International Municipal Lawyers Association

Advancing Excellence in the Practice of Local Government Law.

WATCH YOUR STEP!

Avoiding the Landmines of Conflict, Abuse and Misuse

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PROGRAM OVERVIEW

- **The first part of the program will focus on examples of conflict of interest in the government litigation setting. The conflicts that will be discussed include a lawsuit being filed by a current board member of a government entity who sues the board over a decision that he or she disagrees with. This scenario brings into focus Rule 1.13 of the Model Rules, which deals with an organization as a client and obligations the lawyer has when representing the government body as a whole, as opposed to one of its members.**

- **The second conflict situation to be covered involves the representation of opposing sides to a lawsuit by family members. Interestingly, the Model Rules only deal with this situation indirectly in Rule 1.7, yet the Florida Rules of Professional Conduct and perhaps those in other states, deal with it directly. We will discuss whether the Model Rules adequately cover this situation, and if not, whether the ABA should cover it in a more direct manner, as in the Florida Rules.**

- **The final section of the presentation will focus on the abuse and misuse of public positions, as well as how to educate and train your clients in the avoidance of public position pitfalls. We will discuss misuse of public positions by government officials, taking advantage of available resources, employment of relatives, conflicting employment, and disclosure or use of certain information. In addition, we will suggest how you can insure that appointed and advisory boards meet the highest ethical standards of public service.**

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CONFLICT OF INTEREST IN THE GOVERNMENT LITIGATION SETTING



Rule 1.13 of the Model Rules of Professional Responsibility (*cont'd*)

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 of the Model Rules of Professional Responsibility

Client-Lawyer Relationship

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

REPRESENTATION OF OPPOSING SIDES TO A LAWSUIT BY FAMILY MEMBERS



Rule 1.7(a) of the Model Rules of Professional Responsibility

Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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Purpose of the Code of Ethics

- Promote the public interest and maintain the respect of the people for their government
- Protect the integrity of the government
- Ensure that public officials and public employees conduct themselves independently and impartially, not using their offices for private gain

Florida Statutes, Chapter 112.311

Who Is Subject To The Ethics Laws?

Persons governed by the ethics laws include:

- public officials
- public employees



ABUSE AND MISUSE OF PUBLIC POSITIONS AND PUBLIC POSITION PITFALLS



Ethics Laws Generally Consist of Three Categories:



1. Prohibited Relationships
2. Prohibited Conduct
3. Required Disclosures

Misuse of Public Position



- No employee shall corruptly use or attempt to use his/her official position to secure a special privilege, benefit, or exemption for him or herself or others.
- Corruptly means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.

Florida Statutes, Chapter 112.313(6)

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For Training Purposes Only

(SEE MEDIA4 VIDEO)

Solicitation or Acceptance of Gifts

- No public officer or employee can solicit or accept anything of value based upon the understanding that their official action would be influenced thereby.
- There is a burden on the public officer or employee to take care in determining whether the thing of value is being giving to influence the employee's actions.
- The larger the value, the more difficult it should be to justify the fact that it is not given to justify official action.

Florida Statutes, Chapter 112.313(2)

Examples:

- Employee is involved with the purchasing of computers for the office. A computer salesman offers the employee expensive tickets to a sporting event.
- Administrators receive free meals by use of the "gift card" from a food service company which has contracted with the university.

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Employment of Relatives

An officer or employee with authority to appoint, employ, promote, or advance individuals or make such recommendations cannot advocate or appoint, employ, promote, or advance a relative into a position in the agency over which s/he exercises jurisdiction or control.

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Don't take advantage of available resources

Examples:

- Use an Agency P-card for business expenses only
- Resist temptation to "borrow" office supplies (i.e. using office stationery to promote a seminar for which the employee received compensation)
- Agency-owned technology should only be used for work

Don't take advantage of available resources

Examples:

- Use Agency vehicles for business purposes only
- Performing private work during public working hours or performing private work utilizing public equipment without proper authorization
- Requiring subordinates to perform work relating to your private employment

Conflicting Employment or Contractual Relationship

- An employee can not have an employment or contractual relationship with any business which is subject to the regulation of, or doing business with his agency or one that prevents the full and faithful discharge of their duties.



Florida Statutes, Chapter 112.313(7)

Disclosure or Use of Certain Information

A current or former employee may not disclose or use information not available to the general public and gained by reason of the employee's official position for his or her personal gain or benefit or that of any other person or benefit.



Florida Statutes, Chapter 112.313(8)

Penalties



- ✓ impeachment
- ✓ suspension
- ✓ reprimand
- ✓ reduction in salary
- ✓ public censure
- ✓ removal from office or employment
- ✓ demotion
- ✓ civil penalties not to exceed $10,000
- ✓ restitution of any pecuniary benefits received.

Florida Statutes, Chapter 112.317

Forfeiture of Retirement Benefits

A Public employee who is convicted of a ***specified offense*** committed prior to retirement, or whose employment is terminated by an admission of a ***specified offense*** shall forfeit their Retirement benefits, except for the return of his or her accumulated contributions.

STANDARD OF CONDUCT FORM









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STANDARDS OF CONDUCT FORM

(Consistent with BOCC Policy 01.30.00.00, as pertaining to BOCC appointments, this form is required for all current members of and citizens seeking appointment, reappointment, or confirmation of nomination to any board, council, committee, or authority, including all county staff, agency/governing body representatives, and citizens appointed by individual commissioners)

RECOGNIZING THAT PERSONS HOLDING A POSITION OF PUBLIC TRUST ARE UNDER CONSTANT OBSERVATION, AND RECOGNIZING THAT MAINTAINING THE INTEGRITY AND DIGNITY OF THE PUBLIC OFFICE IS ESSENTIAL FOR MAINTAINING HIGH LEVELS OF PUBLIC CONFIDENCE IN OUR INSTITUTIONS OF GOVERNMENT AND IN THE IMPARTIALITY OF ALL AUTHORITIES, BOARDS, COMMITTEES, AND COUNCILS, EVERY CURRENT MEMBER OF AND ALL CITIZENS SEEKING APPOINTMENT, REAPPOINTMENT, ORCONFIRMATION OF NOMINATION TO ANY BOARD, COUNCIL, COMMITTEE, OR AUTHORITY, INCLUDING ALL COUNTY STAFF, AGENCY/GOVERNING BODY REPRESENTATIVES, AND CITIZENS APPOINTED BY INDIVIDUAL COMMISSIONERS, PLEDGE TO ADHERE TO THE FOLLOWING STANDARDS OF CONDUCT.

THE FLORIDA CODE OF ETHICS SHALL DETERMINE ANY QUESTION RELATING TO VIOLATIONS OF CHAPTER 112, PART III, FLORIDA STATUTES.

1. Regularly attend all scheduled meetings of the respective authority, board, committee, or council, as well as special or called meetings relevant to the position.

2. Prepare for each meeting.

3. Create a positive environment in meetings of the respective authority, board, committee, or council.

4. Maintain an attitude of courtesy and consideration toward other Members, citizens and staff during all discussions and deliberations.

5. Allow other Members, citizens, and staff sufficient opportunity to present their views, within the prescribed rules or bylaws of the respective authority, board, committee, or council.

6. Avoid the use of abusive, threatening or intimidating language or gestures directed at other Members, citizens or staff.

7. Avoid comments, body language or distracting activity that conveys a message of disrespect and lack of interest.

8. Not engage in harassing behavior or unwelcome conduct of a sexual nature towards other Members, employees, clients or citizens.

9. Members shall uphold the prestige of their office and avoid impropriety and the appearance of impropriety.

10. Members shall not convey the impression that they are in a position to influence the outcome of a decision of the respective authority, board, committee, or council and shall not attempt to use their office to influence or sway recommendations.

11. Members shall discharge their duties and responsibilities without favor or prejudice toward any person or group. Members shall not allow personal or business relationships to impact upon their conduct or decisions in connection with their appointed position and shall not lend their influence towards the advancement of personal interests or towards the advancement of the interests of friends or business associates. This provision is not intended to prevent any Member from joining or having an affiliation with any business, professional, or special interest organization.

12. To the extent Florida's Government in the Sunshine Law, Chapter 286, Florida Statutes, is applicable to an authority, board, committee, or council, Members of that authority, board, committee, or council shall avoid creating the appearance of impropriety by refraining from engaging in discussions with any other Member of the same authority, board, committee, or council about matters which would foreseeably come before the respective authority, board, committee, or council for discussion. In addition, if a Member of an authority, board, committee, or council that is subject to the Sunshine law receives a written, telephonic or electronic communication about an item to be discussed before the respective authority, board, committee, or council, the Member will promptly forward the information to the county/staff liaison or other appropriate person so that it may be shared with all other Members at a public meeting.

13. Members shall not accept or solicit a gift, loan, payment, favor, service, promise of employment or business contract, meal, transportation or anything else of value, if such thing is given with the understanding or possibility that it will influence the official action of the Member. The same standard shall apply to a gift, loan, favor, etc. for the spouse, child or relative or business partner of the Member. Chapter 112, Florida Statutes, shall govern all determinations of violations under this paragraph.

_____	_____
Printed Name of Member	Signature of Member
_____	_____
Name of Authority, Board, Committee or Council	Date

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