



# The Sus Among Us

*Ethics for really cool municipal lawyers*

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April 24, 2025  
WSAMA Spring  
Conference

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Live from Suncadia, it's...

ETHICS!



# Origins of the Sus

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“What you nick me for? Sus?”



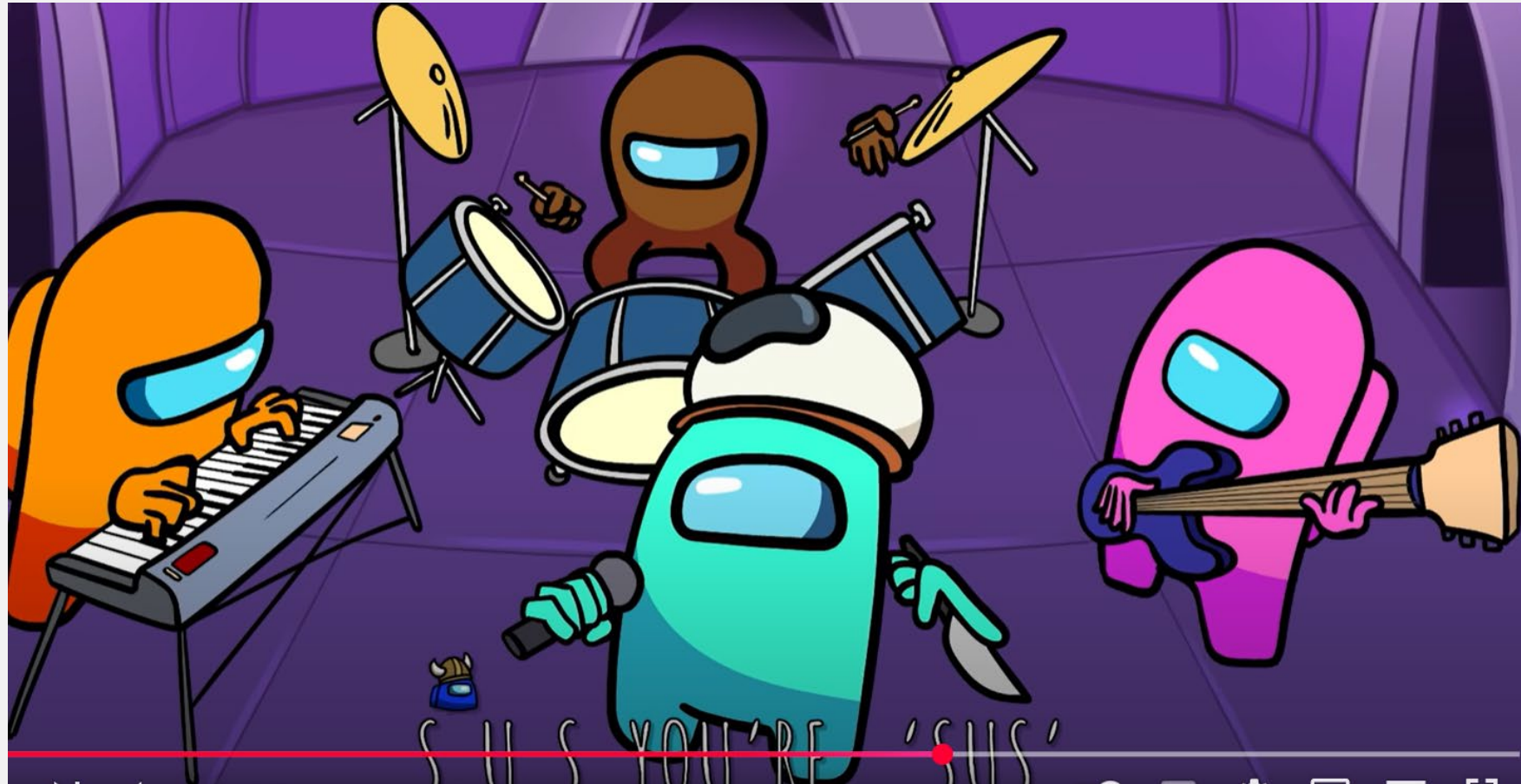
# Northern Exposure



# Among Us

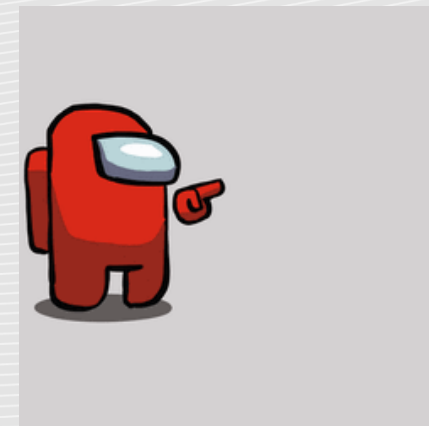


# S.U.S. You're SUS



# The SUS Checklist

- ✓ Disregarding advice
- ✓ Disclosing confidences and secrets
- ✓ Taking actions that create municipal exposure
- ✓ Disregarding local ordinances or state law requirements
- ✓ Acting in the face of conflicts of interest
- ✓ Harassing colleagues and staff
- ✓ Demanding access to wide-ranging information
- ✓ Seeking personal legal advice







# Who Is the Client & Who Holds the Privilege?

# The Anne Elk Problem



# Who is the Client? RPC 1.13

- (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.

# Who is the Client? RPC 1.13

(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.

“These differences are so important and yet so easily misunderstood by employees that the Rules require an organization's attorney, when she is dealing with an organization's employee and ‘it is apparent that the organization's interests are adverse to those’ of that employee, to explain the identity of her client.”

*Edwards v. Massachusetts Bay Transp. Auth.*, CIV.A. 99-0458-F, 2000 WL 1786326 (Mass. Super. Dec. 7, 2000) (emphasis added) (citing RPC 1.13)

*“Thank you Councilmember Sus-Meyer, but I would not be able to give you advice or information about your LUPA petition against the City...”*

# Who is the Client? RPC 1.13

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, **and not the broader governmental entity of which the agency or unit is a part**, unless:

- (1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or
- (2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

# Who holds the privilege?

- **RPC 1.13(a)**
- *United States v. Ferrell*, CR07-0066MJP, 2007 WL 2220213 (W.D. Wash. Aug. 1, 2007) (collecting cases) (“It is generally agreed that the privilege belongs to the government agency, and not an individual government employee.”).

# Who holds the privilege?

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.... This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

**RPC 1.13, cmt. 2**

# Revealing Representation? RPC 1.6

**(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

*See also* RPC 1.5, cmt 4:

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.



# Disclosures and Online Posting

The ABA issued [Formal Opinion 511R](#), which suggests that most posts to a listserv—where the reader could likely identify the poster’s client—would contravene [RPC 1.6](#)’s ban on “reveal[ing] information relating to the representation of a client” and would not be “impliedly authorized” under that Rule.

The [Restatement of The Law Governing Lawyers](#) on the other hand, suggests these postings may be permissible if they are unlikely to harm the client, and they would likely be “implicitly authorized” if the attorney reasonably believes the disclosure will further the client’s objectives.

# Conflicts of Interest

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# Conflicts of Interest: State Law

## **RCW 42.23.070**

(1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

(2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

# Conflicts of Interest: State Law

## **RCW 42.23.070, cont.**

(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.

(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

# Conflicts of Interest: State Law

No municipal officer shall be **beneficially interested, directly or indirectly**, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein [except for specified exceptions].

...

A municipal officer **may not vote** in the authorization, approval, or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies. The interest of the municipal officer must be disclosed to the governing body of the municipality and noted in the official minutes or similar records of the municipality before the formation of the contract.

**RCW 42.23.030 (emphasis added)**

# Remote Interests: State Law

## **RCW 42.23.040**

A municipal officer is not interested in a contract, within the meaning of **RCW 42.23.030**, if the officer has only a remote interest in the contract and the extent of the interest is disclosed to the governing body of the municipality of which the officer is an officer and noted in the official minutes or similar records of the municipality prior to the formation of the contract, and thereafter the governing body authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer having the remote interest.

# Remote Interests: State Law

## **RCW 42.23.040, cont.**

As used in this section "remote interest" means:

- (1) That of a nonsalaried officer of a nonprofit corporation;
- (2) That of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary;
- (3) That of a landlord or tenant of a contracting party;
- (4) That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

None of the provisions of this section are applicable to any officer interested in a contract, even if the officer's interest is only remote, if the officer influences or attempts to influence any other officer of the municipality of which he or she is an officer to enter into the contract.

# Conflicts of Interest: RPCs

## RPC 1.11(a):

Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

## RPC 1.9(c) (emphasis added):

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) **use information relating to the representation to the disadvantage of the former client** except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) **reveal information relating to the representation** except as these Rules would permit or require with respect to a client.



# Conflicts of Interest: RPCs

## RPC 1.11(d)

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 [conflict of interest: current clients] and 1.9 [duties to former clients]; and
- (2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing....



# Solutions, Remedies & Relief

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# Solutions: Ethics Policies

1. **Enact and update a governance policy, council rules, and a code of ethics**
  - BUT beware of language that is broader than state law provisions
2. **Educate and train on policies and rules**
3. **Have procedures in place to proactively address these issues**

# Solutions: Ethics Policies

**If any provision of this chapter conflicts with any provision of a city or county charter, or with any provision of a city-county charter, the charter shall control if it contains stricter requirements than this chapter. The provisions of this chapter shall be considered as minimum standards to be enforced by municipalities.**

**RCW 42.23.060**

# Solutions: Ethics Boards & Commission

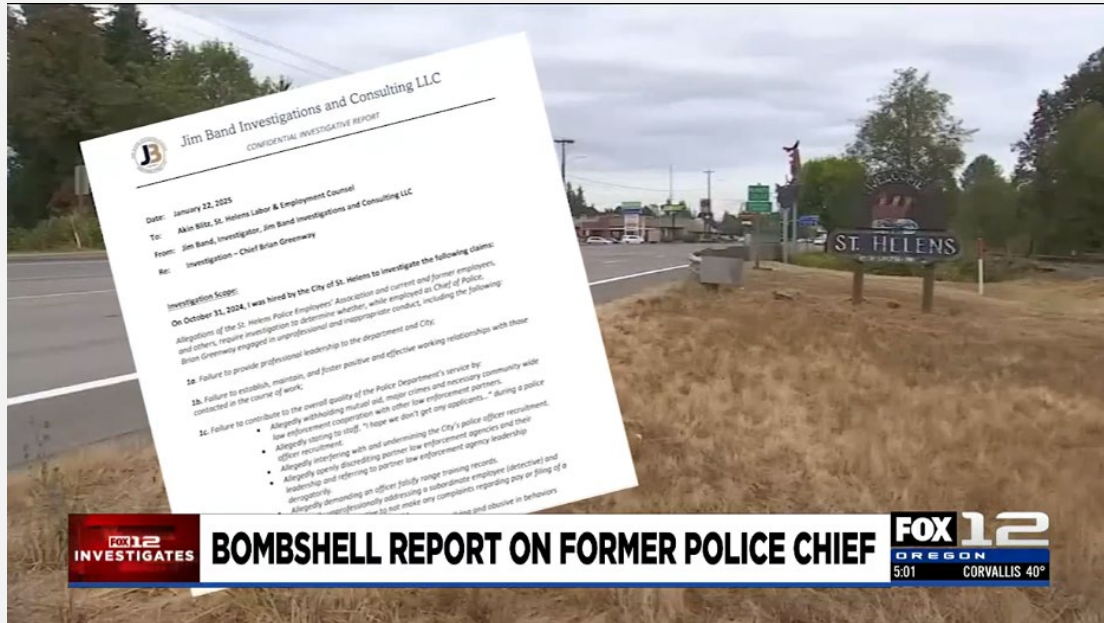
- **Consider creation of an Ethics Board or Commission, or appointment of an Ethics Officer**
- **Considerations:**
  - Qualifications & membership
  - Scope of responsibilities
  - Terms & removal
  - Procedures applicable to Board or Commission
  - Right of appeal from decision (and who can appeal)?

# Solutions: Investigative Reports

- **Consider retaining an outside investigator to determine whether an ethics violation has occurred**
  - Can be part of the process used by an Ethics Officer, Board, or Commission
- But also consider:
  - Public Records Act implications, etc.

# Investigative Report on Sus Chief

**Police chief in scandal-plagued Oregon city texted porn, faked records, mocked colleagues, investigation says** *The Seattle Times*



**FALSIFYING RECORDS**

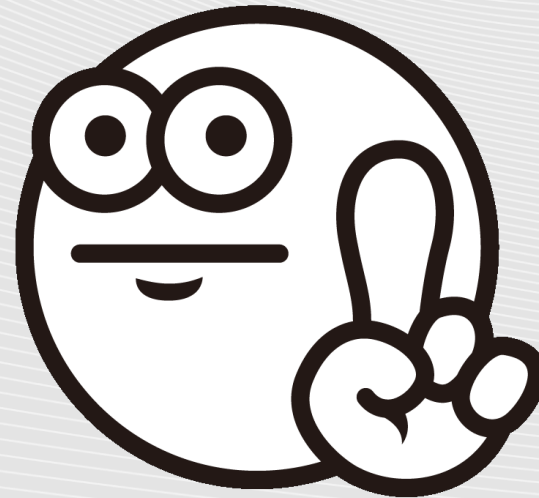
**CLASHES WITH CITY, COUNTY OFFICIALS**

**YELLING AND PORNOGRAPHIC TEXTS**

# Remedies: Admonition

## Admonition

Statement that is advisory in nature, usually verbal but approved by the applicable Council and made to the individual on the record. The statement should be included in the minutes of the meeting at which it is approved.





# Remedies: Reprimand

## Reprimand

A reprimand is sent to the subject in writing. The writing should be approved by the Council and placed in the minutes of the City Council meeting at which it is approved.

- Typically considered more formal and serious than an admonition
- Can include a requirement for corrective action

# Remedies: Censure

## Censure

**A censure is usually a written statement administered to the subject during a public meeting of the Council.**

**A censure typically is a final, non-binding resolution and not subject to further review.**

**The subject should appear but should not make statements in support of or in opposition or in mitigation.**

**The statement should be included in the minutes of the Council.**

# Remedies: Removal

## Chapter 42.23 RCW

Any contract made in violation of the provisions of this chapter is void and the performance thereof, in full or in part, by a contracting party shall not be the basis of any claim against the municipality.

Any officer violating the provisions of this chapter is liable to the municipality of which he or she is an officer for a penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law.

**In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.**

**RCW 42.23.050 (emphasis added)**

# Remedies: Recall

## Recall

(1) "Misfeasance" or "malfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty;

(a) Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and

(b) Additionally, "malfeasance" in office means the commission of an unlawful act;

(2) "Violation of the oath of office" means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

**RCW 29A.56.110**

# Remedies: Recall

## **BUT, please “recall” RCW 42.17A.555:**

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

# Remedies: Whistleblower

It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith in accordance with the provisions of this chapter that an improper governmental action occurred.

## **RCW 42.41.040(1)**

A local government official or employee may not use his or her official authority or influence, directly or indirectly, to threaten, intimidate, or coerce an employee for the purpose of interfering with that employee's right to disclose information concerning an improper governmental action in accordance with the provisions of this chapter.

## **RCW 42.41.045(1)**

# Sus, Real, or Bussin'?

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# Sus or Real?

**Real**

**Genuine, honest, or sincere**

GEN-Z DICTIONARY FOR BOOMERS



# Privilege Scenario I: Sus or Real?

Mayor McCheese takes part in an executive session where you brief the city council about the legalities surrounding the sale of surplus municipal property for the first In-N-Out Burger in Washington State.

The Mayor cannot believe this critical information is being denied from his constituents, including those who eat at his nearby restaurant. Although you advise him against disclosing privileged information, he says he is the Mayor and waives the privilege, then holds a press conference.

**Sus or real?**

# Sus or Real?



# Privilege Scenario I: Who can waive the privilege?

**RCW 42.23.070**

...

**(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.**

**(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.**

# Privilege Scenario II: Sus or Real?

Following the viral McCheese press conference, the law firm of Sus-Man Godfried sends you a public records request for all records related to the executive session and the property sale. You invoke exemptions for executive session and attorney-client privilege, and Sus-Man sues for release under the Public Records Act. “Your honor,” you say, “this is *like, low key, totally sus.*”

**Does the Judge rule for you?**

# Sus or Real?



# Privilege Scenario II: Who can waive the privilege?

Because courts have extended the attorney-client privilege to various governmental entities by drawing a parallel with the corporate entity... the question of who has the power to waive the governmental privilege would seem to logically be resolved along the same lines...

Some decisions have borrowed from the corporate context while others have distinguished governmental entity from corporations. Neither line of cases, however, have thoroughly addressed **the problem of the destruction of the privilege protection through disclosures by governmental agents**, regardless of whether they are authorized to waive. This oversight destroys the basis upon which the privilege was created.

1 Attorney-Client Privilege in the U.S. § 4:28

# Sus or Bussin'?

**bussin'**

(adjective)

Amazing, really good.



# Conflict Scenario I: Sus or Bussin'

Mayor McCheese, contrite in the aftermath of Sus-Man's PRA lawsuit, decides to devote more time to public service. He joins the board of Sus-Tainable Futures, a local nonprofit supporting children's charities, and is quickly elected as (nonsalaried) Treasurer due to his superior record-keeping skills.

Several months later, the Council considers providing funding to Sus-Tainable Futures' after-school program. Prior to the vote, the Mayor states on the record that he serves as Treasurer for Sus-Tainable Futures, but that he does not believe he is precluded from voting on the proposal. He subsequently votes to approve the funding.

**Sus or Bussin'?**



# Is It Bussin?



# Conflict Scenario I: Beneficial Interest

- Chapter 42.23 RCW does not define “beneficial interest,” but the Court of Appeals has ruled that it must be financial in nature
  - We conclude, therefore, that RCW 42.23.030 applies only to municipal contracts involving business transactions, employment matters and other financial interests and cannot be read to apply to the contract here, which conferred no financial benefit[.]”

*Barry v. Johns*, 82 Wn. App. 865, 868, 920 P.2d 222 (1996)

- Although the remote interest statute specifically discusses “a nonsalaried officer of a nonprofit corporation,” that statute clarifies when “[a] municipal officer is **not interested in a contract**, with in the meaning of RCW 42.23.030.” RCW 42.23.040 (emphasis added).

## Conflict Scenario II: Sus or Bussin'?

Billy McBurger, who is a stan of In-N-Out Burger and thinks Mayor McCheese is “unethical,” files a recall petition against the Mayor related to his executive session disclosure and vote to fund Sus-Tainable Futures. The Mayor decides to fund his own defense but money is tight. To raise extra funds, the Mayor’s wife applies for the new catering contract at City Hall. Her company, Bussin’ Burger, is the most qualified applicant.

The Mayor recuses himself from voting on the contract, but prior to the Council meeting he delivers free Bussin’ Burgers to all the Councilmembers (but not the City Attorney).

**Sus or Bussin'?**

# Not Bussin'

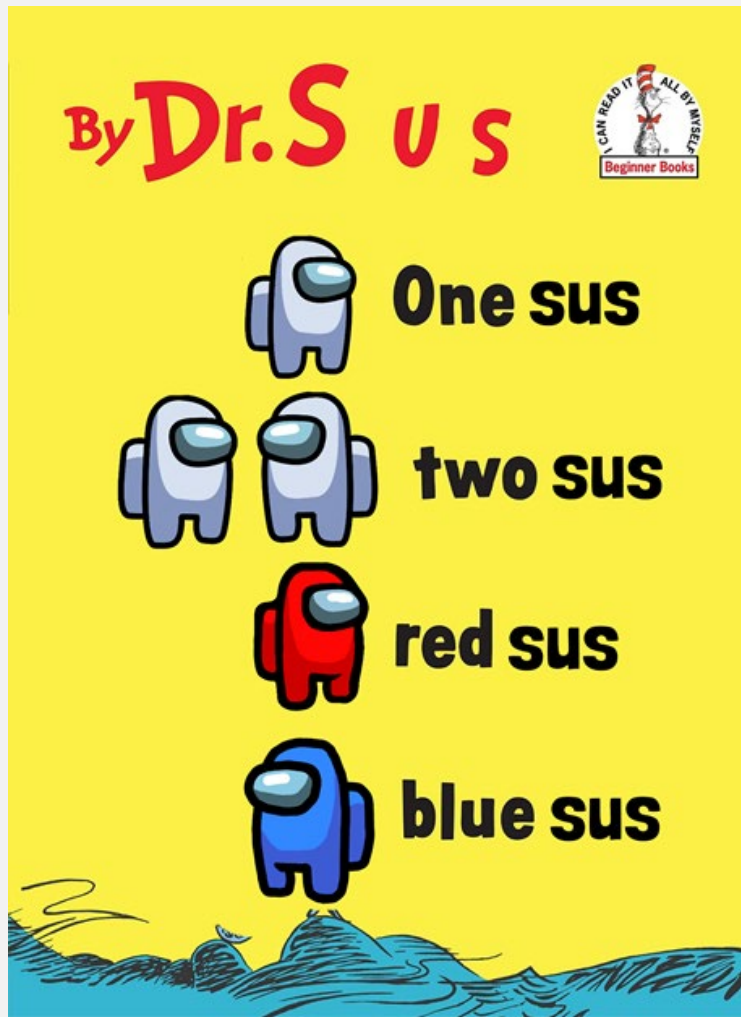


# Conflict Scenario II: Beneficial Interest & Influence

- RCW 42.23.030 provides that a municipal officer shall not “be beneficially interested, *directly or indirectly*”
- Even where an interest is only remote, an office may not influence or attempt to influence any other officer to enter into the contract



# The Sus



**The Sus**

**Has Always Been  
with Us**



# The Sus Among Us

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