov't Code §176.006

<sup>56</sup> Loc. Gov't Code §176,0065

<sup>57</sup> Loc. Gov't Code §176.009

<sup>58</sup> Loc. Gov't Code §176.013(a)

<sup>59</sup> Loc. Gov't Code §176.013(f)

<sup>60</sup> Loc. Gov't Code §176.013(b)

notice from the county of the alleged violation.<sup>61</sup> A violation may result in charges ranging from a Class C misdemeanor to a Class A misdemeanor depending on the value of the contract.

The county may reprimand, suspend, or terminate the employment of a person who knowingly fails to comply with the requirements of Chapter 176.<sup>62</sup> Additionally, the commissioners court may, at its discretion, declare a contract void if it determines that a vendor failed to file a conflicts of interest questionnaire.<sup>63</sup>

**Disclosure of Interested Parties.** The commissioners court may not enter into a contract requiring a vote with a value of at least \$1 million unless the business entity submits a disclosure of interested parties to the county at the time it submits the signed contract to the county.<sup>64</sup> The Texas Ethics Commission has promulgated Form 1295 which must be electronically filed with the commission.<sup>65</sup> The form includes a list of each interested party for the contract that the business entity is aware of and a signature of its authorized agent, acknowledging that it is made under oath and under penalty of perjury.

#### **DISCLOSURE OF INTEREST IN PROPERTY TO BE ACQUIRED WITH PUBLIC FUNDS**

**Affidavit Required.** A public servant who has a legal or equitable interest in property that will be acquired with public funds must file an affidavit within 10 days before the date the property is to be acquired.<sup>66</sup> For the purpose of this provision, a “public servant” is a an official or candidate for nomination to public office even if they are not yet qualified or have not assumed the duties of an office.<sup>67</sup> This includes a person who is elected, appointed, employed or designated as a public official or candidate. Acquisition can occur by purchase or condemnation.

The affidavit must contain specific information, including the nature, type and amount of interest in the property. It is filed with the county clerk in the county in which the public servant resides and in each county in which the property is located.

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<sup>61</sup> Loc. Gov't Code §176.013(g)

<sup>62</sup> Loc. Gov't Code §176.013(d)

<sup>63</sup> Loc. Gov't Code §176.013(e)

<sup>64</sup> Gov't Code §2252.908

<sup>65</sup> Form 1295 may be accessed at [ethics.state.tx.us/whatsnew/elf\\_info\\_form1295.htm](https://ethics.state.tx.us/whatsnew/elf_info_form1295.htm)

<sup>66</sup> Gov't Code §553.002

<sup>67</sup> Gov't Code §553.001(2)

**Criminal Penalty.** A person who has actual notice of the acquisition or intended acquisition of property in which he or she has an interest and fails to file an affidavit may be prosecuted for a Class A misdemeanor.<sup>68</sup> The offense is punishable by a fine not to exceed \$4,000, a jail term not to exceed one year, or both a fine and confinement.

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<sup>68</sup> Gov't Code §553.003

# DUAL OFFICE HOLDING

## THE GENERAL POLICY

The subject of this section, the general prohibition against dual office holding, is another example of an automatic limit on the ability of a single person to hold two incompatible public offices. Both the Texas Constitution and the common law, established by judicial decision and attorney general opinion, include prohibitions against dual office holding.

The penalties for violating the dual office holding prohibition are severe. If not careful, an officeholder may unwittingly forfeit his or her office. This happens more often than one might think and it can stem from a lack of knowledge about this particular area of the law.<sup>69</sup>

## TEXAS CONSTITUTION ARTICLE 16, §40

The constitutional prohibition against dual office holding is set out in Article 16, §40 of the Texas Constitution:

*(a) No person shall hold or exercise at the same time, more than one civil office of emolument, . . .*<sup>70</sup>

Two questions must be answered to determine whether possession of two particular offices violate this section. First, whether both positions are offices of emolument, and second, whether the offices are both civil offices.

## EMOLUMENT

**What is an “Emolument?”** If an officeholder is paid for his or her service, the position might be an office of emolument. “Emolument” is defined as a pecuniary profit, gain or advantage.<sup>71</sup> A civil office of emolument, generally speaking, is a public office for which the officeholder is paid a salary, although the attorney general has also determined that an emolument includes any amount received by the officer in excess of actual expenses, which could include a fixed per diem, payment of hospitalization insurance, or a flat

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<sup>69</sup> A chart summarizing the attorney general opinions related to dual office holding by county officials is attached as Appendix D.

<sup>70</sup> Tex. Const. Art. 16, §40

<sup>71</sup> *Irwin v. State*, 177 S.W.2d 970 (Tex. Crim. 1944)

payment per meeting.<sup>72</sup> Trustee of an independent school district is an example of a public office that is not a civil office of emolument because trustees serve without compensation.<sup>73</sup> A salary does not include legitimate reimbursement of actual expenses.<sup>74</sup>

**Salary Refusal Not Permitted.** The holder of an office of emolument may not cure a dual office holding problem by refusing to accept the compensation attached to the office.<sup>75</sup> The county cannot eliminate the pay or benefit to a position to avoid the dual office holding prohibition.<sup>76</sup> There is a statutory exception to this rule that allows a county official to be appointed to the governing body of a state agency if he or she does not receive compensation.<sup>77</sup> Based on this, a county clerk is also permitted to serve as a director of a river authority if he or she does not receive compensation.<sup>78</sup>

## CIVIL OFFICE

**Independent Authority Required.** Assuming both positions fall under the definition of being offices of emolument, the next question is whether they are both civil offices. Whether a particular office is a civil office centers on a two part analysis: first, does the office holder exercises any sovereign function of the government for the benefit of the public and second, is the office's authority largely independent of the control of others.<sup>79</sup> Whether an office meets this standard is a fact question to be determined on an office-by-office basis by a court or through the attorney general opinion process. However, an elected official is clearly an officer because he or she exercises a sovereign function of government.<sup>80</sup>

**Public Employees vs. Public Officers** A county employee who works for an elected official does not hold a civil office for the purposes of the dual office holding prohibition. The Galveston Court of Civil Appeals determined that a county road engineer was a public employee rather than a public officer because the legislature had provided for the engineer to serve for an indefinite term and to be directly responsible

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<sup>72</sup> Tex. Att'y Gen. Op. No. GA-0032 (2003)

<sup>73</sup> Tex. Educ. Code Ann. §11.061(d)

<sup>74</sup> Tex. Att'y Gen. Op. No. JM-1266 (1990)

<sup>75</sup> Tex. Att'y Gen. Op. Nos. JM-0333 (1985); JM-0704 (1987)

<sup>76</sup> *Broom v. Tyler County Comm'rs Court*, 560 S.W.2d 435 (Tex. Civ. App. – Beaumont 1977, no writ)

<sup>77</sup> Tex. Gov't Code §574.005

<sup>78</sup> Tex. Att'y Gen. Op. No. GA-0250 (2004)

<sup>79</sup> *Aldine Independent School District v. Standley*, 280 SW2d 578 (Tex. 1955)

<sup>80</sup> Tex. Att'y Gen. Op. No. GA-0032 (2003)

to and removable by the commissioners court.<sup>81</sup> Similarly, an elections administrator is a public employee rather than a public officer because while he or she exercises some sovereign function in conducting elections and voter registration, the office remains under the control of the commissioners court, which has authority to create or abolish the office and the county election commission, which has authority to terminate the administrator.<sup>82</sup> An assistant county attorney is not a public officer, since the assistant serves under the direction and at the pleasure of the county attorney.<sup>83</sup> A tax assessor-collector's chief deputy "is an employee and not a civil officer of emolument."<sup>84</sup> And a chief appraiser is not a public officer within the meaning of Article 16, §40 since the office's appraisal functions are subject to review by the appraisal review board and the duties are largely ministerial and derived from statute.<sup>85</sup>

**Law Enforcement Not Public Officers For Dual Office Purposes.** Generally, law enforcement officers are not considered to hold offices for the purposes of dual office holding under Article 16, §40. For example, a sheriff's deputy was determined not to be a public officer within the meaning of Article 16, §40.<sup>86</sup> However, a law enforcement officer may still be prohibited from serving in a second position based on the common-law prohibitions against conflict of interest, conflicting loyalties or incompatibility, as more fully discussed below. Additionally, the State Commission on Judicial Conduct has said that a judge cannot also be a law enforcement officer.<sup>87</sup>

**County Official May Serve on Appraisal District Board.** A member of the commissioners court may serve on an appraisal district board because there is specific statutory authority for he or she to do so and also the appraisal district board is not an office of emolument.<sup>88</sup> If the county assessor-collector is not appointed to the board, the county assessor-collector serves as a nonvoting director.

**State Employee May Serve on Commissioners Court.** A state employee is not prohibited from serving as a member of the governing body of a school district, city, town or other local governmental district but may not receive a salary for serving on the governing body.<sup>89</sup> The term "other local government district" contained in Article 16,

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<sup>81</sup> *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App. – Galveston 1949, writ ref'd)

<sup>82</sup> *Krier v. Navarro*, 952 S.W.2d 25 (1997)

<sup>83</sup> Tex. Att'y Gen. Op. No. LO-89-58 (1989)

<sup>84</sup> Tex. Att'y Gen. Op. No. JM-1083 (1989)

<sup>85</sup> Tex. Att'y Gen. Op. No. JM-0499 (1986)

<sup>86</sup> Tex. Att'y Gen. Op. DM-0212 (1993)

<sup>87</sup> Tex. Comm. Jud. Conduct PS-2000-1

<sup>88</sup> Tex. Tax Code 6.03(a); Op. Att'y Gen. No. DM-0047 (1991)

<sup>89</sup> Tex. Const. Art. 16, §40(b)

§40 does not apply to counties.<sup>90</sup> The attorney general has concluded county commissioners and other elected county officials may also serve as state employees and may be paid for both positions.<sup>91</sup> However, a state legislator is prohibited from being a county employee or elected official.<sup>92</sup>

## AUTOMATIC RESIGNATION

**Consequences of Accepting Second Office.** Under the Constitutional prohibition, when the holder of a civil office of emolument is elected or appointed to a second civil office of emolument, the final act of qualifying for the second office acts as an automatic and immediate resignation of the first. When an office is vacated because the officer entered into a second civil office of emolument, the person is not considered a holdover under Article 16, §17 of the Texas Constitution.<sup>93</sup>

Under the constitutional provision, a person may not hold two offices of this type, unless the offices fall under one of the exceptions discussed below. For example, courts have held that an individual may not serve simultaneously as a constable and a commissioner of an emergency services district.<sup>94</sup>

## EXCEPTIONS TO THE CONSTITUTIONAL PROHIBITION ON DUAL OFFICE HOLDING

**Specific Exceptions.** Article 16, §40(a) contains a number of exceptions to the dual office holding prohibition. Any of the offices named as an exception may be held with another office whether named in the exception or not, so long as holding the two offices does not violate common law incompatibility.<sup>95</sup>

**Justice Of The Peace and County Commissioners.** The offices of justice of the peace and county commissioner are specifically exempted from the operation of the dual office holding provision, though they can and do run into compatibility issues under the common law. A sitting county commissioner could hold the position of a compensated municipal judge of a city located within his county.<sup>96</sup> The attorney general

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<sup>90</sup> *County of Maverick v. Ruiz*, 897 S.W.2d 843 (Tex. Civ. App – San Antonio, no writ); Tex. Att’y Gen Op. No. JC-0074 (1999) (overruling Tex. Att’y Gen. Op. No. H-6 (1973))

<sup>91</sup> Tex. Att’y Gen. Op. No. GA-1026 (2013)

<sup>92</sup> Tex. Const. Art. 16, §40(d); Tex. Att’y Gen. Op. No. JC-0430 (2001)

<sup>93</sup> *Pruitt v. Glen Rose Independent School District No. 1*, 84 S.W.2d 1004 (Tex. 1935)

<sup>94</sup> Tex. Att’y Gen. Op. No. GA-1036 (2014)

<sup>95</sup> *Gaal v. Townsend*, 14 S.W. 365 (Tex. 1890)

<sup>96</sup> Tex. Att’y Gen. Op. No. GA-0348 (2005)

concluded that, “[b]ecause the office is expressly exempted from Article 16, §40...a county commissioner is not prohibited by that constitutional provision from simultaneously serving as a compensated municipal judge.” Similarly, one person may serve as mayor and justice of the peace at the same time.<sup>97</sup> A county commissioner could also serve as a reserve deputy sheriff.<sup>98</sup>

The exception for county commissioners does **not** apply to the county judge.<sup>99</sup> A county judge is prohibited from serving as the director of a river authority based on Article 16, §40.

**Military Personnel.** A person serving in the military is exempted from the constitutional prohibition against dual office holding. Specifically, officers of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and officers and enlisted members of the Texas State Guard and any other active militia or military force organized under state law.

## COMMON LAW INCOMPATIBILITY

**Types of Incompatibility.** In addition to the constitutional prohibition, there are three different aspects to common-law incompatibility: self-appointment, self-employment, and conflicting loyalties. The attorney general and the courts have reviewed whether particular offices are incompatible on a case by case basis. An incompatibility determination runs parallel to potential violations of Article 16, §40. It is possible for a scenario to violate common law incompatibility while not triggering the prohibition set out in Article 16, §40.<sup>100</sup>

**Self-Appointment.** Self-appointment prohibits a governing body from appointing one of its own members to a public office.<sup>101</sup> For example, if there is a vacancy in the office of county judge, a commissioners court may not appoint a sitting commissioner to fill the

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<sup>97</sup> Tex. Att’y Gen. Op. No. O-582 (1939): “By the laws of the State of Texas, constitutional and statutory, as person is prohibited from holding more than one civil office of emolument (Art. 16, §40 of the State Constitution excepting certain offices of which that of the justice of the peace is one.”

<sup>98</sup> Tex. Att’y Gen. Op. No. LO-97-081 (1997)

<sup>99</sup> Tex. Att’y Gen. Op. No. JM-594 (1986)

<sup>100</sup> Tex. Att’y Gen. Op. No. LO-96-004 (1996)

<sup>101</sup> *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928)

vacancy. A commissioner who was interested in being appointed county judge would have to resign office, wait for a person to be appointed to fill the position he or she resigned from (so that the resigned commissioner was no longer be a holdover) and then be appointed by the commissioners court as county judge.<sup>102</sup> On the other hand, a commissioners court may appoint one of its member to a position that is not a public office, such as an advisory board or committee.

**Self-Employment.** Self-employment, on the other hand, prohibits a person from holding an office and a position of employment that his or her office supervises. For example, In *Ehlinger v. Clark*, the Texas Supreme Court ruled that a commissioners court could not hire the county judge as an attorney for the county.<sup>103</sup> Similarly, a school trustee may not simultaneously serve as a volunteer teacher within the district because the board of trustees ultimately has supervisory controls over the teacher.<sup>104</sup>

The attorney general has suggested that the key aspect of self-employment is supervision.<sup>105</sup> A county commissioner, for example, could serve as a reserve deputy sheriff without violating the prohibition against self-employment because the deputy sheriff is under the supervisory control of the sheriff rather than the commissioners court.<sup>106</sup>

**Conflicting Loyalties.** Conflicting loyalties is the question of whether any particular two offices have overlapping territory, duties, or powers such that a person who holds both could be placed in a position to improperly favor one office over the other. A person is found to have conflicting loyalties if simultaneously holding two positions would prevent him or her from exercising independent and disinterested judgement in either or both positions.<sup>107</sup> Most violations of the common law incompatibility doctrine fall under this restriction.

The conflicting loyalties doctrine was first articulated in *Thomas v. Abernathy County Line Independent School District*, a case in which two trustees of a school district were elected to the Abernathy city council and for a time occupied both offices.<sup>108</sup> The court determined the offices of school trustee and alderman were incompatible because there

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<sup>102</sup> Tex. Att’y Gen. Op. No. C-452 (1965)

<sup>103</sup> 8 S.W.2d at 674

<sup>104</sup> Tex. Att’y Gen. Op. No. JC-0371 (2001)

<sup>105</sup> Tex. Att’y Gen. Op. No. GA-0536 (2007)

<sup>106</sup> Tex. Att’y Gen. Op. No. LO-97-081 (1997)

<sup>107</sup> Tex. Att’y Gen. Op. No. GA-0840 (2011)

<sup>108</sup> <sup>108</sup> *Thomas v. Abernathy County Line Independent School District*, 290 S.W.2d 152 (Tex. Comm’n App. 1927), at 153

was a conflict of discretion between the two positions: “if the same person could be a school trustee and a member of the city council or board of aldermen at the same time, school policies, in many important respects, would be subject to direction of the council or aldermen instead of to that of the trustees.”<sup>109</sup> Following *Abernathy*, courts and the attorney general have reviewed on a case by case basis whether particular offices have such a conflict.

For example, a county attorney may not simultaneously serve on a school district board of trustees in the county because the county attorney has “authority to investigate matters and institute proceedings regarding the potential criminal conduct of school district officers.”<sup>110</sup> Similarly, a sheriff is prohibited from serving on a school district board of trustees if he or she is the primary law enforcement official for the district.<sup>111</sup> A county auditor may not serve as a councilmember of a city within the county because “there are many instances in which the duties of the auditor are likely to conflict with the performance of city council duties, particularly when the transfer of funds or property between the city and county is involved.”<sup>112</sup> And a tax assessor-collector may not serve on the school district board of trustees if the district contracts with the county to collect its taxes.<sup>113</sup>

Generally, if the two governmental entities contract with each other through their governing bodies, a person is prohibited from serving on both.<sup>114</sup> Based on this, a county commissioner may not serve as a city council member.<sup>115</sup> Similarly, a county auditor may not serve on a city council.<sup>116</sup>

**No Overlapping Territory.** Generally, a person may not hold positions on two governing bodies where the territory of the offices overlap. This is because there is a potential for conflict between the offices, especially in terms of both entities’ authority to collect taxes.<sup>117</sup> The attorney general has held:

If two districts with overlapping geographical jurisdictions each have the power of taxation, we also believe that the potential for conflict is insurmountable. When the

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<sup>109</sup> *Id.* at 153

<sup>110</sup> Tex. Att’y Gen. Op. No. LO-95-29 (1995)

<sup>111</sup> Tex. Att’y Gen. Op. No. GA-0328 (2005)

<sup>112</sup> Tex. Att’y Gen. Op. No. JM-0133 (1984)

<sup>113</sup> Tex. Att’y Gen. Op. No. LO-92-004

<sup>114</sup> Tex. Att’y Gen. Op. No. GA-0015 (2003)

<sup>115</sup> *Id.*; Tex. Att’y Gen. Op. No. LO-88-49 (1988)

<sup>116</sup> Tex. Att’y Gen. Op. No. JM-0819 (1987)

<sup>117</sup> Tex. Att’y Gen. Op. No. GA-0307 (2005)

object of each district is to maximize its own revenues, a single individual would have great difficulty in exercising his duties to two separate and competing masters.<sup>118</sup>

**Exceptions to Conflicting Loyalties Prohibition.** A determination on whether dual office holding is prohibited by conflicting loyalties must be made on a case-by-case basis. For example, the attorney general reviewed whether a sheriff could serve on the board of trustees of a school district located within the county.<sup>119</sup> The district asserted that there was little interaction between the two offices, with the school district relying more on the police department of the city in which its campus is located for its security. Taking this into account, the attorney general suggested it was unlikely a court would determine the two offices could not be held by the same individual.<sup>120</sup> Similarly, the conflicting loyalties doctrine does not prevent a county hospital board member from serving as county treasurer.<sup>121</sup>

**Public Office Determination Required.** As with Article 16, §40, conflicting loyalties incompatibility only applies when both positions are public offices.<sup>122</sup> Based on this, an independent school district police chief may simultaneously serve as a constable in the precinct in which the district is located because the police chief is not a civil office of emolument.<sup>123</sup> A justice of the peace is also not prohibited from serving as a municipal court judge in a city located in his or her precinct.<sup>124</sup> Similarly, a constable may also simultaneously be an employee of the county road and bridge department without violating the conflicting loyalty doctrine.<sup>125</sup> The attorney general has also determined that a constable may serve as the municipal police chief in a city within his or her precinct.<sup>126</sup> Because the police chief is subject to removal by the city council, the chief does not exercise authority largely independent of the control of others and the two offices do not have overlapping authority that might violate the common-law doctrine of incompatibility.

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<sup>118</sup> Tex. Att’y Gen. Op. No. JC-0557 (2002)

<sup>119</sup> Tex. Att’y Gen. Op. No. KP-0054 (2015)

<sup>120</sup> *But see* Tex. Att’y Gen. Op. No. GA-0328 (2005) (Sheriff may not serve on school district board of trustees because he serves as primary law enforcement official for the area.)

<sup>121</sup> Tex. Att’y Gen. Op. No. GA-1075 (2014)

<sup>122</sup> Tex. Att’y Gen. Op. No. KP-0032 (2015)

<sup>123</sup> Tex. Att’y Gen. Op. No. KP-0032 (2015)

<sup>124</sup> Tex. Att’y Gen. Op. No. JM-0819 (1987)

<sup>125</sup> Tex. Att’y Gen. Op. No. LO-88-32 (1988)

<sup>126</sup> Tex. Att’y Gen. Op. No. KP-0122 (2016)

## CONSEQUENCES OF DUAL OFFICE HOLDING

**Automatic Resignation.** As with the Constitutional prohibition, accepting a second office usually operates as an automatic resignation once the person qualifies for the second, prohibited office under the conflicting loyalties prohibition.<sup>127</sup> A person no longer holds his or her original office once qualified for the second office.

**Self-Appointment Void.** Acceptance of a second position that constitutes self-appointment has been found to be void as a matter of law.<sup>128</sup> The court held that employment of the county judge as a private attorney by the commissioners court is void and, therefore, it does not result in automatic resignation.

## SEPARATION OF POWERS

**Not Applicable To Dual Office Holding.** Article 2, §1 of the Texas Constitution provides for the separation of powers between three departments of government: legislative, executive, and judicial.<sup>129</sup> While older attorney general opinions suggested the separation of powers doctrine as a potential source of dual office holding prohibitions, more recently the attorney general has abandoned this view and does not consider separation of powers an impediment to dual office holding.<sup>130</sup>

## CODE OF JUDICIAL CONDUCT

**Restrictions on Judges.** A person who holds a judicial office, including a county court at law judge, district judge, justice of the peace, and county judge performing judicial functions, are also subject to the Code of Judicial Conduct, which may prevent him or her from holding a second office.<sup>131</sup> For example, the attorney general determined that a county court at law judge was barred from holding a second office of trustee of an independent school district by Canon 4(H) of the Code of Judicial Conduct:

*Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of*

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<sup>127</sup> *Pruitt v. Glen Rose Indep. Sch. Dist.*, 84 S.W.2d 1004 (Tex. 1935)

<sup>128</sup> *Ehlinger*, 8 S.W.2d at 673

<sup>129</sup> Tex. Const. Art. 2, §1

<sup>130</sup> Tex. Att'y Gen. Op. No. JC-0216 (2000)

<sup>131</sup> The Texas Supreme Court has promulgated this Code, which can be found on their website at [txcourts.gov/media/514728/TXCodeOfJudicialConduct\\_20020822.pdf](http://txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf)

*justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.*<sup>132</sup>

This section coupled with the general requirement in Canon 6(A) that judges comply with the Code may act as a barrier to a judge holding a second office.<sup>133</sup> However, it does not prevent a judge from serving in another elected position, such as a junior college trustee.<sup>134</sup>

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<sup>132</sup> Tex. Code Jud. Conduct, Canon 4(H)

<sup>133</sup> Tex. Att'y Gen. Op. No. JM-0213 (1984)

<sup>134</sup> Tex. Att'y Gen. Op. No. JC-0216 (2000)

# ETHICS

## THE GENERAL POLICY

**Public Servants Must Not Use Their Office for Personal Gain.** Ethics laws are intended to prevent a public servant from personally benefiting based on his or her official status. In addition to the conflict of interest laws discussed earlier in this publication, Texas law includes prohibitions against an official or employee receiving a monetary benefit related to his or her office or authority or using public property for personal purposes. The most significant of these restrictions are found in Chapter 36, Bribery and Corrupt Influence, Chapter 37, Perjury and Other Falsifications, and Chapter 39, Abuse of Office, of the Penal Code and Title 15, Regulating Political Funds and Campaigns, of the Elections Code. The Texas Ethics Commission is authorized to issue advisory opinions related to Penal Code Chapters 36 and 39 and Title 15.<sup>135</sup>

There are additional restrictions on the action of specific elected officials or employees. For example, lawyers are subject to the Texas Disciplinary Rules of Professional Conduct, which include ethics provisions.<sup>136</sup> Judges are also subject to the ethics restrictions in the Code of Judicial Conduct.<sup>137</sup> A public official or employee who is licensed by a state agency should consult that agency's website for information related to specific ethics provisions that may apply to his or her professional responsibilities, in addition to those applicable to his or her service as a public official or employee.

## BRIBERY

**“Benefit” Defined.** Under the Penal Code, a “benefit” is anything reasonably regarded as a monetary gain or advantage.<sup>138</sup> It includes a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest, such as a family member or business associate. Except as discussed below, there is no monetary minimum value set

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<sup>135</sup> Gov't Code §571.091. The Texas Ethics Commission's opinions are available on their website [ethics.state.tx.us](http://ethics.state.tx.us).

<sup>136</sup> The Professional Ethics Committee for the State Bar of Texas issues written ethics opinions. The Texas Center for Legal Ethics publishes these opinion, which may be reviewed at [legaleticstexas.com/Ethics-Resources/Opinions.aspx](http://legaleticstexas.com/Ethics-Resources/Opinions.aspx).

<sup>137</sup> The Committee on Judicial Ethics of the State Bar of Texas Judicial Section issues written judicial ethics opinions. The Office of Court Administration publishes Judicial Ethics Opinions, which may be reviewed at [txcourts.gov/media/678096/JudicialEthicsOpinions.pdf](http://txcourts.gov/media/678096/JudicialEthicsOpinions.pdf).

<sup>138</sup> Tex. Pen. Code §36.01(3)

for a benefit. Waiver of a membership fee is a benefit for purposes of Chapter 36.<sup>139</sup> A magazine subscription may be a benefit if it is of more than minimal value.<sup>140</sup>

**Public Servant May Not Take Action in Exchange for a Benefit.** It is illegal for a public servant to accept a benefit in exchange for his or her decision, opinion, recommendation, vote or other exercise of discretion.<sup>141</sup> It does not matter that the public servant is not qualified to perform the requested act, accepting the benefit is still bribery. Additionally, a benefit given to a public servant after an official action is considered bribery and is prohibited. However, a benefit does not constitute an improper bribe if it is **not** offered or accepted as consideration for some official act by a public servant.<sup>142</sup>

**Exceptions.** The Texas Ethics Commission has held that promotional or commemorative items of minimal value, including caps, coffee mugs, tee shirts and key rings, are not a “benefit” for purposes of Penal Code Chapter 36 if they are not offered or accepted in exchange for any action or in action by a public servant.<sup>143</sup> A court has also held that goods and services of minimal value are not prohibited “benefits.”<sup>144</sup> As a general rule, a plaque could not reasonably be regarded a pecuniary advantage and is not a benefit.<sup>145</sup>

## GIFTS

**Limits on Accepting Gifts by Public Servant.** Regardless of whether the donor is asking for something in return, a public servant is probably prohibited from accepting a benefit.<sup>146</sup> A public servant may never solicit, accept or agree to accept a gift from a person under his or her jurisdiction. A public servant is also prohibited from soliciting, accepting, or agreeing to accept a benefit if he or she exercises discretion in connection with contracts, purchases, payments or other monetary transactions. For the purposes of this prohibition, a county or district clerk exercises discretion in regards to purchasing matters by making recommendations to the commissioners court even if he or she is not the final decision maker.<sup>147</sup>

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<sup>139</sup> Tex. Ethics Comm. Op. No. 268 (1995)

<sup>140</sup> Tex. Ethics Comm. Op. No. 120 (1993)

<sup>141</sup> Tex. Pen. Code §36.02

<sup>142</sup> Tex. Ethics Comm. Op. No. 60 (1992)

<sup>143</sup> Tex. Ethics Comm. Op. No. 61 (1992)

<sup>144</sup> *Smith v. State*, 959 S.W.2d 1 (Tex. Civ. App. – Waco, 1997, pet. ref.)

<sup>145</sup> Tex. Ethics Comm. Op. No. 36 (1992)

<sup>146</sup> Tex. Pen. Code §36.08

<sup>147</sup> Tex. Ethics Comm. Op. No. 396 (1998)

**Donation of Unsolicited Gift.** A public servant who receives an unsolicited gift that he or she is prohibited from accepting may donate it to a governmental entity or a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.<sup>148</sup>

## EXCEPTIONS TO PROHIBITION ON GIFTS

**Exceptions Are Specific.** Penal Code §36.10 provides a number of exceptions to the prohibition against gifts to a public servant. The Texas Ethics Commission has issued opinions interpreting most of them. The exceptions most likely to be relevant to county officials are described below. In relying on an exception, a county officer or employee should also consider whether accepting a gift gives rise to the appearance of impropriety.

**Personal Relationship.** A public servant may accept a gift or other benefit from a relative or if he or she has a personal relationship with the donor that is unrelated to his or her official status.<sup>149</sup> The gift must be given based on the donor's personal relationship with the public servant.

**Independent Business Relationship.** A public servant may accept a gift or other benefit from a person with whom the public servant has a professional or business relationship that is unrelated to his or her official status.<sup>150</sup> For example, if a county official or employee regularly receives a holiday gift based on a business relationship, he or she may continue to accept the gift.

**Low-Value Item.** A public servant may accept non-cash items of less than \$50 in value.<sup>151</sup> A county official or employee may not accept a gift card or gift certificate because they are considered cash.<sup>152</sup>

**Food, Lodging, Transportation, or Entertainment Accepted as Guest.** A public servant may accept food, lodging, transportation, or entertainment as a guest provided that any applicable reporting requirements are met.<sup>153</sup> The donor must be present at the event for this exception to apply. Additionally, if a lobbyist provides the food, lodging,

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<sup>148</sup> Tex. Pen. Code §36.08(i)

<sup>149</sup> Tex. Pen. Code §36.10(a)(2)

<sup>150</sup> *Id.*

<sup>151</sup> Tex. Pen. Code §36.10(a)(6)

<sup>152</sup> Tex. Ethics Comm. Op. No. 541 (2017)

<sup>153</sup> Tex. Pen. Code §36.10(B)

transportation, or entertainment, he or she is required to properly report the transaction.<sup>154</sup> The Texas Ethics Commission has held that county officials may accept transportation and lodging necessary to attend vendor's equipment demonstration provided the vendor's representative is present at all meals and the demonstration.<sup>155</sup>

**Political Contributions.** A public official may accept a political contribution authorized by Title 15 of the Election Code.<sup>156</sup>

## HONORARIUM

**Limits on Accepting Honorarium by Public Servant.** A public servant is usually prohibited from soliciting, accepting or agreeing to accept an honorarium in exchange for services he or she would not have been asked to provide but for his or her position or duties.<sup>157</sup> A fee for speaking, teaching and certain other services are considered to be "honorarium."<sup>158</sup> A person may not accept free membership in an organization as consideration for a speech.<sup>159</sup> However, a fee received by a judge for performing a marriage is not an "honorarium."<sup>160</sup> It is important to remember that a prohibited honorarium may not be donated to a tax-exempt charitable organization and must be returned.

**Exceptions.** A public servant may accept food, transportation and lodging in connection with a speech that is more than merely perfunctory.<sup>161</sup> Additionally, a private association of public officials may compensate a person for services as president if he or she was elected because of his or her skills and abilities and not because the person is a public servant of a particular county.<sup>162</sup> If the public servant's official status was not a deciding factor in the request for services, he or she may accept an honorarium.<sup>163</sup>

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<sup>154</sup> Tex. Pen. Code §36.10(c)

<sup>155</sup> Tex. Ethics Comm. Op. No. 355 (1996)

<sup>156</sup> Tex. Pen. Code §36.10(a)(4)

<sup>157</sup> Tex. Pen. Code §36.07

<sup>158</sup> Tex. Ethics Comm. Op. No. 97 (1992)

<sup>159</sup> Tex. Ethics Comm. Op. No. 57 (1992)

<sup>160</sup> Tex. Att'y Gen. Op. No. DM-0397 (1996)

<sup>161</sup> Tex. Pen. Code §36.07(b)

<sup>162</sup> Tex. Att'y Gen. Op. No. GA-0354 (2005)

<sup>163</sup> Tex. Ethics Comm. Op. Nos. 305 and 312 (1996)

## FALSIFICATION

**Tampering With a Governmental Record is Prohibited.** A person is prohibited from knowingly making a false entry in or alteration of a governmental record.<sup>164</sup> It is illegal to make, present, or use any government record knowing it is false and with the intent that it be taken as genuine.<sup>165</sup> The intentional destruction, concealment, removal, or impairment of the legibility or availability of a governmental record is also prohibited.<sup>166</sup>

County officials and employees have been prosecuted and convicted for violating the prohibition against tampering with a governmental record. For example, a constable was convicted for tampering with peace officer training certificates.<sup>167</sup> A court also found that expense vouchers and fake gasoline receipts were governmental records for the purposes of a conviction under the Penal Code when submitted by a county sheriff to obtain travel reimbursement.<sup>168</sup> If a county official approves an employee's timesheet containing false entries, both the official and the employee are subject to prosecution.

## ABUSE OF OFFICE

**Illegal Use of Public Authority.** A public servant must not violate a law related to office or employment. For the purposes of Penal Code Chapter 39, a law relates to a public servant's office or employment if it imposes a duty or governs the conduct of the person.<sup>169</sup>

**Official Oppression.** A public servant is prohibited from intentionally subjecting a person to mistreatment or knowingly and illegally denying a person the ability to exercise or enjoy a right, privilege, power, or immunity.<sup>170</sup> For example, a constable committed official oppression by unlawfully arresting a bar's security guard.<sup>171</sup> Similarly, a sheriff's deputy who demanded sexual favors in exchange for not executing a warrant was guilty of official oppression.<sup>172</sup>

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<sup>164</sup> Tex. Pen. Code §37.10(a)(1)

<sup>165</sup> Tex. Pen. Code §37.10(a)(2)

<sup>166</sup> Tex. Pen. Code §37.10(a)(3)

<sup>167</sup> *Tottenham v. State*, 285 S.W.3d 19 (Tex. Civ. Ap. – Houston, 2009, pet. ref.)

<sup>168</sup> *Mills v. State*, 941 S.W.2d 204 (Tex. Civ. App. – Corpus Christi, 1996, pet. ref.)

<sup>169</sup> Tex. Pen. Code §39.01(1)

<sup>170</sup> Tex. Pen. Code §39.03(a)(1) and (2)

<sup>171</sup> *Tovar v. State*, 777 S.W.2d 481 (Tex. Civ. App. – Corpus Christi, 1989, pet. ref.)

<sup>172</sup> *Prevo v. State*, 778 S.W.2d 520 (Tex. Civ. App. – Corpus Christi, 1989, pet. ref.)

**Sexual Harassment.** Sexual harassment is any unwelcome sexual advance, request for sexual favors or other sexually based verbal or physical conduct submission to which is a term or condition of a person's exercise or enjoyment of a right, privilege, power, or immunity.<sup>173</sup> The impact on a person may be explicit or implicit. For example, there does not need to be an explicit threat that the person will lose his or her job if they don't engage in the conduct.

## MISUSE OF GOVERNMENT PROPERTY

**Personal Use of Public Property Prohibited.** A public official must not misuse government property, services, personnel, or any other thing of value in his or her custody or possession.<sup>174</sup> Misuse includes use contrary to an agreement, oath, or contract of employment, a law, or the limited purpose for which the property was delivered or received.<sup>175</sup> A county official may not use a county employee to perform personal errands for the official during regular business hours.

County officials have been found guilty of violating the prohibition against misuse of government property. For example, a county commissioner's use of county equipment to do work on his family's property was a misuse of public property.<sup>176</sup> A county clerk who billed a third party vendor for work her children's company never performed on behalf of the county and accepted payment violated the law.<sup>177</sup> A justice of the peace who failed to account for fines collected from defendants and falsely reporting was appropriately convicted for misapplication of county funds.<sup>178</sup>

**Reimbursement No Defense.** Reimbursing the county for the value of the thing misused is not a defense to prosecution.

**Elections.** It is a violation of the prohibition against misuse of public property to use county resources on a county official's individual political campaign.<sup>179</sup> This includes

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<sup>173</sup> Tex. Pen. Code §39.03(a)(3) and (c)

<sup>174</sup> Tex. Pen. Code §39.02

<sup>175</sup> Tex. Pen. Code §39.01(2)

<sup>176</sup> *Talamantez v. State*, 829 S.W.2d 174 (Tex. Crim. 1992)

<sup>177</sup> *Megason v. State*, 19 S.W.3d 883 (Tex. Civ. App – Texarkana, 2000, pet. ref.)

<sup>178</sup> *Kirkpatrick v. State*, 515 S.W.2d 289 (Tex. Crim. 1974)

<sup>179</sup> Tex. Ethics. Comm. Op. No. 386 (1997)

use of county personnel for campaign purposes. Displaying campaign material in a county office or transporting it in a county vehicle are also prohibited.

**Exceptions.** Frequent flyer miles, hotel or rental car discounts, or food coupons are not things of value for the purpose of Penal Code Chapter 39.<sup>180</sup> This exception was adopted due to the administrative difficulty and cost involved in recapturing the discount or award for the governmental entity.

## MISUSE OF PUBLIC INFORMATION

**Use of Public Information Limited to Public Purpose.** A public servant may not use confidential information that he or she has access to because of his or her office or employment to acquire a monetary interest in property, a transaction or an enterprise affected by the information, speculate on the basis of the information, or coerce another into suppressing or failing to report the information to law enforcement.<sup>181</sup> The same prohibition relates to helping another person to improperly use the confidential information. A public servant is also prohibited from disclosing or using confidential information for a nongovernmental purpose with the intent to obtain a benefit or harm or defraud another person.<sup>182</sup> Confidential information means that information that the public does not generally have access to and that is prohibited from disclosure under the Public Information Act.<sup>183</sup>

## LAW ENFORCEMENT RELATED ISSUES

**Civil Rights Violations.** Because of the inherent power imbalance between a prisoner and those operating a jail or correctional institution, the Penal Code includes specific prohibitions against certain actions. A public official, employee, any other person who works for compensation in a correctional facility or juvenile facility, a volunteer, or a peace officer may not knowingly deny or impede the exercise or enjoyment of any right, privilege, or immunity by a person in custody.<sup>184</sup> These actions may also constitute official oppression under Penal Code §39.03.<sup>185</sup>

**Sex with a Prisoner Prohibited.** Section 39.04 of the Penal Code expressly prohibits all sexual contact with an individual in custody by a public official, employee, any other

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<sup>180</sup> Tex. Pen. Code §39.02(d)

<sup>181</sup> Tex. Pen. Code §39.06(a)

<sup>182</sup> Tex. Pen. Code §39.06(b)

<sup>183</sup> Tex. Pen. Code §39.06(d); Gov't Code Chapter 552

<sup>184</sup> Tex. Pen. Code §39.04(a)(1)

<sup>185</sup> *Mizell v. State*, 70 S.W.3d 156 (Tex. Civ. App. – San Antonio, 2001, aff'd)

person who works for compensation in a correctional facility or juvenile facility, a volunteer, or a peace officer.<sup>186</sup> Both adults and juveniles are considered to be in custody when they are detained.<sup>187</sup>

## OFFENSES AND PENALTIES

**Offenses.** If a public servant violates any of the Penal Code provisions discussed above, he or she commits an offense and is subject to prosecution. Penalties vary depending on the offense, some increasing based on the specific actions of the person.

**Bribery.** A violation of Penal Code §36.02 is a second degree felony. This offense is punishable by imprisonment in a state jail for not less than two nor more than 20 years. The court may also impose a fine not to exceed \$10,000.

**Gifts and Honorarium.** A person who solicits, accepts, or agrees to accept an illegal gift or honorarium commits a Class A misdemeanor. The punishment for these offenses is a fine of up to \$4,000, a jail term not to exceed one year, or both a fine and confinement.

**Falsification.** Tampering with a governmental record is usually a Class B misdemeanor. However, tampering with governmental record with intent to defraud or harm another is a state jail felony, with a term of not more than two years or less than 180 days and a fine of up to \$10,000.

**Abuse of Office.** A person who commits official oppression or sexual harassment may be prosecuted for a Class A misdemeanor. The punishment for these offenses is a fine of up to \$4,000, a jail term not to exceed one year, or both a fine and confinement.

**Misuse of Public Property.** The penalties for misuse of public property range from a Class C misdemeanor to a first degree felony depending on the value of use of the public resource misused. A class C misdemeanor is punishable by a fine of up to \$500. In contrast, a person who commits a first degree felony may be punished by confinement in state jail for not less than five nor more than 99 years and a fine not to exceed \$10,000.

**Misuse of Public Information.** A person who misuses public information may be prosecuted for a third degree felony in most cases. The penalties for this offense are

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<sup>186</sup> Tex. Pen. Code §39.04(a)(2)

<sup>187</sup> *Pastrano v. State*, 250 S.W.3d 128 (Tex. Civ. App. – Austin, 2008, pet. ref.)

confinement in state jail for not less than two nor more than 10 years and a fine not to exceed \$10,000. Coercion of a person to suppress or fail to report information to a law enforcement agency is a Class C misdemeanor, punishable only by a fine.

**Law Enforcement Related Offenses.** A person who violates the civil rights of a person in custody may be charged with a Class A misdemeanor. Illegal sexual activity with an adult in custody is a state jail felony, and illegal sexual activity with a juvenile in custody a second degree felony. Additionally, illegal sexual activity with a juvenile not in custody but under the supervision of a probationary entity is a state jail felony.<sup>188</sup> Failure to report the death of a prisoner is a Class B misdemeanor, which can be punished by a fine up to \$2,000, a jail term not to exceed 180 days, or both a fine and confinement.

**Removal for Official Misconduct.** Conviction for any ethical violation is probably official misconduct, resulting in automatic removal of the public official or serving as grounds for a removal action.<sup>189</sup> Official misconduct means any intentional, unlawful behavior related to the official duties of a public officer.<sup>190</sup> A conviction for official misconduct under the Penal Code results in the immediate removal of a public official, even if he or she is placed on probation.<sup>191</sup>

**Affirmative Defense.** It is an affirmative defense to prosecution for an ethics violation if, before an elected official took action, he or she relied on a Texas Ethics Commission Advisory Opinion.<sup>192</sup> It is important to note that the commission's opinions are fact specific and should be interpreted narrowly.

**Official Immunity.** A public official may be able to assert the defense of official immunity under certain circumstances. There is a three-part test for a court to apply in determining if there is qualified or official immunity. The elements are: (1) the governmental actor was performing a discretionary act; (2) the act was performed in good faith; and (3) it was within the scope of his or her official authority.<sup>193</sup> This defense of official immunity protects a public official or employee from personal liability because of his or her good faith performance of discretionary duties within the scope of their authority. However, official immunity is a defense and not a bar to litigation.

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<sup>188</sup> Tex. Pen. Code §39.04(g)

<sup>189</sup> Loc. Gov't Code §87.013(a)(2)

<sup>190</sup> Loc. Gov't Code §87.011(3)

<sup>191</sup> Loc. Gov't Code §87.031

<sup>192</sup> Gov't Code §571.097;

<sup>193</sup> *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)

## CAMPAIGN AND OFFICEHOLDER CONTRIBUTIONS<sup>194</sup>

**Election Code Definitions of Types of Contributions.** For the purposes of the Texas Election Code, a “contribution” is a direct or indirect transfer of money, goods, services or other thing of value.<sup>195</sup> It includes an agreement or obligation to make a transfer, regardless of the legality of the action. It also includes a loan or extension of credit, except a loan made in the course of business by a corporation in the business of lending continuously for more than a year before the loan was made or an expenditure required to be reported by a registered lobbyist.<sup>196</sup> The definition of contribution have been found to not be overly broad in violation of the First Amendment.<sup>197</sup> The term “political contribution” may be used to describe either a campaign contribution or an officeholder contribution.<sup>198</sup>

A “campaign contribution” means a contribution to a candidate or political committee with the intent that it be used in connection with a campaign.<sup>199</sup> A campaign contribution may be made before, during, or after an election.

An “officeholder contribution” is a contribution to an office holder or political committee offered or given with the intent that it be used to defray expenses incurred by the office holder in performing a duty or acting related to his or her office that is not reimbursable with public money.<sup>200</sup> Contributions made to an officeholder to defray expenses incurred in connection with an investigation for alleged official misconduct are officeholder contributions for purposes of Title 15.<sup>201</sup>

**Corporate Contributions are Prohibited.** A corporation or labor union is prohibited from making a political contribution.<sup>202</sup> A person may not knowingly accept a political contribution made in violation of Election Code Chapter 253, including a contribution from a corporation.<sup>203</sup> For example, a contribution to a county or district clerk intended

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<sup>194</sup> The requirements of Texas Election Code Chapters 254, Political Reporting, are outside the scope of this publication. The Texas Association of Counties Planning Calendar includes references to filing deadlines applicable to county elected officials.

<sup>195</sup> Tex. Elec. Code §251.001(2)

<sup>196</sup> See Gov’t Code §305.006(b)

<sup>197</sup> *Joint Heirs Fellowship Church v. Ashley*, 45 F. Supp. 3d 597 (S.D. Tex. 2014); *King Street Patriots v. Texas Democratic Party*, 459 S.W.3d 631 (Tex. Civ. App. – Austin, 2014, pet. filed)

<sup>198</sup> Tex. Elec. Code §251.001(5)

<sup>199</sup> Tex. Elec. Code §251.001(3)

<sup>200</sup> Tex. Elec. Code §251.001(4)

<sup>201</sup> Tex. Ethics Comm. Op. No. 334 (1996)

<sup>202</sup> Tex. Elec. Code §253.094

<sup>203</sup> Tex. Elec. Code §253.003

to defray the cost of running for an elective position with the County and District Clerks' Association of Texas is a prohibited officeholder contribution unless the costs are reimbursable with public money.<sup>204</sup>

Only the county, through the commissioners court, may accept a contribution from a corporation or other source prohibited by Title 15.

**Office Holder Expenditure Reimbursable with Public Funds.** A public official may only take money or a thing of value from a corporation as an officeholder if it is for an expenditure that would otherwise be reimbursable with public funds.<sup>205</sup> This means that the governmental body has the authority to reimburse an officeholder for an expense but does not required actual reimbursement or available funds.

**Separate Accounts Required.** A public official must keep his or her campaign and officeholder contributions in one or more accounts that are separate from any other account maintained by the official.<sup>206</sup> A public official who deposits personal funds in an account which holds political contributions must report the amount as a loan.<sup>207</sup>

**Personal Use of Political Contributions Prohibited.** If a person uses funds received as political contributions for personal use and not in connection to the performance of duties or activities as an office holder, he or she is civilly liable to the state for an amount equal to the amount of the converted contribution plus reasonable court costs.<sup>208</sup> A judge may use political contributions to purchase electronic equipment for official use in the courtroom but may not convert the asset to personal use.<sup>209</sup> Use of political contributions to pay for family recreation or entertainment is prohibited.<sup>210</sup>

**Exception for Conversion of Contribution for Personal Use.** If the Texas Ethics Commission determines that a public official has converted a contribution to personal use in violation of Election Code §253.035, the person is not civilly liability if, before the opinion was issued, the person reasonably believed that the use was compliant with existing rules and opinions and, on or before the 30<sup>th</sup> day after the date of the opinion,

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<sup>204</sup> Tex. Ethics Comm. Op. No. 396 (1998)

<sup>205</sup> *Id.*

<sup>206</sup> Tex. Elec. Code §253.040(a)

<sup>207</sup> Tex. Elec. Code §253.0351(c)

<sup>208</sup> Tex. Elec. Code §253.035

<sup>209</sup> Tex. Ethics Comm. Op. No. 25 (1992)

<sup>210</sup> Tex. Ethics Comm. Op. No. 405 (1998)

the person returns the amount of money converted to the political fund and notifies the commission by certified mail of this action.<sup>211</sup>

**Certain Payments for Personal Services Prohibited.** An office holder may not knowingly make or authorize payment from a political contribution for personal services rendered by the officeholder, or his or her spouse or dependent child to any of the identified relatives or to a business in which the officeholder has an interest of more than 10 percent, or serves as an officer or on the governing board.<sup>212</sup> Payment is authorized if it is not more than the amount necessary to reimburse the business for actual expenditures.

## VIOLATIONS AND PENALTIES UNDER TITLE 15

**Civil Liability.** A person who knowingly accepts a campaign contribution or makes a campaign expenditure is liable for twice the unlawful contribution or expenditure and reasonable attorney's fees incurred in the suit.<sup>213</sup> This provision creates a private cause of action that can be brought by an aggrieved candidate.<sup>214</sup>

A person who knowingly makes or accepts a political contribution or makes a political expenditure in violation of Election Code Chapter 253 is civilly liable for damages to the state in the amount of triple the value of the unlawful contribution or expenditure.<sup>215</sup>

**Criminal Penalties.** Title 15 of the Election Code imposes a number of criminal penalties. For example, failure to maintain separate accounts is a Class B misdemeanor.<sup>216</sup> Payment for personal services in violation of Election Code §253.041 is a Class A misdemeanor.<sup>217</sup> Accepting most illegal campaign contributions or making an illegal expenditure is a Class A misdemeanor.<sup>218</sup> Accepting a corporate contribution is a 3<sup>rd</sup> degree felony.<sup>219</sup>

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<sup>211</sup> Gov't Code §571.098

<sup>212</sup> Tex. Elec. Code §253.041

<sup>213</sup> Tex. Elec. Code §253.131

<sup>214</sup> *Osterberg v. Peca*, 12 S.W. 3d (Tex. 2000), cert. den. 120 S. Ct. 2690

<sup>215</sup> Tex. Elec. Code §253.133

<sup>216</sup> Tex. Elec. Code §253.040(b)

<sup>217</sup> Tex. Elec. Code §253.041(c)

<sup>218</sup> Tex. Elec. Code §§253.003(d) and 253.004

<sup>219</sup> Tex. Elec. Code §253.094(c)

## COMPLAINTS FILED WITH TEXAS ETHICS COMMISSION

**Complaint Process.** A person who believes a public official has violated a law subject to interpretation by the Texas Ethics Commission may file a written complaint.<sup>220</sup> The commission may also initiate a complaint for a matter within its jurisdiction.<sup>221</sup>

**Civil Penalties.** The Texas Ethics Commission may impose a civil penalty of not more than the greater of \$5,000 or triple the amount at issue for a person's delay in complying with a commission order or for a violation of a law administered and enforced by the commission.<sup>222</sup> The commission may also impose a civil penalty of not more than \$10,000 for filing a frivolous or bad-faith complain, including one brought for the purposes of harassment.<sup>223</sup>

**Civil Suit or Referral for Criminal Prosecution.** The Texas Ethics Commission may vote to initiate a civil enforcement action or refer a matter to the appropriate prosecuting attorney for criminal prosecution.<sup>224</sup> Additionally, if the commission's executive director believes the person who is subject to a complaint has violated Penal Code Chapters 36 or 39, he or she may refer the matter to the appropriate prosecuting attorney for criminal prosecution. Chapter 253 of the Election Code recognizes the commission's authority to impose criminal penalties.<sup>225</sup>

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<sup>220</sup> Gov't Code §571.122

<sup>221</sup> Gov't Code §571.121

<sup>222</sup> Gov't Code §571.173

<sup>223</sup> Gov't Code §571.176

<sup>224</sup> Gov't Code §571.171

<sup>225</sup> Tex. Elec. Code §253.134

# NEPOTISM

## THE GENERAL POLICY

**Public Hiring Should Focus on Merit, Not Relationship.** The statutory prohibition against a public official hiring his or her close relatives supports a couple of public policy purposes – it prevents concentration of political power in a single family and it ensures that hiring for public jobs is based on objective criteria. While the nepotism law may occasionally cause hardship in a county with a small population, since the only qualified person may be related to the public official responsible for filling a position, overall it supports ethical government. Because a violation of the prohibition against nepotism may result in the automatic removal of a public official, understanding the law is critical.

## RESTRICTIONS

**Hiring a Close Relative is Prohibited.** A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of an individual who will be directly or indirectly compensated with public funds if the individual is within the degree of relationship prohibited by Government Code Chapter 573.<sup>226</sup> “Appointment” and “employment” describe the same activity for the purpose of a nepotism conflict. The prohibitions against nepotism apply to an elected or appointed public official and his or her relatives within the third degree of consanguinity or the second degree of affinity.<sup>227</sup> This prohibition continues in effect as long as a county official is serving in a holdover capacity.<sup>228</sup>

In the case of the commissioners court, its members are prohibited from voting to hire a person related in a prohibited degree to any member of the court. This means that a county commissioner may not hire the nephew of another county commissioner.<sup>229</sup> The

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<sup>226</sup> Gov’t Code §573.041

<sup>227</sup> Gov’t Code §573.002; *see also* §573.023 and §573.024. A chart outlining the prohibited degrees of relationship is attached as Appendix C.

<sup>228</sup> Tex. Att’y Gen. Op. No. DM-0002 (1991)

<sup>229</sup> Tex. Att’y Gen. Op. No. O-272 (1939)

abstention of the member with the nepotism conflict does not relieve the remaining members from the prohibition.<sup>230</sup>

**Hiring Authority.** For the purposes of Chapter 573, a public official is considered to be the “hiring authority” if he or she may exercise control over hiring decisions.<sup>231</sup> An elected official with independent hiring authority may hire the relative of another elected official. For example, it is not a violation of the nepotism law for the district clerk to appoint a deputy who is the sister of the acting county judge because the commissioners court does not confirm the appointment.<sup>232</sup> The district clerk may hire the daughter of a county commissioner as a deputy clerk.<sup>233</sup> The county treasurer may appoint a deputy who is related to county commissioner because commissioners court only authorizes the treasurer to appoint a deputy in budget and does not exercise any control over the person to be selected by appointment or confirmation.<sup>234</sup> The sheriff may hire the son-in-law of a county commissioner as a jailer since the authority to hire and fire rests exclusively in the sheriff.<sup>235</sup> The nepotism statute does not bar a county tax assessor-collector from hiring a relative of a commissioner as a deputy tax assessor-collector because the commissioners court has no control over the hiring or firing of the deputy.<sup>236</sup> District clerks and tax assessor-collectors may appoint relatives of a county commissioner as deputy clerks.<sup>237</sup> And finally, a county commissioner’s relatives may be appointed as an assistant district attorney.<sup>238</sup>

This is true of other local governmental entities as well. For example, because the county judge has no authority to hire employees of the county hospital, the nepotism statute does not prohibit the hospital from employing the judge’s wife.<sup>239</sup> Similarly, a county department under the County Civil Services Act may employ a person closely related to a county commissioner because the commissioners court exercises no direct or indirect control over the selection process.<sup>240</sup>

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<sup>230</sup> Tex. Att’y Gen. Op. No. JC-0184 (2000)

<sup>231</sup> Tex. Att’y Gen. Op. No. DM-0002 (1991)

<sup>232</sup> Tex. Att’y Gen. Op. No. O-875 (1939)

<sup>233</sup> Tex. Att’y Gen. Op. No. O-480 (1939)

<sup>234</sup> Tex. Att’y Gen. Op. No. O-4895 (1945)

<sup>235</sup> Tex. Att’y Gen. Op. No. LA-116 (1975)

<sup>236</sup> Tex. Att’y Gen. Op. Nos. H-993 (1977); O-6221 (1944); O-1954 (1940)

<sup>237</sup> Tex. Att’y Gen. Op. No. LA-70 (1973)

<sup>238</sup> Tex. Att’y Gen. Op. Nos. O-4720 (1942); O-2993-B (1941); O-38 (1936)

<sup>239</sup> Tex. Att’y Gen. Op. No. KP-0045 (2015)

<sup>240</sup> Tex. Att’y Gen. Op. No. H-697 (1975); *See* Loc. Gov’t Code Chap. 158

**Compensation.** An essential component of the nepotism prohibition is the element of compensation. If a position is unpaid or if the person only receives reimbursement for actual expenses, the position is not subject to the nepotism restrictions. A public official may appoint a close relative to a volunteer position that provides reimbursement for incurred expenses but no compensation.<sup>241</sup> For example, a county and district clerk could not appoint his wife as a deputy to serve without direct or indirect remuneration, but could allow her to do clerical work for the office without compensation if she is not appointed as a deputy.<sup>242</sup> Similarly, a district attorney could appoint his wife to be the unpaid victim-assistance coordinator in his office, while she also worked as the paid crime-victim liaison at the sheriff's office.<sup>243</sup> A county commissioner may not hire the brother-in-law of another commissioner to work on a road crew when the employee is paid with public funds.<sup>244</sup>

The prohibition applies to independent contractors. A commissioners court may not hire a relative of a county commissioner within the prohibited degree as an independent contractor.<sup>245</sup> Nor can it contract with a corporation that is the "alter ego" of a close relative of a public official.<sup>246</sup> However, it does not apply to employment of a sheriff's relative by a private company that operates a county detention center.<sup>247</sup>

**May Not Authorize Payment If Ineligible.** If a public official knows that a person is ineligible to be an employee because of the nepotism prohibitions, the official must not authorize or allow payment of the person's salary.<sup>248</sup> Compensation for an ineligible individual must be withheld by a public official who knows about the ineligibility. The Attorney General's Office has held that a commissioners court could not approve payment of salary to the rabies control officer because his wife was an aunt of a commissioner.<sup>249</sup>

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<sup>241</sup> Tex. Att'y Gen Op. No. KP-0157 (2017)

<sup>242</sup> Tex. Att'y Gen. Op No O-31 (1939)

<sup>243</sup> Tex. Att'y Gen. Op. No. LO-98-0098 (1998)

<sup>244</sup> Tex. Att'y Gen Op. No. O-2925 (1940)

<sup>245</sup> Tex. Att'y Gen. Op. No. DM-76 (1992)

<sup>246</sup> Tex. Att'y Gen. Op. No. LO-88-44 (1988)

<sup>247</sup> Tex. Att'y Gen. Op. No. GA-0419 (2006)

<sup>248</sup> Gov't Code §573.083

<sup>249</sup> Tex. Att'y Gen. Op. No. O-6406 (1954)

**Trading Prohibited.** Generally, a public official may not hire a person related to another official in a prohibited degree in exchange for the other official's hiring of a relative of the first official.<sup>250</sup> However, a county judge may hire the daughter of a county commissioner as his secretary provided that the hiring does not involve "trading."<sup>251</sup> Similarly, a commissioners court may employ an architect who will probably employ the county judge's son, if the employment of the judge's son is not the result of an express or implied agreement between the architect and the court.<sup>252</sup>

**Delegation Prohibited.** A public official may not delegate his or her hiring authority to prevent a nepotism conflict.<sup>253</sup> For example, the commissioners court may delegate authority to hire various courthouse employees to sheriff but nepotism laws prohibit the commissioners court from using the sheriff as an agent to employ the brother of a commissioner.<sup>254</sup>

**Judges.** All judges are subject to the Rules of Judicial Conduct, which include limits on a judge's appointment authority related to relatives.<sup>255</sup> Additionally, a district judge may not appoint a person related to the judge or the district attorney within the third degree as an official stenographer for the district.<sup>256</sup> Because the district judge must approve the appointment of the county auditor's assistant, the auditor could not appoint a first cousin of the wife of the district judge as his assistance.<sup>257</sup>

**Restriction on Tax Assessor-Collector.** A chief appraiser may not employ any individual related to a member of the board of directors within the second degree by affinity or the third degree by consanguinity.<sup>258</sup> The continuous employment exception discussed below does not apply to an employment relationship prohibited by this prohibition.<sup>259</sup> Therefore, the chief appraiser may not employ the spouse of the county tax assessor-collector, who is a member of the appraisal district board.<sup>260</sup>

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<sup>250</sup> Gov't Code §573.044

<sup>251</sup> Tex. Atty Gen. Op. No. LA-115 (1975)

<sup>252</sup> Tex. Att'y Gen. Op. No. O-2010 (1940)

<sup>253</sup> Tex. Att'y Gen. Op. No. GA-0123 (2003)

<sup>254</sup> Tex. Att'y Gen. Op No. O-4686 (1942).

<sup>255</sup> The Texas Supreme Court has promulgated this Code, which can be found on their website at [txcourts.gov/media/514728/TXCodeOfJudicialConduct\\_20020822.pdf](http://txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf)

<sup>256</sup> Gov't Code §573.043

<sup>257</sup> Tex. Att'y Gen. Op. No. O-4710 (1942)

<sup>258</sup> Tax Code §6.05(f)

<sup>259</sup> Tex. Att'y Gen. Op No. GA-0187 (2004)

<sup>260</sup> Tex. Att'y Gen. Op. No. GA-0375

**Limits on a Candidate.** The Election Code includes requirements that each candidate acknowledge his or her awareness of the nepotism restrictions.<sup>261</sup> A candidate may not act to influence an employee of the office the candidate is running for or an employee or officer of the governmental body the candidate is running for regarding the appointment, employment, change in status, compensation or dismissal of an individual related to the candidate within a prohibited degree.<sup>262</sup>

**General Exceptions.** In addition to the continuous employment exception discussed more fully below, there are several exceptions to the nepotism prohibitions that may apply to counties.<sup>263</sup> A person may be appointed to be a notary public or a personal attendant for a public official with physical infirmities. Additionally, a person may be appointed as an election clerk if he or she is not related by first degree of consanguinity or affinity to the elected county official that appoints the election judges.<sup>264</sup>

## DETERMINING DEGREE OF RELATIONSHIP

**Consanguinity.** Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor.<sup>265</sup> An adopted child is considered to be a child of his or her adopted parents for this purpose. However, step-siblings are not considered relatives because they are not related by blood. Relatives in the first degree of consanguinity are parents or children.<sup>266</sup> Relatives in the second degree of consanguinity are siblings, grandparents and grandchildren. Relatives in the third degree of consanguinity are great-grandparents, great-grandchildren, aunts and uncles related to a parent, and nieces and nephews related to a sibling.

The Attorney General's Office has issued a number of opinions related to county employment and the nepotism prohibition based on consanguine relationships. For example, a county commissioner may not employ a person whose father is the first cousin of the mother of the county judge.<sup>267</sup> A county commissioner may not employ a

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<sup>261</sup> Tex. Elec. Code §§141.013(a)(4)(L); 252.032(a)(2)

<sup>262</sup> Gov't Code §573.042

<sup>263</sup> Gov't Code §573.061

<sup>264</sup> Note that there are other relationship prohibitions in the Election Code that apply to election judges and clerks. Under Election Code §32.054, they may not be related within the second degree of consanguinity or affinity to an opposed candidate on the ballot.

<sup>265</sup> Gov't Code §573.022. See chart attached as Appendix C.

<sup>266</sup> Gov't Code §573.023

<sup>267</sup> Tex. Att'y Gen. Op. No. O-5452 (1943)

person who is the first cousin by marriage of another county commissioner.<sup>268</sup> The district clerk may not employ a person whose mother is the first cousin of the father of the district clerk.<sup>269</sup> A county commissioner may not vote for employment of his second cousin, who is related to him within the third degree of consanguinity, but may vote for employment of a third cousin.<sup>270</sup>

**Affinity.** Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual.<sup>271</sup> A husband and wife are related to each other in the first degree of affinity.<sup>272</sup> Determining other relationships by affinity, the degree is the same as the underlying relationship by consanguinity. For example, a person's mother-in-law, father-in-law, daughter-in-law, and son-in-law are all related in the first degree of affinity, as are the person's spouse's children by a previous marriage.

Attorney general opinions also address relationships by affinity and the nepotism prohibitions applicable to county employment. The nepotism statute does not prohibit a county from hiring a commissioner's wife's sister's husband.<sup>273</sup> The district clerk is not related by affinity to his step-mother-in-law and is not acting in violation of nepotism law by appointing her as a deputy.<sup>274</sup> The wife of a public official's wife's nephew by marriage is no relation, either by affinity or consanguinity, to public official and nepotism statute has no control.<sup>275</sup>

However, the treasurer may not appoint his or her niece as a deputy clerk.<sup>276</sup> County tax assessor-collector may not appoint his first cousin as a deputy.<sup>277</sup> Nor can he appoint his nephew's wife as a deputy.<sup>278</sup> The county clerk may not appoint his wife as deputy county clerk to serve during his absence in the armed forces.<sup>279</sup>

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<sup>268</sup> Tex. Att'y Gen. Op. No. O-6337 (1945)

<sup>269</sup> Tex. Att'y Gen. Op. No. LA-67 (1973).

<sup>270</sup> Tex. Att'y Gen. Op. No. O-4987 (1942)

<sup>271</sup> Gov't Code §573.024. See chart attached as Appendix C.

<sup>272</sup> Gov't Code §573.025

<sup>273</sup> Tex. Att'y Gen. Op. No. O-0119 (1939)

<sup>274</sup> Tex. Att'y Gen. Op. No. O-0875 (1939)

<sup>275</sup> Tex. Att'y Gen. Op. No. O-7433 (1946)

<sup>276</sup> Tex. Att'y Gen. Op. No. O-6810 (1945)

<sup>277</sup> Tex. Att'y Gen. Op. No. O-6221 (1944)

<sup>278</sup> Tex. Att'y Gen. Op. No. O-6299 (1944)

<sup>279</sup> Tex. Att'y Gen. Op. No. O-4973 (1941)

**Appointments to Public Office.** The nepotism prohibition also applies to appointments made by the commissioners court to elective county offices. For example, the commissioners court cannot legally appoint the county's judge's wife's uncle as a justice of the peace.<sup>280</sup> The appointment to the office of county clerk by the commissioners court of the half first cousin of the county judge would be a violation, whether or not the county judge was absent or refused to act on the appointment.<sup>281</sup> The commissioners court may not appoint the first cousin of a county commissioner to fill an unexpired term as acting county clerk.<sup>282</sup> The commissioners court also may not appoint a commissioner's first cousin to the office of tax assessor-collector vacated by death of the incumbent.<sup>283</sup> The nepotism provisions do not apply to appointments to unpaid advisory positions.

**Divorce and Death.** If a public official has a living child as the result of a marriage, he or she must continue to comply with the nepotism prohibitions based on affinity even after a divorce or the death of his or her spouse.<sup>284</sup> If the official's marriage did not result in any children, divorce or death ends all relationship by affinity. For example, the widow of a deceased sheriff, serving as sheriff by appointment, could appoint her deceased husband's brother as a deputy, if there were no children from her marriage to the sheriff.<sup>285</sup>

## CONTINUOUS EMPLOYMENT EXCEPTION

**Tenured Employee May Retain Position.** A county employee may continue to work at the county even if a relative is appointed or elected if he or she has been continuously employed by the county for a specific amount of time.<sup>286</sup> If the employee's relative was appointed by the commissioners court, he or she must have been continuously employed by the county for at least 30 days before the appointment. If the employee's relative was elected to a county office, he or she must have been continuously employed by the county for at least one year before the public official assumes office.

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<sup>280</sup> Tex. Att'y Gen. Op. No. O-4773 (1942)

<sup>281</sup> Tex. Att'y Gen. Op. No. O-3016 (1941)

<sup>282</sup> Tex. Att'y Gen. Op. No. JM-0741 (1987)

<sup>283</sup> Tex. Att'y Gen. Op. No. JM-0253 (1985)

<sup>284</sup> Gov't Code §573.024(b)

<sup>285</sup> Tex. Att'y Gen. Op. No. O-1257 (1939)

<sup>286</sup> Gov't Code §573.062

The continuous-employment period begins the first day an employee is employed and ends on the date the public official to whom the employee is related in a prohibited degree assumes office.<sup>287</sup> An employee must have at least 30-days continuous service before his or her relative is appointed to an elective office to continue employment under the nepotism statute.<sup>288</sup> The statute requires an employee to complete one year of continuous service at a time that the employee's elected relative is not an employer with the power to hire or fire the employee.<sup>289</sup> A person who was employed by the county for two years before his or her brother took office as a county commissioner could have been retained as a county employee.<sup>290</sup>

Once the continuous-employment exception is satisfied, it exempts an individual from the nepotism prohibition only until the employment relationship is broken.<sup>291</sup> For example, a long-time county employee who was discharged between his wife's election to the commissioners court and her taking office, may not be reemployed.<sup>292</sup>

**Marriage During Employment.** A county employee who marries a relative of the commissioners court but has not been employed a sufficient amount of time must resign.<sup>293</sup> However, the continued employment of the sheriff's spouse in his office after their marriage does not violate the nepotism laws when the individual has held her position continuously for five years before the sheriff was reelected and for more than seven years before they married.<sup>294</sup> However, the continuous employment exception is only available if the employee has completed the applicable period of service during a time when his or her new spouse was not an employer with the power to hire or fire the employee.<sup>295</sup>

**Pay Raises.** A county employee who has retained his or her job due to the continuous employment exception may receive a raise if his or her relative does not participate in any deliberation or vote on the employee's status or compensation.<sup>296</sup> This does not

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<sup>287</sup> Tex. Att'y Gen. Op. No. GA-1016 (2013)

<sup>288</sup> Tex. Att'y Gen. Op. No. DM-2 (1991)

<sup>289</sup> Tex. Att'y Gen. Op. No. JM-636 (1987)

<sup>290</sup> Tex. Att'y Gen. Op. No. V-1142 (1951)

<sup>291</sup> Tex. Att'y Gen. Op. No. GA-1024 (2013)

<sup>292</sup> Tex. Att'y Gen. Op. No. MW-23 (1979)

<sup>293</sup> Tex. Att'y Gen. Op. Nos. GA-0121 (2003); LO-93-144 (1993); DM-0132 (1992); LO-89-53

<sup>294</sup> Tex. Att'y Gen. Op. No. GA-0121 (2003)

<sup>295</sup> Tex. Att'y Gen. Op. No. LO-95-0070 (1995)

<sup>296</sup> Tex. Att'y Gen. Op. No. DM-0046 (1991)

prohibit a member of the commissioners court from voting on a class or category of employees including a relative.<sup>297</sup> For example, a vote to give all county employees a cost of living raise is permitted.<sup>298</sup> Similarly, the commissioners court may approve a salary increase for the position of county attorney's investigator, even though the first cousin of a commissioner holds that position.<sup>299</sup>

**Change in Status.** A public official whose relative continues employment under the exception may not take any action that impacts the employment, reemployment, change in status, compensation or dismissal of the employee.<sup>300</sup> The phrase "change in status" includes a reassignment that is not taken with respect to a "bona fide class or category of employees."<sup>301</sup> Therefore, a sheriff may not promote his son and daughter even though they had sufficient prior continuous service to retain their jobs in the sheriff's office after their father became sheriff.<sup>302</sup> A termination is a change in status and, although there is no guidance from the attorney general on this issue, a public official is prohibited from firing a relative who is protected by the continuous employment exception by the express language in the statute.

## VIOLATIONS AND PENALTIES

**Criminal Offense.** A county official who violates the nepotism prohibitions, votes on the salary of a relative continuing employment under the continuous employment exception, or approves payment for an ineligible person commits a misdemeanor offense involving official misconduct.<sup>303</sup> The offense is punishable by a fine of not less than \$100 or more than \$1,000. The continuous employment exception may be asserted as a defense to prosecution.

**Removal.** A public official who violates the nepotism prohibitions or votes on the salary of a relative continuing employment under the continuous employment exception is subject to automatic removal.<sup>304</sup> If removal does not occur as a result of a criminal conviction for violating the nepotism statute, removal must be by a *quo warranto*

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<sup>297</sup> Tex. Att'y Gen. Op. Nos. JC-0558 (2002); JC-0546 (2002); JC-0442 (2001); JC-0336 (2001); JM-0234 (1984)

<sup>298</sup> Tex. Att'y Gen. Op. Nos. DM-0046 (1991); JM-1188 (1990)

<sup>299</sup> Tex. Att'y Gen. Op. No. JM 253 (1985)

<sup>300</sup> Gov't Code §573.062(b)

<sup>301</sup> Tex. Att'y Gen. Op. No. JC-0193 (2000)

<sup>302</sup> Tex. Att'y Gen. Op. No. JM-1188 (1990)

<sup>303</sup> Gov't Code §573.084

<sup>304</sup> Gov't Code §573.081

proceeding. The attorney general, with the assistance of the local district or county attorney, is authorized to bring a *quo warranto* proceeding in Travis County or the district court of the county in which the official resides.<sup>305</sup>

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<sup>305</sup> Gov't Code §573.082

# RESIGN TO RUN

## THE GENERAL POLICY

**Public Officials Must Focus on Duties of Office, Not Campaigning.** The Texas Constitution includes an automatic resignation provision applicable to county elected officials that is intended to encourage each official to devote his or her attention to the duties of office during an entire four-year term of office.<sup>306</sup> Since state and local elections occur every other year, if a county official announces his or her candidacy for a different office during the middle of a four-year term, the person automatically resigns to run for the new office. Four issues relevant to understanding resign to run, each of which is discussed below, are: What is an office of trust? How does a person become a candidate? What is an announcement of candidacy? What is the impact of automatic resignation?

### TEXAS CONSTITUTION ARTICLE 16, §65

**Automatic Resignation Mandated.** For most county elective offices, Article 16, §65 of the Texas Constitution provides that it is an automatic resignation for an officeholder to announce his or her candidacy or to file for a public office other than the one he or she currently holds if more than a year and 30 days remain in the term. The text of the provision, which applies to specifically named county officials including a county judge, county commissioner, county treasurer, district or county clerk, criminal district attorney, justice of the peace, sheriff, tax assessor-collector, county or district attorney and constable reads:

*Sec. 65. TERMS OF OFFICE; AUTOMATIC RESIGNATION.*

*(a) This section applies to the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys; County Surveyors; County Commissioners; Justices of the Peace;*

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<sup>306</sup> Article XVI, §65 was added to the Constitution in 1954 to extend the then two year terms of county offices to four years and create staggered terms. This provision was amended in 1958 to add the automatic resignation language. In the context of the November 2011 amendment to this section discussed below, the stated purpose of the Article XVI, §65(b) resign to run provision is to require officeholders “to give their undivided attention to the duties of their current office during most of their term, rather than campaigning while in the middle of the term.” *Analyses of Proposed Constitutional Amendments, November 8, 2011 Election*, Texas Legislative Council, pg. 59 (2011).

*Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.*

*(b) If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one year and 30 days, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.*

**Timing to Avoid Automatic Resignation.** The one year and thirty days period was formerly a year, but the section was amended by the voters in November 2011 to correspond with changes to the primary filing period, which had been moved to a mid-November through mid-December time frame. The primary dates were changed in an effort to comply with new mail balloting deadlines for the primary election under the federal MOVE (Military and Overseas Voter Empowerment) Act. Under prior law, the primary deadline had been on January 1, which allowed an officeholder whose office was up for re-election to wait to file on January 1 for a different office since there would be less than a year remaining in his or her term. The officeholder therefore would not have automatically resigned. Shifting the Article 16, §65(b) deadline to a year and 30 days allows an officeholder to time his or her filing in the same manner to avoid automatically resigning office.

**Validity of Automatic Resignation Provision.** The United States Supreme Court upheld the section's validity determining the automatic resignation provision represents neither a violation of county officeholders' first amendment rights nor an Equal Protection violation.<sup>307</sup> The court dismissed the argument that Article 16, §65(b) was invalid because it limits the operation of the provision to the listed county offices; candidacy is not a fundamental right and the state's rationale for the resign to run provision is sufficient to defend it against an equal protection challenge.

## OFFICE OF TRUST

**Meaning of "Office."** The phrase "office of trust" is interchangeable with "office."<sup>308</sup> An office is a position that is invested with a sovereign function of the government, exercised by the official largely independently of the control of others. A school board

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<sup>307</sup> *Clements v.ashing*, 457 U.S. 957 (1982)

<sup>308</sup> Tex. Att'y Gen Op. No. LO-96-107 (1996)

member, for example, holds an office of trust.<sup>309</sup> A member of a Selective Service Local Board does not. An office of a political party is not an “office of profit or trust.”<sup>310</sup> Because a director of a water control and improvement district is an office of trust, it was an automatic resignation for a justice of the peace with more than a year on his term to announce his candidacy for the office.<sup>311</sup>

## BECOMING A CANDIDATE

**Applying for a Place on the Ballot is Automatic Resignation.** The first way a county officer can trigger automatic resignation is relatively cut and dry—by in fact becoming a candidate in any general, special or primary election for an office of profit or trust other than the one already held. The act of filing an application for a place on the ballot for a second office at a time when there is more than a year and thirty days left in the current term triggers the automatic resignation.<sup>312</sup> The application is a public document signed and dated by the officeholder and filed with the appropriate authority, such as the county chair for the primary. The Attorney General concluded that an officer “in fact become[s] a candidate” by the act of applying for a place on the ballot.<sup>313</sup> The only potential for a mistaken automatic resignation with an actual filing for an officeholder who wished to remain in office while running for a new position would be a miscalculation of the year and 30 day point. For example, a county officeholder might enthusiastically file with the county chair for a different office on the first day of the primary filing period. On that first day to file in mid-November, there would generally be a year and 45 or so days remaining in the term resulting in the officeholder’s automatic resignation under Article 16, §65(b).

Specific examples of the application of resign to run include a constable who was a sitting councilmember in a city within his precinct at the time he was elected constable. While the two offices may be *held* by the same individual, when the constable filed for re-election to the city council, the act of filing for a second office of profit or trust at a time when he had more than a year remaining in his constable term was held an automatic resignation of his constable office.<sup>314</sup> Similarly, a county commissioner who filed for school board trustee when he had more than a year on his term automatically resigned his office.<sup>315</sup>

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<sup>309</sup> Tex. Att’y Gen. Op. No. GA-0057 (2003)

<sup>310</sup> Tex. Att’y Gen. Op. No. JC-0562 (2002)

<sup>311</sup> Tex. Att’y Gen. Op. No. H-767 (1976)

<sup>312</sup> *Ramirez v. Flores*, 505 S.W.2d 406 (Tex. Civ. App. – San Antonio, 1973, ref. n.r.e.)

<sup>313</sup> Tex. Att’y Gen. Op. No. JC-0249 (2000)

<sup>314</sup> Tex. Att’y Gen. Op. No. GA-0550 (2007)

<sup>315</sup> See *Ramirez, supra*.

**Ineligibility for Office is Not an Exception.** Filing an application for a place on the ballot may trigger an automatic resignation even if the officeholder is not eligible to run for or to hold the second office. Under Article 16, §65(b), the trigger for the automatic resignation is the act of filing for the second office or announcing candidacy with more than one year and thirty days remaining on the term, regardless of whether the officeholder is qualified to be on the ballot.

For example, a county commissioner who was a land developer and therefore statutorily ineligible to serve on the board of directors for a water control and improvement district filed for a position on the board. The Attorney General determined that with the act of filing his application for a place on the ballot the commissioner had automatically resigned from the commissioners court.<sup>316</sup>

**Exception related to Partisan Nomination.** To trigger a resignation, the application the officeholder files must actually be an application of candidacy filed under the Election Code. A county court at law judge who sought the nomination of his party's executive committee for a new judicial office did not become a candidate.<sup>317</sup> The act of seeking a nomination was not equivalent to an announcement of candidacy because whether or not the person is a candidate in the election is contingent on receiving the nomination from the executive committee.

**Exceptions Related to Preliminary Actions.** The Legislature has taken steps to limit the impact of Article 16, §65. For example, filing a campaign treasurer appointment does not constitute candidacy or an announcement of candidacy for purposes of the automatic resignation provisions of Article 16, §65.<sup>318</sup> The campaign treasurer form does not require the filer to indicate the office. To avoid accidental resignation, it may be the better course of valor for a county officeholder thinking about running for a second office to leave the section blank when filing the treasurer form. Similarly the circulation of a petition in lieu of filing fee to be filed with the application for a place on the primary ballot does not constitute candidacy or an announcement of candidacy under Article 16, §65(b).<sup>319</sup> These two sections have not been challenged but it is worth noting that the Attorney General has questioned whether statutes purporting to define a constitutional term are within the Legislature's authority.<sup>320</sup>

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<sup>316</sup> Tex. Att'y Gen. Op. No. JM-0132 (1984)

<sup>317</sup> Tex. Att'y Gen. Op. No. JC-0249 (2000)

<sup>318</sup> Tex. Elec. Code §251.001(1)(A)

<sup>319</sup> Tex. Elec. Code §172.021(d)

<sup>320</sup> Tex. Att'y Gen. Op. No. JC-0249 (2000)

## ANNOUNCING CANDIDACY

**Announcing Candidacy is Automatic Resignation.** The second trigger for automatic resignation under Article 16, §65 is an announcement of candidacy. The term “announcement” is undefined and at least partially requires a determination of the would-be candidate’s intent. How to determine whether or not an officeholder has announced his or her candidacy is the subject of most cases and opinions interpreting Article 16, §65(b).

For example, a constable with more than a year to serve in his term decided to run for sheriff and told numerous individuals in public settings, including the local newspaper editor, that he was running for the new office, even asking for financial support and publicity. The commissioners court determined the constable, through these actions, had automatically resigned his office under Article 16, §65(b) and appointed a replacement constable to fill the vacancy. The constable sued to regain his position, arguing that he had not “announced” candidacy. The court disagreed, holding that his conversations and public requests for support were sufficient to support a finding of an announcement of candidacy.<sup>321</sup>

In contrast, a justice of the peace intending to run for another office had a conversation with a reporter on December 31<sup>st</sup> at which point there was more than a year remaining in his term. The conversation was reported after January 1 of the next year in the local newspaper, by which time there was less than a year remaining in the justice of the peace’s term. In this instance, the Attorney General opined that the conversation with the editor alone was not an announcement of candidacy; the announcement came only with publication because “an announcement must be both certain and public to trigger automatic resignation.”<sup>322</sup>

However, the Attorney General found that a county court at law judge’s announcement in an open commissioners court meeting that he was at that moment a candidate for district judge constituted a public declaration.<sup>323</sup> Since at the time he made the statement his remaining term exceeded a year, the county court at law judge had automatically resigned his office.

**Reasonable Person Standard Applied.** The Attorney General has derived an objective standard to determine whether a person has “announced candidacy” for another office:

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<sup>321</sup> *Standley v. Sansom*, 367 S.W.2d 343 (Tex. Civ. App. – San Antonio, 2012, rev. den.)

<sup>322</sup> Tex. Att’y Gen. Op. No. GA-0210 (2004)

<sup>323</sup> Tex. Att’y Gen. Op. No. DM-0377 (1996)

Whether a reasonable person would conclude from an individual’s written or oral statement that he or she intends to run for the office in question.<sup>324</sup> A person who has merely stated he or she will “seriously consider running” for an office if the incumbent resigns has not announced his or her candidacy.<sup>325</sup>

## IMPACT OF AUTOMATIC RESIGNATION

**Constitutional Holdover Provision.** When a county officeholder resigns, he or she is a holdover in office under Article 16, §17 of the Texas Constitution.<sup>326</sup> Under the holdover provision, the resigned officer remains in office for all purposes until his or her successor is appointed and finally qualifies for office.<sup>327</sup> The officeholder may not withdraw his or her candidacy to undo the resignation.<sup>328</sup> The commissioners court is not required to appoint a successor and may allow the officeholder who resigned as a result of Article 16, §65 to remain in office.<sup>329</sup> The commissioners court’s decision not to fill a vacancy cannot be challenged by a *quo warranto* action.<sup>330</sup>

**Reappointment after Resignation Prohibited.** The Attorney General has opined that an officeholder who automatically resigned under Article 16, §65(b) may not be appointed to the office he or she resigned from.<sup>331</sup> Reappointment would defeat the purpose of the provision.

## ADDITIONAL RESTRICTIONS

### Code of Judicial Conduct, Canon 5(3) – Refraining from Inappropriate Political Activity

**Judge Must Resign to Become Non-Judicial Candidate.** In addition to the operation of Article 16, §65(a), most judges are subject to the provisions of the Code of Judicial Conduct. Specifically, Canon 5(3) provides that:

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<sup>324</sup> Tex. Att’y Gen. Op. Nos. GA-0643 (2008), GA-0210 (2004), JC-0249 (2000)

<sup>325</sup> Tex. Att’y Gen. Op. No. LO-95-071 (1995)

<sup>326</sup> The text of this section reads: Sec. 17. OFFICERS TO SERVE UNTIL SUCCESSORS QUALIFIED. All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

<sup>327</sup> Tex. Att’y Gen. Op. No. DM-0337

<sup>328</sup> Tex. Att’y Gen. Op. No. LO-94-059

<sup>329</sup> See Loc. Gov’t Code §87.041; Tex. Att’y Gen. Op. No. JC-01540 (1999)

<sup>330</sup> *Bianchi v. State*, 444 S.W. 3d 231 (Tex. Civ. App. – Corpus Christi, 2014)

<sup>331</sup> Tex. Att’y Gen. Op. Nos. DM-0377 (1996), WW-0788

*A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.*<sup>332</sup>

**Exception for Certain County Judges.** This section does not apply to county judges or to justices of the peace.<sup>333</sup> However, it does apply to a county court at law, probate and domestic court, and county criminal court. A judge whose office is governed by this canon would have to resign from office if he or she became a candidate for a non-judicial office. For example, if a county court at law judge decided to run for district attorney, a non-judicial office, the judge would have to resign under Canon 5 regardless of how long a period remained in her term. In contrast, if the same county court at law judge decided to run for district judge, the county court at law judge would not have to resign under the Canon 5 restriction. However, the judge’s action might still violate Article 16, §65 depending on whether more than a year and thirty days remained in the judge’s term at the time he or she became a candidate for the second office.

### **Texas Constitution Article 3, §19 – Ineligibility of Persons Holding Other Offices**

**County Officeholder Must Resign to Run for State Legislature.** Article 3, §19 of the Texas Constitution limits the ability of judges and most county officeholders to run for or be appointed to the state legislature during their terms. The text of this provision reads:

*No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.*

Most county offices fall under this section because the definition of lucrative office is so broad. Effectively, an office is lucrative if the recipient receives compensation “no matter how small.”<sup>334</sup>

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<sup>332</sup> Tex. Code Jud. Conduct, Canon 5(3)

<sup>333</sup> Tex. Code Jud. Conduct, Canon 6(B)(4); 6(C)(1)(e)

<sup>334</sup> *Dawkins v. Meyer*, 825 S.W.2d 444 (Texas 1992)

**Validity and Interpretation of Limitation.** A challenge to the validity of this section was upheld by the United States Supreme Court which rejected the argument made by a justice of the peace (among others) that Article 3, §19 had the impact of limiting his access to the ballot until he completed his term.<sup>335</sup> The court ruled the provision rests on a reasonable predicate, the state's interest in maintaining the integrity of (in the particular case) justices of the peace.

The Texas Supreme Court has also issued a ruling to somewhat limits the prohibition, allowing a resignation to remove the disability under certain circumstances.<sup>336</sup> It overruled previous decisions under which a university system trustee would have been ineligible for the legislature during his six year term and determined a candidate could in fact cure the ineligibility to run for the legislature and hold office if he or she resigned the office prior to filing for a place on the ballot. In this case, the trustee's successor had been qualified in his place.

**Effect of Holdover Provision.** Under current law, Article 3, §19 of the Texas Constitution has effectively become a resign to run provision for county officials who wish to file for the Texas Legislature. What effect, if any, the Article 16, §17 holdover provision of the Texas Constitution might have on an officeholder's ability to file for and run for the legislature has not been addressed by a court. Generally, under the holdover provision, an officer who resigns is considered still in office until his or her successor qualifies for office. If an officeholder has resigned and a successor has been qualified, the holdover provision no longer applies. A county judge who announces candidacy or becomes a candidate for legislature when more than one year remains of term of office may be disqualified from the legislative office until his or her successor has qualified.<sup>337</sup> The county judge will automatically resign as county judge under Article 16, §65 but is not disqualified from running even though the term as county judge overlaps the legislative term.

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<sup>335</sup> *Clements*, 457 U.S. 957, at 958

<sup>336</sup> *Wentworth v. Meyer*, 839 S.W.2d 766 (Texas 1992)

<sup>337</sup> Tex. Att'y Gen. Op. No. LO-97-0092

APPENDIX A

Affidavit

STATE OF TEXAS
COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_(name)\_\_\_\_\_, as a member of the \_\_\_\_\_ County Commissioners Court, make this affidavit and under oath state the following:

I have a substantial interest in a business entity or real property that may receive a special economic effect by a vote or decision of the \_\_\_\_\_ County Commissioners Court, and the economic effect on my business entity or real property is distinguishable from the effect on the general public. What constitutes a "substantial interest," "business entity," "real property," and a "special economic effect" are terms defined by Local Government Code Chapter 171. The business entity or real property is [include name, address of business or description of property].

The nature of my substantial interest in the business entity or real property is:

- An ownership interest of 10 percent or more of the voting stock or shares of the business entity.
- An ownership interest of 10 percent or \$15,000 or more of the fair market value of the business entity.
- Funds received from the business entity exceed 10 percent of \_\_\_\_\_ [my, his, her] gross income for the previous year.
- Real property is involved and \_\_\_\_\_ [I have, he has, she has] an equitable or legal ownership with a fair market value of at least \$2,500.
- A person who is related to me within the first degree of consanguinity (blood) or affinity (marriage) has a substantial interest in the involved real property or business entity. I have also checked which of the above types of interest my relative has in the item.

Upon the filing of this affidavit with the \_\_\_\_\_ County Clerk, I affirm that I shall abstain from any discussion, vote, or decision involving this business entity or real property and from any further participation in this matter whatsoever.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Title: \_\_\_\_\_

BEFORE ME, the undersigned authority, on this day personally appeared \_\_\_\_\_ and by oath swore that the facts stated above are true and correct to the best of his/her knowledge and belief.

Sworn to and subscribed before me on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas  
My commissioner expires: \_\_\_\_\_

**APPENDIX B**

**CONFLICT OF INTEREST QUESTIONNAIRE**  
**For vendor doing business with local governmental entity**

**FORM CIQ**

**This questionnaire reflects changes made to the law by H.B. 23, 84th Leg., Regular Session.**  
 This questionnaire is being filed in accordance with Chapter 176, Local Government Code, by a vendor who has a business relationship as defined by Section 176.001(1-a) with a local governmental entity and the vendor meets requirements under Section 176.006(a).  
 By law this questionnaire must be filed with the records administrator of the local governmental entity not later than the 7th business day after the date the vendor becomes aware of facts that require the statement to be filed. See Section 176.006(a-1), Local Government Code.  
 A vendor commits an offense if the vendor knowingly violates Section 176.006, Local Government Code. An offense under this section is a misdemeanor.

**OFFICE USE ONLY**

Date Received

**1 Name of vendor who has a business relationship with local governmental entity.**

**2**  **Check this box if you are filing an update to a previously filed questionnaire.** (The law requires that you file an updated completed questionnaire with the appropriate filing authority not later than the 7th business day after the date on which you became aware that the originally filed questionnaire was incomplete or inaccurate.)

**3 Name of local government officer about whom the information is being disclosed.**

\_\_\_\_\_   
 Name of Officer

**4 Describe each employment or other business relationship with the local government officer, or a family member of the officer, as described by Section 176.003(a)(2)(A). Also describe any family relationship with the local government officer. Complete subparts A and B for each employment or business relationship described. Attach additional pages to this Form CIQ as necessary.**

A. Is the local government officer or a family member of the officer receiving or likely to receive taxable income, other than investment income, from the vendor?

Yes       No

B. Is the vendor receiving or likely to receive taxable income, other than investment income, from or at the direction of the local government officer or a family member of the officer AND the taxable income is not received from the local governmental entity?

Yes       No

**5 Describe each employment or business relationship that the vendor named in Section 1 maintains with a corporation or other business entity with respect to which the local government officer serves as an officer or director, or holds an ownership interest of one percent or more.**

**6**  Check this box if the vendor has given the local government officer or a family member of the officer one or more gifts as described in Section 176.003(a)(2)(B), excluding gifts described in Section 176.003(a-1).

**7**

\_\_\_\_\_  
 Signature of vendor doing business with the governmental entity

\_\_\_\_\_  
 Date

## APPENDIX B

### **CONFLICT OF INTEREST QUESTIONNAIRE** **For vendor doing business with local governmental entity**

A complete copy of Chapter 176 of the Local Government Code may be found at <http://www.statutes.legis.state.tx.us/Docs/LG/htm/LG.176.htm>. For easy reference, below are some of the sections cited on this form.

**Local Government Code § 176.001(1-a):** "Business relationship" means a connection between two or more parties based on commercial activity of one of the parties. The term does not include a connection based on:

- (A) a transaction that is subject to rate or fee regulation by a federal, state, or local governmental entity or an agency of a federal, state, or local governmental entity;
- (B) a transaction conducted at a price and subject to terms available to the public; or
- (C) a purchase or lease of goods or services from a person that is chartered by a state or federal agency and that is subject to regular examination by, and reporting to, that agency.

**Local Government Code § 176.003(a)(2)(A) and (B):**

(a) A local government officer shall file a conflicts disclosure statement with respect to a vendor if:

\*\*\*

(2) the vendor:

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

(i) a contract between the local governmental entity and vendor has been executed;  
or

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

(B) has given to the local government officer or a family member of the officer one or more gifts that have an aggregate value of more than \$100 in the 12-month period preceding the date the officer becomes aware that:

- (i) a contract between the local governmental entity and vendor has been executed; or
- (ii) the local governmental entity is considering entering into a contract with the vendor.

**Local Government Code § 176.006(a) and (a-1)**

(a) A vendor shall file a completed conflict of interest questionnaire if the vendor has a business relationship with a local governmental entity and:

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

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

(3) has a family relationship with a local government officer of that local governmental entity.

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

(1) the date that the vendor:

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

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

(2) the date the vendor becomes aware:

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

(B) that the vendor has given one or more gifts described by Subsection (a); or

(C) of a family relationship with a local government officer.

**APPENDIX B**

**LOCAL GOVERNMENT OFFICER  
CONFLICTS DISCLOSURE STATEMENT**

**FORM CIS**

(Instructions for completing and filing this form are provided on the next page.)

This questionnaire reflects changes made to the law by H.B. 23, 84th Leg., Regular Session.

This is the notice to the appropriate local governmental entity that the following local government officer has become aware of facts that require the officer to file this statement in accordance with Chapter 176, Local Government Code.

**OFFICE USE ONLY**

Date Received

**1 Name of Local Government Officer**

**2 Office Held**

**3 Name of vendor described by Sections 176.001(7) and 176.003(a), Local Government Code**

**4 Description of the nature and extent of each employment or other business relationship and each family relationship with vendor named in item 3.**

**5 List gifts accepted by the local government officer and any family member, if aggregate value of the gifts accepted from vendor named in item 3 exceeds \$100 during the 12-month period described by Section 176.003(a)(2)(B).**

Date Gift Accepted \_\_\_\_\_ Description of Gift \_\_\_\_\_

Date Gift Accepted \_\_\_\_\_ Description of Gift \_\_\_\_\_

Date Gift Accepted \_\_\_\_\_ Description of Gift \_\_\_\_\_

(attach additional forms as necessary)

**6 AFFIDAVIT**

I swear under penalty of perjury that the above statement is true and correct. I acknowledge that the disclosure applies to each family member (as defined by Section 176.001(2), Local Government Code) of this local government officer. I also acknowledge that this statement covers the 12-month period described by Section 176.003(a)(2)(B), Local Government Code.

\_\_\_\_\_  
Signature of Local Government Officer

AFFIX NOTARY STAMP / SEAL ABOVE

Sworn to and subscribed before me, by the said \_\_\_\_\_, this the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, to certify which, witness my hand and seal of office.

\_\_\_\_\_  
Signature of officer administering oath      Printed name of officer administering oath      Title of officer administering oath

## APPENDIX B

### LOCAL GOVERNMENT OFFICER CONFLICTS DISCLOSURE STATEMENT

Section 176.003 of the Local Government Code requires certain local government officers to file this form. A "local government officer" is defined as a member of the governing body of a local governmental entity; a director, superintendent, administrator, president, or other person designated as the executive officer of a local governmental entity; or an agent of a local governmental entity who exercises discretion in the planning, recommending, selecting, or contracting of a vendor. This form is required to be filed with the records administrator of the local governmental entity not later than 5 p.m. on the seventh business day after the date on which the officer becomes aware of the facts that require the filing of this statement.

A local government officer commits an offense if the officer knowingly violates Section 176.003, Local Government Code. An offense under this section is a misdemeanor.

Refer to chapter 176 of the Local Government Code for detailed information regarding the requirement to file this form.

#### INSTRUCTIONS FOR COMPLETING THIS FORM

*The following numbers correspond to the numbered boxes on the other side.*

- 1. Name of Local Government Officer.** Enter the name of the local government officer filing this statement.
- 2. Office Held.** Enter the name of the office held by the local government officer filing this statement.
- 3. Name of vendor described by Sections 176.001(7) and 176.003(a), Local Government Code.** Enter the name of the vendor described by Section 176.001(7), Local Government Code, if the vendor: a) has an employment or other business relationship with the local government officer or a family member of the officer as described by Section 176.003(a)(2)(A), Local Government Code; b) has given to the local government officer or a family member of the officer one or more gifts as described by Section 176.003(a)(2)(B), Local Government Code; or c) has a family relationship with the local government officer as defined by Section 176.001(2-a), Local Government Code.
- 4. Description of the nature and extent of each employment or other business relationship and each family relationship with vendor named in item 3.** Describe the nature and extent of the employment or other business relationship the vendor has with the local government officer or a family member of the officer as described by Section 176.003(a)(2)(A), Local Government Code, and each family relationship the vendor has with the local government officer as defined by Section 176.001(2-a), Local Government Code.
- 5. List gifts accepted, if the aggregate value of the gifts accepted from vendor named in item 3 exceeds \$100.** List gifts accepted during the 12-month period (described by Section 176.003(a)(2)(B), Local Government Code) by the local government officer or family member of the officer from the vendor named in item 3 that in the aggregate exceed \$100 in value.
- 6. Affidavit.** Signature of local government officer.

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**Local Government Code § 176.001(2-a):** "Family relationship" means a relationship between a person and another person within the third degree by consanguinity or the second degree by affinity, as those terms are defined by Subchapter B, Chapter 573, Government Code.

**Local Government Code § 176.003(a)(2)(A):**

(a) A local government officer shall file a conflicts disclosure statement with respect to a vendor if:

\*\*\*

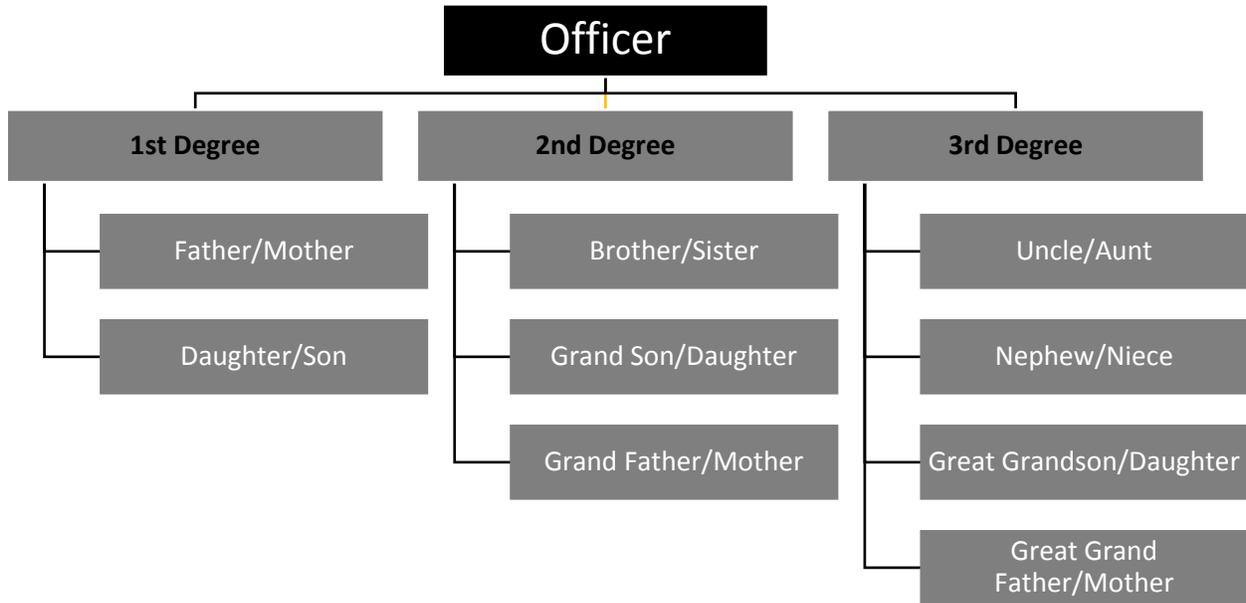
(2) the vendor:

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

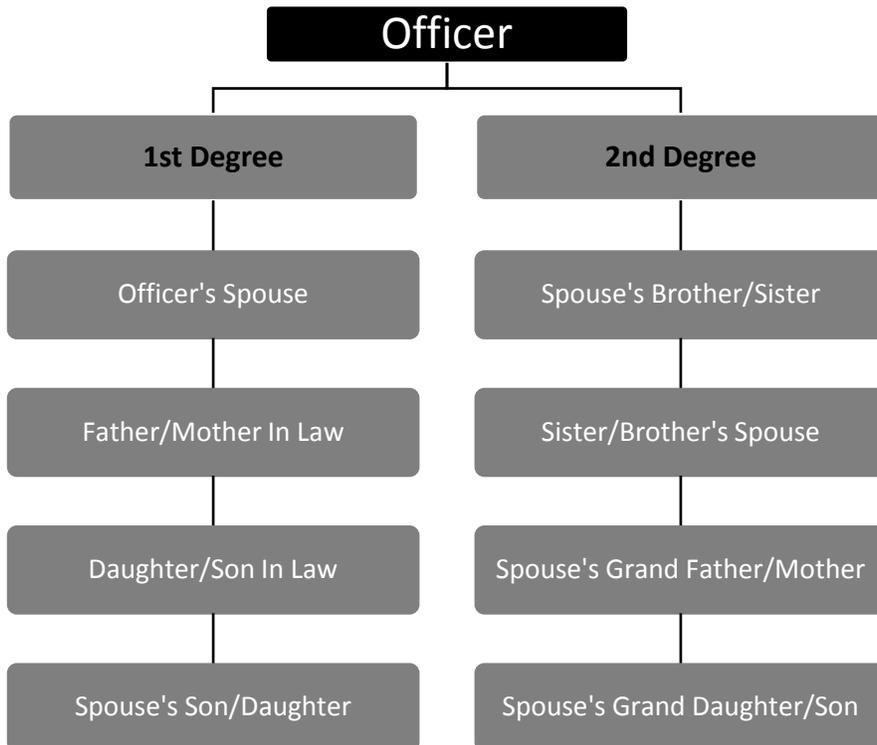
- (i) a contract between the local governmental entity and vendor has been executed; or
- (ii) the local governmental entity is considering entering into a contract with the vendor.

APPENDIX C

**CONSANGUINITY KINSHIP CHART**  
(Relationship by Blood)



**AFFINITY KINSHIP CHART**  
(Relationship by Marriage)



**APPENDIX D**

**COUNTY DUAL OFFICE HOLDING CHART**

<b>AUDITOR</b>			
<b>POSITION</b>	<b>POSITION</b>	<b>PERMITTED?</b>	<b>AUTHORITY</b>
Auditor	City Council	No	JM-0133

<b>CONSTABLE</b>			
<b>POSITION</b>	<b>POSITION</b>	<b>PERMITTED?</b>	<b>AUTHORITY</b>
Constable	Groundwater District Board	No	GA-0214; GA-0540
Constable	Municipal Fire Fighter	Yes	JC-0270
Constable	School Board	Yes	JM-0519
Constable	Deputy Sheriff	Yes	GA-0402
Constable	Jailer	Yes	JM-0485
Constable	Marshal	No	<i>Torno v. Hochstetler</i> , 221 S.W. 623
Constable	Groundwater District Board	No	GA-0214; GA-0540
Constable	Public School Teacher	Yes	LO-94-077
Constable	Bailiff	Yes	LO-92-73 (and salary OK per LO-97-060)
Constable	Chief of Police (same county)	No	JM-0422
Constable	Municipal Police Chief (same county)	Yes	KP-0122
Constable	ESD Commissioner	No	GA-1036
Constable	ISD Police Chief	Yes	KP-0032
Deputy Constable	Assistant Fire Chief	Yes	DM-0156

## APPENDIX D

COUNTY ATTORNEY			
POSITION	POSITION	PERMITTED?	AUTHORITY
County Attorney	City Attorney (same county)	Yes	JC-0054
County Attorney	Special Prosecutor (different county)	Yes, no salary	JM-0763
County Attorney	City Prosecutor (same county)	Yes	LO-96-148
County Attorney	Professor (part-time, state university)	Yes	LO-90-039
County Attorney	School District Board of Trustees (same county)	No	LO-95-029
County Attorney	Board of Directors, County Hospital	No	LO-97-100
County Attorney	Assistant County Attorney (different county)	Yes	GA-0350
Assistant County Attorney	State Representative	No	JC-0430
County Attorney/	Assistant District Attorney (different county)	Yes	LO-96-148

DISTRICT ATTORNEY			
POSITION	POSITION	PERMITTED?	AUTHORITY
District Attorney	Teaching Position (state university)	Yes	LO-93-96
District Attorney	Teaching Position (community college)	Yes	GA-0273
Assistant District Attorney	Municipal Utility District, Elected Director	Yes, without salary	LO-88-19
Assistant District Attorney	School District Board of Trustees (same county)	Yes	LO-89-082

## APPENDIX D

CLERK			
POSITION	POSITION	PERMITTED?	AUTHORITY
County Clerk	School Trustee	Yes	GA-0468
District Clerk	County Law Librarian	Yes	LO-90-10
District Clerk	Reserve Deputy Sheriff	Yes	LO-98-035
Deputy District Clerk	Deputy County Clerk	Yes	MW-415

COUNTY COMMISSIONER * Exempt from Constitution Article 16, §40			
POSITION	POSITION	PERMITTED?	AUTHORITY
Commissioner	Municipal Judge	Yes	GA-0348
Commissioner	City Council	No	GA-15; LO 88-49
Commissioner	Board of Trustees, Community College (same county)	No	JM-0129
Commissioner	Reserve Deputy Sheriff	Yes	LO-97-081
Commissioner	Municipal Judge	Yes	GA-0348
Commissioner	College Trustee	No	KP-0119
Commissioner	EMS Administrator	No	LO-94-046
Commissioner	Director, Groundwater Conservation District	No (if territories overlap)	JC-0455

JUDICIAL			
POSITION	POSITION	PERMITTED?	AUTHORITY
County Court at Law Judge	ISD Trustee	No	JM-0213
County Judge	County EMS Administrator, (same county)	No	LO-94-46
County Judge	River Authority Director	No	JM-0594
County Judge	Practicing Attorney (same county)	Gray Area	JC-0033; see also Govt. Code §82.064 and Code of Prof. Resp. Rule 1.06
County Judge	Records Management Officer (same county)	Yes	LO-90-062

## APPENDIX D

JUDICIAL, cont.			
POSITION	POSITION	PERMITTED?	AUTHORITY
County Judge	Texas Board of Criminal Justice	No	LO-95-052
County Judge, Candidate	Mayor	Depends	JM-0553
District Judge	ISD Board Trustee (same district)	No	LO-98-094
Former District Judge, sitting by assignment (and available for assignment)	Teaching Position (state university)	Yes	LO-98-109
Judge Subject to Code of Judicial Conduct	Law Enforcement Officer	No	State Commission on Judicial Conduct PS-2000-1

JUSTICE OF THE PEACE * Exempt from Constitution Article 16, §40			
POSITION	POSITION	PERMITTED?	AUTHORITY
Justice of the Peace	City Council	No	JM-0395
Justice of the Peace	Part-Time Municipal Judge	Yes	JM-819, LO-2055
Justice of the Peace	Jailer	No	JM-1047
Justice of the Peace	Juvenile Law Master (same county)	Yes	LO-96-078
Justice of the Peace	Deputy Sheriff (same county)	No	LO-90-9
Justice of the Peace	Deputy Sheriff (different county)	Yes	LO-92-35
Justice of the Peace	Deputy Constable (same Precinct)	No	LO-92-35
Justice of the Peace	Deputy Constable (Different Precinct)	Yes	LO-92-35
Justice of the Peace	County EMS Employee	Yes	GA-0569

## APPENDIX D

SHERIFF			
POSITION	POSITION	PERMITTED?	AUTHORITY
Sheriff	School Trustee	No	GA-0328
Sheriff	School Trustee	Yes (little interaction – no conflicting loyalties)	KP-0054
Deputy Sheriff	School Trustee	Yes	O-3308
Deputy Sheriff	Constable	Yes	GA-0402
Deputy Sheriff	Justice of the Peace	No	LO-90-9
Reserve Deputy Sheriff	Commissioner	Yes	LO-97-81

TAX ASSESSOR-COLLECTOR			
POSITION	POSITION	PERMITTED?	AUTHORITY
Tax Assessor-Collector	ISD Trustee	No	LO-92-004
Tax Assessor-Collector, Chief Deputy	Court Reporter (county court)	Yes	JM-1083
Tax Assessor-Collector (multi-district)	Chief Appraiser (multi-county)	Yes	JM-0499
Tax Assessor-Collector	Appraisal District Board Member	Yes	JM-1157

TREASURER			
POSITION	POSITION	PERMITTED?	AUTHORITY
Treasurer	School Board Trustee	Yes	JC-0490
Treasurer	County Hospital District Board Member	Yes	GA-1075

## APPENDIX D

OTHER COUNTY POSITIONS			
POSITION	POSITION	PERMITTED?	AUTHORITY
Governing Bodies (any 'public office')	DPS Officer	No	JM-0588
Local Elected Public Official	Employee of State Legislator	Yes, salary in some cases	LO-98-039
County EMS Employee	Justice of the Peace	Yes	GA-0569
County Improvement District Board	ISD Trustee	No	GA-0307
County Road & Bridge Dept. Employee	Police Officer	Yes	JM-0862
County Special District Employee	City Council	Yes	JM-1266
Director – County Water Authority	City Council	No	LO-92-68
Director – Flood Control District	City Council	Yes	LO-96-064
Election Clerk	Off-Duty School District Employee	Yes	JM-0862
Peace Officer	Peace Officer (different agency)	Case-by-case	GA-0214
Police Officer	Part-Time Security Officer	Yes	DM-0212
Polygraph Examiner (DA's office)	Municipal Judge	Unclear	GA-0551
Investigator (DA's office)	ISD Trustee	Yes, no salary	LO-95-001
Hospital District Director	Mayor	No	JC-0363
Probation Officer	ISD Board Member	Yes	GA-1083