

QUICK TAKE

CONFLICTS OF INTEREST AND OPIOID LITIGATION PROCEEDS: ENSURING FAIRNESS AND TRANSPARENCY

OPIOID SETTLEMENTS

NUMEROUS LEGAL ACTIONS WERE BROUGHT against manufacturers of prescription opioids, pharmaceutical distributors, and pharmacy chains stemming from actions that fueled the opioid overdose epidemic.¹ More than \$50 billion will be allocated over the next 18 years, with at least 85% of funds from the National Settlements going directly to participating states and local governments to abate the opioid epidemic.² States have convened experts across various fields to establish decision-making or advisory councils³ to oversee proceeds allocation. This publication outlines potential conflicts of interest within decision-making and advisory councils, identifies best practices from states with extensive protocols for conflicts of interest, and provides recommendations based on these findings.

UPHOLDING ETHICAL STANDARDS

The litigation brought against the opioid industry was premised on corporate greed and unethical behavior, resulting in untold damage to local communities. These behaviors are strikingly similar to the tobacco industry's malfeasance and subsequent litigation. Lessons can be gleaned, therefore, from the failures of the tobacco settlement to adequately fund tobacco cessation and prevention programs. Transparency about spending and decision-making, coupled with strong conflict of interest laws will help prevent misspent funds and ensure monies are spent appropriately. A strong ethics code underpins efforts to abate the damage caused by the opioid industry. Opioid councils should make explicit the values and ethical principles that drive their actions to ensure fairness and transparency. The abatement councils should represent people impacted, and those on the front line of addressing the opioid crisis,

individuals too often left out of decision-making. Further, adequate guardrails are needed to ensure that ethics are upheld and decisions are made fairly and transparently.

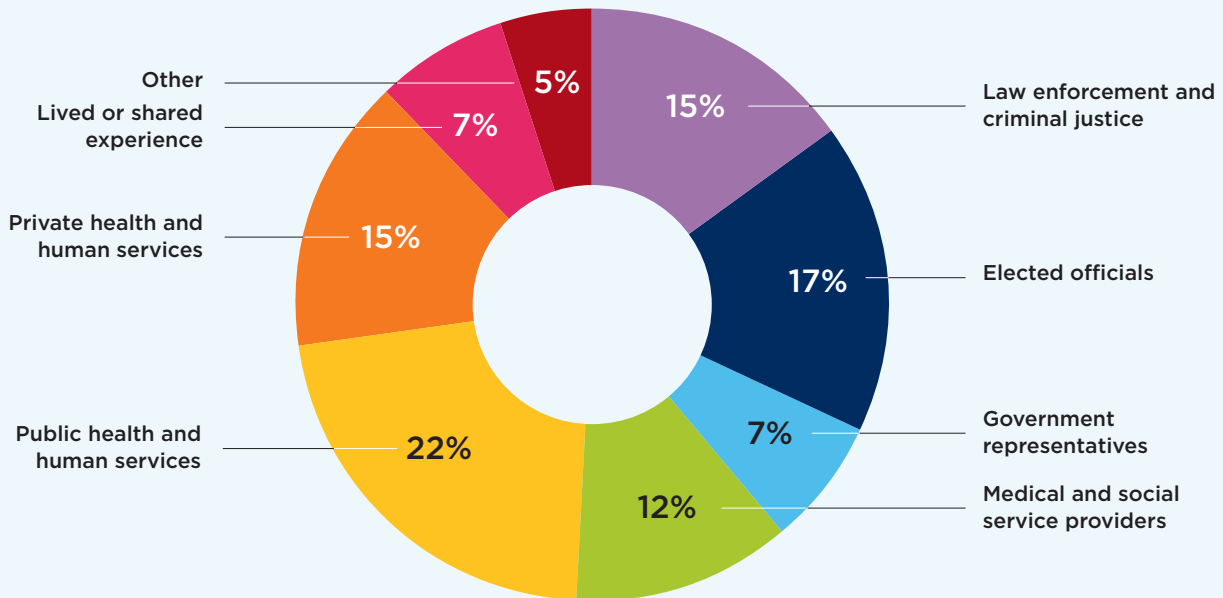
CONFLICTS OF INTEREST

Fourteen states have established decision-making councils that govern opioid litigation proceeds allocation, and twenty-four other states, plus Washington, DC, have established advisory councils that form budget priorities and make recommendations.⁴ Establishment of advisory councils, representation, and other requirements are often written into legislation or memorandum of agreement (MOA). The Kaiser Family Foundation (KFF), in collaboration with Johns Hopkins University and Shatterproof, **created a database** profiling the councils across the country. Councils vary in size, make up, authority, and how individuals are

A STRONG ETHICS CODE UNDERPINS EFFORTS TO ABATE THE DAMAGE CAUSED BY THE OPIOID INDUSTRY. OPIOID COUNCILS SHOULD MAKE EXPLICIT THE VALUES AND ETHICAL PRINCIPLES THAT DRIVE THEIR ACTIONS TO ENSURE FAIRNESS AND TRANSPARENCY.

WHICH VOICES ARE PART OF YOUR STATE'S COUNCIL?

Across the country, council members generally fall into seven categories, but the ratios in which they're represented differ greatly and offer clues about a state's values. Percentages shown here are based on current membership rather than the category designations some states set for their councils.



Source: KFF Health News' Lydia Zuraw, Aneri Pattani, Colleen DeGuzman, and Megan Kalata; Shatterproof's Kristen Pendergrass and Eesha Kulkarni; Johns Hopkins University's Sara Whaley and Henry Larweh

appointed. Council membership includes physicians, researchers, county health directors, law enforcement officers, business owners, people in recovery, and people who have lost loved ones due to an overdose.⁵ Allocating funds appropriately and effectively requires engaging experts in the substance use field. However, engaging such experts has the potential to create conflicts of interest due to the experience and involvement of organizations eligible for funding. States and counties can open themselves to criticism for appointing individuals who are invested, financially or otherwise, in organizations seeking funding from a settlement council. Establishing a clear conflict of interest protocol is imperative to sustaining the integrity of decision-making and advisory councils, but without negating the need for expertise and an understanding of organizations eligible for funding.

The Model Opioid Litigation Proceeds Act is a model state law that has been enacted as written by three states; another eleven states have passed similar laws. The Act defines "conflict of interest" as: "a financial association involving a council member or the member's immediate family that has the potential to influence a council member's actions, recommendations, or decisions related to the disbursement of opioid litigation proceeds or other council activity."

The practical applications of this definition vary. For example, conflicts of interest may be direct

and involve a financial interest, thereby requiring disclosure and recusal from a specific decision. Disclosing actual or potential conflicts of interest is a standard ethical practice that applies to the council's decision-making process and other activities under the council's authority. Other questions may flow from a direct financial conflict of interest. For example, while an individual may be required to recuse themselves from voting on their own eligibility for funding, must they also recuse themselves from discussing and voting on other entities competing for the same funding, or is disclosure itself sufficient?

In Wright County Minnesota, the **Wright County Opioid Settlement Advisory Council Bylaws** require disclosure *and recusal* from a matter in which the individual has a conflict of interest. The bylaws also provide that all questions regarding actual or potential conflict of interest are to be decided by a majority vote of the members present who do not have a conflict of interest. In other states, decisions regarding the presence of a conflict of interest are left to the chairperson or non-voting member.

New Hampshire's Opioid Abatement Trust Fund & Advisory Commission requires members with conflicts of interest to disclose *and recuse* themselves on votes involving their own organization. However, members **do not have to recuse** themselves from voting on other applications for funding even if their own organization has submitted an application.

TRANSPARENCY AND ACCOUNTABILITY PRINCIPLES

States and counties must prioritize transparency and accountability principles that extend from council member appointments to expenditures. Often, councils must comply with their respective state ethics codes, but that does not negate the need for strong conflict of interest policies and guidance on when recusal is required. A specific conflict of interest policy for advisory and decision-making councils may complement and improve upon a state ethics code, and provide more transparency.

Conflict of interest laws are often complemented by strong open meeting and public record requirements. **New York State's Opioid Settlement Advisory Board** bylaws require that the minutes of each Board meeting include all disclosures, discussions, votes, and abstentions regarding conflicts of interest. Given that opioid litigation proceeds will be distributed in most states over 18 years, establishing standards in council bylaws will help sustain transparency over time.

BEST PRACTICES

New York State's Opioid Settlement Advisory Board includes extensive conflict of interest policies. Prior to discussion or vote on a funding recommendation, board members are required to disclose all actual or potential conflicts and, when appropriate, explain the conflicts. If a member does not disclose an actual or potential conflict, the Chair may remind the member of any known actual or potential conflict of interest. The Chair may also, at their discretion, request members disclose any conversation or correspondence they have had with other board members regarding the recommendation. Once a conflict of interest is disclosed, there is a criterion for absolute or possible disqualification for participating in any vote of the board on that recommendation. The board's policy also provides for action when a member fails to disclose conflict. This may include invalidating the vote or recounting as an abstention. Further review for conflict and/or disqualification is then done by the chair.

South Carolina's Opioid Recovery Fund Board is required by **statute** to adopt a conflict of interest

policy. It is also subject to the requirements of **South Carolina's Freedom of Information Act**. Funding applications for organizations are objectively scored using a **rubric**. Applications are reviewed and scored on technical proposal, qualifications and experience, and budget, with descriptors for scoring criteria provided in the rubric.

Establishing a robust set of conflict of interest standards, coupled with transparency requirements, will help build public trust and engagement over the lifetime of the opioid litigation councils. Based upon best practices and ethical standards, we have developed the following recommendations for entities charged with distributing these funds.

RECOMMENDATIONS

1 Disclosure and Recusal: Disclose conflict of interest, and recuse from votes involving organizations with a conflict of interest.

While disclosure of a conflict of interest is a foundational requirement, disclosure must be accompanied by recusal from votes involving a direct financial or other conflict of interest for an individual council member or their immediate family members. Establishing a recusal process allows members to continue serving and the council to benefit from their expertise while sustaining the integrity of the council.

2 Transparency: Meetings should be open to the public, available on the Internet, and materials posted.

Engaging the public in the advisory and decision-making process ensures transparency and the enforcement of accountability principles. In Rhode Island, for example, all board meetings must comply with **Rhode Island's Open Meetings Act**, and all minutes must be made publicly available. Compliance with a state's open meetings and records act should be a threshold practice, however councils should also provide ready access to public information on a council's webpage. Such transparency can help ensure accessibility to impacted communities and improve equity.

ESTABLISHING A ROBUST SET OF CONFLICT OF INTEREST STANDARDS, COUPLED WITH TRANSPARENCY REQUIREMENTS, WILL HELP BUILD PUBLIC TRUST AND ENGAGEMENT OVER THE LIFETIME OF THE OPIOID LITIGATION COUNCILS.

3 Diversity and Representation: Prioritize a diverse makeup of decision-making and advisory councils.

Prioritizing a diverse makeup of decision-making and advisory councils allows for a variety of perspectives, but also accountability within the council for when conflicts of interest arise. Diversity in race, gender, lived experiences, geography, and profession should be considered. However, care should be taken to ensure that traditionally marginalized groups are not relegated to non-voting positions.

4 Core Strategies: Identify core strategies to guide decision-making and advisory councils, or follow the nationally recognized Principles for the Use of Funds from the Opioid Litigation published by Johns Hopkins Bloomberg School of Public Health.

Identifying core strategies for councils to follow alleviates conflicts that may arise if a council does not reflect the diversity of a community. For example, 47% of Tennessee's council, which has decision making authority, is composed of individuals representing law enforcement and the criminal justice system.⁶ By following external core strategies and implementing a robust public input process, decisions and recommendations can still account for varying interests despite the overrepresentation of one group of individuals.

5 Prioritize ethical standards: provide ongoing training and a mechanism by which to receive guidance.

The chair of each council should regularly emphasize the importance of ethical standards by reinforcing ethics guidelines, provide for ethics training, and ensure that members know how to seek guidance about potential conflicts of interest. Depending upon a council's structure, ongoing training and refreshers might be provided by a state's ethics committee.

Whether a council has final authority over litigation expenditures or is advisory, processes and standards for handling actual or perceived conflicts of interest should be clear.

6 Enforce ethical standards: Establish a mechanism for reporting potential ethics violations.

Provide council members and the public with a way to report potential ethics violations, along with an assurance of strict confidentiality. This reporting mechanism, sometimes an email address or hotline, should be publicly available on the council website.

Abating the effects of the opioid epidemic will take a long-term, concerted effort and councils play a central role in overseeing appropriate spending. Policymakers, therefore, should make certain their decision-making processes uphold ethical standards to ensure they have the full support of the public and impacted individuals.

ENDNOTES

- 1 National Association of Attorneys General. (n.d.). *Opioids*. <https://www.naag.org/issues/opioids/>
- 2 Wise, C., & Fritz, M. (2023, July 31). *As opioid settlement money starts to flow in, states debate how best to use it*. [Broadcast transcript]. PBS. <https://www.pbs.org/newshour/show/as-opioid-settlement-money-starts-to-flow-in-states-debate-how-best-to-use-it#:~:text=More%20than%20%2450%20billion%20in,local%20governments%20across%20the%20country>
- 3 For the sake of this document, we refer to councils throughout, although some states may use the word "board" or "commission".
- 4 Pattani, A. (2023, July 10). Meet the People Deciding How to Spend \$50 Billion in Opioid Settlement Cash. *KFF News*. <https://kffhealthnews.org/news/article/opioid-settlement-funds-state-council-members-database/>
- 5 Pattani, A. (2023, July 10). Meet the People Deciding How to Spend \$50 Billion in Opioid Settlement Cash. *KFF News*. <https://kffhealthnews.org/news/article/opioid-settlement-funds-state-council-members-database/>
- 6 Pattani, A. (2023, July 10). Meet the People Deciding How to Spend \$50 Billion in Opioid Settlement Cash. *KFF News*. <https://kffhealthnews.org/news/article/opioid-settlement-funds-state-council-members-database/>