

Ethics: The Many Ways to Get in Trouble

Presented by:
Erin Seele

CUNNINGHAM, VOGEL & ROST, P.C.
legal counselors to local government

333 S. Kirkwood Road, Suite 300
St. Louis, Missouri 63122
314.446.0800
erin@municipalfirm.com
www.municipalfirm.com



Today's Topics

I. Conflicts of Interest (Statutory Law)

II. Nepotism (Constitutional Law)

III. Incompatible Offices (Case Law)

IV. Ex Parte Communications & Bias (Case Law)



I. Conflicts of Interest (Statutory Law)

Sections 105.452-.464 RSMo. impose statutory restrictions and prohibitions on public officials related to conflicts of interest, including:

§ 105.452	Elected or appointed public officials and employees
§ 105.454	Certain elected or appointed public officials and employees serving in an executive or administrative capacity
§ 105.458	Members of governing and legislative bodies of political subdivisions
§ 105.461	Officials with a substantial personal or private interest in any measure, bill, order, or ordinance proposed or pending
§ 105.462	Any person with rulemaking authority
§ 105.464	Any persons in judicial or quasi-judicial positions

Summary



No appointed or elected official or employee shall:

- Use or disclose confidential information with intent to result in financial gain for himself, his spouse, his dependent child, or any business within which he is associated
- Use decision making authority for the purpose of obtaining financial gain which materially enriches himself, his spouse, or dependent children
- Perform any service, act, refrain from acting, or attempt to influence a decision by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value

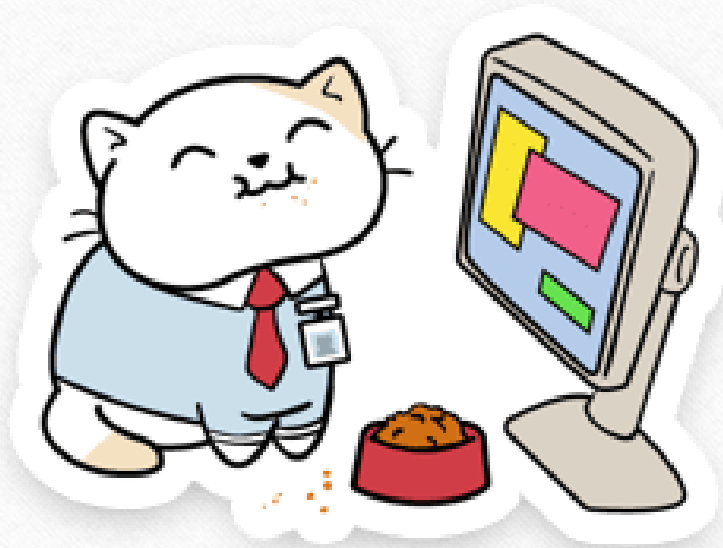
Summary Cont.



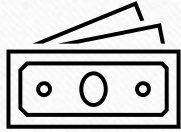
No appointed or elected official or employee shall:

- Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit
- Sell, rent, or lease any property, or provide a service to the city in excess of \$500 per transaction or \$5,000 per year unless competitively bid and provided the bid is the lowest received
- Perform 1 year after termination any service for compensation to influence a decision

Disclosure of Conflicts



- § 105.461 requires:
 - any member of the governing body of a political subdivision
 - who has a substantial personal or private interest in any measure, bill, order, or ordinance proposed or pending
 - to file a **written report of the nature of the interest** with the governing body's clerk
 - *before* such official passes on the measure, bill, order, or ordinance
- This requirement is considered to be met if the member files a financial interest statement pursuant to §§ 105.483 to 105.492 which discloses the basis for such substantial personal or private interest



Financial Disclosure Requirements for Cities



§ 105.483(11) dictates which city officials are required to file financial interest statements:

- ✓ In political subdivisions with an annual operating budget of >\$1 Million...
 - ✓ All elected officials and candidates for elective office; the chief administrative officer; the chief purchasing officer; and the general counsel--if employed full time
- ✓ In ALL political subdivisions...
 - ✓ All officials or employees who are authorized by the governing body of the political subdivision to promulgate rules and regulations with the force of law or to vote on the adoption of rules and regulations with the force of law

UNLESS the political subdivision adopts an ordinance, order, or resolution pursuant to subsection 4 of § 105.485...

Financial Disclosure - The Exception for Cities

The § 105.485.4 exception requires a city to:

- Biennially adopt by ordinance or resolution by Sept. 15 the preceding year establishing and making public **its own method of disclosing potential conflicts of interest and substantial interests**
- Have minimum requirements as stated in subsection 4 (see also Appendix C of Handout)
- Mail a certified copy of the ordinance or resolution to Missouri Ethics Commission within 10 days of adoption

Prohibited Acts – Judicial or Quasi-judicial proceedings

- § 105.464 prohibits any person serving in a judicial or quasi-judicial capacity from participating in any proceeding in which the person knows that a party is any of the following:
 - the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin
- What is a *quasi-judicial* proceeding?



Additional Info

- **City Code & Policies** – many cities adopt additional ethical rules for their elected officials and employees
- **Appearance of Impropriety** – just because an action does not violate Chapter 105 (or other prohibitions), it does not mean that there is not an appearance of a conflict to where it may be best to recuse
- **Tip:** when in doubt, safest course is to recuse yourself



Statutory Restrictions Question #1

A Board of Adjustment is voting to grant a variance to the City's zoning code to allow a roundabout to be built in a residential area as part of a new residential development. The Chair of the Board lives close to the development, and she is in favor of a roundabout being built there to help improve traffic flow



Does the Chair have a conflict?

A. Yes

B. No

C. Maybe

Answer: B (No)



- Not under Chapter 105 RSMo.
- If the variance is granted, the Chairman does not stand to gain financially from the action

Statutory Restriction Question #2

What if the Chair of the Board is actually one of the contractors working on the construction of the residential development where the roundabout is requested?



Now does the Chair have a conflict of interest in participating in the decision?

- A. Yes
- B. No
- C. Probably

Answer: C (Probably)



- The statutes prohibit the following conduct:
 - Use decision making authority for the purpose of obtaining **financial gain** which **materially enriches** himself, his/her spouse, or dependent children;
 - Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit
- So, the question is whether approving the variance for the roundabout will materially enrich the Chair or provide her with a special monetary benefit
- This does not address whether there is an appearance of a conflict to where we would advise the member to recuse herself

Statutory Prohibition Question #3

An Alderman's company places its bid for a \$25,000 city project and is the second lowest bid but unlike the lowest bidder, his company is known for quality of work and ability to always finish on time



May the city award the contract to the Alderman's company?

- A. Yes, but only if the bid was publicly advertised
- B. No
- C. Yes, if the bid was publicly advertised, but Robert cannot vote

Answer: B

(No; must be the lowest bid)



- § 105.454 prohibits any elected or appointed official or employee from performing any service in excess of \$500 per transaction or \$5,000 per year unless after public notice and competitive bidding, he/she is *the lowest bidder*
- The alderman not voting on the matter will not cure the prohibition within § 105.454

Statutory Restrictions Question #4

Assume instead, it was the Alderman's son's company.



Could the city award the bid to the son's company?

- A. Maybe - depends
- B. No
- C. Yes

Answer: C (Yes)



- Because the alderman's son is not an employee or official of the city, §§ 105.452-.458 prohibitions do not apply
- Therefore, the city may award to son's company

Statutory Restrictions Question #5

The trickier question is...

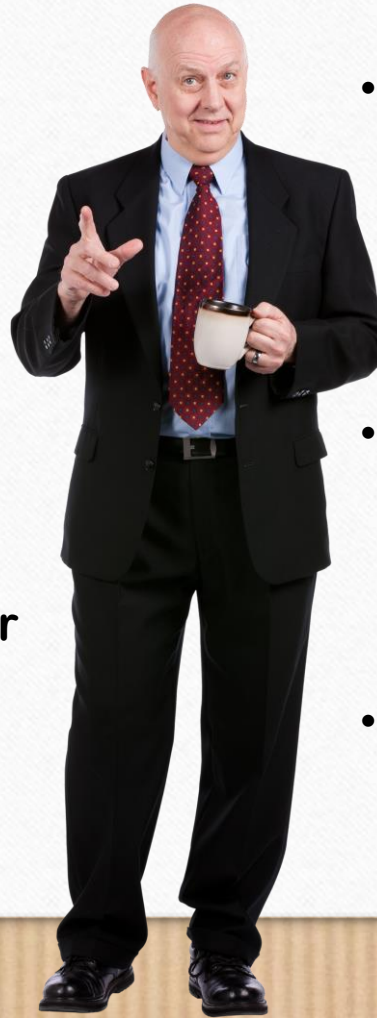


Could the Alderman vote on the issue of awarding the bid to his son?

- A. Maybe**
- B. No**
- C. Yes**

Answer: A (Maybe)

- § 105.454 prevents any official or employee from taking part in a matter costing in excess of \$500 per transaction or \$5,000 per year that will result in value to him/her, his/her spouse, dependent child in his/her custody, or business associated with the member
- § 105.452 prevents the Alderman from favorably acting on any matter that is so specifically designed so as to provide a special monetary benefit to him or dependent child



- Here, depends
 - a) if the son is dependent and
 - b) whether the Alderman can be said to be “associated” with the son’s business
- Also depends if the Alderman would receive a special monetary benefit from his son getting the contract
- But remember “appearance of impropriety”

II. Nepotism (Constitutional Law)

- Art VII, Section 6 of the Missouri Constitution prohibits any public officer or employee from hiring or naming any relative (of the 4th degree) to any public office, board, or employment



Nepotism Details



This is a *very unforgiving* prohibition:

- Intent (or ignorance) is irrelevant
- Does not matter if the vote was needed
- Does not have to be a paid appointment
- You cannot retroactively “fix” the violation

Penalty is forfeiture of office

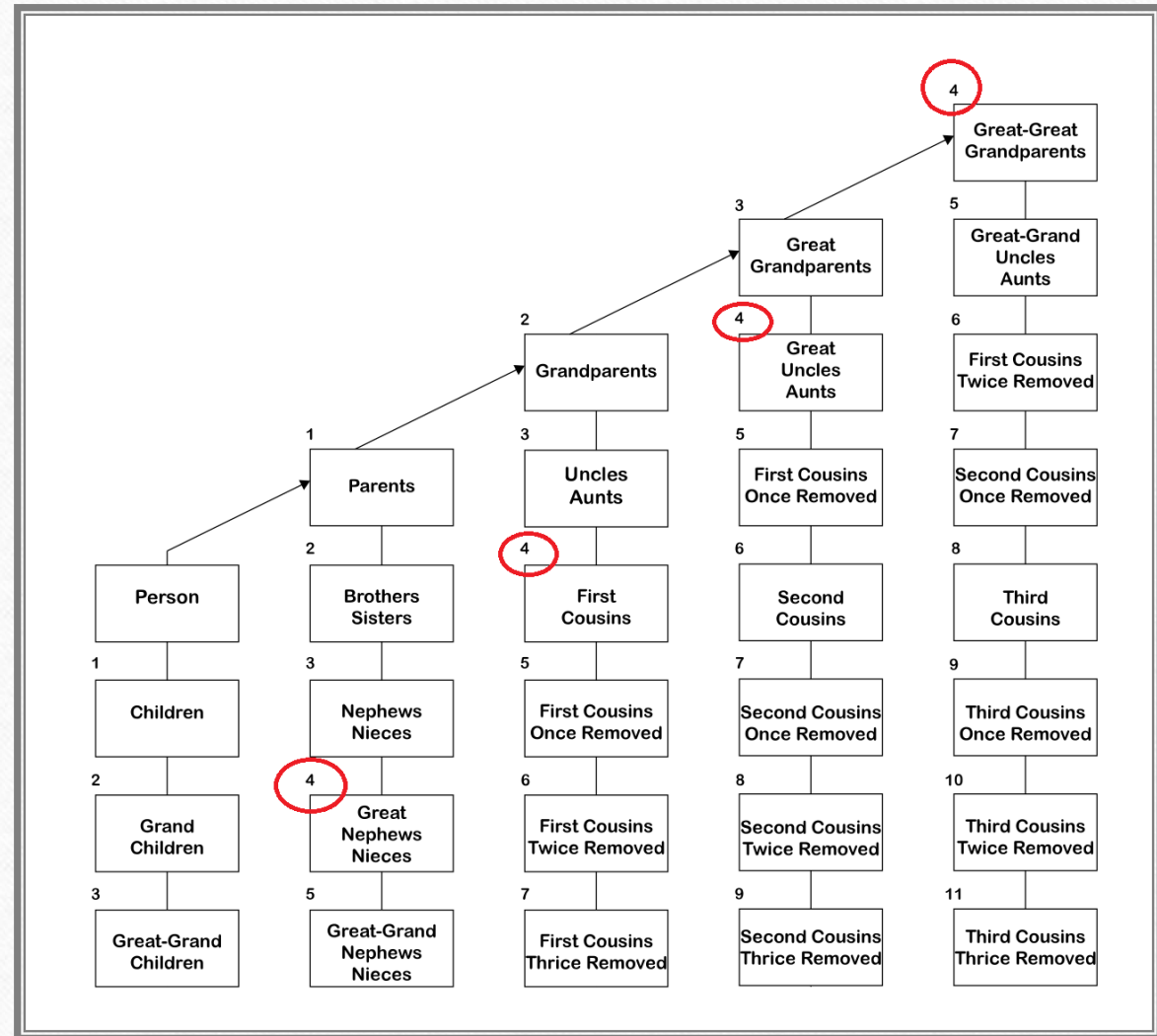
- Self-executing v. self-enforcing?

What does “within the 4th degree” mean?

Means relatives that are 4
“degrees,” or steps, away
from you, relationally

Fourth Degree Relatives=

- Great, Great Grandchildren
- Grand Nieces/Nephews
- First Cousins
- Great Aunts/Uncles
- Great, Great Grandparents



What does “within the 4th degree” mean? (Cont’d)

- A husband is related by marriage (affinity) to his wife’s relatives in the same way that she is related to them by blood (consanguinity) and she to his family in the same way
- The kindred of the spouses are not related to one another
- Half = whole; Step = blood
- Relationship by affinity terminates if death or divorce occurs



Nepotism Question #1

Husband and wife are both running for 2 open seats on Board of Aldermen. Citizen argues that this is nepotism if both would win



Is the citizen wrong?

- A. Regardless of what the law says, it's a bad idea and should be prevented
- B. Yes
- C. No



Answer: B (Yes)



Nepotism does not apply:

- There is no state law that specifically prohibits a husband and wife serving together
- Especially here where it is the people voting
- But even on appointed Boards, there is no law preventing a wife and husband from serving together . . .
 - Check your City Code

Nepotism Question #2

The Mayor has her son-in-law perform work to repair a city sign. The Mayor pays her son-in-law \$100 from the general fund upon completion of work repairing the sign. The Mayor argues that is not nepotism because she hired her son-in-law as an independent contractor



Is the Mayor correct?

- A. Yes
- B. No, the son-in-law was employed by the city in violation of nepotism
- C. Yes, \$100 to fix a sign is such a small amount
- D. Yes, the son-in-law is not related to the mayor within the 4th degree.

Answer: B

(No- violated nepotism)



- See *State ex inf. v. Rhoads*, 399 S.W.3d 905 (Mo. App. 2013)
 - The exact argument made by the Mayor was that because her son-in-law was an independent contractor, she did not appoint him to “employment” as that term is used in the Constitution
 - But odd facts that could have made a difference
- The appeals court found that work as an independent contractor falls within the definition of “employment” as that term was used in the constitution
- Affirmed Mayor’s removal

Nepotism Question #3

A woman has been working as a nurse at the county jail for the last several years. Her husband is running for County Sheriff. His opponent has opined that if he is elected County Sheriff and his wife continues to be employed by the county, he has committed nepotism



Is the opponent correct?

- A. Yes
- B. No
- C. Yes, unless the Sheriff were to fire his wife right away

Answer: B

(No- not a nepotism violation)



- See Missouri Ethics Commission Advisory Opinion # 2020.02.CI.002
 - The key distinction: The wife was *already* employed by the county before the husband was elected County Sheriff. When the husband was elected, the wife's employment "carried over."
 - As long as the wife's employment as a county jail nurse is not subject to *reappointment* by her husband in his official capacity as County Sheriff, there is no nepotism violation, and she can continue her job

III. Incompatible Offices (Case Law)

- This is a common law prohibition of one person holding two public offices that are held to be incompatible
- Established in an old Missouri Supreme Court case from 1896: *Walker v. Bus*
- Case-by-case determination looking at job descriptions and duties of both offices



Two-Prong Test



2-Prong Test to determine if the public offices are incompatible:

- (1) Are they both public offices?
 - Office must have some degree of permanency and continuity;
 - Officeholder must take an official oath of office;
 - Created by constitution, legislature, or by a municipality or other body through authority conferred by the legislature;
 - Must possess a delegation of a portion of the sovereign power of government, exercised for the benefit of the public
- (2) Are the offices Incompatible?
 - Turns on whether duties are “inconsistent, antagonistic, repugnant or conflicting”
 - Primary test: whether one office is subordinate to the other in some aspect of performing its duties – supervision authority, hiring, firing, setting salary, etc.

If the offices are incompatible, taking oath of the 2nd office acts as an implied resignation from the 1st

Are these offices incompatible?

1. Alderman & Special police officer?
2. County Emergency Planning Coordinator and City Council member
3. County Commissioner and Member of School Board in different county
4. County Auditor and City Council Member



1. Most likely
2. Most likely
3. Most likely not
4. Most likely

IV.a Ex Parte Communications



- “Ex Parte” literally means: one side only
- Generally prohibited
- 2 Aspects:
 - A communication between counsel and the court when opposing counsel is not present
 - Communication (oral or written) concerning a pending **quasi-judicial case** (such as a zoning variance request) that is not on the record

Ex Parte Concerns

- Endangers right to have decision based on the record
- Thwarts party's right to cross-examine and refute evidence
- Can compromise both the appearance and reality of fairness and due process



Best Practices



"Ex Parte" Communication Best Practices:

- ✓ DO NOT discuss matter with applicants or their attorneys
- ✓ DO NOT hear evidence outside hearing

Ex Parte Question

In voting on a conditional use permit request, City Council members relied on a report they received from staff that was not provided to the applicant or made a part of the record



Is this a problem?

- A. Yes
- B. No
- C. Depends on what the report said

Answer: A

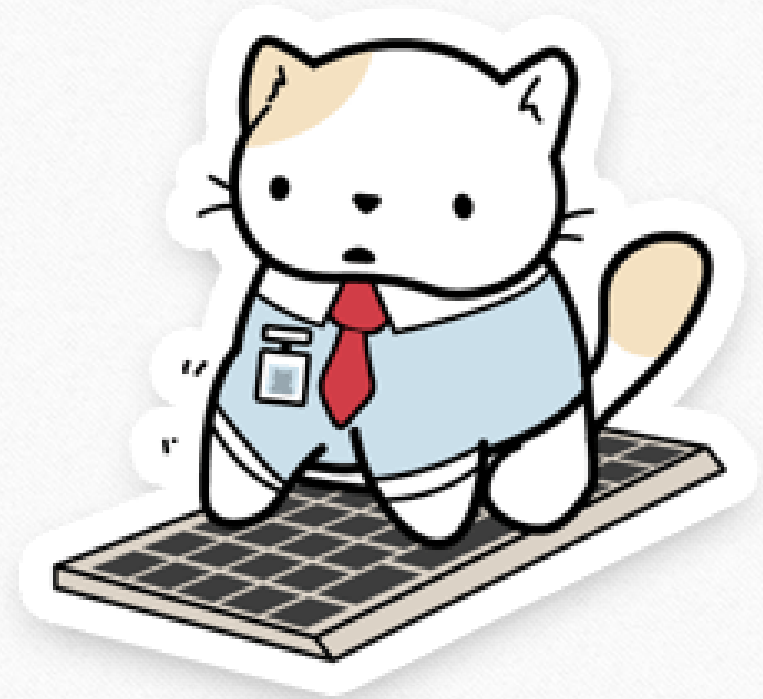
(Yes)



- *State ex rel. Steak n Shake, Inc. v. City of Richmond Heights*, 560 S.W.2d 373 (Mo. App. 1997)
 - City Council decision remanded because court found denying conditional use permit was “arbitrary, capricious, and an abuse of discretion” as City admits “members of the Council did base their votes, at least in part, on personal knowledge, on a report never introduced into evidence or seen by appellant, and on other evidence not in the record.”

IV.b Bias

- Common law doctrine that requires members to come with an open mind
- Not a prohibition to come into a matter with a pre-conception of that matter
- If a member participates that is biased, even if that vote was not needed to support the decision, the whole decision is a violation of due process



Bias Question #1

City Council is considering whether to grant a special use permit to a medical marijuana dispensary to operate in a commercial district. A council member has a business next door to the proposed location and is absolutely opposed to marijuana sales of any sort, believing it brings crime to the area and that it is a gateway drug as experienced in his own household



Is that member biased?

- A. Yes
- B. No
- C. Probably

Answer: C (Probably)

- These facts definitely make a City Attorney nervous and provide arguments for an applicant if denied
- Bias is a case-by-case determination so hard to say yes, the person is biased, but on these facts, I would definitely recommend the member recuse themselves



Bias Question #2

A Council member is a botanist and absolutely loves street trees. City Council is voting on whether to eliminate the street tree program due to the problems street trees cause for public works in maintenance and damage to sidewalks



Is that member biased?

- A. Yes**
- B. No**
- C. Probably**

Answer: B (No)

- Just because a member may have a preconceived notion that street trees are a benefit or are favorable to have, does not alone mean the person is biased



Bias Question #3

Board of Aldermen are sitting as a Board of Impeachment to determine if the conduct by the Mayor constitutes good cause for impeachment. Mayor personally attacked the member in a newspaper accusing him of various unethical conducts and repeatedly yelled at the member during public meetings, but member is willing to testify that he will have an open mind and he will wait for the evidence at the hearing to determine whether the Mayor should be impeached



Is that member biased?

- A. Yes
- B. No
- C. Probably

Answer: C (Probably)

- These facts are very close to the facts in *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (1990)
- While the court found the members testified they could have an open mind and put aside their personal feelings, the court found “even when administrative decisionmakers have expressed no prejudgment concerning adjudicative facts, ‘experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable [in situations] including . . . [those] . . . in which the adjudicator . . . has been the target of personal abuse or criticism from the party before him.’”



BONUS (if time allows)

Attorney Ethical Rules

- Rule 4-1.13(a): *A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents*
- What issues does this create?
 - Who does the City Attorney take direction from?
 - What about the Board of Adjustment?
 - Who does the City Attorney owe confidences to? Who may waive those confidences?

BONUS (if time allows)

Attorney Ethical Rules

- **Why you care:**
 - **Understand the City Attorney represents the city – he/she is not your individual lawyer and does not represent you personally in any way**
 - **May advise you in your official capacity but still representing you in manner that is best for the city**
 - **Understand that the City Attorney's duties are to the city**
 - **City Attorney has duty to do what is in the best interest of the City**
 - **Know that what you tell the City Attorney in your official capacity as a City Official is the city's privilege to waive, not yours**

Questions?



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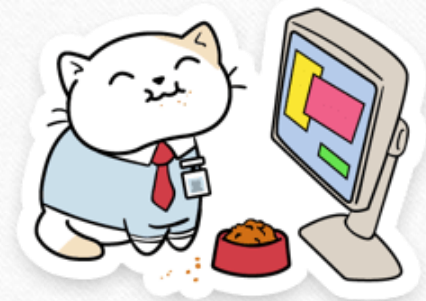
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