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EXPERT COUNSEL  REAL SOLUTIONS

Dealing with Conflicts of Interest, Ethics & Difficult Board Members

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APRIL 26, 2022



Disclaimer

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to a particular situation.
- Please contact an attorney if you need assistance related to a specific legal issue.





Presentation Goals

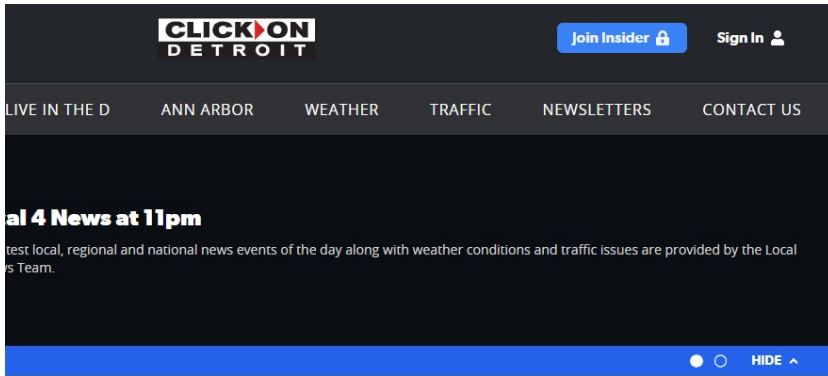
1. Define “ethics.”
2. Review how the law places ethical duties on township board members.
3. Discuss tactics of “difficult” board members.
4. Learn strategies to mitigate difficult board members.



What are “ethics?”

- Defined from the Greek word *ethos* (character) and the Latin word *mores* (customs).
- “A set of moral principles: a theory or system of moral values.” *Merriam-Webster Dictionary*
- Simply put, the “right” way to conduct township business and yourself.





Why are ethics important?

- **Legal Ramifications:** “The governor shall remove a township officer chosen by the electors of any township, when the governor is satisfied from the evidence submitted that the officer has been *guilty of official misconduct, wilful neglect of duty, extortion, habitual drunkenness, or has been convicted of being drunk, or when it appears by a certified copy of the judgment of a court of record of this state that the officer, after the officer's election or appointment, was convicted of a felony.*” MCL 168.369.
- **Public Trust:** Acting unethically can erode public trust and faith in yourself and your township!
- Avoid the news!

Warren City Council refuses to pay nearly \$5 million in city bills over conflict with administration

Council says it won't pay city bills until certain legal services are paid by city admins, who refuse



What authorities apply ethical obligations on township officials?

Case Law

General Fiduciary Duties

Avoiding Imposing Duress on Subordinate Boards

Avoiding Impropriety

Statutes and Citing Authority

Standards of Conduct for Public Officers and Employees Act

Incompatible Public Offices Act

Contracts of Public Servants with Public Entities Act

Election Law Removal Standards

Ethics Ordinances and Township Policies / Bylaws

Typically, voluntary and not required

But can be very helpful!

Unfortunately, everything is not in one place!



Ethical Standard – Fiduciary Duties

- Township board members are agents of their township. Accordingly, they are trusted to carry out public functions for the good of the public and to promote a township's interests, not their own. *People ex rel Plugger v Overysse Tp Bd*, 11 Mich 222, 226 (1863).
- The Court of Appeals in *Township of Kochville* discussed township board members as fiduciaries of a township. *Dept of Transp v Twp of Kochville*, 261 Mich App 399, 403; 682 NW2d 553 (2004).
- **“Fiduciary”** Someone who is required to act for the benefit of an organization on all matters and owes a duty of good faith, loyalty, care, and disclosure.
 - **Duty of Good Faith** – Faithfulness towards one's obligation as a township board member.
 - **Duty of Loyalty** – Acting in the interests and advances the interests of your township (not yourself).
 - **Duty of Care** – Making reasoned decisions as a township board member.
 - **Duty of Disclosure** – Duty to reveal relevant information (e.g., potential conflict of interest or financial interest) to township before making a decision, if applicable.
 - *Definitions adopted for township officials from terms in Blacks Law Dictionary (11th ed. 2019).*



Examples Applying Fiduciary Duties

- “Duress” – Avoiding situations where your position as a board member could impose duress and impact the decision making of subordinate boards. See *Barkey v Nick*, 11 Mich App 381, 385; 161 NW2d 445 (1968) where the Court of Appeals voided a Zoning Board of Appeals decision when a city councilmember represented a party to the appeal during the hearing.
 - *Think – Duty of Disclosure and Good Faith*
- “Conflicts of Interest” – Situations where a personal, financial, or other arrangement will make you too “self-interested” to vote or deliberate on a particular topic of public policy.
 - **Example:** You serve as Clerk and your brother’s company bid on a contract to perform landscaping services for Township Hall.
 - **Fiduciary Duties Potentially Implicated:** Duty of Disclosure, Duty of Good Faith, and Duty of Loyalty.
 - **Resolve?** Abstain from vote and deliberation of contract.



Ethical Standards – Statutory Requirements

1. **Standards of Conduct for Public Officers and Employees Act, MCL 15.341 et seq.**

- *Outlines various conduct that is prohibited by public officials.*
- *Some prohibited conduct memorializes fiduciary duties to a township.*

2. **Incompatible Public Offices Act, MCL 15.181 et seq.**

Outlines situations when a public official / public employee cannot hold two positions.

3. **Contracts of Public Servants with Public Entities Act, MCL 15.321 et seq.**

- *Prohibits in most cases a public employees and public officials from entering into contracts with the public entity that they serve. MCL 15.322(1).*





Statutory Deep Dive – Standards of Conduct for Public Officers and Employees Act

- **Standards of Conduct for Public Officers and Employees Act, MCL 15.341 *et seq.***
 - Applies to township officials.
 - General prohibition on a variety of specific topics. See MCL 15.342.
 - Most relevant to townships are:
 1. Only using township resources in accordance with the law and not for self-gain. MCL 15.342(3).
 2. Not accepting gifts or loans that would tend to influence a township official's performance of official duties. MCL 15.342(4).
 3. Not engaging in business transactions where a township official may profit from their position with their township. MCL 15.342(5).
 4. Not participating in any execution of contract or granting of permits as a township official with an entity that a township official may have a financial or personal interest in. MCL 15.342(6).
 - Penalties – Civil fines of not more than \$500.00, among other civil liability. MCL 15.342b(3).
 - State Ethics Board applies this Act to state employees. State Ethics Board decisions are helpful to interpret prohibitions of the Act.

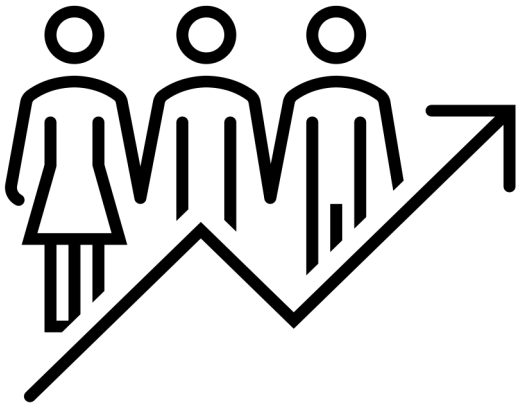


Statutory Deep Dive – Incompatible Public Offices Act

- **Incompatible Public Offices Act, MCL 15.181 *et seq.*,**
 - In many cases, prohibits public officers from holding two incompatible positions (e.g., county board of commissioner and member of a township board of review – 2018 Mich OAG No 7297).
 - A public official cannot hold two positions at the same time when:
 1. One office is subordinate to another.
 2. One office supervises the other.
 3. It would cause a breach of duty in public office.
 - See MCL 15.182 and MCL 15.181(b)
 - Many exceptions including in municipalities with less than 40,000 residents such as serving as EMS personnel, a police officer, a firefighter, or performing services to a local unit of government. See MCL 15.183(4).
 - **Cannot Abstain:** A public official cannot abstain from votes of one office to comply with this statute. They must vacate one incompatible office. *Contesti v Attorney Gen*, 164 Mich App 271, 281; 416 NW2d 410 (1987).



The Benefit of Ethics Ordinances and Policies



- As you can see, Michigan law provides many sources that guide “ethical conduct” of township officials.
- Unfortunately, these guiding principles are not compiled in one place and instead are scattered in various statutes and cases.
- An ordinance or ethics policy could help compile standards from all of these to:
 - Require township officials to meet the applicable standards.
 - Outline a mandatory reporting process for potential conflicts of interest or ethical violations
 - *This not only benefits the township itself, but also the official. Many determinations of whether a township official can take a particular action will heavily depend on the facts of the situation. Such a process can ensure a proper analysis of relevant legal authority occurs.*
- **Helps prevent “losing track” of the web of various authorities!**





DIFFICULT BOARD MEMBERS



The “Team” Approach

- Remember, as a township official you owe a duty of loyalty to your township!
- Unproductive meetings, petty politics, and in-fighting often is not the most efficient use of your time to benefit the township and its residents.
- Dysfunctional boards will erode public trust in a township.
- Working as a “team” will reduce board dysfunction.
 - Set common goals
 - Allow everyone to speak
 - Facilitate constructive conversation
 - Avoid personal attacks
 - Have the Board take ownership of successes and failures





Types of Difficult Board Members

- We know that it is sometimes unavoidable to have a “perfect” team-based Board.
- Types of “Difficult” Board Members
 1. Those committing blatantly unlawful acts
 2. Those with policy or personal disagreements that conduct obstructive behavior
 3. Those with policy disagreements



Type I – Board Members Conducting Blatantly Unlawful Activities

- These types of Board members will conduct serious unlawful acts, often knowingly (e.g., not making a mistake by forgetting to respond to a FOIA request).
- Examples:
 - Embezzlement
 - Knowingly destroying public records
 - Making unauthorized purchases
 - Threatening residents with legal action on behalf of the township without informing the board
 - Harassing and/or intimidating staff

NEWS · CRIME AND PUBLIC SAFETY

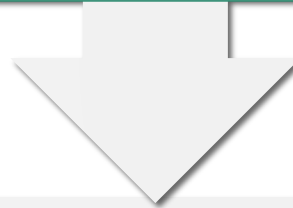
Fallen Macomb prosecutor Eric Smith gets 21-month federal sentence

Judge: Smith did 'incalculable harm to justice system'



Solutions

Contact Township Attorney for Guidance	Contact County Prosecutor	Contact Attorney General's Office – State Operations Division	Recall	Removal of Official
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It may be awkward to report a member of your board, but if the conduct is serious enough, remember that you have a duty of loyalty to your township and should report any misconduct before it can severely damage your township.



Type 2 – Board Members Obstructing Progress



- Our second classification of “difficult board members” are generally board members who have policy or personal disagreements, that are now resorting to unproductive, obstructionist activities.



**Examples of
unproductive,
obstructionist
activities:**

- **Failure to keep or maintain records**
- **Failure to perform role**
- **Overuse of platform / excessive grandstanding**
- **Reporting technical Open Meetings Act “violations”**
- **Nit-picking expenditures**
- **Continuous requests to view records and potentially making FOIA requests**
- **Excessive attempts to contact township staff or legal counsel**



LOCAL NEWS

Genesee County Clerk arrested, charged with bribing witness and willful neglect of duty

by Amy Diaz
April 8, 2022



The Michigan Daily
One hundred and thirty-one years of editorial freedom

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ANN ARBOR

City councilmembers sue city of Ann Arbor for breach of protocol in sale of Library Lot

by Alice Tracey
June 27, 2018

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Updated: Mar. 10, 2021, 2:14 p.m. | Published: Mar. 10, 2021, 2:13 p.m.



Flint City Councilman Eric Mays speaks during a press conference on Tuesday.



Examples of Conflict in Our State



Minimizing Obstructionist Activities



Clarify Roles

- If a township function is not being done by an official, have it performed by someone else
- Ensure each official knows their role

Policies

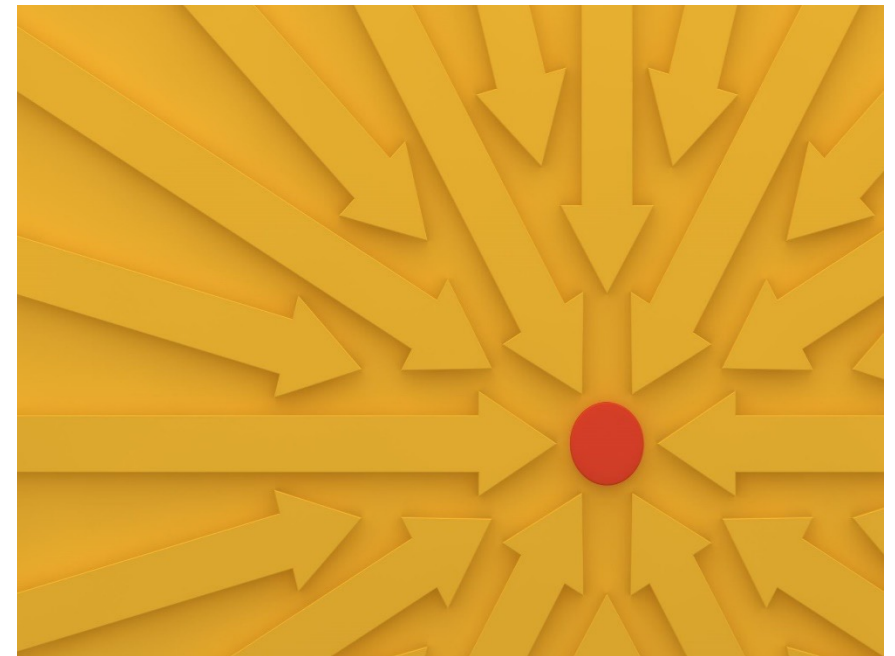
- Governing public comment and board member comment
- Addressing how board members can request records, make requests to staff, and contact the township attorney
- Expenditure policy (and follow it!)



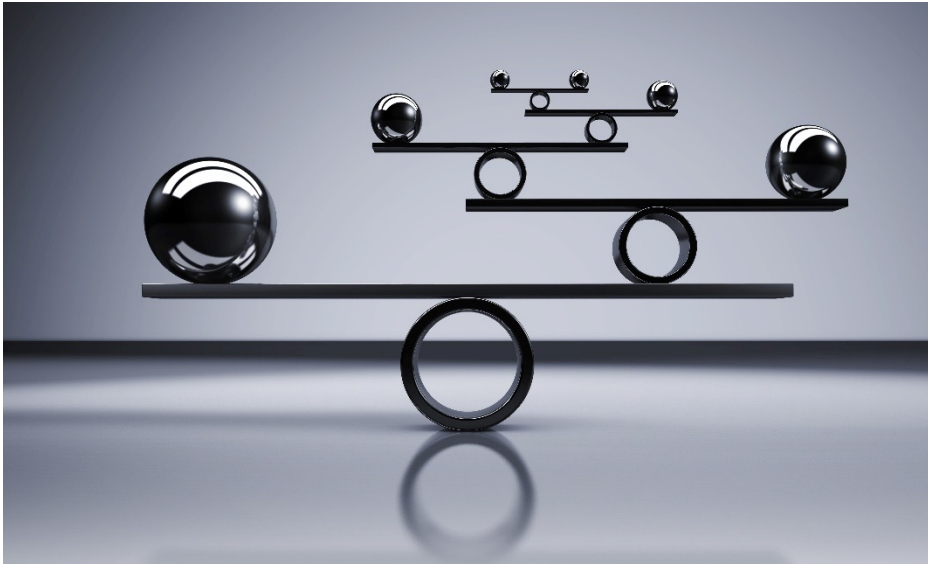
Minimizing Obstructionist Activities

Annual Goal Setting

- Many disputes stem from policy disagreements.
- Having a work session or meeting the beginning of each year to address policy goals for a year can set clear expectations of focus areas and prevent misunderstandings of township priorities.
- Goal setting can mitigate uncertainty which often leads to conflict.



Minimizing Obstructionist Activities



- **Knowing your Board**

- Retreats
- Social Interaction
- Over the course of history, there are many examples of individuals with completely different political leanings developing friendships and ultimately respect for each other. Although this may not result in someone always agreeing with you, it can avoid dysfunctional activities.

- **Facilitations**

- There are professionals who work with elected bodies to help avoid unproductive activities.



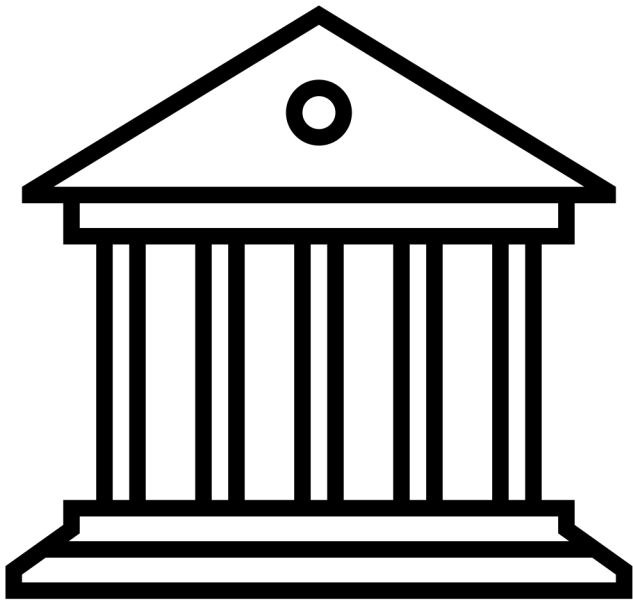
Working Around Obstructionist Board Members



- **Some helpful hints if your board has a difficult member, and it cannot repair the relationship:**
 - Don't “roll in the mud” with the pig.
 - Listen calmly when they speak, ensure strong leadership to avoid a single member monopolizing a meeting.
 - Be the bigger person – avoid personal attacks. Do not take things personally.
 - Censure – Use caution. Can have positive impacts with the public trust but may backfire due to limited legal effect and potential for the censored member to “stack” a meeting with supporters.



Type 3 – Board Members With Different Policy Outlooks



- Board members with different policy ideas can also seem difficult, but remember, a township will have many residents with different viewpoints.
- In many cases, board members with different policy perspectives will either think they are representing a majority of township residents or are doing the right thing for the township.



Resolving Purely Policy Disputes

- When Board members disagree about policy, here are some helpful tools to help build consensus:
 1. Resident Surveys
 2. Resident Stakeholder Committees
 3. Listen to Public Comment
 4. Workshops and Study Sessions
 5. Disagree with Policy, Not the Person
 6. Have a Split Vote and Move On





Questions

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