

Conflicts of Interest/*Ex Parte* Communication with Decision-Makers

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This paper is intended to inform city attorneys on the applicable law governing two potentially problematic areas encountered by decision-makers of governmental bodies: conflict of interest issues and *ex parte* communications. In addressing these areas, this paper will focus on the dual roles city attorneys often assume as advisors to their councils and as representatives of their municipality's interest before state agencies.

CONFLICTS OF INTEREST

Public servants owe a special responsibility to the people of Texas in the performance of their official duties. Understanding the law and avoiding conflicts of interest are critical to fulfilling that responsibility.

□ Local Public Officials

The common law conflicts of interest principle prohibits a public officer from having a direct or indirect financial interest in a contract entered into by the governmental body of which he is a member.² For local public officials,³ however, the Texas Local Government Code preempts the common law. Chapter 171 of the Code regulates conflicts of interests relating to officers of municipalities, counties, and certain other local governments while chapter 176 governs the disclosure of certain relationships with local government officers and provides for public access to certain information.

Chapter 171 Local Government Code

A local public official⁴ is barred from participating in a matter involving a business entity or real property in which the official has a substantial interest if:

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² *Meyers v. Walker*, 276 S.W. 305, 307 (Tex.Civ.App.-Eastland 1925, no writ); *see also* Op. Tex. Att'y Gen. No. LO97-072 (1997).

³ A "local public official" is defined as a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity *who exercises responsibilities beyond those that are advisory in nature*. TEX. LOC. GOV'T CODE ANN. § 171.001(1) (Vernon 1999 & Supp. 2005) (emphasis added).

⁴ Under Chapter 171, the local public official is considered to have a substantial interest in a business entity if a person related to the official within the first degree of consanguinity or affinity (spouse, parents, children, in-laws, and step-children of the member) has a substantial interest in a business entity. *Id.* at § 171.002(c).

- (1) the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
- (2) it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property that is distinguishable from its effect on the public.⁵

For purposes of this chapter, a local public official is determined to have a “substantial interest” in a business entity if the local public official owns ten percent or more of the voting stock or shares or owns either ten percent or more or \$15,000 or more of the fair market value of the business entity. Even if the local public official’s interest does not rise to the level described above, he is also considered to have a substantial interest in business entity if the funds received by the local public official from the business entity exceed ten percent of the person’s gross income for the previous year. A substantial interest in real property is found if the local public official has an equitable or legal ownership valued at \$2,500 or more (fair market value).⁶

The relevant point in time to determine the existence of a substantial interest in a business entity or in real property is when the governmental body takes up the matter (*i.e.*, begins deliberations) that will affect the business entity or real property.⁷ The substantial interest in the business entity (based upon ownership) will terminate upon full divestiture of the ownership interest by the local public official. However, if the interest is derived from a receipt of income, the local public official is determined to have a substantial interest if the local public official received funds in excess of ten percent of his income during the twelve month period prior to the time the governmental entity takes up the matter.⁸

- **Compliance with Chapter 171**

Compliance with the statute is absolutely required. Texas courts do not need evidence that influence was actually exercised in order to find that the statute was violated.⁹ The statutory provisions governing conflicts of interest issues for local public officials are cumulative of municipal charter provisions and ordinances.¹⁰

Prior to a vote or decision on the matter, the official must file an affidavit with the official record keeper of the governmental entity.¹¹ The affidavit must state the nature and extent of the

⁵ *Id.* at § 171.004.

⁶ *Id.* at § 171.002(a)(b).

⁷ Op. Tex. Att’y Gen. No. JC-0063 (1999).

⁸ *Id.*

⁹ *Delta Elec. Const. Co. v. City of San Antonio*, 437 S.W.2d 602 (Civ.App. 1969, ref. n.r.e.); *see also Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271 (App. 5 Dist. 1991, writ denied) (no proof of evil motives required to find violation of statute).

¹⁰ TEX. LOC. GOV’T CODE ANN., *supra* note 3, at § 171.007(b). A home-rule city may adopt ordinance provisions relating to conflicts of interests involving its officers that are not inconsistent with Local Government Code chapter 171. However, the city may not attempt to exempt its officers from the requirements of chapter 171. Op. Tex. Att’y Gen. No. GA-0068 (2003).

¹¹ The Attorney General has determined that engaging in deliberations leading up to the vote or decision on the matter can be considered participating in the vote or decision within the ambit of the conflicts of interest

interest. If a governing body is voting on a budget item specifically dedicated to a contract with a business entity in which a member of the board has a substantial interest, the body must take a separate vote on the budget item.¹² If the local public official has complied with the statute by filing an affidavit and abstaining from involvement on the vote on the specific budget item and the matter in which the local public official is concerned has been resolved, the local public official may vote on the final budget.¹³

- **Exception**

The statute recognizes an exception to the prohibition against an official's participation in the matter in which he retains a substantial interest if the official files the affidavit and the majority of the members of the governmental entity are similarly required to file affidavits noting their substantial interest in the same matter.¹⁴

- **Consequences of Violating Statute**

The local governmental official commits a Class A misdemeanor if the official knowingly violates § 171.004; acts as surety for a business entity that has work, business, or a contract with the governmental entity; or acts as surety on any official bond required of an officer of the governmental entity.¹⁵

In the event the Chapter 171 is violated, the action of the governing body is not rendered voidable unless the action would not have passed without the vote of the official who violated the statute.¹⁶

- **Practical Examples**

Several Attorney General Opinions have been issued regarding the breadth and effect of the conflicts of interest statute:

No prohibited participation:

- * An elected county official serving on a county salary grievance committee is not barred by Chapter 171 from voting on his own salary grievance. A county officer's interest in his compensation from the county is neither a real property interest nor an interest in a business entity under the statute. Op. Tex. Att'y Gen. No. LO98-097 (1998).
- * County Commissioners Court is not prohibited from approving payment of invoices to an inn that were submitted by the executive director of county's industrial commission for a member of the industrial commission

statute. Op. Tex. Att'y Gen. No. JM-379 (1985) (considering an earlier statutory provision that, upon repeal, was replaced by Chapter 171).

¹² TEX. LOC. GOV'T CODE ANN., *supra* note 3, at § 171.005(a).

¹³ *Id.* at § 171.005(b).

¹⁴ *Id.* at § 171.004(c).

¹⁵ *Id.* at § 171.003(a)(b).

¹⁶ *Id.* at § 171.006.

that owned the inn. The facts demonstrated that county commissioners were not barred from approving payment of the invoices because no commissioner had an interest in the inn. Similarly, the Executive Director of the industrial commission did not violate the statute because he had no interest in the inn. Finally, although the individual member of the industrial commission had a business interest in the inn, the evidence showed that the industrial commission voted only on an overall budget and did not consider day-to-day expenditures. Op. Tex. Att’y Gen. No. LO98-112 (1998).

- * Simply residing in a housing project does not amount to a conflict of interest violation for tenant board member. Op. Tex. Att’y Gen. No. JM-308 (1985) (considering an earlier statutory provision that, upon repeal, was replaced by Chapter 171).
- * A county is not prohibited from contracting with a sole supplier even though one county official had a substantial interest in the business. The county official is barred from participating in any deliberations regarding the contract with the business. Op. Tex. Att’y Gen. No. DM-279 (1993).

Substantial Interest:

- * A home rule city council member may be required to abstain from voting on a zoning issue that would affect the area in which the member’s residence is located because the decision may affect the member’s real property interest. Whether the decision would have “a special economic effect” on the member’s property different than the effect upon the public is a factual question that must be answered on a case-by-case basis. Op. Tex. Att’y Gen. No. DM-130 (1992).
- * Along the same lines as above, a member of the zoning commission may be required to abstain from involvement on a matter if the commission is considering an ordinance that would affect the member’s business entity. Op. Tex. Att’y Gen. No. DM-309 (1994).
- * A city council member may be required to abstain from voting on payment of bills submitted by a business entity in which the member holds a substantial interest if the vote will have a special economic effect upon the business entity. A violation of § 171.004 also occurs if the member votes on the purchase of goods or services from a sole source when that source is a business entity in which the member has a substantial interest. Op. Tex. Att’y Gen. No. JM-846 (1988).
- * A member of the pension board is prohibited from voting to invest pension funds with a business entity in which he held a ownership interest, whether or not that interest was in the entity that issues stock. Op. Tex. Att’y Gen. No. JM-291 (1984) (considering an earlier statutory provision that, upon repeal, was replaced by Chapter 171).

In addition, *Dallas County Flood Control District No. 1 v. Cross*, 815 S.W.2d 271, (App.5 Dist. 1991, writ denied) held that the statute had been violated when members of the

flood control easement board voted to approve the district's acquisition of an easement over land owned by the district president at a price that was 16 times what the president had paid for the property two years earlier. Prior to the vote, the members had received substantial sums from the president and the president's son-in-law that exceeded 10 percent of the members' previous-year incomes. In making its decision, the court determined that indirect payments to the board members could be considered if the business entity in question was responsible for the payments.

Chapter 176 Texas Local Government Code

This newly enacted chapter of the Local Government Code provides a means for public disclosure of potentially conflicting relationships between vendors and members of a local governmental body.¹⁷ It requires local government officers and vendors to file conflict of interest forms with the records administrator of the applicable local government entity.¹⁸ "Local government entity" includes all political subdivisions as well as 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 municipality, or the governing body of a municipality."¹⁹

▪ Compliance with Chapter 176 – Local Government Officers

A local government officer must file a conflicts disclosure statement when that officer has a specified relationship with a "person who has contracted with or seeks a contract with a local government or if a local government entity is considering doing business with the person" (hereinafter "Vendor").²⁰ A "local government officer" includes "a member of the governing body of the local governmental entity and a director, superintendent, administrator, president or other person designated as the executive officer of the local governmental entity."²¹

A disclosure statement is required if one of these officers or the officer's family members:²²

- 1) has a business relationship with a vendor that results in the officer or family member receiving taxable income; or
- 2) if the vendor has given the officer or family member one or more gifts, other than food, lodging, transportation or entertainment accepted as a guest, that have an aggregate value of more than \$250 in the 12-month period preceding the date the officer becomes aware that a contract has been executed or that the local government entity is considering doing business with the person.²³

¹⁷ Op. Tex. Att'y Gen. No. GA-0446 (2006).

¹⁸ TEX. LOC. GOV'T CODE ANN., *supra* note 3, at § 176.002 (Vernon Supp. 2005).

¹⁹ *Id.* at § 176.001(3). *See also*, Op. Tex. Att'y Gen. No. GA-0446, *supra* note 17.

²⁰ *Id.* at § 176.003(a)(1). The Attorney General has interpreted "contract or seek a contract" to include contracts involving small and routine purchases. Op. Tex. Att'y Gen. No. GA-0446, *supra* note 17, at 7.

²¹ *Id.* at § 176.001(4). Under § 176.005, a local government entity may extend disclosure requirements to all or a group of employees of the entity.

²² "Family member" is defined as a person related to another person within the first degree by consanguinity or affinity, as described by Subchapter B, Chapter 573, Government Code. *Id.* at § 176.001(2).

²³ *Id.* at § 176.003(a)(2).

Pursuant to § 176.003, an officer has a "business relationship" with a Vendor when the officer has a connection to a Vendor based on the commercial activity of one of them.²⁴

A Conflicts Disclosure Statement form must be filed with the local records administrator 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 filing as stated above.²⁵ Conflicts Disclosure Statement forms are available from the Texas Ethics Commission.²⁶ In accordance with the requirements of § 176.004, the officer must disclose:

- 1) an employment or other business relationship and the nature of that relationship; and
- 2) gifts received by the officer and any family member of the officer from a vendor or other person described in § 176.002 within the 12-month period described in § 176.003(a)(2)(B) if the aggregate value exceeds \$250.²⁷

Following this disclosure, the officer must sign the statement under oath and penalty of law, acknowledging that the disclosure applies to each family member and that the statement covers the twelve month period as described above.²⁸ The disclosure requirements herein are in addition to any other disclosure required by law.²⁹

- Compliance with Chapter 176 – Local Government Entities

The records administrator for the local governmental entity must maintain a list of local government officers of the entity and is required to make that list available to the public.³⁰ Further, counties with populations greater than 800,000 and municipalities with populations greater than 500,000 are required to provide access to this information on their websites.³¹

- Consequences of Violating Chapter 176

The local government official commits a Class C misdemeanor if the officer knowingly violates § 176.003, which require the filing of a Conflicts Disclosure Statement.³² It is, however, a defense to prosecution if the person filed the required conflicts of interest disclosure statement not later than the seventh business day after the date the person received notice of the violation.³³

²⁴ Op. Tex. Att'y Gen. No. GA-0446, *supra* note 17, at 8-9.

²⁵ TEX. LOC. GOV'T CODE ANN., *supra* note 3, at § 176.003(b).

²⁶ Texas Ethics Commission, available at http://www.ethics.state.tx.us/whatsnew/conflict_forms.htm.

²⁷ TEX. LOC. GOV'T CODE ANN., *supra* note 3, at § 176.004(1).

²⁸ *Id.* at § 176.004(2)-(3).

²⁹ *Id.* at § 176.010.

³⁰ *Id.* at § 176.007.

³¹ *Id.* at § 176.009.

³² *Id.* at § 176.003(c).

³³ *Id.* at § 176.003(d).

- Practical Examples

Since Chapter 176 has become effective, Texas Attorney General Greg Abbott issued an opinion regarding how this chapter should be interpreted and applied.³⁴ The following are highlights from the opinion:

- * Local government entities do not have a duty to "enforce" chapter 176 nor is it required to notify vendors of their requirements under the law.
- * A personal or business interest-bearing savings account that generates taxable income to the officer or the officer's family member or personal or business loan from an officer that produces taxable income to the vendor are business relationships that would trigger the requirements of chapter 176.
- * Because chapter 176 does not expressly exclude professional service providers, this chapter applies to contracts with such persons.
- * As applied to a partnership, corporation or other legal entity, the disclosure requirements of § 176.002 apply only to the legal entity that is the person contracting or seeking to contract. Third-party individuals who act as agents under agency law for a legal entity are independently subject to chapter 176 under § 176.002(a)(2).
- * Failure of a vendor to comply with disclosure requirements under § 176.006 does not void a contract with the entity, nor does it require that the entity cease business with that vendor.
- * Disclosure requirements apply when a vendor is a family member of the officer.
- * The phrase "aggregate value of more than \$250" in § 176.003(a)(2)(B) applies to each individual officer or family member who receives the gift rather than to the family as a unit.
- * The Attorney General declined to issue an opinion regarding instances where a vendor is also a client of an attorney who is an officer and whether the identity of that vendor may be withheld from disclosure pursuant to the attorney-client privilege.

- **State Officers**

[An agency official] is charged with the solemn trust to act fairly and impartially in fulfilling invested duties in the governmental household of the public. Each must act with genuine evenhandedness, compelled by a firm and continuous desire to render to everyone that which is his due, and to shun any conduct tending to undermine faith and confidence in the man or the office in which he acts. *Lewis v. Guaranty Federal Sav. & Loan Ass'n*, 483 S.W.2d 843.

³⁴ Op. Tex. Att'y Gen. No. GA-0446, *supra* note 17.

▪ Statutory Prohibition Against Conflicts of Interest

All state officials must avoid direct and indirect conflicts of interest in order to “strengthen the faith and confidence of the people of this state in state government...”³⁵ Texas Government Code § 572.001 sets forth that:

It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial or other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest.³⁶

The state officer or employee is prohibited from accepting or soliciting any gift, favor, service, employment, or compensation that could be reasonably expected to impair the independence of judgment in the performance of official duties.³⁷ The state official or employee is also prohibited from making personal investments that could reasonably be expected to create a substantial conflict between the public interest and the officer’s or employee’s private interest.³⁸

For state officers, compliance with the statute is policed mainly through the required annual filing of financial disclosure statements that account for the financial activity of the officer, the officer’s spouse, and the officer’s dependent children.³⁹

Administrative officials are presumed to be neutral and nonbiased, capable of making a thoughtful and informed judgment.⁴⁰ This presumption can be overcome by demonstrating that the decision-maker’s mind is “irrevocably closed” on the matters at issue.⁴¹ However, an administrative officer is not disqualified simply because he or she has previously taken a position, even in public, on a policy issue related to a particular dispute:

Although an administrator may have an underlying philosophy in approaching a specific case, he or she is still assumed to be a person of conscience and intellectual discipline, capable of judging a particular controversy fairly.⁴²

³⁵ TEX. GOV’T CODE ANN. § 572.001(a)(b) (Vernon2004).

³⁶ TEX. GOV’T CODE ANN. § 572.001(a). Section 572.005 delineates the determination of a “substantial interest” in a business entity.

³⁷ *Id.* at § 572.051.

³⁸ *Id.*

³⁹ *Id.* at § 572.021. In 2005, this section was amended to include filing requirements for candidates. A provision was also added which exempts an appointed officer from filing requirements if that officer resigns or if their office expires and if that person ceases to participate in the functions of the state agency. *Id.* at § 572.0211.

⁴⁰ *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004 (1941). In order to prevail, the party alleging the conflict of interest must overcome the presumption that agency members are persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

⁴¹ *Federal Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 701, 68 S.Ct. 793, 803 – 804 (1948).

⁴² *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004 (1941).

The “Irrevocably Closed Mind” Standard – A Case Study

FACTS: Commissioner Paul Meek served as Chairman of the Public Utility Commission (“PUC”) at the same time that he was Chairman of the Board of Directors of American Petrofina. Chairman Meek also received retirement benefits from American Petrofina and held shares of its stock while he was PUC Chairman. Contracts between American Petrofina and Texas Utilities Electric, an investor-owned utility regulated by the PUC, were an issue in a contested case proceeding pending before the PUC. Although Chairman Meek recused himself from any vote directly affecting American Petrofina, he did not recuse himself from the discussion immediately preceding the vote on the issues directly impacting American Petrofina or from voting on other issues that implicitly affected American Petrofina. In addition, Chairman Meek gave an interview to a newspaper reporter expressing his disappointment with the PUC’s decision to disallow \$1.3 billion of costs related to the nuclear plant owned by Texas Utilities Electric.

ISSUE: Did Chairman Meek’s connections to American Petrofina and his comments to the newspaper lead to an unfair proceeding, prejudice substantial rights of the parties, or prevent the Chairman from making impartial findings in the rate proceeding? Were the actions that Chairman Meek took sufficient to ensure that the PUC’s findings were impartial?

HELD: The party asserting the conflict of interest is required to rebut the presumption of neutrality afforded agency officials by demonstrating that the decision-maker’s mind is irrevocably closed on matters at issue. No conflict of interest was found because Chairman Meek was confirmed by the Senate to serve as a Public Utility Commissioner following the revelation of his business conflict and the Chairman recused himself from voting on issues directly impacting American Petrofina. Chairman Meek’s opinions about the gas industry were not shown to have resulted in a deprivation of the right to an impartial and fair hearing. *Texas Utilities Electric Co. v. Pub. Util. Comm’n*, 881 S.W.2d 387, 391 (Tex.App.—Austin 1994, rev’d in part on other grounds, 935 S.W.2d 109 (Tex. 1996)).

To the extent that an appointed official is a member of a board or commission having policy direction over a state agency and has a personal or private interest in a decision pending before the commission, he shall publicly disclose that fact to the commission in a public meeting. The official may not vote or otherwise participate in the decision. Failure to comply with this requirement is grounds for removal from office upon petition to the Attorney General, the Attorney General’s own initiative or by a court’s judgment.⁴³ In determining whether the official should be removed, the court’s decision is to be based upon a preponderance of the evidence.

▪ Agency Provisions

⁴³ *Id.* at § 572.058.

In addition to the requirements of Chapter 572, the Legislature may adopt provisions governing conflicts of interest that are applicable to specific state agencies. For example, the Public Utility Regulatory Act prohibits the appointment of person to the office of commissioner if:

- * Within the past two years the person served as “an officer, director, owner, employee, partner, or legal representative of a public utility, affiliate, or direct competitor of a public utility or owned or controlled, directly or indirectly, stocks or bonds of any class with a value of \$10,000 or more in a public utility, affiliate, or direct competitor of a public utility...”,⁴⁴
- * The person is a registered lobbyist that lobbies on behalf of a profession related to the operation of the commission;⁴⁵
- * The person serves on the board of directors of a company that supplies fuel, utility-related services, or utility-related products to regulated or unregulated electric or telecommunications utilities;⁴⁶
- * The person or person’s spouse is employed by or participates in the management of a business entity or other organization that is regulated by or receives funds from the commission;⁴⁷
- * The person or person's spouse directly or indirectly owns or controls more than a 10 percent interest (or a pecuniary interest with a value exceeding \$10,000) in an entity regulated by or that receives funds from the commission, a utility competitor, utility supplier, or entity affected by a commission decision;⁴⁸
- * The person or person's spouse uses or receives a substantial amount of tangible goods, services, or funds from the commission, other than compensation allowed by law for membership, attendance or expenses;⁴⁹
- * The person or person's spouse has an interest in a mutual fund or retirement fund in which more than 10 percent of the fund’s holdings at the time of the appointment is in a single utility, utility competitor, or utility supplier in this state and the person fails to disclose the information to the governor;⁵⁰ or
- * The person or the person’s spouse is an officer, employee, or paid consultant of a trade association.⁵¹

During their period of service, commissioners are prohibited from having a pecuniary interest in or accepting a gift, gratuity, or entertainment from a public utility or affiliate or a business that furnishes goods or services to public utilities or affiliates. In addition, the

⁴⁴ TEX. UTIL. CODE ANN. § 12.053(b) (Vernon 1998).

⁴⁵ *Id.* at § 12.151.

⁴⁶ *Id.* at § 12.152(a)(1).

⁴⁷ *Id.* at § 12.152(a)(2)(A).

⁴⁸ *Id.* at § 12.152(a)(2)(B); The person otherwise ineligible because of §12.(a)(2)(B) may serve as commissioner if he or she informs the attorney general and commission that the person would be ineligible to serve because of the ownership interest or control and divests the person’s ownership or control before the appointment to commissioner or within a reasonable time. *Id.* at § 12.152(b).

⁴⁹ TEX. UTIL. CODE ANN., *supra* note 40, at § 12.152(a)(2)(C).

⁵⁰ *Id.* at § 12.152(a)(2)(D).

⁵¹ *Id.* at § 12.153.

commissioner may not directly or indirectly own or control securities in a public utility, affiliate, or direct competitor of a public utility. The commissioner may not suggest to a public utility or its affiliate that the public utility offer employment to a particular person.⁵²

- **Doctrine of Incompatibility**

A more subtle potential conflict of interest issue arises when a person holds two public offices where “one office might impose its policies on the other or subject it to control in some other way.”⁵³ This is sometimes referred to as the common-law doctrine of incompatibility. For example, if a member of a city council also attempted to sit on the board of municipal utility district, the two offices may have overlapping jurisdictions, including the ability to levy and collect taxes. The dual office holder may make a decision in one office that is not to the benefit of the other office, and thus impose its policies on the other. The Attorney General has determined that “because the duties of the two offices are in conflict where they have overlapping jurisdiction, the common-law doctrine of incompatibility bars one person from holding both offices.”⁵⁴

EX PARTE COMMUNICATIONS

Administrative law generally characterizes “*ex parte* communications” as oral or written communications that concern an administrative proceeding and occur between an agency decision-maker and an interested person outside the presence or knowledge of other interested persons. The prohibition against *ex parte* communications is designed to prevent litigious facts from coming before an agency decision-maker without becoming part of the record in a contested case.⁵⁵ Above all, the bar against *ex parte* communication is meant to ensure that due process is carried out in agency decision-making.⁵⁶

- **Sources of Law**

- **The Administrative Procedure Act**

Under the Texas Administrative Procedure Act (“APA”), *ex parte* communications are prohibited between a member of a state agency assigned to render a decision in a contested case and any state agency, person, party or representative of those entities.⁵⁷ Pursuant to the APA, a

⁵² *Id.* at § 12.154.

⁵³ Op. Tex. Att’y Gen. No. DM-47 (1991). *See also*, TEX. GOV’T CODE ANN. § 572.051(3) (Vernon 1998).

⁵⁴ Op. Tex. Att’y Gen. No. JC-0339 (2001).

⁵⁵ *See Texas State Board of Medical Examiners v. Guice*, 704 S.W.2d 113 (Tex.App.-Corpus Christi 1986, writ ref’d n.r.e.) and *Amarillo Independent School Dist. V. Meno*, 854 S.W.2d 950 (Tex.App.-Austin 1993, writ denied). *See also, Young Chevrolet v. Texas Motor Vehicle Board*, 974 S.W.2d 906 (Tex.App.-Austin, 1998, pet. denied).

⁵⁶ However, the mere fact that an *ex parte* communication occurred is not sufficient to establish a violation of the constitutional guarantees of procedural due process of law. *Young* at 906.

⁵⁷ TEX. GOV’T CODE ANN., *supra* note 49, at § 2001.061. *See also, County of Galveston v. Texas Department of Health*, 724 S.W.2d 115 (Tex.App.-Austin, 1987, writ ref’d n.r.e). The Texas Supreme Court has held that there is no contested case until an application for agency consideration is filed. *Vandygriff v. First Savings And Loan Association of Borger*, 617 S.W.2d 669, 672 (Tex. 1981).

contested case “means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”⁵⁸

- **Specific Agency Rules**

In addition to the general prohibitions included in the APA, state agencies may also enact provisions regarding *ex parte* communications that are applicable to the agency’s specific area of regulation. For example, the Texas Health and Safety Code sets forth that, “a hearings examiner may not communicate, directly or indirectly, with any employee of the commission, any commissioner, or any party to a hearing conducted by the commission in connection with any issue of fact or law pertaining to a contested case in which the commission or party is involved.”⁵⁹

- **Municipal Charters**

A home-rule municipality’s charter may also specifically prohibit *ex parte* communications. Such a charter may prohibit *ex parte* communications between an applicant and a member of a quasi-judicial body of the municipality (*e.g.*, zoning board or a board of adjustment).

- **Exceptions**

In some instances, a blanket prohibition against all *ex parte* contacts would leave agency decision-makers extremely isolated and would reduce the quality of agency decisions and increase the incidence of legal error. Agency decision-makers often need direct, “hands-on” assistance in evaluating technical and complex evidence.⁶⁰

APA § 2001.061(a) states that an agency decision maker may not communicate *ex parte* on issues of law or fact in a contested case “except on notice and opportunity for each party to participate.”⁶¹ Under this provision, a party may submit a pleading, brief, or letter to an Administrative Law Judge or an agency member, provided that other parties receive copies and are given a reasonable opportunity to respond.⁶² At least one Texas court has held that no *ex parte* communication takes place when an opposing side’s attorney is present and able to object and respond to the other party’s comments.⁶³

The APA also allows a state agency member to communicate *ex parte* with another member of the agency unless such action is prohibited elsewhere in the law.⁶⁴ In addition, under

⁵⁸ *Id.* at § 2001.003(1).

⁵⁹ TEX. HEALTH & SAFETY CODE ANN. § 361.0831(a) (Vernon 2001). *See also*, Op. Tex. Att’y Gen. No. DM-144 (1992).

⁶⁰ Baron, Steven, “Sense and Sensibility: A guide to *ex parte* issues in administrative proceedings.” (1997 Advanced Administrative Law Conference).

⁶¹ *Young Chevrolet v. Texas Motor Vehicle Board*, 974 S.W.2d 906 (Tex.App.-Austin, 1998, pet. denied).

⁶² Baron, Steven, *supra* note 57.

⁶³ *Hunter Industrial Facilities v. TNRCC*, 910 S.W.2d 96 (Tex.App.-Austin, 1995, writ denied).

⁶⁴ TEX. GOV’T CODE ANN., *supra* note 49, at § 2001.061(b).

§2001.091, which relates to official notice and evaluation of evidence in connection with a hearing, a member or employee of a state agency assigned to render a decision or to make findings of fact may communicate *ex parte* with an agency employee who has not participated in the hearing in the case.⁶⁵

□ **Consequences of Violating *Ex Parte* Prohibitions**

Ex parte communications may have serious, even criminal, repercussions for those who would communicate with decision makers outside of the presence of the other parties involved: “[a] person commits an offense [Class A misdemeanor] if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.”⁶⁶ An “adjudicatory proceeding” is defined by the statute to mean “any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.”⁶⁷

□ **Practical Advice – Know Your Audience**

If you have any uncertainty as to the role and responsibilities of an agency employee, get clarification before discussing a case. It is not always clear which agency staff is participating in the hearing process or whether a particular member of the agency is an advisor in the decision-making process.⁶⁸

For example, the Public Utility Commission has “in house” Administrative Law Judges who are often looked to for procedural advice. These judges often act as decision-makers or advisors to decision makers in handling cases prior to transmittal to SOAH. Thus, communications with such a judge by a party to an application that may come before that judge would be prohibited.⁶⁹

Uncertainties also *may* arise when the Legislature directs an agency simultaneously to participate in the hearing before another agency and to play a role in the decision-making process.⁷⁰ Thus, when dealing with staff from various agencies on a particular application, an applicant should keep in mind which staff will be making recommendations to the decision makers.

⁶⁵ *Id.* at §2001.061(c). The stated purpose of this section is to allow the decision-maker to utilize the special skills or knowledge of the agency and its staff in evaluating the evidence.

⁶⁶ TEX. PENAL CODE ANN. § 36.04 (Vernon 2003).

⁶⁷ *Id.* at § 36.04(b).

⁶⁸ Baron, Steven, *supra* note 57.

⁶⁹ *Id.*

⁷⁰ *See, Coalition Advocating a Safe Env’t v. Texas Water Comm’n*, 798 S.W.2d 639 (Tex. App.-Austin, 1990, writ granted, vacated 819 S.W.2d 799).