Nepotism and Conflicts

29th Annual Election Law Seminar for Cities, Schools & Other Political Subdivisions

Zindia Thomas
Assistant General Counsel, Texas Municipal League
and
Kristi Clark
Senior Attorney, Legal Services, Texas Association of School Boards

This information is provided for educational purposes only to facilitate a general understanding of the law or other regulatory matter. This information is neither an exhaustive treatment on the subject nor is it intended to substitute for the advice of an attorney or other professional advisor. Consult with your attorney or professional advisor to apply these principles to specific fact situations.
Topic Overview

• Nepotism – Government Code Chapter 573
• Dual Office Holding/Incompatibility
• Resign to Run
• Conflict of Interest
  – Local Government Code Chapter 171
  – Local Government Code Chapter 176
Nepotism

Government Code
Chapter 573
What is Nepotism?
Gov. Code § 573.041

Prohibits a public official from:

- Appointing,
- Confirming the appointment of, OR
- Voting on the appointment of

a close relative of certain public officials to a paid public position or employment
Which Public Officials Does Nepotism Apply To?

- Public official who has **final hiring authority** or member of the governing body that has **final hiring authority**.

- **Final Hiring Authority** means the individual or entity that has control over hiring decisions.

Gov. Code § 573.001(3)
Special “Public Official” Rules for School Board and Superintendents

Need to know:

(1) if the population of the school district’s county is less than 35,000; and

(2) whether the board or superintendent has final hiring authority with respect to the type of employment (at-will, contract).

Educ. Code § 11.1513 (a), (f)-(g)

Check TASB policy DC(LOCAL) for hiring authority.
**Nepotism: Government Code Chapter 573**

**Board Members in Districts in Large Counties (≥ 35,000)**

**Question:** In districts in counties ≥ 35,000, may the board members’ relatives be hired?

**Answer:** No, and it does not matter if hiring authority has been delegated to the superintendent.

<table>
<thead>
<tr>
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Board Members in Districts in Small Counties (< 35,000)

**Question:** In districts in counties < 35,000, may the board members’ relatives be hired?

**Answer:** Yes, but only to the extent they have delegated the hiring authority to the superintendent.

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The Superintendent - Public Official?

**Question:** May the superintendent’s relatives be hired?

**Answer:** Yes, but only to the extent the board has *not* delegated hiring authority over the position to the superintendent.

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Special Rules for Cities
Delegation for Purposes of Nepotism

A delegation of hiring authority **by city charter** is valid.

A delegation of hiring authority **by ordinance** is not valid.

Who Is Considered a Close Relative?

- **Close relative** is a relative who is either in the
  - 1\textsuperscript{st}, 2\textsuperscript{nd} or 3\textsuperscript{rd} degree of consanguinity (blood)
  or
  - 1\textsuperscript{st} or 2\textsuperscript{nd} degree of affinity (marriage)

Gov. Code § 573.002
What is the 1\textsuperscript{st}, 2\textsuperscript{nd} or 3\textsuperscript{rd} Degree of Consanguinity (blood)?

- 1\textsuperscript{st} degree: mother, father, son, daughter
- 2\textsuperscript{nd} degree: brothers, sisters, grandparents, grandchildren
- 3\textsuperscript{rd} degree: aunts, uncles, nieces, nephews

*Adopted children* and *half brothers/sisters* are considered full blooded under consanguinity.

*Step brothers/sisters* are not.
What is the 1\textsuperscript{st} or 2\textsuperscript{nd} Degree of Affinity (marriage)?

- **1\textsuperscript{st} degree**: wife, husband, stepchildren, son-in-law, daughter-in-law
- **2\textsuperscript{nd} degree**: brother-in-law, sister-in-law, spouse’s grandparents, spouse’s grandchildren
What Happens if a Public Official has a Nepotism Conflict?

Neither the public official nor the other members of the governing body can hire the close relative, unless a specific statutory exception applies.

Gov. Code § 573.041
Nepotism Question

Does nepotism prohibit a person from running for a public office if the person has a close relative who is currently a public employee?

A. Yes
B. No
Nepotism Answer

B. No

However, if the person is elected, the close relative might have to resign if they are not protected by the prior continuous employment exception.
Prior Continuous Employment Exception

Employee may continue employment if the employee has been continuously employed (uninterrupted) for a sufficient time period immediately prior to the appointment or election of the close relative.

- **30 days** if public official is appointed
- **Six months** if public official is elected in an election other than the general county and state election
- **One year** if public official is elected in the general county and state election

Gov. Code § 573.062
Additional Exceptions

- Bus drivers for school districts located in counties with population < 35,000. Gov. Code § 573.061(4)
- Substitute teachers (not permanent position). Gov. Code § 573.061(6)
- Corporate employees – as long as corporation appoints, supervises, and pays
- Cities under 200: Nepotism prohibitions do not apply to cities with a population less than 200. Gov. Code § 573.061 (7)
Nepotism Scenario

Mayor Walter of the City of Texasville was elected to office in January 2001 and reelected in 2005. Rhonda, an Assistant City Secretary, was employed by the City of Texasville in October 1999.

As time progressed, Mayor Walter and Assistant City Secretary Rhonda became more acquainted and eventually fell in love. They got married in February 2006.

The local watchdog has written an editorial in the local newspaper accusing the mayor of violating the nepotism laws because he is still employing his now wife, Rhonda, at the City of Texasville.
Nepotism Scenario Question #1

Is Mayor Walter violating the nepotism law by continuing to employ his wife, Rhonda, as an Assistant City Secretary for the City of Texasville?

A. Yes b/c now they are related by 1st degree of affinity
B. Yes b/c now they are related by 1st degree of consanguinity
C. No b/c even though they are related now, Rhonda was employed by the city prior to marrying Mayor Walter over a year before the mayor was elected and she has remained employed since his elections.
D. No b/c nepotism does not apply if the marriage happened after the mayor was elected.
Nepotism Scenario Answer #1

C. No b/c even though they are related now, Rhonda was employed by the city prior to marrying Mayor Walter over a year before the mayor was elected and she has remained employed since his elections.
Nepotism Scenario Question #2

Can Mayor Walter and the city council promote Assistant City Secretary Rhonda to City Secretary while they are married?

A. Yes, b/c she is the best assistant city secretary and she deserves it.
B. Yes b/c though she is married to Mayor Walter, the prior continuous employment exception allows for her to receive promotions as long as Mayor Walter does not participate, deliberate or vote on the promotion.
C. No b/c she is his wife.
B. Yes b/c though she is married to Mayor Walter, the prior continuous employment exception allows for her to receive promotions as long as Mayor Walter does not participate, deliberate or vote on the promotion.

Gov. Code § 573.062(b)
Consequences for Violating The Nepotism Law

• Public official commits official misconduct
• Fine not less than $100 nor more than $1000
• Public official can be removed from office if convicted and the conviction is final
• Employment contract is void

Gov. Code §§ 573.081 – 573.084
Dual Office Holding & Incompatibility
Dual Office Holding
Texas Constitution Art. XVI, Section 40

• “No person shall hold or exercise at the same time, more than one civil office of emolument…”

• What is “civil office of emolument”?
  – A paid public office
Distinction Between “Public Office” and “Public Employment”

Public Office is determined by:

1. The officeholder’s authority to exercise governmental power for the benefit of the public, AND

2. Officeholder’s independence from the control of other governmental bodies or officials

_Aldine Independent School District v. Standley, 280 S.W.2d 578 (Tex. 1955)_
Definition of Emolument

• Pay or some other benefit, compensation or thing of value received in exchange for the person’s service as an officer.

• Reimbursement for actual governmental related expenses is not considered emolument.

Incompatibility

• Prohibition against a person holding certain public offices at the same time because of conflicts of interest that might arise.

• Three types of Incompatibility
  – Self Appointment
  – Self Employment
  – Conflicting Loyalties
Incompatibility

Incompatibility: Self Appointment
Prevents a governing body from appointing one of its own members to a public office.

*Ehlinger v. Clark, 8 S.W.2d 666 (Tex. 1928)*

Incompatibility: Self Employment
A member of a governing body may not simultaneously serve as an employee of his/her entity.

Tex. Att’y Gen. LO-97-34
Incompatibility: Conflicting Loyalties

Prevents a person from holding two public offices when the interest of the two entities may conflict and when voting on behalf of one public entity would possibly compromise the interest of the other public entity.

The City of Texasville has a 5 member city council. Each council member serves a 2 year term. The Council members receive $50 for every meeting they attend. The County of Tejas has a commissioners court that has 4 members and a county judge. Commissioners are paid a salary once they are elected, and they serve 4 year terms.

Council Member Davis has decided to run for County Commissioner in the County of Tejas where Texasville is the county seat. Council Member Davis was just reelected to the Texasville City Council and still has over a year on her term.

At the press conference announcing her candidacy for County Commissioner, a reporter asked Council Member Davis if she planned to remain a council member before the election. She responded that she planned to continue as a council member. The reporter then asked if she planned to stay a council member if she became the next county commissioner. Council member Davis stated that she would keep both positions because she thinks it would be best for both Texasville and Tejas County because it would help bridge the communication gap that sometimes happened between the governmental bodies.
Question #1
Would Dual Office Holding prevent Council Member Davis from being a city council member and a county commissioner at the same time?

A. Yes b/c both positions are paid.
B. Yes b/c both positions are public offices.
C. Yes b/c both positions are public offices and paid.
D. No b/c county commissioners are exempted from Dual Office Holding.
Dual Office Holding / Incompatibility Scenario

Answer #1

D. No b/c county commissioners are exempted from Dual Office Holding.

Art. XVI, §40 of the Texas Constitution provides that certain public officers are exempt from Dual Office Holding, including county commissioners.
Question #2

Would Incompatibility prevent Council Member Davis from being a city councilmember and a county commissioner at the same time?

A. Yes b/c it would be considered self appointment.
B. Yes b/c it would be considered self employment.
C. Yes b/c it would be considered conflicting loyalties.
D. No b/c dual office holding allowed it.
Dual Office Holding / Incompatibility Scenario

Answer #2

C. Yes b/c it would be considered conflicting loyalties.

Conflicting Loyalties applies b/c:
1. Texasville and Tejas County have overlapping boundaries.
2. Both entities are taxing authorities.
3. Council Member Davis would be holding two public offices where the interest of one might conflict with the interest of the other.
Does Council Member Davis automatically resign her position on the Texasville City Council when she accepts the position of County Commissioner?

A. Yes
B. No
Dual Office Holding / Incompatibility Scenario

Bonus Answer

A. Yes

Automatic Resignation operates as a matter of law only when either:

1) A public officer accepted a second public office that is a paid position; or

2) A person accepts a second public office that would present a conflicting loyalties problem under common-law incompatibility.

Automatic Resignation can sometimes apply when the public official announces their candidacy for a second public office. (i.e. Resign to Run)

Pruitt v. Glen Rose ISD, 84 S.W.2d 1004 (Tex. 1935); Tex. Att’y Gen. LO-89-57 (1989)
Consequences for Violating Dual Office Holding or Incompatibility

There are no criminal penalties for holding two conflicting public offices or for other types of prohibited dual office holding. Such a violation would have to be challenged through a civil action in a district court.
Resign to Run
Resign to Run
Texas Constitution, Art. XVI, § 65

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; 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.
Resign to Run

School Board Trustee

School board trustee is not one of the public offices subject to the resign to run provision; however, it is an office of trust.

Ramirez v. Flores, 505 S.W.2d 406 (Tex. Civ. App.—San Antonio, 1973, writ ref’d n.r.e.)
Sec. 11. (a) A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby; provided, however, that such officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies. . . .
Resign to Run

Cities

Resign to run is triggered in a city when the officer:

• serves more than a two-year term; and
• has more than 1 year 30 days left in that term
Resign to Run

Resign to Run

Additional Information

• Whether or not the officeholder wins the second office is irrelevant. Tex. Att’y Gen. LO-96-011, n.1 (1996)

• A candidate’s later withdrawal from candidacy does not undo an automatic resignation. Tex. Att’y Gen. LO-94-059 (1994)


• A home-rule city charter may include a resign to run provision. Tex. Att’y Gen. LO-96-014
Conflict of Interest
Part 1

Local Government Code
Chapter 171
What is Conflict of Interest in Local Government Code Chapter 171?

Prohibits local public officials from:

• Discussing,
• Deciding, OR
• Voting on

Issues that the local public official has a Substantial Interest in a Business Entity or Real Property.
Who is Considered a Local Public Official?
Local Gov. Code § 171.001(1)

Local Public Officials include:

- Elected Officials, and
- Appointed Officials,

Whether paid or unpaid, who exercise responsibilities that are more than advisory in nature.
Two Types of Conflict of Interest

1. **Substantial Interest in a Business Entity:** Conflict due to a local public official’s substantial financial interest in a *business entity* that has an issue before the governmental unit.

2. **Substantial Interest in Real Property:** Conflict due to a local public official’s substantial financial interest in *real property* that would be affected by the governmental unit’s action.
Substantial Interest in a Business Entity
Local Gov. Code § 171.002(a) & (c)

A person has a substantial interest in a business entity if the person has:

- **Stock Interest**: owns 10% or more of the total voting stock or shares
- **Other Ownership Interest**: owns either 10% or more, or $15,000 or more, of the fair market value of the business entity
- **Income Interest**: received more than 10% of his/her gross income from the previous year from the business entity
- **Close Relative w/any of the above interests**: close relative within the 1st degree of consanguinity (blood) or affinity (marriage)

**Business Entity** means sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust or any other entity recognized by law.
Test for Conflict of Interest Regarding Business Entity
Local Gov. Code § 171.004(a)(1)

1. **Substantial Interest Analysis**: determine if official or close relative has a substantial interest in the business entity

2. **Special Economic Effect Analysis**: determine whether the action the local governmental body is considering would have a special economic effect on the business entity that is distinguishable from its general effect on the public
Substantial Interest in Real Property
Local Gov. Code § 171.002(b) & (c)

A person has a substantial interest in real property if the person has:

• **$2,500 Ownership Interest**: a legal or equitable interest in real property worth $2,500 or more

• **Close Relative w/$2,500 Ownership Interest**: close relative within the 1st degree of consanguinity (blood) or affinity (marriage)
Test for Conflict of Interest Regarding Real Property
Local Gov. Code § 171.004(a)(2)

1. **Substantial Interest Analysis**: determine if official has substantial interest in real property

2. **Special Economic Effect Analysis**: determine whether the action the local governmental body is considering would have a special economic effect on the value of the property that is distinguishable from its general effect on the public
Conflict of Interest: Local Gov. Code Chapter 171

What Does Local Public Official Do if He/She has a Conflict of Interest?
Local Gov. Code § 171.004(a) & (b)

1. **File an Affidavit** stating the nature and extent of the official’s interest with the governmental body’s record keeper;
2. **Abstain from discussion** or other proceedings regarding the item; and
3. **Abstain from voting** on the item.
Consequences for Violating Conflict of Interest Law
Local Gov. Code § 171.003

1. **Civil:** Action taken is voidable

2. **Criminal:** Four situations in which a public official may be prosecuted for action or inaction that is a Class A misdemeanor punishable by a fine not to exceed $4,000 and/or up to one year in jail:
   a. Failure to file an affidavit
   b. Participating in discussion regarding an item when there is a conflict
   c. Serving as surety for a business entity that has work, business, or a contract with the governmental body
   d. Serving as surety on any official bond required for an official of a governmental body

3. **Possible Removal from office**
Conflict of Interest
Part 2

Local Government Code
Chapter 176
What is Conflict of Interest in Local Government Code Chapter 176?

Requires a vendor or a local government officer of a local governmental entity to disclose certain business relationships.
Local Governmental Entities
Local Gov. Code § 176.001(3)

- Includes a county, city, school district, charter school, junior college district, water district created under Subchapter B, Chapter 49, Water Code, or other political subdivision of this state or a local government corporation, board, commission, district, or authority to which a member is appointed by the commissioners court of a county, the mayor of a city, or governing body of a city.

- Does not include an association, corporation, or organization of governmental entities organized to provide to its members education, assistance, products, or services or to represent its members before the legislative, administrative, or judicial branches of the state or federal government.
Local Governmental Officer
Local Gov. Code § 176.001(4)

1. A member of the governing body of a local governmental entity;

2. A director, superintendent, administrator, president, or other person designated as the executive officer of a local governmental entity; or

3. An agent of a local governmental entity who exercises discretion in the planning, recommending, selecting or contracting of a vendor.
Vendor
Local Gov. Code § 176.001(7)

- A person who enters or seeks to enter into a contract with a local governmental entity.
  - The term includes an agent of a vendor.
  - The term includes an officer or employee of a state agency when that individual is acting in a private capacity to enter into a contract.
  - The term does not include a state agency except for Texas Correctional Industries.
Agent
Local Gov. Code § 176.001(1)

A third party who undertakes to transact some business or manage some affair for another person by the authority or on account of the other person. The term includes an employee.
Family Members
Local Gov. Code § 176.001(2)
Person related to another person within the 1st degree by consanguinity (blood) or affinity (marriage).

Family Relationship
Local Gov. Code § 176.001(2-a)
A relationship between a person and another person within the 3rd degree by consanguinity (blood) or the 2nd degree by affinity (marriage).
Gift
Local Gov. Code § 176.001(2-b)

- A benefit offered by a person, including food, lodging, transportation, and entertainment accepted as a guest.
- The term does not include a benefit offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.
Conflict of Interest: Local Gov. Code Chapter 176

Who are the “Conflict Disclosure Statements” and “Conflict of Interest Questionnaires” Filed With?
Local Gov. Code §§ 176.003(b) & 176.006(a-1)

• The statements and questionnaires must be filed with the record administrator of the local governmental entity.

• **Record Administrator** is the director, county clerk, city secretary, superintendent, or other person responsible for maintaining the records of the local governmental entity or another person who is designated by the local governmental entity to maintain the statements and questionnaires. Local Gov. Code § 176.001(5)

• If the local governmental entity maintains a website, then the statements and questionnaires must be posted on the website. Local Gov. Code § 176.009
When is a Local Government Officer Required to File a “Conflicts Disclosure Statement”?  
Local Gov. Code § 176.003

Two-Part Test

WHEN

Part 1
A vendor enters into a contract with the local governmental entity
or
The local governmental entity is considering entering into a contract with the vendor

AND
When is a Local Government Officer Required to File a “Conflicts Disclosure Statement”?  
Local Gov. Code § 176.003  
Part 2  
The Vendor Has

A. An employment or other business relationship w/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:

1. A contract b/w the local governmental entity and vendor has been executed; or

2. The local governmental entity is considering entering into a contract with the vendor; OR

B. Given the local government officer or a family member of the officer one or more gifts with an aggregate value of more than $100 in the 12-month period preceding the date the officer becomes aware that:

1. A contract b/w the local governmental entity and vendor has been executed; or

2. The local governmental entity is considering entering into a contract with the vendor; OR

C. A family relationship with the local government officer.
When is the “Conflict Disclosure Statement” Required to be Filed?
Local Gov. Code § 176.003(b)

No later than 5:00 p.m. on the seventh business day after the date on which the officer becomes aware of facts that require filing of the statement.
Consequences of Not Filing “Conflict Disclosure Statement”
Local Gov. Code § 176.013

• An officer commits an offense if the officer:
  – Is required to file a statement; AND
  – Knowingly fails to file the statement when the officer becomes aware of
    the facts that require filing the statement.

• **Exception to prosecution** if officer files a statement or questionnaire
  not later than the seventh day after the date the officer receives
  notice from the local governmental entity of the alleged violation.

• Local governmental entity may reprimand, suspend, or terminate
  the employment of an employee who knowingly fails to comply.
When is a Vendor Required to File a “Conflict of Interest Questionnaire”?  
Local Gov. Code § 176.006

If the vendor has a business relationship with the local governmental entity and has:

1. An employment or other business relationship with a local government officer or an officer’s family member that results in the officer or officer’s family member receiving taxable income that is more than $2,500 in the preceding twelve months; or

2. Given a local government officer or an officer’s family member one or more gifts totaling more that $100 in the preceding twelve months, with some exceptions; or

3. A family relationship w/a local government officer of that local governmental entity.
When is the “Conflict of Interest Questionnaire” Required to be Filed?
Local Gov. Code § 176.006(a-1)

Not later than the seventh business day after the later of the following:

• The date the vendor:
  – begins discussions or negotiations to enter into a contract with the local government entity;
  – submits an application, response to a request for proposal or bid, or another writing related to a potential contract with the local governmental entity;
  
  OR

• The date the vendor becomes aware:
  – of an employment or other business relationship with a local government officer or a family member of officer;
  – that the vendor has given a gift to an officer or officer’s family member; or
  – of a family relationship with a local government officer.
Consequences of Not Filing “Conflict of Interest Questionnaire”
Local Gov. Code § 176.013

• A vendor commits an offense if the vendor:
  – Is required to file a questionnaire; AND
  – Either knowingly fails to file:
    • the questionnaire when the vendor becomes aware of the facts that require the filing; or
    • an updated questionnaire when the vendor becomes aware of an event that would make a statement in a questionnaire previously filed incomplete or inaccurate.

• Exception to prosecution if vendor files the questionnaire not later than the seventh business day after the date the vendor receives notice from the local governmental entity of the alleged violation.

• The governing body of a local governmental entity may, at its discretion, declare a contract void if the governing body determines that a vendor failed to file a questionnaire.
Possible Offenses for Knowingly Failing to file the Statement or the Questionnaire
Local Gov. Code § 176.013(c)

1. Class C misdemeanor if the contract amount is less than $1 million or if there is no contract amount;

2. Class B misdemeanor if the contract amount is at least $1 million but less than $5 million; or

3. Class A misdemeanor if the contract amount is less than $5 million.
For More Information

• **Nepotism**
  – TASB: Conflict of Interest: Nepotism - [https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/conflict_int_nepotism_may15.pdf](https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/conflict_int_nepotism_may15.pdf)

• **Dual Office Holding / Incompatibility**

• **Resign to Run**
  – TML: Resign to Run Legal Q & A: [https://www.tml.org/p/2014%20March%20Resign%20to%20Run%20HM.pdf](https://www.tml.org/p/2014%20March%20Resign%20to%20Run%20HM.pdf)

• **Conflict of Interest – Local Government Code Chapter 171 & 176**
Contact Information

Zindia T. Thomas
Assistant General Counsel
Texas Municipal League
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
512-231-7400
zthomas@tml.org
www.tml.org
Kristi Clark
Senior Attorney, Legal Services
Texas Association of School Boards
PO Box 400
Austin, Texas 78767
800.580.5345
legal@tasb.org
legal.tasb.org
Darn! That's The End!