

Local Government Ethics Programs:

A Resource for Ethics Commission Members,
Local Officials, Attorneys, Journalists, and Students,
And A Manual for Ethics Reform

by

Robert Wechsler

Director of Research
City Ethics, Inc.

City Ethics, Inc.



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Robert Wechsler, 16 Windsor Road, North Haven, CT 06473
rwechsler@cityethics.org, 203-230-2548, fax 203-286-1091

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[**Appendix 2 - Best Practices**](#)

[**Books of Interest**](#)

[**Glossary**](#)

The Goals and Purposes of This Book

Twenty years from now, every local government in the United States will have a program that ensures that its officials and employees professionally handle their conflict of interest situations just the way they professionally handle financial, legal, and engineering situations. In other words, a local government ethics program. That is the goal of this book.

The reality today is that only a small percentage of local government in the United States have such a program or have even considered establishing such a program. The reality today is that the great majority of local government officials and employees have only a limited understanding of government ethics, and they have no trained, not to mention independent individual to turn to for ethics advice. Little disclosure of possible conflicts of interest is required, and there are few active ethics commissions, and even fewer with any staff, to provide oversight and enforcement.

Clearly there is a long way to go. But despite the length of this book, the way is clear and simple. For a truly clear and simple introduction, see the 27-page [Local Government Ethics Programs in a Nutshell](http://www.cityethics.org/publications/LGEP-Nutshell) (<http://www.cityethics.org/publications/LGEP-Nutshell>), available as a separate e-book.

Here is the problem: an important part of being a professional local government official or employee is lacking, primarily due to a lack of understanding and to fiercely emotional reactions to what appears to be a questioning of one's integrity. In other words, something that is professional in nature is seen as something personal in nature.

Here is the goal: a program that (1) trains government officials and employees to recognize their and others' conflict of interest situations; (2) provides them with guidelines and advice on how to responsibly handle these situations; (3) requires them and those who seek special benefits from the government to disclose information necessary to recognize conflict of interest situations; and (4) enforces requirements for handling these situations.

And here is the way to get there: create or improve an ethics program so that it will do all these things and one more: be and appear independent of those officials and employees under its jurisdiction, so that it earns the public's trust.

A conflict of interest situation involves the conflict between officials' personal interests and their special obligations to the public to act in the public interest. The public cannot trust an ethics program to be protecting the public's interests against the personal interests of officials if those officials (1) select those who run the government ethics program, (2) provide ethics advice to their colleagues and clients, (3) and enforce ethics rules against themselves and their colleagues and clients. If the public cannot trust a program designed to ensure the public's trust that those who govern the community are not acting in their personal interests, then why bother with having a program at all?

You now know everything that is in this book. Except the details.

For most people who will encounter this book, it is a resource, a repository of information.

If you are on an ethics commission, and no one has given you much, or any, training, this is a place to get that training. However, be warned: what you learn here might lead you to turn your commission from a passive body that rarely meets into an active group of people who make their ethics program something to be proud of.

Ditto for administrators and public administration students. It would be great if a new generation of local administrators started out with a deep understanding of government ethics. There is a strong need for knowledgeable leadership in this area. It is the rare area where elected officials have proved to be better leaders than professional administrators.

If you are a government attorney, especially one asked to provide ethics advice or to counsel an ethics commission, this book will let you see that government ethics programs are far less law-centered than you thought, and that you should do what is necessary to get out of your role in the ethics program, except to encourage officials and employees to seek ethics advice from your city or county's ethics officer.

If you are a journalist, this book will help you understand the ethics issues that arise in your area and ask the right questions.

This book is not a resource book in the way a dictionary or encyclopedia are resources. It is descriptive, as they are, but it is also prescriptive. It presents a vision of what a comprehensive, integrated ethics program should look like, and explains why it is important to have each of its elements. It tries to get readers to think more outside the box, to consider out-of-the-ordinary problems (such as institutional corruption) and out-of-the-

ordinary remedies (such as debriefing). And it tries to get readers to think more inside the box, that is, focusing on the mishandling of conflicts of interest rather all sorts of other misconduct that are better dealt with in other ways.

This book provides two kinds of information: information about how things are and information about what a government ethics program should be, why it is important to do it this way, and how to get it done. Guidance is the most important element of a government ethics program, and it is also the principal goal of this book.

If you seek to reform your local government's ethics program, this book can work as a manual. You will find all the information and tactics you need, both in this book and in places this book links to, including the [City Ethics Model Code](#) and the [City Ethics blog](#), which deals in greater depth with situations in local governments across the country. The blog also links to other useful resources, including books, articles, essays, reports, advisory opinions, training materials, and ethics and court decisions. There is a whole chapter on ethics reform and another on obstacles to ethics reform, and how to get around them.

The facilitation of serious ethics reform at the local level is an important goal of this book. To do this, I present not only the reasons for and advantages of each element of a government ethics program, but also the arguments that will be made against each element (and reform as a whole), and the responses that should be made. It is important to anticipate, understand, and contend with the statements about government ethics that are made again and again, but which simply are not true (e.g., giving ethics commissions enforcement authority will lead to witch hunts against elected officials). It is also important to recognize language and omissions of language that, although seemingly minor, can seriously limit an ethics commission's authority (e.g., not allowing ethics commissions to initiate investigations).

Equally important is the positive side: having a clear vision of what is most essential to a government ethics program, and why, so that priorities may be established. For example, ethics commission independence, in its many aspects, is the most important single characteristic of an effective ethics program. The second most essential characteristic is having an independent individual provide ethics advice in a professional and expeditious manner. Since only a small percentage of local government ethics programs have either of these characteristics, there is a lot of room for reform.

There are many obstacles in the way of good government ethics programs. In fact,

there is [an entire chapter](#) of this book that examines these obstacles and offers ways to get around them. Some of the obstacles are psychological, some are based on preferred values, such as personal and group loyalty, and some involve protecting officials' perks, prerogatives, reputation and turf. But the principal obstacle is ignorance. Information available free to all is the best antidote there is.

Local government ethics is at an early stage of development. For one thing, its practitioners have no association, no publication, no website (the closest thing, COGEL, the Council on Governmental Ethics Laws, consists primarily of state ethics professionals, with only a few local ethics members). Local ethics officers and ethics commission members do not get together online or off to discuss the issues that come before them. There are very few full-time local government ethics practitioners. Instead, the practitioners include many thousands of local government attorneys and officials, and smaller numbers of ethics commission members, gadflies, good government groups, and journalists, all dealing with each situation practically in a vacuum, with little or no knowledge of how things are done elsewhere, why things are handled (or not handled) the way they are locally, and how to change the local ethics program. It is rarely even recognized that there is such a thing as a local ethics program. This book will hopefully change this situation.

With this book available, officials will anticipate that there will be people who know the best practices and who can present the reasons why they are important to follow. Such people will identify alternatives to the status quo or to proposed amendments to the ethics code. Therefore, when ethics reform is in the air, it will be much harder for officials to do what is so common: look at the ethics codes in one or two nearby cities or counties, or at a state model, and draft a minimal ethics code.

This book explains why a weak ethics code with no real ethics program can be worse than no ethics program at all. A strong, comprehensive ethics program is what is needed, no matter what the size of the community. Small communities that can't afford their own ethics officer can join together in a county or regional ethics commission to get the benefits of a strong ethics program, at little expense.

I believe that local government officials, with the knowledge of what a local government ethics program can be (and why it is so important) and with the help of well-informed good government groups and other local organizations, are capable of transcending the obstacles inside them as well as overcoming the obstacles others place in an ethics

program's path. But they first have to take the time to consider best practices. When the issues and best practices of government ethics are known and openly discussed, it is hard to ignore them.

This book begins with an introduction to government ethics, what it is and what it is not. It is important to narrow and focus the topic, because it is a topic with a limited scope that is often seen as encompassing much more. Because of misperceptions of what government ethics encompasses, too much is expected of government ethics programs and what they can provide is not sufficiently appreciated.

The second chapter describes what a government ethics *program* is. Too often, people think in terms of ethics laws, but they are only one part of an ethics program. When an ethics code is drafted, and nothing more is done, there is no ethics program, only the appearance of one.

The third and fourth chapters look at the most common ethics provisions, starting with the basic conflict of interest provision. Ethics provisions are guidelines for officials and employees to help them identify and deal responsibly with their conflict of interest situations and with the conflict of interest situations of their colleagues. Appendix 1 provides a list of unusual but valuable ethics provisions from local ethics codes across the country.

The fifth chapter considers the three principal kinds of disclosure, along with a few other kinds of disclosure. Disclosure helps officials focus on their possible conflict of interest situations before they become problematic, and it provides the public and the ethics commission with useful information regarding possible conflicts of interest. Disclosure goes beyond filling out an annual disclosure form. Officials and those seeking benefits from the government are required to make disclosures when certain events occur.

The sixth chapter looks at one area where a great deal of ethical misconduct occurs: procurement, the purchasing of goods and services by a local government. A chapter on land use, the other major area of ethical misconduct, will be added in the future.

The seventh chapter begins the section of the book on ethics administration. It looks at the most important part of ethics administration: guidance. This includes ethics training and ethics advice, the core of every government ethics program, as well as the discussion of ethics issues, both formally and informally.

The eighth chapter, which is all new, provides definitions for the Definitions section of an ethics code.

The ninth, tenth, and eleventh chapters deal with administration of an ethics program and with enforcement. These chapters include everything from selecting ethics commission members to creating useful websites to investigations, settlements, and hearings. With so much emphasis on ethics provisions, these areas are too often given little thought when ethics programs are created. And since many ethics commissions believe they exist only to respond to complaints and requests for advisory opinions, it is important for them to know about all the things they could, and should, be doing. Government ethics administration is a much more proactive thing than most people think.

The eleventh chapter considers how an ethics commission obtains information, including ethics hotlines, and how those who provide information can be protected. It also considers one of the most important powers an ethics commission needs to have: the ability to itself initiate an investigation and draft a complaint when it obtains information.

The last three chapters are the most special chapters in the book. They take the book beyond nuts and bolts and best practices. These chapters are more philosophical and yet very practical in the advice they supply.

The twelfth chapter considers all the ways in which ethics reform has and can be accomplished, as well as the ways some people try to prevent it from happening. This and the final chapter are essential chapters for good government groups and anyone else involved in creating or improving an ethics program.

The thirteenth chapter looks at ethics environments, the cultures in local government organizations that underlie most ethical misconduct. This chapter considers the characteristics of healthy and poor ethics environments, and provides a number of ways to improve an ethics environment.

The final chapter looks at the many obstacles that stand in the way of an independent, comprehensive government ethics program, including misunderstandings, fear, blind spots, the demand for retribution, non-functioning ethics commissions, backsliding, local government attorneys, independent agencies, and the legislative immunity defense.

About the Author

I wrote this book because, without such a book, those involved in local government ethics

have nowhere to turn for information or guidance. As it was until now, anyone could say just about anything about local government ethics, and get away with it, because who is in a position to say otherwise? Since I have been writing about local government ethics for years in my City Ethics blog, I felt that it was my obligation to fill this void.

Like almost everyone in this field, I got into it in an unusual manner. I practiced law and then was a book editor, publisher, and writer. My first introduction to local government ethics was experiencing ethical misconduct: being the object of intimidation in my own town, by the people who ran my town's government. This experience pulled me into town politics as a gadfly and into government ethics as a researcher.

I started by working with Connecticut Common Cause. I reviewed and graded all of the local government ethics codes in my state, and I wrote a long essay on the state's forms of government and how to change them through the charter revision process. I wrote a model ethics code for Connecticut municipalities. And I testified before a state legislative committee to try to get the state involved in local ethics reform.

Then I went to work with [City Ethics](#) as its Director of Research. City Ethics is a nonprofit, nonpartisan organization that provides advice on local government ethics programs across the country. I started the only local government ethics blog in 2006 and wrote the [City Ethics Model Code](#), its comments, and related forum essays.

I was also the first Administrator of the [New Haven Democracy Fund](#), one of the few local public campaign financing programs in the U.S., from 2007 to 2012.

With respect to writing books, I was a book editor for seventeen years, and I am the author of [Performing Without a Stage: The Art of Literary Translation](#), among other titles.

Edition 2.0

Technology now allows us to update books with far greater frequency than the every-so-many-years new hard-copy editions of the past. What you are reading is edition 2.0 of this book. It improves on the edition 1.0 in several ways:

1. It includes much more information on rules and regulations, and bylaws, and has added a chapter on definitions and a list of best practices.
2. It updates materials, based on new events, laws, and publications, as well as based on the blog posts I have written since edition 1.0.

3. I went through the entire book one more time, rethinking everything, improving the language, making corrections, and organizing the book better.

4. And I wrote a short overview called [Local Government Ethics Programs in a Nutshell](#), which is available as a separate little e-book.

Topics to be added in future editions include lobbying, land use, transparency, and local campaign finance laws.

Not only do things change, but future editions also have the benefit of feedback and information from others. So please send me your feedback and information, and I will incorporate them in this ongoing project.

I am grateful to Mark Davies, Executive Director of the New York City Conflicts of Interest Board, for his feedback on this book as well as for [his model code](#), (“Keeping the Faith: A Model Local Ethics Law-Content and Commentary,” 21 Fordham Urban Law Journal 61 (1993)), which was the basis for my City Ethics Model Code. Davies’ vision of government ethics programs is the inspiration for my vision and approach. I also thank Jim Kwalwasser for his critical observations.

I. What Local Government Ethics Is and Isn't

Public service integrity always revolves around managing conflicts of interest. It entails balancing personal interest and obligations of service to the community. ... Where you stand directly influences what you see. We see things involving others with a clarity which escapes us when we have a personal involvement. Not infrequently, we do not see impropriety in our own actions, and cannot understand why others see personal interest.

—Beith Atkinson, then Senior Advisor, Trust and Values, New Zealand State Services Commission

A. The Basics

For the purpose of local government ethics, “ethics” is not the field of study concerned with being or doing good, what most people consider it to mean. It refers to the area of decision-making regarding conflicts between, on the one hand, the obligations government officials and employees have toward the public and, on the other hand, their obligations to themselves and their family, their business associates, and others with whom they have a special relationship. It involves not only the reality of these obligations, and of the underlying relationships, but also how these obligations and relationships appear to the public.

Government ethics is not about being “good” or “bad.” It is about acting responsibly and professionally, as a government official or employee, under certain circumstances and following certain rules and procedures. Government ethics laws provide minimum, enforceable guidelines to facilitate ethical decision-making. Government ethics programs provide training and advice to further facilitate ethical decision-making. Government ethics programs also require financial and relationship disclosure, which provides information to help the public, as well as officials, better determine if conflicts of interest might exist, so that they can be dealt with responsibly.

What is “bad” with respect to government ethics is the failure to provide guidelines, training, advice, disclosure, and independent enforcement, that is, the failure to provide a strong, comprehensive government ethics program. Once such a program is in place, government ethics is about being professional and responsible, following the rules and asking for advice whenever it is not clear how to deal with a particular situation, whether it is one’s own or one’s colleague’s.

The principal goal of a local government ethics program is to further the public’s trust that those who govern their communities are putting their personal interests aside in favor of the public interest. It is hard for a community to have social trust when its residents perceive officials using government to profit themselves and their friends and families. Without this trust, people tend not to participate in their government, even as voters, and they feel as if their government were something apart from their community, an organization designed to benefit its members and those with the right connections, rather than an organization that serves, manages, and supports the community. They also feel they are being taken advantage of and treated unfairly. This leads to very strong emotional reactions.

As Mark E. Warren has written, “a government viewed as corrupt cannot be trusted. And a government that cannot be trusted will be crippled in its capacity to lead.”

The opposite of trust is not distrust, which we need in order to keep our representatives accountable, but a lack of trust. A lack of trust causes people not to accept their government’s decisions as fair. A democratic government does not thrive when there is a lack of trust in those who govern it.

Two other important goals of a local government ethics program are (1) to stop ethical misconduct before it becomes criminal conduct, and (2) to establish best practices and a healthy ethics environment at the level where most elected officials learn the ropes. Local government is where the individuals who become our state and federal representatives too often experience their first poor ethics environment, learn the rules of the game, misplace their loyalty, and begin to feel a special entitlement. Therefore, effective local government ethics programs help to create healthy ethics environments in state and federal government organizations, as well.

1. Fiduciary Duty and Other Theories Behind Government Ethics

One reason that government ethics is described in terms of *obligations* is that government officials have a fiduciary duty or obligation toward the community for which they work (and which, in most cases, elected them or their appointing authority). The obligation government officials have toward the community, usually referred to as “the public,” is unlike any other obligation. Government ethics deals with conflicts between this special obligation and an official’s other obligations.

Government ethics codes don’t usually use the term “fiduciary duty.” An important exception is the first substantive provision in Chicago’s ethics code, which reads, “Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.” Note, this duty is owed to the city, not to the city government.

Government officials’ over-riding duty is different from that of a trustee to a beneficiary, which is the most common use of the term “fiduciary.” The difference is inherent in the forms of government in the United States. In many forms of government, officials are responsible to a king or a dictator, rather than to the public. Even in some democracies, such as Japan, government officials do not feel the same sense of obligation to the public. There is an old saying in Japan, *kan son min pi*, literally, according to Tomofumi Oka, “government personnel are respectable, non-government personnel are not respectable,” or “respect government officials, don’t respect the public.” In the U.S., on the other hand, government officials are required to respect and be responsible to the public.

Another way of understanding an official’s fiduciary duty is by looking at it from the point of view of the public. The public elects representatives who spend the public’s money and make decisions about their community that affect their lives. The U.S. version of this representative system can work only if the public has confidence that its representatives, and those appointed or hired by its representatives, are spending tax dollars and making decisions solely for the benefit of the community rather than for themselves or for those with whom they have special relationships.

The type of hiring, either as employee or as a contractor or subcontractor, is both unknown to the public and irrelevant to the hired individual’s fiduciary duty to the community. In fact, those who receive or spend public funds have the same duty, even if they were not hired by a government.

We cannot actually know much about the character of those who work in our local government, and we cannot expect our representatives, or those they appoint to office, to

be as competent as we would like, or have as good judgment or vision as we would like, but we can at least expect them not to misuse their office to benefit themselves or those to whom they have personal obligations that conflict with their obligations to the community.

Because we cannot know the character or motivations of those who manage our communities, and because we cannot know how much their personal obligations affect their decisions, we can judge them only by their actions and their relationships. In other words, appearances matter a great deal. Appearances, in a government ethics context, are not something vague and abstract. They are the facts of what an official does and what relationships an official has. It is motivations and character that are vague.

Therefore, while appearance is central to government ethics, motivations and character are irrelevant. This is the most difficult thing for most government officials to understand, because what they see when they look at themselves is motivations and character, all those things that are invisible to their community. But when officials look at other officials, all they see is obligations, relationships, and conduct.

The duties and expectations that comprise the relationship between local officials and their community lie at the center of our form of government. These duties and expectations are supported and enforced by government ethics programs and, when there is bribery or embezzlement, they are enforced by the criminal justice system. The “contract” between a community and its government is based on what are referred to as “[regime values](#),” that is, the values of our form of government, the ones to which elected and appointed officials take an oath of office, including the values stated in our federal and state constitutions, and in our city and county charters.

Although this book focuses on fiduciary duty as the principal basis for government ethics, it is important to recognize that there are other bases. In her 2012 law review article “Defining Corruption and Constitutionalizing Democracy” (Mich. L. Rev (Vol. 111)), University of Maryland Law School professor Deborah Hellman argued that defining legislative corruption requires a theory of the legislator's role in a democracy. This applies to other government officials, as well. She discusses three theories other than fiduciary duty.

1. Corruption as a Deformation of Judgment. We see this theory in the common ethics code phrase, “impairment of an official's judgment” (see [my argument](#) against the use of this phrase). The unspoken theory of the legislator's role that lies behind this view of corruption is that, for each decision they make, legislators should consider only

reasons based on the merits. Any non-merits-based argument – or personal greed or an obligation to someone – that influences a legislator involves an improper impairment of the legislator's judgment.

2. **Corruption as the Distortion of Influence.** In this theory, the legislator is supposed to be responsive to constituents' preferences. Therefore, any responsiveness to some constituents' preferences over others', caused by undue influence, is a distortion of what is supposed to happen and is, therefore, corrupting. This is the theory behind gift rules that, like bribery provisions, mention “intent to influence,” or that use language like the following with respect to soliciting or accepting a gift:

under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him

See [my argument](#) against gift provisions that require a show of intent to influence.

3. **Corruption as the Sale of Favors.** This theory says that anything a legislator does is okay, so long as the legislator does not exchange a vote or favor for something of value. This is the view of corruption clearly stated by the majority opinion in the *Citizens United* decision, where corruption is only “quid pro quo corruption.” This theory does not even recognize the validity of government ethics. Thankfully, this is true only in the context of campaign finance, which happens to be the focus of Hellman's article.

In a government ethics context, the Supreme Court has accepted a different theory of the legislator's role: a legislator casts a vote “as trustee for his constituents, not as a prerogative of personal power.” [Nevada Commission on Ethics v. Carrigan](#), 564 U.S. _____, 180 L. Ed. 2d 150 (2011). What is especially different about this theory is that it is not a theory about legislators, but rather a theory about government officials.

In his book [What Money Can't Buy](#) (Farrar Straus, 2012), Michael Sandel raises another theoretical argument for government ethics. When it is perceived that there is a market for government access or favors, it degrades government “by treating it as a source of private gain rather than as an instrument of the public good.” Ethical misconduct taints our community. It makes us feel not only angry, but disgusted. This occurs when conduct that may be valued outside government, like the reciprocal giving of favors or helping one's family members, is pursued in the context of managing a community.

Whatever the particular theory involved, what we can take from Hellman's paper is the recognition that “to define corruption requires articulating the standards of proper functioning of the institution or individual involved.” This is too often ignored. What drives ethics codes is often scandals, that is, the negative side, rather than the positive side: what we expect from our government officials and how we view the proper functioning of government.

2. The Values of Our Founding Fathers

It is worth considering what government ethics meant to our founding fathers. Those who became public leaders at that time sought to demonstrate their public virtue, which meant their ability to rise above the self-interest that absorbs the energies and limits the views of ordinary men. The character necessary for this purpose was a matter of both personal integrity and public reputation. A young man was considered to have the necessary public reputation to make him worthy of office when established gentlemen testified to his worth by supporting him as a candidate for political office or appointing him to a position of public trust, according to Gordon S. Wood in his book [*Revolutionary Characters: What Made the Founders Different*](#) (Penguin, 2006). Wood points out that Aaron Burr's treason was less his conspiracy against the U.S. government, than “his willingness to use politics for private gain.”

Thus, when we talk about the importance of government ethics, we are talking about an ideal that was being lived at the founding of our country. Unfortunately, the norms of our founding fathers were lost, to a large extent, during the Jacksonian period. These values came back into our culture through early twentieth-century Progressivism, which was led by people who thought of public service much as the founding fathers did. Although government ethics has deep roots in our culture, it co-exists with the culture of Jacksonian democracy, where the principal goal is to get what you can get.

3. Conflicts of Interest

We have conflicts among our obligations all the time. Our obligations are not something abstract; they are based on our personal and professional relationships. We can only fulfill our obligations to our children and our spouse, our parents and our siblings, our employer, partners, clients, customers, and other business associates, and our relatives, friends, pets, and neighbors at the expense of our other obligations, including our obligations to ourselves.

We are constantly juggling these obligations, and those to whom we have obligations, including ourselves, are constantly disappointed in us because of the priorities we set among our obligations. These priorities are necessitated by our limited time, energy, abilities, and authority.

Conflicts in local government are a small subset of our daily conflicts. In our daily juggling of obligations, there are so many that we rarely think about them in any depth. Our principal solution to the problem is to have a schedule: getting ready in the morning, commute time, work time, meal times, food shopping time, times to drop off our children and pick them up, exercise time, time spent with spouse, children, and pets, leisure time, visits to our parents, vacation time, and sleep time. If we cannot schedule something or get to it on our to do list, it's very likely to be put off or not accomplished at all.

But juggling obligations goes beyond the constant scheduling and prioritizing of our time. There are expectations placed on us, and we are pressured — lobbied, influenced — by everyone in our lives to give them and their interests a higher priority. His family, her family, his friends, her friends, spouse, children, boss, clients, and pets all have their ways of trying to influence how we prioritize our attention and our time, and how we make our decisions.

All these people and animals feel they have a right to our time and attention, and there are no rules to help us decide which to show preference to or to what extent. One good thing about government ethics is that it has a central rule: that no preferential treatment should be shown. A developer who gives large campaign contributions or promises tickets to big football games may not be given preferential treatment over a politically uninvolved citizen who doesn't want water drainage from a proposed development to flood her property. Contractors must be selected by competitive bidding. Officials cannot hire their relatives. Nor can friends be given access to public works equipment unless everyone can (and everyone can't).

Obligations, and the relationships on which they are based, work like stress does in our bodies. They don't cause the disease of corruption, but they help undermine our immune system. Our natural selfishness is strengthened when we can tell ourselves that we are helping our family, friends, and business associates live a better life. Just as stress increases our susceptibility to disease, obligations increase our susceptibility to acting

unethically, that is, to putting our obligations to others ahead of our obligations to the public.

Conflicts of interest that are not dealt with responsibly create stress in the relationship between a local government and the community it manages. From the point of view of citizens, when an official has a conflict of interest, does not disclose it, and does not withdraw from participating in the matter, he may purport to be acting as an official, but if it comes out, he will be seen as being an agent of whoever it is he has a special relationship with, whether it be his brother, his wife's company, his business partner, or himself. He will be seen as selfish and untrustworthy and, more important, the government that does not insist on him dealing responsibly with his conflict of interest will be seen as a bunch of people who are in it for themselves and their family and friends.

In other words, it's less about the individual than it is about the government itself. If the public's trust in one official were all that was undermined, it wouldn't matter that much. But if there is not a strong ethics program, the entire government-community relationship suffers from the misconduct of one official. And, as everyone knows, it is rarely only one official who is at fault. Certain kinds of misconduct may be considered normal. And there are those who enable and those who know about each conflict of interest situation, but say and do nothing.

Conflict Situations

There are many ways in which conflicts of interest arise. Many simply exist, and become relevant only when a matter involving a family member or business associate comes before an official. For example, an official's law firm represents a contractor. This is okay until the official has to deal with, or is in a position to influence, a contract the contractor has or wants. As soon as this happens, there is what I refer to as a "conflict situation," and the official has to deal responsibly with the situation by following the procedures required by her local government's ethics program. This usually involves disclosure of the conflict of interest and withdrawal from participation in the contract matter, that is, letting someone else, or the rest of the board, deal with the contract.

This is a lot easier than dealing with our everyday conflict situations, such as deciding whether to take the dog for a walk (you need the exercise as much as him) and let your wife

do the dishes, or to instead show compassion for a spouse who's just come back from a business trip and asking your son to walk the dog, while you help with the dishes.

And there is one other big difference. If you go for the walk, you might have to deal with an angry wife, but it's your choice. In government, however, you have a paramount responsibility to the public. It is your duty not to work on the specifications of a contract (or talk to someone working on the specs) that might go to a contractor represented by your law firm, not because you can't be trusted doing an honest job (how can anyone know this?), but because you owe it to the public to disclose the conflict of interest and deal with it responsibly, that is, in a manner that will preserve the public's trust in a fair government that is not being used by officials to enrich their family or business associates.

Dealing responsibly with conflict situations is the central act in government ethics. The rest of a government ethics programs revolves around this: training and advising officials how to deal responsibly with conflict situations, requiring the disclosure of information relevant to conflicts of interest, and enforcing the ethics code when officials do not deal responsibly with their conflict situations.

Conflicts of Interest Created By Events

Other conflicts of interest are created by events. For example, a developer seeking approvals from a zoning board invites a couple of zoning board members for a long weekend at his Caribbean home. Or a contractor offers work to the accounting firm of a commission member while the commission is overseeing the contract. Or a government official asks a subordinate to enter into a business transaction with her.

In these instances, it is not enough simply to withdraw from the matter. The question is whether the gift, the work, or the transaction must be rejected, and whether or whom to alert about the offers.

Misuse of Office

Another way to look at ethical misconduct is in terms of misuse of office. Every official temporarily holds an office or position in a government. That office is supposed to be used solely for the benefit of the community. The authority that accompanies this office, but is its holder's only because he holds that office, can do a great deal of good, as well as damage. When an official uses his office for the benefit of himself or someone with whom he has a

special relationship, or to harm others, this is a misuse of office. It is this view of ethical misconduct that has caused many basic conflict of interest provisions, including the City Ethics Model Code's, to start out with the phrase "An official or employee may not use his or her official position or office. . ."

This approach also makes it clear that government ethics is not just about voting. It is about the misuse of office in any way, for any purpose: making a call or sending an e-mail explaining one's position on a matter where the official has a conflict of interest, making a speech to a community organization about the matter, even whispering in the ear of a colleague or subordinate at a meeting on the matter (this is why officials with a conflict of interest are usually asked to sit in the audience or leave the room).

Ethical misconduct not only involves the misuse of office for the personal benefit of oneself and others. It also causes officials to continue to act in their personal interest in order to hide what they have done, and to pull others into their cover-ups. This involves secrecy, circling the wagons, intimidation, dishonesty, denials, and personal attacks on anyone seen to be capable of making the misconduct public or getting the public to understand what is wrong with it.

The covering up of ethical misconduct often places pressure on others to engage in additional ethical misconduct. It can be like a snowball rolling downhill, to the point where no colleague has the courage to speak out even privately, or vote independently, even though they have an obligation to do so. It makes everyone complicit, even those who are merely trying to stay out of it.

In this way, ethical misconduct co-opts and corrupts others. This is the worst thing about it. And it is why it is so important to have a good, independent government ethics program, not just to enforce the laws, but to stop the snowball from rolling downhill and to prevent politicians from being able to create a smokescreen, or believe they can. No ethics code can do this. Only a full-fledged ethics program can.

This is why, unlike many in the good government world, I do not cheer when a local official is indicted. I see it as unfortunate and unnecessary. Lives are ruined and the public trust is undermined because simple, inexpensive ethics reforms were not instituted, or an ethics commission did not do its job.

4. Terminology

The most common term in government ethics is “conflict of interest,” but I prefer not to use the “of interest” part of this term. The reason is that we don’t generally think in terms of “interests” except in the basic opposition of “personal interests” and the “public interest.” The public, officials, and people who seek special benefits from the government think more in terms of relationships, obligations, and biases than in terms of interests.

We don’t balance interests, we balance obligations. A developer gives a gift to an official not to create an interest, but to create a feeling of obligation. And citizens are angered by officials’ apparent biases toward individuals and companies, arising from special relationships, not something as vague as their “interests.” “Relationship” and “obligation” are words that are too often left out of discussions of government ethics. But these are essential words, and both provide more guidance than the word “interest.”

The word “interest” in “conflict of interest” also creates confusion because “interest” has a second important meaning and usage in government ethics. This is an “interest” in a company, which involves ownership, or an “interest” in a transaction, which means that an official, or someone especially important to an official, might benefit from a transaction with the local government.

In 2012, the Baltimore ethics board hired a law student as an intern to review financial disclosure forms. When asked if they had any financial “interest” in properties or entities that do business with the city, many officials filled out the form incorrectly. The intern wrote in her report, “The word ‘interest’ confused filers. Many expressed they did not receive any interest from their home.”

Not only is there a confusion of meaning surrounding the word “interest,” but there is also an issue of clarity. An “interest” in a transaction is far less concrete than the “benefit” someone gets, or may get, from a transaction. When it comes to gifts, this is even more clear. An official “benefits” from a gift from a contractor; it would be odd to say she has an “interest” in a gift.

A lot of the language in government ethics obscures rather than clarifies. It is language used by lawyers, not by ordinary government officials and employees, not to mention citizens. It is wrong to use such language, because an ethics code is intended to provide guidance to ordinary people. If only lawyers understand the language, the ethics code provides little guidance, there will be less compliance with the rules, and enforcement of ethics provisions will not be fair.

It is a serious problem in getting people to understand government ethics that both of its principal terms, “ethics” and “conflict of interest” do not clearly convey to the public, or even to government officials and employees, what the field is all about.

In this book, I use the terms “conflict” and “government ethics,” and I will speak as much as possible in terms of “obligations,” “benefits,” and “relationships” rather than “interests.”

5. Government Ethics and Politics

There is one very big exception to the rule that government office should not be used for the benefit of its holder and those to whom the holder has obligations. That big exception is politics. A politician (as opposed to an administrator or employee) is permitted to give precedence to her political obligations and to benefit her political career and her political colleagues, with some exceptions. Our democratic system allows an elected or appointed official to wear the additional hat of the politician.

Elected officials and their appointees often act to benefit their parties and factions, and their own political futures. Many elected officials do what they can to get re-elected or elected council president or mayor. And many mayors have their eyes on higher office. Board and commission members often think of running for council, or making sure their party remains in control of the government.

The results include partisan strife, patronage, a lack of transparency, and games played with the budget and with taxes. Although it undermines public trust, most of this is considered legal. In any event, it is not part of government ethics. Conflicts between political obligations and obligations to the public cannot generally be enforced by ethics commissions. They are dealt with in other ways, however, such as nonpartisan elections, the council-manager form of government, and limits on interference by elected officials with administrative matters, hiring, land use decisions, contracts, and grants.

6. Appearance of Impropriety

In politics, appearance is as important as reality. The same holds true for government ethics, but in a different sense. Government ethics is not about manipulating appearances, but rather about recognizing that the appearance of impropriety is damaging to the public trust. If a government official appears to have a conflict, even though the situation is not clearly

prohibited by an ethics code provision, and that apparent conflict is not handled responsibly, it has the same effect on the public in terms of their trust in those who govern as it would if the conflict were prohibited by law.

As the Portland, Oregon Ethics Explanations and Examples pamphlet says, “Public service requires a continual effort to overcome cynical attitudes and suspicions about the people in government.” Considering not only laws, but also appearances, is part of this effort.

Many people say that the most important test government officials should use when faced with a possible conflict situation is either what their mother would think or how they would feel if their failure to deal responsibly with the conflict situation appeared on the front page of tomorrow’s newspaper. You can check and see what the ethics code says, but even if there’s nothing that would make your conduct a violation, it’s still important to think how one’s conduct would look, because that is what will affect the public’s trust.

Another way of looking at the appearance of impropriety is by acknowledging that, unlike how we see people we know well, the public sees government officials only from afar. The public lacks the usual cues that allow us to determine whether someone is telling the truth or is sincere about a position. All we can know is that the position benefits the official or someone with whom the official has a special relationship. We can hold our representatives accountable only through their acts as they appear on their face, because we cannot know their motives.

But since officials do know, or think they know, their motives, it is hard for them to see how their conduct appears, no matter what test they use. In order to handle a conflict situation responsibly, nothing is better than describing one’s situation to a neutral observer, to a government ethics professional if possible, to see how one’s conduct would appear to others.

It is also important to recognize that much conduct that appears improper, such as incivility, lying, love affairs, or drug use, is outside the province of a government ethics program. Government ethics programs are limited to dealing with conflicts. [See below](#) for a discussion of this.

7. Fairness

When one talks about impropriety in a government ethics context, one is talking about fairness. Those who manage a community are supposed to be looking out for the community, that is, treating citizens as fairly and equally as possible. Preferential treatment not only benefits those in power and those with connections but, more important, it is unfair to others.

No one likes unfairness. Our dislike for unfairness is both deep and powerful. The reason for its power is that it is based on disgust. We feel about people who offend our values, especially people who do something we consider unfair, the same way we feel about rotten food. It's not an accident that "corrupt" not only refers to someone who is using a government office to help himself and his associates, but also to something that is impure, that has become rotten or tainted. Our vocabulary for corruption comes right out of our vocabulary for spoiled food.

Jonathan Haidt's Moral Foundations Theory argues that there are six moral modules or foundations. Liberals, conservatives, and libertarians embrace different moral foundations. The only one of the six foundations that is equally common to all is fairness/proportionality, which is also the one most important to government ethics. Cooperation among individuals, especially across groups, depends on playing tit for tat, being fair. The result is that we feel very angry when we believe that people in power, who have obligations to all of us, do not treat us all equally.

A democratic system cannot function unless it is seen to be fair. When a local government appears to favor the families, friends, business associates, and major contributors of its officials, this undermines the public trust, and causes resentment along with less participation by residents in local government. Residents feel that their views and efforts are worthless in an unfair environment that favors people with connections they do not have. Residents stop being citizens.

Being fair to the community and its residents means making sacrifices, and this seems unfair to officials. Officials have to give up certain business and professional opportunities, such as seeking a contract or grant from the government, and they may not help their relatives and business associates in their business with the government. They have to give up accepting gifts from those seeking benefits from their government (although most of these gifts would hardly have been made if they were not in a position to influence policies and the provision of contracts, permits, and grants). Officials can benefit from government actions

to the same extent others do, as taxpayers, senior citizens, or the like, but they cannot benefit in any special way. This is a sacrifice they must make if they choose to take a job or position in their local government.

Fairness/proportionality is also the foundation that officials most often use to justify their misconduct, both to themselves and, when caught, to the public. They say that they have sacrificed potentially higher pay in the private sector, or they are serving as volunteers, giving up their precious time for the community. But it is not unfair that officials are required not to use their office for their benefit or for the benefit of those with whom they have a special relationship. Government in a democracy has to act fairly, and not appear to favor its officials and employees, or those with special connections to them, at the expense of the community.

Officials also give up important rights. Their freedom of speech is curtailed, because they have to speak as officials, for the community, rather than for themselves. They have to treat citizens with respect, something citizens do not have to do to each other or to officials. There are many statements that, if they were to say them as officials, would hurt or anger individuals in their community, and cause tension in the community, or even violence. Even their spouses are no longer free to do whatever they want. This can be a difficult thing for government officials and their families to accept.

An important aspect of fairness is going through the formal processes, rather than following unwritten rules, which generally mean unfair, preferential treatment. Formal processes exist to make government action more fair, not, as many people think, to make a bigger, more expensive bureaucracy. Government ethics is just one of the formal processes that makes government more fair.

8. Minimum Requirements

“The worst thing you can do is read the [ethics] law like a lawyer and look for loopholes.”

—Richard H. A. Washburn, past training manager with the then New York State Commission on Public Integrity

The principal difference between a government ethics code and other ordinances is that an ethics code provides only minimum requirements, that is, the least that is expected from government officials. Ethics provisions are the floor, not the ceiling, as Judy Nadler of the Markkula Center for Applied Ethics puts it.

Other sorts of laws provide maximum requirements, that is, the ceiling on what is acceptable. Every aspect of a criminal law must be proved beyond a reasonable doubt, or there is no crime. Regulations make specific requirements, and no more is expected.

Ethics provisions are not meant to be viewed or interpreted the way other laws are. If an ethics code does not clearly state that certain conduct is a violation, that does not mean that the conduct is appropriate. It only means that it is not illegal.

There are two reasons for this. An ordinary ordinance is the way the government (that is, the community) regulates citizens. An ordinary citizen is expected to act in his or her own interest. An individual or company need only depart from that interest to the extent the community, through its government, requires. If certain conduct is not covered by local or state law, it is not illegal. Whether it is ethical or not is a personal issue. If someone finds a loophole, the government is supposed to get rid of it. Until it does, acting according to the loophole is legal. It only becomes an ethics issue if one or more officials decide to leave the loophole in to benefit those to whom they have personal obligations.

In contrast, an ethics code is the way the government (that is, the community) regulates those who serve the community in the government. Unlike ordinary citizens, those who agree to serve the community are not expected to act in their own interest. They are not expected to use their position to help themselves or those with whom they have special relationships. In other words, they have a special, overriding fiduciary duty to the community. If they find a loophole in an ethics law, they are supposed to get rid of the loophole and, until they do, not take advantage of it. If they take advantage of it, even if their conduct is legal, it is unethical, inappropriate, and harmful to the public trust in its government. And unlike ordinary citizens, public servants have a special duty not to act unethically.

The second reason why an ethics code provides only minimum requirements is that while ethics codes are meant to guide officials to act in the public interest, ordinary ordinances are not meant to guide, but to limit and define. Everyone knows it's wrong to

kill people, but criminal laws divide killing into a number of different crimes. No one checks homicide laws to help them decide whether or not to kill someone.

People do check tax laws before they make business decisions. However, while accountants' advice is intended to help clients get the best result consistent with tax laws, ethics advisers seek to help officials do what is best for the public.

An ethics code cannot look anything like a tax law. It has to have simple rules that are only minimum requirements, even though the requirements on a government official are greater than what these simple ethics provisions say.

The best example of a situation that is usually legal, but which should cause an official to withdraw from a matter, is when a close friend or romantic partner of an official is involved. Because it is difficult to define "friend" or "lover," their involvement usually does not give rise to a conflict under an ethics code. But that doesn't mean an official should vote on a grant to her boyfriend or a zoning permit for her best friend.

The principal extralegal standard is appearance of impropriety. If an official has a special relationship with anyone or any entity involved in a matter, it will look improper if the official has anything to do with it. If someone who seeks benefits from the government offers something to an official, it will look improper, so it should be rejected. If an official is not sure what to do, he should ask the ethics adviser.

The extralegal standards and concepts of government ethics are simple, but their application to a particular matter can be complicated. This is another reason why ethics provisions have to be only minimum requirements. [If officials were required to seek ethics advice](#) whenever they had a possible conflict situation, there arguably would not be a need for ethics laws at all.

Since in government ethics the appearance of impropriety is as much a problem, with respect to the public's trust, as impropriety itself, a government ethics adviser will not interpret an ethics code narrowly, as lawyers do. An ethics adviser knows that ethics provisions are full of loopholes, but he views them as gray areas, rather than as opportunities to deal irresponsibly with what would appear to the public to be a conflict situation. He will say that the conduct would not violate the law, but that it would appear improper. He will say that the conduct would undermine the public trust, and he will provide advice regarding responsible ways of dealing with the situation. A government ethics adviser is creative not in

getting around ethics laws, but in finding ways to deal responsibly with conflict situations while requiring the least amount of sacrifice from the official.

This attitude is recognized in Seattle by requiring that the ethics code be “liberally construed” for the public’s benefit.

This is in clear contrast to criminal laws, which are maximum rules that are to be narrowly construed for the accused’s benefit. With minor criminal laws, people go well beyond the limits of the law, knowing there is leeway. This is because criminal laws are all about enforcement, and citizens have no special obligations. Speeding laws are one example. The speed limit may be 55 mph, but a highway with this speed limit will generally go at 65 mph.

Ethics rules are different. If a gift limit is \$100 aggregate per year from someone doing business with the city, that doesn’t mean that it’s okay for an official to go over the limit a bit. In fact, the responsible thing to do might be not to reject a \$50 gift, because it would appear improper. The \$100 limit is merely a guideline as to what would be considered a gift sufficiently small to be legally excepted from enforcement of the rule that no gifts should be accepted from people or entities that do business with the local government.

When faced with allegations of ethical misconduct, local officials often insist that they didn’t do anything wrong because they followed the law. They often say that they asked a local government attorney, and she said it was okay, as if it were a purely legal decision. If the decision involved a financial or engineering or management decision, in which law was only one aspect of the official's professional decision, would the official place all the responsibility for his decision on a lawyer? The legal aspects of a government ethics decision are only part of the story.

It is important for lawyers to recognize these distinctions. Normally, a lawyer will consider whether conduct is a violation of the law and, if it is not clearly a violation, she will tell her client the conduct is legal. That is not how a conflict situation should be approached.

Lawyers are paid to look for loopholes for their clients. But officials are not a government attorney’s clients; the city or county is the client. And it is not appropriate to use loopholes in an ethics code to a government official’s advantage. It is important to recognize that, even when conduct may be legal, taking advantage of a loophole can look worse than directly breaking a law, because it appears scheming. An official may plead

non-illegality, but it appears that she and her collaborators were acting selfishly and intentionally, and this undermines the public's trust in government more than one official's ethics violation, which might have been inadvertent.

Since so many politicians are lawyers, and government officials who are not lawyers often consult with government attorneys about ethics matters, far too many government officials take a legalistic approach to government ethics. It is as if two languages were being spoken. Lawyers speak Law and government ethics professionals speak Ethics. The difference is that ethics professionals speak both languages, while most lawyers don't even recognize that there are two languages. This may be the biggest problem in local government ethics, because the handling of so many conflict matters involve an attorney.

B. Sources of Confusion

There are several sources of confusion in government ethics. The principal source is the word "ethics," which implies far more than conflicts. The next ten sections look at some of the other sources of confusion.

1. Personal vs. Professional Ethics

Ethical Decision-Making

One important source of confusion is how people look at ethical decision-making in government. Is it dependent on an official having a good character, that is, being a good person who does the right thing? Or is it dependent on acting professionally, including consulting with an expert, that is, is it similar to other sorts of decision-making?

With effective training, in a healthy ethics environment, government ethics decision-making should be just another professional routine. Lawyers call their ethics rules "Rules of Professional Conduct." Other professions have codes that tell them not how to be good, but how to be professional and responsible, how to fulfill their professional obligations to clients and patients.

Too rarely do you hear officials argue that they went through a professional ethical decision-making process and simply made a misjudgment. Or that they had no training in ethical decision-making, and didn't know what to do. Many people would laugh if an official

said she didn't know how to do ethical decision-making in a government context, as if it were something every good person instinctively knows. If it were, there would be no need for government ethics programs. Or this book.

Instead of speaking in terms of professionalism, officials insist they're good people, or people of good character, and their friends testify as to the official's integrity. But what the official and her friends and colleagues believe about character and integrity is immaterial. What the public believes is what matters most when it comes to dealing with conflict situations. That is the professional way to look at it.

Conflicts Between Personal and Government Ethics

Sometimes personal and government ethics are in conflict with each other. Here's an example. An official's girlfriend represents a nonprofit seeking a grant from his board. The official is faced with making a personal ethics decision – whether to help his girlfriend get the grant (while taking the risk that his relationship with her might become an issue and thereby undermine the nonprofit's grant and thereby harm his girlfriend) – or a government ethics decision – making sure his relationship does not appear to bias his participation in the approval of the grant and thereby undermine the public's trust in his agency or body. As a government official, it is his duty to make a government ethics decision rather than a personal ethics decision. It also happens to be the easier decision to make.

The Integrity of Government Institutions, Not People

In his book [*Ethics in Congress*](#) (Brookings Institution Press, 1995), Dennis F. Thompson included a valuable description of a basic difference between personal and government (what he refers to as “legislative”) ethics:

Personal ethics originates in face-to-face relations among individuals. It is a response to the social need for principles to guide actions toward other individuals across the whole range of personal relations.

Legislative ethics originates in institutional circumstances. It arises from the need to set standards for interpersonal relations among people who may never meet and who must judge each other at a distance.

The function of personal ethics is to make people morally better, or, more modestly, to make the relations among people morally tolerable.

Legislative ethics serves to guide the actions of individuals, but only in their institutional roles and only insofar as necessary for the good of the institution. Legislative ethics uses personal ethics only as a means — not even the most important means — to the end of institutional integrity.

Government ethics relates to a public servant's institutional role, the good of the institution, and the democratic process. It is not about personal ethics, character, or integrity, but about the institution's integrity. Conduct that is praiseworthy outside of government, such as helping a family member get a job or returning a favor one has been given, is considered unethical in a government context.

This is so difficult for an individual to understand about himself that even government ethics professionals sometimes see their own conflict situations as personal rather than institutional. For example, in 2012 a complaint was filed with British Columbia's ethics commissioner against the provincial premier. The ethics commissioner's son was a close aide to the premier and had formerly worked for the premier's then husband. Although eventually the ethics commissioner withdrew from the matter, turning it over to another province's ethics commissioner, his first response was to treat it as a personal issue, saying:

“I don't perceive a problem in making a decision in this case that will have nothing to do with my son's career. If I had any difficulty, or felt that I in any way couldn't handle this file like I do every file — on the basis that I will go where it takes me, and I will make the decision that needs to be made without, dare I say it, fear or favour — then I should pack it in.”

When officials talk about character and personal integrity, they should be reminded (1) that there is no way the public can know what their character is, and (2) that life is not that simple. By their nature, conflict situations put officials between a rock and a hard place. In a conflict situation, no one, no matter what his character, can satisfy all his obligations. He is going to have to hurt or disappoint someone. Government ethics takes the position that, with respect to official business, an official has an obligation to the public that overrides the official's other obligations. This takes most of the pressure off an official. All an official

need do is treat the matter as a government ethics matter, seek government ethics advice, and let all others involved know that she had no other choice. It is only when one has a choice, or acts as if one had a choice when one legally and ethically does not, that character becomes an issue.

In addition, the way we view character is fundamentally wrong. It is not the stable thing we think it is, formed at an early age and continuing throughout our lives, so that there are people of integrity and people without integrity. This view of character is important to people when they make judgments about trusting others, but it is inaccurate.

In their book [*Out of Character*](#) (Crown Archetype, 2011), David DeSteno and Piercarlo Valdesolo assert that “there lurks in every one of us the potential to lie, cheat, steal, and sin, no matter how good a person we believe ourselves to be.” They see character as a fluctuating trait, a balance between competing psychological mechanisms. When character is seen to involve balance rather than a steady state, we can see how vulnerable we are to suggestion and manipulation. “Character unfolds over time, but not in a slow or linear way. ... it's constantly oscillating to adjust to our needs, situations, and priorities.”

An important element of an individual’s response to a conflict situation is the character of the organization in which the individual functions, what I call its “ethics environment.” The values and unwritten rules of a government organization can make it hard for an official to act responsibly. Or they can make it easy. A good, comprehensive ethics program that has the full support of most high-level officials makes it hard for an official to misuse her office to help herself or others. A poor ethics environment makes an official feel like a chump if she doesn’t misuse her office, and like a rat if she tells someone he shouldn’t do something or reports misconduct to an ethics commission.

In our individualistic society, we easily understand harm done to individuals, such as the undermining of reputations, but we do not so easily understand harm done to institutions or communities. In any scandal, most of the talk is about personal misconduct, personal integrity, and personal reputation. The effect on the community's pride, citizens' participation in government, and the anger citizens feel is rarely discussed (the principal exception is the misuse of taxpayer funds).

If we lived in a sociocentric society, people would instead talk of the effects of ethical misconduct on the tribe and, possibly, how our ancestors would feel and act if we engaged in misconduct. We do talk of the Founding Fathers to buttress our arguments. But we don't

talk of how our actions today would cause them agony and possibly lead them to take vengeance on us.

Non-Conflict-Related Conduct

Despite that word “ethics,” a local government ethics program deals only with conflicts of interest, not other types of official misconduct and certainly not types of misconduct in which officials engage outside of their government role. And yet many local governments try to use an ethics program to deal with misconduct by officials such as incivility, dishonesty, and the like.

Regulating civility, honesty, and the like is very different from what an ethics program does. An ethics program’s priorities are training, advice, and disclosure. It is hard to train someone to be civil and honest, one cannot give them advice before they act uncivilly or do not tell the truth, and there is nothing to disclose.

In other words, while enforcement is the lowest priority in a government ethics program, it is the top priority in a program to regulate other kinds of misconduct. Since these other kinds of misconduct are more frequent than the irresponsible handling of conflict situations, this shifts an ethics commission’s priority to enforcement, greatly increases its cost, and turns an ethics program into a series of personal and/or partisan squabbles.

In addition, while government ethics enforcement is based on clear prohibitions and requirements, regulating incivility and the like means vague rules that are very hard to enforce fairly. One can argue for hours over whether an official acted without appropriate civility, or whether an official lied, made a misrepresentation, misstatement, or whatever. One cannot argue for hours over whether an official helped his sister get a no-bid contract.

This is why, non-conflict-related misconduct has no place in a local government ethics program. Such misconduct should be dealt with in a Code of Conduct that is enforced by supervisors and, on boards, by the chair. All boards that are run according to Robert’s Rules have disciplinary rules and a procedure for enforcing them (Chapter XX). If a chair cannot or is not willing to enforce disciplinary rules, he or she should be replaced.

Dealing with Conflict Situations Personally and Professionally

The personal things about ethical decision-making in a government context are (1) an official having the strength of will to act responsibly, or seek professional advice, when it seems that

there is something to gain by acting irresponsibly. This is especially difficult when acting responsibly is not the norm in one's organization, and (2) an official having the imagination to recognize that, in the long run, he may lose out far more by acting irresponsibly than he will by acting responsibly and sacrificing a potential benefit in the short run.

The most professional thing a government official can do, when uncertain whether he is in a conflict situation or how to deal with it, is to discuss the matter with neutral individuals, especially an ethics adviser. If the government has no ethics adviser, the next best thing may not be a government attorney, because they tend to take a legal rather than ethics approach to ethics laws, and they are often biased toward the officials they know and represent.

The encouragement of open discussion of the ethical aspects of decisions is the hallmark of a healthy ethics environment. Ethical teamwork is very much like any kind of professional teamwork. But first you must recognize that government ethics is not personal, but professional.

The Role of an Ethics Environment in Ethical Decision-Making

Officials need to be honest with themselves and each other about the quality of their ethics environment and how it affects their ethical decision-making. They need to consider what the norms of their organization are, that is, what others do and do not do, what they keep secret and what they are open about, and how afraid they are to talk with higher officials about their ethics matters or to report ethical misconduct. When they are uncomfortable with these norms, they need to ask themselves whether they are appropriate for individuals who have been given the authority to manage their community and, therefore, have special obligations to the public.

Officials also need to consider what their obligation is not only for handling their own conflicts, but also for helping those around them responsibly handle their conflicts when they are blinded by their obligations to those with whom they have a special relationship, or they are too caught up in the values or overwhelmed by the pressures of a poor ethics environment.

Bad People and Government Ethics

Sometimes, officials raise the issue of character to argue that no laws or program can do anything to stop people who lack character. This rings true to us. Bad people do bad things.

There are three responses to this. One is that no one is all or even mostly bad. Two is that ethics programs are not for the worst people, but for ordinary people, who need guidance in dealing with difficult conflict situations. And three is that the worst people do not act in isolation. They act either with the support or acceptance of their colleagues, or in opposition to their colleagues. A good ethics program takes away this support and acceptance, so that the worst people have to work alone and take a huge risk in order to misuse their positions to help themselves and others. People are less likely to engage in ethical misconduct when they know they cannot count on those around them to keep their conduct secret.

People who say that ethical misconduct is based on an individual's character are saying that it is unavoidable and unfortunate. They say that we are helpless other than by trying to enforce laws against it, and that clever people can find loopholes in them. When instead one sees ethical misconduct as an injustice – unprofessional, unfair, and damaging to the community, in terms of money, pride, participation, and the attraction of businesses – one sees how important (and possible) it is to prevent this misconduct through means other than mere enforcement.

2. Personnel vs. Ethics Issues

Agencies and departments often view conflict matters as personnel issues, especially when they involve employees. This view can lead to employee matters being excluded from an ethics commission's jurisdiction, or at least from an ethics commission's enforcement authority. In such an ethics program, when an ethics commission finds an employee has violated an ethics provision, the commission must turn the matter over to the employee's supervisor.

Often ethics commissions are not even told about conflict matters. Instead, they are handled internally, either by an agency or department, by a police or fire commission, or by a local legislative body, when its members or staff are involved. Sometimes, as with employees accepting gratuities, this is reasonable, since for any individual employee tipping is a minor matter, but for an agency as a whole it can be a serious problem, requiring a clear rule and enforcement by supervisors. But more often, handling conflict matters internally is

a matter of power and turf, where the agency, department, or body does not want an outside body involved in its affairs. “Personnel issue” is a justification, not an argument.

The handling of conflict situations does have a performance aspect to it. An employee who mishandles a conflict situation has acted unprofessionally. But if a local government has set up a government ethics program to provide guidance, oversee disclosure, and enforce ethics laws, the importance to a supervisor or personnel department of the performance aspect of such conflict situations must give way to the need for consistent ethics guidance, oversight, and enforcement.

The best thing for an ethics program to do is give supervisors, the personnel department, and union representatives special ethics training that will allow them to understand the value of independent, consistent ethics guidance and enforcement. In addition, the ethics commission and its staff should work hard to develop a good working relationship with those who deal with personnel issues. An important goal of this relationship should be to ensure that, when a gray-area question about authority arises, the two sides will discuss it and work out in a cooperative manner who has jurisdiction. If they cannot, there should be some formal way of determining jurisdiction. And that way should not include any local government officials.

3. Government vs. Administrative Ethics

The field of administrative ethics differs from government ethics in several important ways. One, administrative ethics focuses on government administrators more than on elected officials. Two, its concept of “ethics” includes not only conflicts of interest, but also integrity, honesty, civility, pride, accountability, compassion, respect, non-discrimination, obeying laws, taking responsibility, having good character, making good decisions, and considering all stakeholders. Conflicts are only a small part of administrative ethics.

Three, administrative ethics codes are primarily aspirational in character and in language. That is, unlike government ethics provisions, their provisions are not intended to be enforced. Instead, they are intended to show public servants how they should act.

The values of administrative ethics are incorporated in ethics codes drafted by professional associations such as the [American Society for Public Administration](#) (ASPA) and the [International City-County Management Association](#) (ICMA). The ICMA, a professional

association for city and county managers, does have an enforcement mechanism. However, the provisions are primarily aspirational in character.

Most of the books and articles on ethics in government involve administrative ethics rather than conflicts of interest, as can be seen in [this book's bibliography](#). This is also true of most of the university courses in this field. This has created confusion, since the same word – ethics – is used. This confusion is responsible for some of the misunderstanding that administrators have about government ethics.

A principal reason that government ethics cannot cover the same ground as administrative ethics is that government ethics requirements are enforceable. Much ethical misconduct cannot be prevented through enforcement, at least without enormous expense and without turning the ethics process into a political and personal circus.

One form of ethical misconduct that is particularly difficult to enforce is bending the truth. Politicians bend the truth all the time. It isn't that this is acceptable. It's just very hard to enforce. Defending a misrepresentation leads to more misrepresentations and other forms of dishonesty. It can get really ugly. Truth is too slippery, and precious, a thing to enforce.

Another problem is that, if an enforceable ethics provision required all government officials to tell the truth, there would be ethics complaints filed on a weekly basis, and the ethics commission would spend so much time trying to deal with half-truths, distortions, mistakes, misspeakings, and false inferences that no one would volunteer to serve on the commission anymore.

In addition, ethics programs would be all about enforcement, with training, advice, and disclosure taking a back seat.

Some ethics codes do include aspirational provisions. This is acceptable, but only if the two are clearly separated from each other, and it is made absolutely clear that the aspirational provisions are unenforceable. The best practice is to place the aspirational provisions at the beginning of the code, in a Declaration of Policy or the like. It should be expressly stated that the prohibitions or requirements in a Declaration of Policy may not be the subject of complaints or advisory opinions.

If this is not done, ethics commission members may feel they are required to enforce the aspirational provisions. This makes officials feel that ethics enforcement is the sort of unfair, gotcha! thing they fear the most. When aspirational provisions were treated as enforceable by the District of Columbia ethics board in 2013, the respondent, a council

member, correctly argued that several of these provisions were so vague that to enforce them would violate due process.

Placing what appear to be enforceable ethics provisions among aspirational provisions can be confusing. In 2012, Chicago added an aspirational Code of Conduct to its ethics code. The problem is that this Code of Conduct includes two important provisions that are commonly enforceable (and are otherwise enforceable under the ethics code): misuse of confidential information and misuse of city resources. It is confusing to have the same provisions in a section that is expressly unenforceable as well as in a section that is expressly enforceable.

Unfortunately, the ethics codes of some local governments consist primarily of aspirational provisions, and yet they are enforced. These codes, which focus on character and values, are not conflicts of interest codes, but they sometimes are part of what otherwise appears to be a government ethics program. It is important to distinguish these two kinds of code. Unfortunately, the term “conflict of interest code,” which better describes a true government ethics code, is used only by New York City and a small number of other local governments.

Albuquerque’s [Ethical Public Service Act](#) has an extensive aspirational section, written in the first person (e.g., “I do not lie cheat or steal, or tolerate those who do.”). The provisions on enforcement of aspirational provisions is worth sharing:

(A) The seven values of ethical public service . . . govern all actions of public servants. The seven values are guidelines for behavior, and do not by themselves create a basis for discipline or other consequences.

(B) For violations of the seven values that are not prohibited by a specific law or the prohibited behavior section of the Ethical Public Service Act, the consequences are the loss of personal respect and the diminished reputation of all public servants.

This is a responsible way to deal with aspirational provisions. Unfortunately, some of the *enforceable* provisions in the Albuquerque ethics ordinance are also aspirational, such as lying, and others involve areas of law other than government ethics, including criminal conduct, such as theft, and sexual and racial harassment. These are complex areas that should be left to the criminal justice system and personnel departments.

4. Influence vs. Pay to Play

The common view is that contractors, developers, and lobbyists seek to influence the decisions of government officials. To do this, they tempt officials in many ways, benefiting them directly through gifts and campaign contributions, and indirectly through giving business to their law firms and hiring their relatives. From this point of view, officials are relatively innocent victims who either do or do not give in to temptation.

Sometimes it is government officials who take the initiative. They seek to get something for themselves from contractors, developers, and their lobbyists. They misuse the power of their office to get a wide range of gifts, direct and indirect, legal and illegal, because they know that contractors, developers, and their lobbyists learn very quickly when and how they must pay in order to get the contracts and permits they want. From this point of view, contractors and developers are relatively innocent victims of extortion, commonly known as “pay to play.”

And sometimes those seeking special benefits from a local government get caught in the middle. Take a developer hired by a landowner who is in a rush to get a building built, whatever it takes. The developer knows that certain officials are happy to facilitate getting the project approved in half the usual time, if the right steps are taken. It doesn't matter to the developer whether it is a matter of influence or pay to play. It's just a matter of meeting a customer's demands.

It is valuable to be able to differentiate among these situations. But it is more important to recognize that government ethics generally does not differentiate, because government ethics does not generally consider intent or motive. A gift is a gift, no matter who initiated it or why.

Some criminal laws, however, do distinguish between influence and pay to play. And people in different positions (officials, contractors, good government groups) often portray the same conduct very differently.

The biggest problem, from an enforcement perspective, arises from campaign contributions, because they cannot be prohibited (there are, however, some limits or prohibitions on contributions made by government contractors). But elected officials do have the opportunity to do something about this problem. What they can do is return contributions from those the public might see as seeking to influence them. They can even

say at the beginning of a campaign that they will not accept contributions from any individual or company that is regulated by, does business with, or may be seeking to do business with the city or county. This might sound like a fantasy, but candidates actually do this.

Rejecting this important source of campaign contributions puts a candidate at a disadvantage. But those given such contributions are usually incumbents, so they already have an advantage. And they are in a position to push for public campaign financing, which makes the contributions of contractors and developers smaller and, therefore, of much less importance.

It is important to recognize that, when it comes to both influence and pay to play, the government official is in control. Gifts and contributions from those seeking benefits do not simply happen to officials. They can reject them and let it be known that they will reject them. Whether it is influence or pay to play, officials have a special obligation to the public not to create the appearance that their decisions are for sale.

There is a great deal of creativity wasted on the games of influence and pay to play, because bribe-taking is a serious crime. These games are very often the cause of ethical misconduct in local governments. They are especially prevalent in poor ethics environments.

5. Government Ethics vs. Crime

Most local government ethics program originate or are improved after local scandals that involve crimes such as bribery, fraud, and embezzlement, rather than after instances of mishandling conflict situations. Since most local governments cannot pass criminal laws, or have any effect on criminal enforcement, they turn to what they can do: ethics laws and ethics enforcement.

But since the impetus for change is crime, local governments often create criminal sanctions for ethical misconduct, at least when they can. The crimes are usually only misdemeanors, and yet sometimes they include the possibility of incarceration.

There are two principal problems with this confusion of ethics and crime. First, it ignores the fact that ethics programs are intended to stop ethical misconduct before it becomes criminal misconduct. Enforcement is not an ethics program's principal goal; prevention is. Prevention is done primarily through training and advice, and through the

creation of a healthy ethics environment, which includes transparency and the open discussion of ethics issues in every context.

Second, for most ethics violations criminal enforcement is overkill. There is no reason, for example, to bring in prosecutors to deal with officials who file their disclosure statements late; the pressure should come from their supervisors and board chairs, whose responsibility it should be that all their subordinates or board members file on time.

Ethics enforcement, when it is necessary, should be relatively simple, quick, and inexpensive, usually ending in a public settlement that provides guidance to other officials. It is much harder, and far more expensive, to bring a proceeding, and get a settlement, when the enforcing authority has to prove guilt beyond a reasonable doubt (the criminal standard of proof) and, in most cases, intent. This is why criminal cases are rarely brought for ethics violations. When they are, it is often for political reasons, since district attorneys, unlike independent ethics commission members, are political animals.

Ethics enforcement has a far lower standard of proof, much more relaxed presentation of evidence, and little or no requirement to prove intent. Therefore, ethics violations are far easier to investigate, and ethics laws are far easier to enforce. On the other hand, no one goes to prison and fines are relatively low. When penalties are too high, officials will fight for their lives, and the ethics program will be expensive, distorted away from its emphasis on prevention, and sometimes destroyed in order to prevent further enforcement and expenditures.

The difference between ethics and criminal enforcement can be seen in the difference between a gift and a bribe. Criminal law says that a gift intended to influence an official is a crime, but it is very difficult to prove that a gift was intended to influence. This usually requires that phones be tapped or individuals be wired. Ethics codes say that a gift from someone doing or seeking business with a local government is prohibited. No proof of intent or influence is required and, therefore, little investigation needs to be done or evidence presented. With such easy proof and an effective ethics program, influence and pay to play become difficult to pull off, so they are prevented. With only criminal enforcement, officials, contractors, and developers are only vulnerable to the rare sting, so there is less prevention and more scandals.

When there is no effective ethics program, ethical misconduct often leads to criminal misconduct. For example, a town commissioner in Florida started out using city stationery

for personal business purposes, and moved on to unauthorized junkets, a phantom campaign worker, an undisclosed conflict that might have led to criminal charges had a reporter not forced disclosure, approval of an overpriced land purchase, and involvement with free tickets and missing funds at local festivals. And then the commissioner apparently turned a local business association into a family affair. First, she worked for it and arranged for a sizeable loan to the association from her brother. Then her daughter became the association's president. The commissioner did not disclose her family's involvement and voted on matters involving the association, including a grant that would have helped pay back her brother's loan.

She is one of many politicians who has trouble separating the personal from the public. But she had no help with her problem, it eventually led to an indictment. A good ethics program would have helped her with her problem and prevented this. Criminal enforcement alone simply puts people in prison after they have seriously undermined the public's trust in government.

Another confusion between government ethics and crime occurs when an ethics commission treats criminal behavior and other misconduct as if it were under its jurisdiction. An especially damaging example of this occurred in San Francisco in 2012, when four out of five ethics commission members found that the sheriff had committed "official misconduct" by bruising his wife's arm and pleading guilty to the crime of false imprisonment of his wife. Only the ethics commission chair understood the distinction between ethical misconduct and other misconduct, writing that the sheriff had clearly engaged in misconduct, but that it was not "official" misconduct because it was not committed in "relation to the duties of his or her office." He asserted that, without this clear definition, the city risked confusion and ad-hoc future interpretations of "official misconduct."

To determine whether an official's conduct should be treated as an ethics matter, one should ask the question whether the conduct directly or indirectly involved government resources, those seeking special benefits from the government, or situations where the official, as an official, is wearing two conflicting hats.

6. Ethics vs. Compliance

Another common confusion is between government ethics and compliance programs. These programs take different approaches to and, for the most part, deal with different kinds of misconduct. With respect to ethical misconduct, they are complementary approaches that should work in concert, not in competition.

Compliance, which is the most common corporate approach to “ethics,” shares with government ethics an emphasis on rules, but the rules compliance focuses on are much broader, with special emphasis on such areas as accounting, procurement, and other administrative processes. Its principal rules can be found in the [Federal Sentencing Guidelines for Organizations](#), and its principal purpose, besides preventing criminal misconduct, is decreasing the severity of fines against an organization, which are mitigated by up to 95% if a court finds that the organization had an effective compliance program.

In government, the focus of compliance programs is on waste, which is not an ethics issue; embezzlement, which is a criminal issue; and fraud, which is also a criminal issue. Compliance is the work of auditor and inspector general offices. As with criminal authorities, investigation and enforcement are more central to these offices than they are to a government ethics program, which emphasizes training, advice, and disclosure. A compliance program’s prevention primarily involves such things as accounting and procurement rules.

And yet often the two approaches are put in competition with each other or combined. After a scandal, the goal is to set up programs that make the public trust their local officials, and little thought is given to how well they’ll work together. It is true that inspector general offices often have better investigatory personnel, and they can be helpful in certain ethics investigations. But if they are not well integrated, an ethics commission and a compliance or inspector general office can step on each other’s toes, especially in terms of turf and priorities, and undermine their shared good government goals.

In addition, when there is talk of ethics reform, it is thought that an inspector general is enough. People do not understand or make clear the difference between what inspectors general and ethics commissions do, or how much less expensive a government ethics program is than criminal enforcement (although the costs of criminal enforcement against local officials are generally paid by the state rather than the local government, to taxpayers this distinction matters less than it does to local officials).

The work of ethics commissions and inspectors general do not overlap; they are complementary. An ethics commission and its staff provide training, independent advice, oversight of disclosure, and enforcement with respect to officials' conflicts of interest, all things an inspector general does not provide. An inspector general's office might do investigations for the ethics commission and might uncover ethical misconduct in other investigations, but that is its only possible role in government ethics.

7. Government Ethics vs. Judicial Ethics

Judicial ethics, like government ethics, deals primarily with conflicts, and many people, including judges, think that government ethics is pretty much the same as judicial ethics. But there is one very big difference: we expect judges to be impartial, to not have made their minds up on a matter before they hear it. However, we do not expect elected officials to be impartial. In fact, we often vote for candidates *because* they are partial, because they have the same positions we do.

Here's an example. When the head of a local environmental organization opposed to development along the local river is elected to the council, opposing this development as a council member is not a reflection of his relationship with the organization, but rather it is the position he was elected to take. But the same relationship with this organization would be a conflict for a judge were an appeal of a decision on the riverside development to come before his court.

Some ethics codes use the language of "impartiality." This is inappropriate. Officials' impartiality is limited to individuals and companies with which it has a special relationship. It does not apply to policies.

8. Government Ethics vs. Legal Ethics

The difference between government ethics and legal ethics is even greater than that between government ethics and judicial ethics. Legal ethics does deal with conflicts, but with a much more limited range of them, compared with government ethics. And a lawyer can ask a client to waive a conflict.

Government officials can't ask a client to waive a conflict; their client is the public. Only an ethics commission can waive a conflict.

As for government lawyers, they are held to a much broader range of ethics rules than legal ethics provides. Yet, government lawyers sometimes argue that they shouldn't be subject to local government ethics laws because they have their own ethics rules and their own ethics program. However, their profession's ethics rules are limited, and their profession's ethics programs are self-enforced. Therefore, legal ethics rules and enforcement have no bearing on government lawyers' conflicts. The one exception involves part-time government lawyers whose representation of clients other than a city or a county (including another city or county) might give rise to a conflict that can best be dealt with by a legal ethics program.

Other professions have ethics rules and programs, but no one says these should exclude them from the jurisdiction of government ethics programs.

An important government ethics issue is, Are government lawyers officials who happen to be lawyers, or lawyers who happen to be officials? I take the former position.

9. Accountability

It is often argued that the democratic way to ensure accountability is to vote an official out when he has acted unethically. This argument is often used to oppose the creation of an ethics program. It is said that such a program is unnecessary: ethics enforcement is better done at the polls.

This is wrong for several reasons. One, citizens cannot act on what they don't know. Without a good ethics program, there is no reason to believe that citizens will know about ethical misconduct. If accusations are made, there is no way for citizens to know if they are true or not, or make a correct determination of the truth. They may vote out officials who have done nothing wrong. In any event, most citizens don't pay close attention to accusations made against officials, don't have much understanding of government ethics, and are unlikely to remember what happened when the next election rolls around.

Two, there is no reason to believe that ethical misconduct will be the determining factor in many people's voting decisions, as opposed to policies and the qualities of other candidates. And many candidates run unopposed or against a very weak opponent.

Three, voting an official out of office is a harsh sanction for most ethics violations. The polls argument assumes that someone who violates an ethics provision lacks integrity, rather than that she lacks good judgment and access to good ethics advice.

Four, most officials are not elected.

Five, with respect to officials who represent a district, an official's constituents are not the only ones who have an interest in protecting the integrity of public offices. Every citizen of a city or county has an interest in having the officials who run their community act in the public interest. Therefore, it should not be up to district voters to enforce government ethics. They might very well benefit from their representative's ethical misconduct, while the rest of the city suffers from it.

Accountability goes far beyond the ballot box. An ethics program is another important way to hold officials accountable.

10. Independence

It is important that an ethics program is independent in order to ensure that it is not seen as controlled and manipulated by people under its jurisdiction, especially high-level officials. An ethics program with a conflict at its heart will not be trusted by the public.

Most independent agencies and authorities are independent for a different reason. They are independent because their head is separately elected, because their jurisdiction is not the same as any one government (this is especially true of regional transit, water, and other authorities), because that's the way these things are done (e.g., housing authorities), or for historical reasons (often because one official wanted to create a fiefdom for himself).

When these independent agencies and authorities insist on independence from independent ethics programs, they are asserting an authority that is not very relevant to the situation. It is true that an independent agency can create its own independent ethics program, but this is almost never done well. And if it is done, it is unreasonably expensive, since there is already an ethics program to which it could simply give jurisdiction over its officials and employees.

C. The Moral Development of Government Organizations

The way local governments deal with conflicts among their officials and employees shows their ethical maturity. James Bowman, in his book [*Ethical Frontiers in Public Management*](#)

(Jossey-Bass, 1991), usefully applied Lawrence Kohlberg's well-known stages of moral development to government organizations.

A Level 1 government, like a child, focuses on finding strategies to avoid punishment. It acts by manipulating situations, and uses victory as the justification for the tactics it uses. There is a strong feeling in a Level 1 government of Us vs. Them, and it is therefore marked by secrecy and paranoia. You've seen government officials acting like children, petty, squabbling, manipulative, deceitful, secretive, highly unprofessional. They're usually part of a Level 1 government, what is usually referred to as a government with a poor ethics environment. They do what they can get away with, treating the law (not to mention constituents) as something to get around rather than something to respect.

A Level 2 government, like the average adult, conforms to common practices, takes direction from legitimate authority, and bases its ethics on the law. A Level 2 government is not opposed to its community, but rather sees itself as an important part of it. It seems to act professionally, but it is really acting conventionally, doing its job.

A Level 3 government is truly professional. Professionals think for themselves and they think critically. They rely on open discussion, participatory management, critical analysis, and consensus. Their ethics comes not just from the law, but also from universal principles, such as fairness and justice. A Level 2 government might implement an unfair law. A Level 3 government openly and honestly debates a law to determine if it is fair. It does more than what is common and required, opening government up and considering the ethical implications of everything it does.

Ethics programs are not only different in governments that are at different levels, but they are treated differently by officials. In a Level 1 government, if they exist at all, many officials treat them as obstacles. Council members and other officials are usually at war with the ethics commission or successful in keeping it under their control or even inactive. In a Level 2 government, the ethics program provides laws that are to be followed, but only to the letter. Lawyers are the most important players in the ethics program. The ethics code's spirit is often ignored by officials. In a Level 3 government, the most important aspect of an ethics program is advice, because professionals want input from specialists to help them do their job right.

D. Why Local Government Ethics Is Important in the U.S.

Because the U.S. is considered one of the least corrupt nations on earth, it might appear that government ethics is a waste of time. Yes, people say, there are a few bad apples, but they don't really spoil the pie, or even cost taxpayers all that much. And the reason that politicians aren't trusted isn't that they're corrupt, it's that they're untrustworthy in general, and all they care about is themselves, while acting as if all they care about is the public.

It is this caring more about themselves than the public that is central to government ethics. Out-and-out bribery might be relatively low in the U.S. right now, but there are so many other ways for government officials to use their positions to help themselves and those close to them, often at the public's expense. In fact, it's more difficult to see corruption in the U.S. than it is in a developing country where officials will do nothing unless they are bribed. Here, everything happens behind the scenes. We don't see manipulations of contract specifications, sweetheart deals with developers, or the pay-for-play hiring of officials' family members by companies doing business with the city. We don't understand how laws and procedures are used to prevent the enforcement of ethics codes. We have no idea whether our local governments are following best practices with respect to ethics advice and financial disclosure. All we know is that things don't feel good or right.

It is important to recognize that corruption ("the abuse of entrusted power for private gain," according to Transparency International) is the norm, the default situation in government historically and internationally. There are and have been many cultures where the principal way to become rich is through political power. The U.S. political culture goes against historical precedent, for the most part, but in some cities and counties the culture is very poor.

Our political culture is precious, something we pride ourselves on and try to keep improving. It is also a beacon for others to follow to get out of their cultures of political corruption.

A hatred for government corruption was central to protests in the Middle East, as it was to the revolutions in Central and Eastern Europe in the late '80s. Government corruption is a serious problem in China and India, and throughout most of the developing world. In most countries, as in the U.S. throughout most of its history, the norm has been to

use government office to help oneself, one's family and friends, and one's business associates. When a nation's or city's culture accepts corruption, the whole barrel is bad, even if most of the people in it are good apples simply going along, or too afraid to oppose or disclose what others are doing.

Corruption is not a problem that simply gets better. It doesn't necessarily go away as a country becomes richer or more advanced. In fact, in 2010, the U.S. fell out of the top 20 least corrupt nations, according to Transparency International's Corruption Perceptions Index (by 2012 it was up to 19). Corruption can increase. It cannot simply be assumed that our governments, or those who govern us, will not become more corrupt. And it certainly cannot be assumed that our thousands of local governments have good ethics environments. In fact, people love to argue which is more corrupt, Chicago or Memphis, the local governments of Florida or New Jersey. The local governments of the U.S. are not where their citizens want them to be. Not yet. And backsliding is always a possibility.

The fact is that many more local governments have ethics scandals than have good, comprehensive ethics programs. There is more disclosure and access to damning information, but there is not more professional ethics guidance. And ethics training, where it exists, is still very limited. Most officials do not, therefore, understand government ethics, and they feel it is more a problem than a professional tool.

The result is that there is more to instill a lack of trust than there is to instill trust in local government. This makes it feel like things are getting worse (as polls show) when the reality is that things are getting better, only too slowly and in far too few jurisdictions.

It is important to recognize that poor ethics environments start at the local level. Most state and national elected officials start their careers running for local office. The values and habits they learn early in their career stay with them. Good ethics programs and healthy ethics environments at the local level could go a long way toward improving officials' ethical behavior at all levels of government.

This is also true of those who seek benefits from government. They need to be trained and brought into local government ethics programs in order to learn that they too have obligations as citizens to keep our country from being corrupt.

Finally, it is important to recognize that government ethics is less about individuals than it is about institutions. Government ethics programs seek to create and maintain within our governments the conditions needed to promote the integrity of our democratic process

and institutions. Not the integrity of individuals, but rather the effect both individual and institutional corruption have on the way our governments work and the way citizens feel about their governments.

Why Everyone Should Support Government Ethics

Americans tend toward three views of government: they think government is important to managing a community; they think it should be as small as possible; or they have specific problems with it, such as over-regulation. All three groups are naturally supportive of government ethics.

People who believe that government is important to managing a community usually believe that the public servants who represent and work for the community cannot legitimately deal with these matters unless they are committed to the public interest rather than to their personal interests.

People who believe that government is a necessary evil, and should be as small as possible, are generally more distrustful of government than pro-government people, and also more concerned with government officials sticking their hands into citizens' pockets. Therefore, they are strongly supportive of efforts to ensure that public servants do not use government power and tax dollars to enrich themselves, their families, and their business associates.

Those who are more specifically anti-government, such as businesses that want less government regulation but support other government roles, generally favor local government ethics, because they want to work with government officials they can trust. The one exception is local businesses that receive favors from a local government run to further its officials' interests and the interests of their business associates and supporters. This is why, although business associations in larger cities are often important supporters, even leaders, of ethics reforms, in smaller cities, towns, and counties they are rarely supporters of effective ethics reform.

II. What a Local Government Ethics Program Consists Of

A local government ethics program is not just an ethics code and an ethics commission. Even in a town or small county, other elements are necessary to have an effective ethics program. The most important elements are training and advice. Without quality training and timely, professional advice, ethics programs are usually ineffective. They can also become (or, more likely, appear to be) the kind of gotcha! enforcement regimes that politicians fear.

Here are the essential elements of a local government ethics program, according to Mark Davies, longtime director of New York City's Conflicts of Interest Board:

- (i) clear and comprehensive conflicts of interest code, providing clear guidance to officials, employees, contractors, and citizens;
- (ii) three kinds of sensible disclosure of interests: an annual disclosure statement, disclosure when a conflict arises (transactional disclosure), and disclosure when someone bids for business or requests a permit (applicant disclosure); disclosure is the democratic way of letting people know about possible conflicts of interest;
- (iii) effective administration, featuring an independent ethics commission with teeth, which gives swift advisory opinions, which has a monopoly on interpreting and enforcing the code, which can give waivers for exceptions, and which provides training for all officials and employees, as well as for everyone who does business with the local government; and
- (iv) whistle-blower protection so that government employees (the people who know what's going on) and others will be able to report violations without endangering their jobs and pensions.

Other important elements of an ethics program include oversight of the disclosure process; jurisdiction over agencies and over those who seek special benefits from or are regulated by the government, such as contractors, developers, and grantees; a hotline; and adequate, guaranteed funding. For larger jurisdictions, there are also lobbyist, campaign finance, and transparency laws, which may be administered by the ethics commission or by another office or body.

Most ethics programs are created or improved after a scandal occurs, often a scandal that has little or nothing to do with government ethics. The approach in such a situation is usually to start from nothing or from a limited program, and add something to it. Another scandal, another addition, without any idea of what a local government ethics program should look like, no vision of how the pieces work together or what the goals are, other than to put out a fire.

A better approach is to consider all the possible elements and laws, and then place the burden on officials to argue why each element and law should not be included, or should be included only in a limited form.

Some people say that an ethics program is an unnecessary increase in government bureaucracy or unnecessary because ethics decisions are obvious. Anyone who skims through this book will quickly realize that government ethics decisions are far from obvious. And government ethics programs are not expensive; in most cases they save money but, more important, they increase citizen trust and participation in government, and improve the reputation of a community, both of which are invaluable. Nor do ethics programs impose requirements other than the responsible handling of conflicts between personal interests and the public interest. The only conduct they regulate is the public conduct of public servants and of people and companies that seek special benefits from or are regulated by the government.

Ethics Environment

Nothing is more important to an ethics program's success than a local government's ethics environment.

What is an ethics environment? Its principal characteristic is leadership, both in the government and in the community. An ethics environment is greatly facilitated by leaders who believe that citizens' trust in government is of paramount importance and who do what they can to help government officials and employees, as well as those who do business with the local government, deal responsibly with possible conflicts before they exist, when they become relevant to a particular matter, and after mistakes are made.

Besides leadership, nothing is more important to a healthy ethics environment than the open discussion of the ethics aspects of every matter. As with professional discussions of the best way to recycle, fix a bridge, or preserve open spaces, all officials and employees

must know that they may openly and honestly discuss possible conflicts (theirs and others') and disagree with their supervisors over how to handle them responsibly, hopefully causing the official to ask for ethics advice. This sort of discussion rarely occurs without the full support and encouragement of government leaders.

When a government organization has a healthy ethics environment, many people argue that there is no need for an ethics program. This isn't true. Leaders understand that an effective ethics program is an important part of ensuring the professional handling of conflict situations, thereby preserving the health of the ethics environment. In addition, an effective ethics program will help preserve the healthy ethics environment as new leaders take office and as circumstances in the community change (e.g., a development boom or a major transit project). There is no better time to start or improve an ethics program than when there are responsible leaders who understand the value of a government ethics program.

In a healthy ethics environment, leaders are not afraid of an independent ethics program, because they understand that the best way to prevent investigations and ethics proceedings is to do everything possible to prevent officials and employees from acting in ways that create an appearance of impropriety. The best way to do this is through training, advice, and open discussion, not the prevention or crushing of an ethics program.

In an unhealthy ethics environment, government is closed and not trusted, citizens who have no direct interest in local government decisions tend to stay away and leave the work to those who do. When it is perceived that government is run by those with personal interests, this undermines participation all the more. The result is an unvirtuous circle that deepens the community's lack of trust in its government and its unwillingness to participate in government.

A lack of ethics complaints is often considered to be a mark of a healthy ethics environment. It is not. Individuals, and especially government employees, are less likely to file ethics complaints when they believe an ethics program is not fair, is too weak or politicized, or is not supported by government and other community leaders. An ethics program that is controlled by politicians does not earn the public's respect. People do not believe it is worth the bother, or the risk, to file a valid complaint when, at best, nothing will come of it and, at worst, there will be retaliation against them. And in an unhealthy ethics environment there is secrecy and fear, which make it unlikely that people will know about ethical misconduct and that those who know will dare to report it.

Ethics Training

One of the most expensive parts of an ethics program is training. The more officials and employees who are trained and the more live training they get, the more the program costs.

But training, if done right, is also the best way to prevent the costs of investigating and enforcing, and the litigation that can arise from enforcement. It is the best way to prevent costs to taxpayers through ethical misconduct and the criminal misconduct it often leads to, and the cost to the community of having a poor reputation. And it is the best way to prevent the non-monetary costs to citizens, especially their lack of trust in their local government. Trust is a priceless commodity.

It is important with ethics training to put the most resources into training those who need it the most, that is, those who are in a position to make and influence important decisions: high-level officials, government attorneys, officials working in the areas of land use, procurement, licensing, and grants, and ethics commission members and staff. These individuals need live training that includes discussion. Those with less authority and, therefore, less occasion to put their personal interests ahead of the public interest, can more easily get by with videos or online interactive training.

Many local officials are resistant to ethics training, due to a false belief that people naturally understand ethics (and that attorneys' ethics training is applicable to government ethics, which is not the case). This belief is closely associated with a misunderstanding of what government ethics is (see [the previous chapter](#)).

No one has a natural understanding of how to recognize and discuss ethics issues, how to deal responsibly with conflict situations (theirs and others'), or when to ask for professional ethics advice.

This is especially true of ethics commission members, who often receive little or no training. They do not have a natural understanding of how to deal with minor matters, how to investigate major political footballs, or how to interpret ethics provisions. Ethics commission members need a great deal of specialized training that goes far beyond what is provided to ordinary officials and employees.

The best ethics training consists of an introduction to the concepts of government ethics and the psychological mechanisms that prevent officials from dealing responsibly with their conflict situations. This general introduction should be followed by consideration of

the elements and principal rules of the jurisdiction's ethics program, and a comparative look at other ethics-related laws and bodies in the city, county, and state, including personnel and compliance offices, the inspector general or auditor, and criminal authorities.

Then active discussions of specific case studies should follow, using local and regional cases as much as possible, since these will mean most to the participants. Case studies should be approached from the point of view of both complaints and requests for advisory opinions, since the approach taken is different.

The most important thing an official should take out of an ethics training class is that, when she has a special relationship with anyone involved in a matter, or when she is offered a gift, or when she wants to make special use of government resources, she should ask the ethics officer what to do, just as she would ask a lawyer when faced with a legal question or an engineer when faced with an engineering question.

Ethics Advice

When it comes to particular situations, the most valuable way of providing guidance and preventing ethical misconduct is the provision of ethics advice by the ethics program.

There are two kinds of ethics advice: formal and informal. Many ethics codes provide for only formal advice, which requires a written request and consideration by the entire ethics commission. Formal advisory opinions are an important way for an ethics commission to interpret ethics provisions with respect to specific situations, since no ethics code can take the wide range of possible situations into account. These interpretations, when made public, provide more concrete guidelines to local officials than any ethics provision can supply.

But it can take a long time before formal advice is available to the individual who requested it, since an ethics commission usually does not meet more than monthly, and its members may need more than one meeting to deal with a difficult issue, especially if it has questions for the official requesting the advice.

Because of the long and uncertain response period, many officials and employees, faced with an imminent need to act, will not seek a formal opinion. What they need is an informal opinion, that is, quick but professional advice which applies only the situation at hand. This is best provided by an ethics officer who is not otherwise a government official.

One additional kind of advice that some ethics commissions employ is the general advisory opinion, that is, an interpretation of an ethics provision which has not been requested, but which the commission believes is important to clarify the ethics code in areas or with respect to situations where there seems to be some confusion among local officials. Such general advisory opinions are often a response to multiple requests for informal advice.

Conflicts of Interest Code

A conflicts of interest code, usually known as an ethics code, is the most visible part of an ethics program. In fact, many people think it is all there is to an ethics program. Pass a law and you're done.

But a code is only one part of an ethics program, which is why I didn't put it first in this chapter. In fact, a code all by itself is often nothing but window dressing for a local government with an unhealthy ethics environment. It can actually be worse than no ethics code at all, because people will come to see that there is no effective ethics program and that, therefore, the government that acted as if it were creating an ethics program is not to be trusted. Since ethics programs are intended to increase trust in government, nothing could be worse than this.

A conflicts of interest code should be both clear and comprehensive. It should begin with a series of ethics provisions, move on to disclosure requirements, and then describe the powers and responsibilities of an independent body that has a monopoly on the interpretation, administration, and enforcement of the code, including training and advice. The code should set out the process for dealing with ethics complaints and requests for waivers and advice. And finally, the code should bring together, not simply refer to the numbers of, all city, county, and state laws, rules, and regulations that relate to local government ethics, so that all ethics laws can be found in one place, and read in relation to one another.

A conflicts of interest code should use the simplest language possible, especially in the ethics and disclosure provisions (as opposed to the administrative and enforcement provisions). It is irresponsible to draft ethics provisions that cannot be read by the average local government official. An unreadable ethics code does not provide guidance, nor can it be enforced when violated by someone who honestly did not understand it or who dishonestly, but equally effectively, employs the defense of a lack of understanding. An

unreadable ethics code quickly turns officials against an ethics program. They reasonably worry that it will be used to catch them unawares.

The language of an ethics code is not the only thing that makes it hard to read. It is also important to ensure that a code is organized so that the parts most useful to the ordinary official, that is, the ethics and disclosure provisions, go before the administrative and enforcement provisions. Definitions too should not go first, and they should be used for clarification alone, not to catch officials who don't check the definition of every word in the provisions. This is why there should be no rules in the definitions section (although including exceptions is permissible). In the online ethics code, each word that is defined should be linked to its definition.

The aspect of ethics code readability that is most often discussed by local legislative bodies is the length of an ethics code. They tend to show a preference for a short ethics code. But all that really matters is the length of the basic ethics provisions, because these are the only ones that most officials will read (officials read the administrative and enforcement sections only when they need to, and since they are so procedurally oriented, they need to be as long as they need to be). The best way to keep ethics provisions short is to have few exceptions or to put the exceptions in the definitions section. Keeping an ethics code short and simple does not require the exclusion of any important ethics provision. Nor does it require the omission of helpful comments after each provision. Length is not really an important issue; simplicity and clarity are far more important. Ethics codes can be made even more user-friendly through the drafting of a handbook and through ethics training.

Most local conflicts of interest codes are ordinances, but some ethics programs and bodies are created pursuant to a charter provision. It is important to make sure that charter requirements are followed carefully. Too often, they are ignored.

Conflicts of interest codes are supplemented by ethics commission interpretations, advisory opinions, regulations, and rules of procedure. It is very useful to include with the relevant code provision links to each interpretation, advisory opinion, and rule or regulation, so that those covered by the code can find all relevant information in one place. Relevant state laws should be included in a local ethics code for the same reason.

There are nine essential conflict of interest provisions, and others that are highly recommended. These provisions are discussed at length in Chapters [3](#) and [4](#).

1. Conflict of Interest. This most basic provision prohibits the use of one's position to do anything that may benefit an official or employee, his family, or his business associates, except to the extent a large segment of the community also benefits. It is important to define conflicts not in terms of interests, which are vague, but instead in terms of benefits and relationships, which are more concrete.

2. Withdrawal from Participation. Also known as recusal (the judicial term), withdrawal is what someone usually does to deal responsibly with a pre-existing conflict. Often withdrawal is seen as simply not voting on a matter, but it is far more than that. It means not discussing the matter, privately or publicly, directly or indirectly. It means not participating in the matter at all.

3. Gifts. Prohibiting gifts from those who seek special benefits from or are regulated or otherwise specially affected by the local government (usually referred to, in this context, as "restricted sources") is the most important way in which an ethics program takes bribery and pay to play out of the criminal sphere, where it is difficult to prove. There is no reason for gifts to be given to officials or employees by those seeking something from the local government. Most gift provisions allow gifts worth no more than, say, \$50 annually from a single source (which includes a firm's principals and officers, as well as affiliated firms), but it is questionable whether officials or employees, or their immediate families, should seek or accept a gift of *any* amount from a restricted source beyond, say, a cup of coffee at a meeting. There appears to be a profession that thinks up ways to take advantage of exceptions to gift provisions.

4. Representation and Appearances. These two, closely related provisions prohibit government officials and employees from representing others before the local government or even elsewhere when it is against the interests of the government, for example, in a suit against the government. The reason there are often two separate provisions is that an appearance is a much more concrete act, easy to prove, and yet there are many instances where representation can occur without an appearance, and such representation creates just

as serious a conflict situation as an appearance. Prohibiting just appearances leaves open a big area for abuse.

5. Confidential Information. This provision prohibits the use of confidential information to benefit oneself or others. It does not, however, prohibit the disclosure of confidential information when disclosure does not benefit someone. This is because (1) simple disclosure of confidential information is an administrative, not a government ethics problem; and (2) there are many instances where what is considered “confidential information” *should be* disclosed to the public. Because transparency is important to government ethics, an ethics code should have no provision that undermines transparency.

6. Post-Employment Restrictions. These provisions apply certain of the ethics provisions to officials and employees usually for a limited period of time after they have left their government positions. The provisions applied to former officials and employees are usually the representation and appearance provisions, the confidential information provision, and the conflict provision. The reason is that leaving government office to work for a company that did business with one’s board or agency makes it look as if the official was misusing his or her office to help the business, and was being rewarded for the favor.

7. Misuse of Local Government Property. This provision prohibits using or allowing others to use local government property for personal purposes, unless the use is generally available (e.g., use of the library, sports facilities, etc.). Local government property includes not only concrete things, such as vehicles and equipment, but also such things as expense reimbursements. This is the provision most often violated by ordinary employees.

8. Transactions with Subordinates. In a certain sense, this involves the misuse of local government property, except that it involves people. Violations of this provision can be very injurious to individuals, and can have a serious effect on morale.

9. Complicity and Knowledge. Bad apples are not the norm in government ethics violations. Usually, there are multiple individuals involved, individuals who either know what is going

on, and say nothing, or who are complicit in others' ethical misconduct. This provision makes complicity a violation, and requires the reporting of ethics violations.

Lobbying, Campaign Finance, and Transparency Laws

Larger local governments often have ordinances that deal with lobbying, campaign finance, freedom of information, and open meetings. These areas of government ethics are dealt with only tangentially in this book. The reasons for this are (1) there is not a great deal of lobbying in small cities, towns, and counties; (2) these areas tend to be dealt with at the state level, and states either prohibit, or have to approve, local laws; and (3) the laws relating to these areas exist primarily in larger cities and counties. In some cases, local governments can supplement state law, making requirements that are stricter than state law, for example, requiring earlier publication of meeting agendas or banning campaign contributions from local government contractors and lobbyists. There also a few local government public campaign financing programs. Sometimes, an ethics commission has jurisdiction over these areas, but more commonly they are handled by other bodies or offices.

Disclosure

The disclosure of relationships (e.g., family members, employers, partners, and clients) and information that suggests possible conflicts (e.g., property and business ownership) keeps the wheels of an ethics program well oiled. That is, by disclosing relationships and possible conflicts, officials and those seeking benefits from a local government do three things, all of which are intended to avoid ethics violations.

One, by disclosing, officials remind themselves of possible conflicts at a time when it is easier to deal responsibly with them, because there is no pressure on the official and there is time to ask for an advisory opinion. Two, disclosure lets other officials (such as supervisors, fellow board members, and those providing oversight) and the public (including the news media) know about conflicts that might arise, so that when a conflict situation does occur, there is information available for these people to make sure the conflict is dealt with responsibly. And three, disclosure means that officials regularly participate in the ethics program, which helps create a good, active ethics environment in the local government.

There are three types of disclosure, and two sides to disclosure (by the official and by individuals and entities seeking benefits from the government). The three types are (1) annual disclosure of financial and personal relationships and ownership interests (which are to be updated when there is a new relationship or interest); (2) “transactional disclosure” of conflicts when a matter comes before an official who has a conflict situation; and (3) “applicant disclosure,” that is, disclosure of relationships to officials, direct or indirect, by an individual or entity seeking a contract, permit, license, or grant from the local government.

Independent Administration

Since government ethics is all about conflicts, it is extremely important that there not be any conflicts in the ethics program itself. Officials under the jurisdiction of an ethics program have a conflict with respect to it. Therefore, they should withdraw from participation in the program, beyond training and requests for advice. That is what you do when you have a conflict.

Unfortunately, high-level officials rarely withdraw from an ethics program. High-level officials’ participation takes the form of selecting the members of an ethics commission and, sometimes, its executive director; making enforcement decisions; approving the ethics program’s budget; and, in the case of city or county attorneys, providing ethics advice and ethics commission representation. Sometimes, in fact, officials administer an ethics program themselves, alone or as part of a commission that also includes citizens.

In each case, such officials have many potential conflicts based on their own interests (in not being found in violation of an ethics provision) and their relationships with other officials, personally, politically, and sometimes financially. Whenever officials involved in an ethics program appear to act too indulgently toward other officials (or do not act at all, or appear to act to hurt their opponents), their involvement undermines the public trust.

In fact, high-level officials don’t even have to *act* in order to do this; if people do not trust the ethics program, they will not seek advice or file complaints at all. When an ethics program is inactive, this is often the reason.

This is why the independence of an ethics program from government officials is the single most important criterion for its effectiveness.

Fortunately, the trend today is to have ethics commission members selected by community organizations, to give the ethics commission full enforcement authority and a

guaranteed budget, and to have the ethics commission choose its own staff, who have a monopoly of providing ethics advice. These are the elements that make an ethics program truly independent. And trusted.

Enforcement

Here is an interesting way to look at the enforcement of a conflicts of interest code, based on Jonathan Haidt's book [*The Righteous Mind: Why Good People Are Divided by Politics and Religion*](#) (Pantheon, 2012). Although we humans are innately hierarchical, like the other apes, we made a political transition that allowed us to band together to punish alpha males who overly or improperly dominated our group. Weapons helped a lot, making physical strength less important. But language helped even more. Gossip was an effective way to keep people in line.

Ethics enforcement can be usefully seen as a formal, more fair and reliable form of gossip. It is one of the newer ways communities have developed to limit their oppression by leaders.

So, whenever there is a scandal involving misconduct by a high-level government official, the first thing everyone thinks of is enforcement of laws (although it does nothing to lessen gossiping). Training and advice are even more evolved ways of dealing with leaders who might put their self-interest ahead of the public interest, but the public hasn't caught up with this new idea yet. Nor have most elected officials.

The evolution from hierarchy to relatively egalitarian politics makes things more difficult and emotional when it comes to government ethics. If it were accepted that whoever fought successfully for leadership could do anything he wanted, the big gorillas in every community would hire and give contracts to their family members and supporters, and no one would complain. That is, after all, how dictatorships, and some political machines, run. There is even a name for this: kleptocracy.

As it is, elected officials sometimes come to feel like big gorillas, but they live in a culture where gossip (now made faster by the internet and its blogs) and the enforcement of ethics and criminal laws make reputation exceptionally important and worth fighting for, via accusations, intimidation, lies, and cover-ups.

It is also useful to look at a government ethics program as something owned by the public. It is the public, through an ethics officer, that effectively advises government officials

how to deal responsibly with their conflicts. It is the public, through an independent ethics commission consisting of ordinary, nonpolitical citizens, that enforces the code. It is in the name of the public that an ethics program ensures that the public interest will take precedence over officials' private interests.

Jurisdiction

If certain groups are excluded from an ethics program's jurisdiction, the others will feel that the program is unfair. Therefore, an ethics program should have jurisdiction over all local government officials, including the local legislative body and those who consider themselves independent agencies, such as sheriff's offices, law departments, housing departments, transit, water and sewer authorities, and the board of education (unless the state has an ethics system for boards of ed). An ethics program should also have jurisdiction over employees and board members of quasi-public and public-private agencies and authorities.

Government ethics rarely interferes with uniformed departments' oversight mechanisms, nor do its provisions overlap with legal and other professional ethics enforcement. Therefore, uniformed departments, lawyers and other professionals should not be excluded from ethics jurisdiction.

There should also be jurisdiction over government employees, including union members, although the less responsibility they have, the more limited are the ways in which they can have conflicts. Many minor matters, such as gratuities given to teachers or sanitation workers, are best handled by the personnel department or by supervisors.

In addition, ethics administrators should have jurisdiction over former officials and employees, government contractors and vendors, consultants, businesses seeking permits, licenses, grants, and other favors from the local government, lobbyists, and anyone who aids or induces ethics violations. It is important to include all parties to each transaction, so that all parties are enrolled in the program. By doing this, it is in everyone's interest to help officials deal responsibly with their conflicts. No one should benefit from officials' ethical misconduct.

Local government has changed over the last twenty years or so. The change often goes by the name of "privatization" or "public-private partnership." I like what George Frederickson calls it in his 2009 lecture ["Searching for Virtue in the Public Life: Revisiting the Vulgar Ethics Thesis"](#): "the modern extended state," the "vast public sea" in which

governments float. This public sea includes entities with various “shades of publicness”: nonprofit and professional organizations, contractors and developers, lobbying firms, political parties, unions (public service, construction, and others), and watchdog groups, as well as single-purpose jurisdictions (school, water, transit, and sewer districts and authorities), public-private organizations of all sorts, charter schools, utilities and other public monopolies, tribes, and numerous quasi-governmental agencies.

All these entities are involved in the governance of our communities. They enter into contracts or take grants from our local governments, and they take managerial and service-delivery functions out of the hands of public servants. The result, in terms of government ethics, is the removal of patronage, nepotism, embezzlement, and other sorts of misuse of office out of what is traditionally considered government and into these other entities.

No matter how public or private these entities are, they are involved in many complex conflict situations, which are too often outside the jurisdiction of any government ethics program, even when they involve governmental business or services and government funds. Being outside the jurisdiction of an ethics program does not only mean that ethics laws cannot be enforced against these entities and their officers. It also means that those who work for these entities get no ethics training, have no access to ethics advice, do not provide disclosure, and are not subject to transparency or lobbying rules. In other words, they fall into a huge loophole in ethics laws. And the loopholes are growing bigger.

Frederickson says that “the rise of the modern extended state is the dominant feature of our public life and of contemporary public administration.” And yet it has been practically ignored by government ethics. This is a mistake.

State and Regional Programs

Several states have ethics programs that cover all or some local officials and employees. However, some of these programs are limited in their ethics provisions or in their ability to enforce, slow in providing advice, or limited in the disclosure they require. Therefore, although state programs are independent of local officials, a local ethics program can sometimes do a far better job. Florida is an example of a state where state jurisdiction over local government ethics has not prevented numerous scandals. The result has been a recent increase and improvement of local ethics programs.

Regional and countywide ethics programs are a good compromise between state and local programs. They allow local governments to keep ethics programs local while allowing for more independence in administration, sharing the cost of a professional ethics officer, and having experienced and trained ethics commission members.

For another, excellent encapsulated version of what is essential to a local government ethics program, read [the statement of Mark Davies](#), executive director of the New York City Conflicts of Interest Board, to the Chicago Ethics Reform Task Force, dated February 14, 2012.

III. Basic Conflict Provision and Withdrawal

A. Conflicts of Interest

1. Conflicts

Conflicts are the central topic of government ethics, and dealing with them responsibly — usually by withdrawing from participation in a matter or rejecting the offer of a gift or a request to take improper action — is the central act in government ethics. The various issues and requirements in an ethics program have to do with different kinds of conflicts.

Conflicts involve personal relationships, with one's family members, one's employer and business associates, one's colleagues at work, one's friends, those seeking benefits from the government, and oneself.

Because it is impossible to define a "friend," friends are rarely included in ethics codes, at least by name, but that does not mean that government officials are not expected to deal responsibly with conflicts arising from friendships. In government ethics terms, the term "friend" should be defined backwards. That is, someone to whom an official gives preferential treatment is a "friend." Officials should not appear to be benefiting friends, because they shouldn't be giving preferential treatment to anyone. The conflict is just as real because the relationship is just as real; the only difference is the ability to draft a clear definition.

There is nothing wrong with having relationships, or with having conflicts, at least up to a point. By the time someone becomes a mayor, she will know thousands of people in the community, and will feel she owes many of them favors (and even more will feel she owes them a favor). Family members, business associates, political colleagues and supporters, and friends will have sacrificed a great deal to help her get to the top. Money may be only a small part of what they have sacrificed, but they will most likely expect money or business in return.

Some favors can be paid back, in the form of political appointments, as opposed to regular jobs. But officials other than a mayor — and in council-manager forms of

government not even the mayor — do not have the power to appoint anyone, or perhaps just an aide or two.

What about favors done for constituents? An official's relationship with an ordinary constituent does not create a conflict. Doing a favor for a constituent that the official would do for anyone (and that is part of constituent work, that is, not helping someone get a contract or a zoning change, for instance) is not an instance of favoritism, but rather its opposite: doing one's job. An official helping a constituent with whom she has no relationship will not be seen as putting her personal interests ahead of the public interest. See below for more on [the provision of constituent services](#).

Although there is nothing wrong with having relationships, when those relationships lead to an apparent conflict between an official's obligations to others and the official's obligations to the public, the conflict must be handled responsibly. Usually, but not always, this means that the official must withdraw from participation in any matter involving those with whom he has a special relationship. Many think this only means abstaining from a vote. But withdrawal means far more than this. It means not discussing the matter with anyone involved or anyone in a position to influence the matter, directly or indirectly. See [the section on Withdrawal](#) in this chapter.

It is important to keep in mind that conflicts are more important at the local level not only because there are more personal relationships, but also because, in local government, ideology plays a far smaller role than it does in states and certainly in the federal government. At the local level there are differences in policy, but party and faction tend to be more about power than about ideology. And power includes the ability to hand out the "spoils" of government, that is, jobs, contracts, licenses, land use changes, and grants. Therefore, personal relationships, and the mutual favors that are part of every relationship, play a far more important role locally than they do at other levels.

For example, a U.S. senator who argues that America's military must be strong enough to fight two wars at once is perceived as a neoconservative, not as someone who is favoring a brother who works for a military contractor. But a county commissioner who argues that the county needs a new courthouse will be seen as favoring a brother who owns the big local contractor that gets the bulk of the work on big projects such as this.

Because relationships with the most important people in an official's life are involved in conflicts of interest, it is important to be sensitive to the strain that can be placed on an

individual's relationships when she becomes a government official. We need to have compassion for the feelings of someone placed in such a dilemma, caught between loyalties to the community and to one's family, business associates, and friends.

Relationships are what conflicts are all about. It's not about laws or catching people. It's about what we know is important and what must not be allowed, as far as possible, to get in the way of fully acting in the public interest.

This is why conflicts cannot be managed in a purely legal way. They can only be managed by owning up to the full range of risks, of possible harm, discussing them with a neutral, professional ethics adviser and, when necessary, making serious sacrifices rather than creating a situation where the public will see you as acting for yourself, your family, or your clients instead of for them.

The Title of This Section of an Ethics Code

It's easy to come up with a title for most sections of an ethics code: Administration, Enforcement, Definitions. But what do you call the ethics provisions as a whole?

The most common title for the ethics provisions section of an ethics code is "Standards of Conduct." However, this is a term often given to personnel standards for conducting oneself on the job, involving relations among employees, not conflicts of interest. Some codes use the title "Conflicts of Interest," which is good, but should actually be the title of the entire code ("Conflicts of Interest Code"). A reasonable alternative is the simple descriptive term "Code Provisions." The [City Ethics Model Code](#) combines these two in its title, "General Conflicts of Interest Provisions" under Part A, which is called "Ethics Provisions." But I also like the title "Duties," which is the title used in the [International Municipal Lawyers Association Model Ordinance](#). This most simple of titles gets across the message that these provisions involve the obligation to deal responsibly with one's conflicts. "Obligations" would be an equally good title.

Prohibiting Conflicts

Despite the fact that conflicts are common and there is nothing wrong with having a conflict, many ethics codes expressly prohibit them. The basic conflict provision of these codes reads like this:

No person subject to this code shall have any interest, financial or otherwise, or engage in any business, employment, transaction or professional activity, or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her public duties or employment.

The problematic word in this provision is in the first line: “have.” If ethics codes are supposed to provide rules for dealing responsibly with conflicts, how can *having* a conflict be wrong in and of itself? You don't deal responsibly with bribery or theft or murder. That's why they're prohibited crimes. Conflicts are different. What is wrong is not *having* a conflict, but *creating* a conflict, for example, by investing in or going to work for a contractor or developer. Therefore, *having* a conflict should not be prohibited

By failing to understand government ethics, those who draft and pass code provisions such as this go far beyond what is necessary, or even desirable. The news media follows their lead, saying things like “The mayor has been accused of a conflict,” turning every minor conflict situation into a scandal, sometimes before it can be handled responsibly. Officials become defensive at the suggestion they have a conflict, rather than disclosing conflicts when they arise. Prohibiting conflicts turns officials against government ethics, and prevents the open discussion of ethics issues. Officials become afraid even to ask for advice, or they make sure they ask someone who will give them the answer they want, so that they have a good defense (or so they think) if their conflict becomes public.

New York City has a compromise position on this. Its conflicts of interest code prohibits holding an interest in a company doing business with the city, but if an official or employee already has such an interest, he may disclose it to the conflicts of interest board for a determination of what action is required (divestiture or otherwise) to deal responsibly with the conflict situation, under the following provision. Here is the language:

When an individual or public servant discloses an interest to the board pursuant to paragraph three of this subdivision, the board shall issue an order setting forth its determination as to whether or not such interest, if maintained, would be in conflict with the proper discharge of the public servant's official duties. In making such determination, the board shall take into account the nature of the public servant's official duties, the manner in which the interest may be affected by any action of the city, and the appearance of conflict to the public. If the board determines a conflict exists, the board's order shall require divestiture or such other action as it deems

appropriate which may mitigate such a conflict, taking into account the financial burden of any decision on the public servant.

The good thing about such a rule is that it draws the new official or employee's attention to possible conflicts. However, it also makes a lot of work for an ethics commission and, if it is not handled well, may require divestiture where it is not really necessary. Except for high-level officials, it is questionable whether divestiture should ever be required, unless the conflict leads to frequent withdrawal, that is, when the conflict is ongoing.

Ongoing or recurring conflicts are the one situation where having a conflict itself is the problem: when the conflict becomes an issue, or will most likely become an issue, on a regular basis. For example, if a zoning board member's husband is a big developer in town, every time that developer, or even a competitor, comes before the zoning board, the board member would be conflicted. Withdrawal is not sufficient where the conflict is recurring. A zoning board member cannot keep withdrawing and represent her community. In such a situation, the official should resign from her position.

But otherwise, resignation from a government job or position is usually unnecessary. In fact, it can send the wrong message: that having a conflict means you shouldn't get involved in government at all. It is important to recognize that one can irresponsibly handle a conflict by doing too little or by doing too much. Responsibly handling a conflict has an important educational function, which should be taken into account in ethical decision-making. The educational function is much easier for an ethics adviser to recognize than it is for an ordinary government official or employee.

The best time to deal with recurring conflicts, if they are foreseeable, is before a position is accepted or before someone runs for a particular office. This is one reason why it is important to provide ethics training to candidates and new officials and employees, and to require them to file a disclosure form. The earlier a conflict is handled responsibly, the better for everyone involved.

For example, if a candidate has a contract that would be illegal the day he took office, and he is very likely to win the election, he can get the bid process going so that there is a new contractor doing the work as soon as possible after he is elected. It's also important that a candidate make it clear during his campaign how he is dealing or will deal responsibly with

his conflicts. To do this most effectively, he should seek ethics advice. (For more on ongoing conflicts, see [the section on them below](#).)

Defining Conflicts in Terms of Benefits

Another mistake commonly made in drafting ethics codes is to use the language of “interests.” The public, officials, and people who do business with government think more in terms of obligations, benefits, and relationships. We don’t balance interests, we balance obligations. It may be a conflict of interest that is at issue, but it is the underlying relationships and the possible benefits to those with whom officials have special relationships, to whom they have special obligations, that we see. In other words, an interest in a transaction is far less concrete and understandable than the benefit someone might get from the transaction.

So this book will use primarily the language of “benefits,” “obligations,” and “relationships” rather than the language of “interests.” This difference becomes especially important when it comes to drafting an ethics code’s basic conflict provision. Here is the main part of the City Ethics Model Code’s conflict provision:

An official or employee may not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows, or has reason to believe, may result in a personal or financial *benefit*, not shared with a substantial segment of the city's population, for any of the following persons or entities (no group of government employees may be considered “a substantial segment” for the purposes of this provision):

“Benefit” is generally considered to include its double negative sibling, that is, the removal of a detriment, obstacle, or disadvantage. Some jurisdictions expressly state this. It should also be pointed out up front that attempts to use one’s position to benefit those with whom you have a special relationship are damaging whether they are successful or not. Therefore, attempts are also prohibited. Again, some jurisdictions expressly state this.

The other magic word is “relationship.” It is special relationships, existing or created by gifts or offers, that are at the heart of all conflicts. The relationships covered by the basic conflict provision are enumerated after the colon, and are [dealt with below](#).

Integrity and Appearance

When someone says she believes an official has a conflict situation that needs dealing with, many officials feel that their integrity is being questioned or that people are doubting that they can act in an unbiased manner. The official or a supporter says, “How dare you question my (his) integrity? I (he) would never do anything like that. I put my loyalty to my constituents ahead of loyalty to anyone or anything.”

Conflicts have little to do with integrity or character. Everyone has relationships with people who do business with a government, and everyone has obligations to others that conflict with their obligations to the public. In fact, people with unquestioned integrity can still put their self-interest or others’ interests ahead of the public interest, and they most certainly can be seen to be doing so.

Even individuals who think long and hard about ethical matters often make ethical decisions on an emotional rather than a rational basis. In fact, anyone who says, in response to questions about their conflicts, that they would never let a relationship, gift, or large campaign contribution affect their decisions is acting emotionally, not rationally or ethically. The reason is that anyone who has thought long and hard about government ethics knows that it is not the official’s belief in himself that matters, but the public’s belief in the official.

But there is something even more seriously wrong with an official referring to his integrity when someone raises the issue of a conflict existing. Mentioning personal integrity shifts the issue from the ethical conduct of a *government official*, which involves dealing responsibly with a conflict situation, to the individual’s character, whether he is a good or bad person. In other words, it is an excellent and popular way not to deal responsibly with a conflict, to consciously or unconsciously worm one’s way out of one’s responsibilities. Since no individual of unquestioned integrity would ever think of doing such a thing, then one of two things has to be true:

1. The official did not mean to worm out of dealing with the conflict, but when faced with an ethical decision, was not in control of his emotions. Therefore, there is no reason to believe he would act more rationally and responsibly when participating despite the conflict.
2. The official did mean to worm out of dealing with the conflict, and therefore his integrity is in question, and he is either lying about his character or believes it is different than it actually is.

Behavioral ethics studies, many of which are discussed in [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) by Max H. Bazerman and Ann E. Tenbrunsel (Princeton University Press, 2011), have shown that people tend to deal with ethical decisions emotionally, and then use their reason to justify what they have done. In addition, the authors show that people greatly misjudge how they will deal with an ethical decision, consistently believing they will do the “right” thing, but then doing what is in their self-interest.

In any event, where there is a good ethics program, government ethics does not require a great deal of ethical decision-making. Like many areas of government activity, there are rules to follow. When the rules do not clearly apply to a particular situation, an official seeks advice from the ethics officer or ethics commission in order to get a rational, disinterested approach to the situation. This takes the ethical burden off the official. This is why a good ethics program is more helpful to officials who want to handle conflict matters responsibly, those with integrity, than it is to anyone else.

What officials need to learn is that the part of government ethics where integrity most comes into play is in the setting up of a good ethics program, that is, one that provides quality training, and independent advice and enforcement. It is in recognizing that officials are not in the best position to deal with their own conflict situations, and then creating clear rules and an independent agency to deal with them, that officials can truly show that they are individuals of utmost integrity.

When the issue of an official’s personal integrity is raised, it is important to push the issue aside as quickly and respectfully as possible. The best way to do this is to explain that what matters is not an official’s integrity or her ability to be unbiased despite a conflict, but rather how the conflict situation appears to the public. And it is important to explain, as well, that the public cannot possibly know the level of an official’s integrity. The public can only know how responsibly an official has dealt with her conflict situation.

In order to deal responsibly with a conflict situation, an official has to go beyond her self-view, however true it might be, and accept the public’s necessarily limited view. It is hard to accept that what you yourself believe is immaterial. But that is the situation, and an official has to learn to accept it. It is much easier to accept if there is good ethics training and

frequent discussion of ethics issues, where the importance of the public's view of a conflict situation is acknowledged.

This is such an important concept that I will repeat it again, in a different way. It does not matter what a government official believes about his integrity, that is, about his capability to act without regard to his personal interests. Not only is this belief irrelevant to how he will actually act, but what matters most is what the public believes. Recognizing this difference between the personal and the public is at the very heart of what a public servant is, as the term itself makes clear when you stop and think about it. It is also at the very heart of government ethics.

Another way of putting this is, Having a conflict does not mean that when an official acts or votes, he will *be* corrupt. It means that if he acts or votes, he will *appear* corrupt.

Not only will he appear corrupt but, as James Madison said 225 years ago (in *Federalist #10*), "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." In other words, when officials act with a conflict, this does not necessarily mean that they lack integrity. But it does mean that their integrity will be corrupted, both in reality and in the eyes of the public. Every official who stands on his integrity should be read these wise words of Madison's. And recognize how valuable it is to have an ethics officer to turn to for advice.

Impairment of Judgment

Some conflict provisions speak of relationships or employment that "impair (or, sometimes, "prejudice") the judgment (or "the independence of judgment")" of an official. Some conflict provisions add "could reasonably be expected to impair an official's judgment."

There are three serious problems with this language. One, it is vague. What does it mean to have one's judgment "impaired" or "prejudiced"? When a conflict is defined this way, and there is no independent ethics commission, the determination of whether a conflict exists may depend on whether the official is in the minority or majority party or faction on the council or a board, or is popular with her peers, or has a good relationship with the city attorney if the city attorney is allowed to interpret an ethics code. In other words, when ethics provisions are vague, ethics enforcement is based on power rather than on clear rules that government officials and employees can be expected to follow.

Two, although people constantly question their memory, very few people ever question their judgment. And they certainly don't think their judgment is impaired or prejudiced by their relationships with or obligations to others. Nor do they feel comfortable openly questioning the judgment of others.

As Max H. Bazerman and Ann E. Tenbrunsel point out in their book [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) (Princeton University Press, 2011), we naturally see the world from our point of view. Our self-serving judgments lead us to different conclusions than others have regarding what is a fair solution to a conflict situation. “[W]e tend to first determine our preference for a certain outcome on the basis of self interest, and then justify this preference on the basis of fairness ... This difference in the way information is processed isn't just strategic; it happens whether we want it to or not. Our minds actually absorb the information that is advantageous to us and ignore information that isn't.”

The result is that our judgment is clouded, for example, our judgment about whether our conduct would be viewed as unethical. And there is no way for an official to recognize that this is going on. The authors don't even believe it can be taught. “Teaching individuals about the insidious influence of egocentrism has been shown to be effective at teaching them to recognize the egocentrism of others. Unfortunately, such training on egocentrism doesn't reduce the influence of egocentrism on our own behavior. While we recognize that others are egocentric, we don't believe the bias affects us — an egocentric interpretation of the egocentric bias!”

In other words, what people need is independent ethics advice, not rules that refer to the impairment of their judgment and proceedings in which officials argue that their judgment was not in fact impaired at all. This sort of discussion makes the ethics process look unfair, prevents little misconduct, and yet, due to the vagueness, catches some unsuspecting officials. This is not a good basis for a government ethics program.

The third serious problem is that the lawyers who draft such lawyerly language do not appear to have considered the vision of government ethics that lies behind this language. Is government ethics intended to prevent officials from having their judgment impaired? Having an unimpaired judgment sounds like something one asks of a judge, not an official. We *expect* our local officials, at least our elected and appointed officials, to have impaired judgments. That is, we expect them to have prejudices (e.g., for or against development), to

be partisan, to do what we elected them to do. What we don't want is for them to use the power of their office to help themselves and those with whom they have special relationships. None of this comes through when a basic conflict provision uses the judicial terms of impaired or prejudiced judgment.

Indirect and Indefinite Conflicts and Benefits

Most conflicts, like most relationships, simply exist. They become relevant only when a matter involving a related person or entity, for instance a sister or a business partner's other business, comes before an official. These are the conflicts for which the basic conflict provision is intended.

Other conflicts are created by events. For example, a contractor invites a council member, with whom he has no prior relationship, to play golf with him at his country club. Or a developer offers business to the law firm of a zoning officer's wife. These conflicts are treated in other provisions.

The simplest kind of conflict involves a direct financial benefit to the official. For example, a zoning board member's company comes before his board and would benefit from or be harmed by the board's decision. Or an official is offered a gift by a prospective contractor. These conflicts are relatively easy to see, understand, and handle responsibly.

But many conflict situations are much more complex. They involve different kinds of indirect and indefinite conflicts, which will be explored below. Most indirect conflicts are based on relationships between an official and the possible beneficiary of government action.

Indirect benefits appear to the public as no different from direct benefits. Wherever there are benefits and relationships, there is an appearance of impropriety that will seriously undermine the public's trust in its government.

It's important to recognize that an official's participation in a matter can benefit someone not just by putting money in her pocket or other concrete benefits, but also by preventing harm, such as a dump just behind her backyard. And there are even benefits that are not concrete, such as benefit to someone's reputation in the community.

It is also important to recognize that a benefit does not require that there be a profit. A contractor who loses money on a contract still was put in a position to benefit from it. An official who uses government resources for her business is still benefiting, even if the

business hasn't broken even. The success or failure of an attempt to profit from one's position is not relevant to whether there is an ethics violation.

De Minimis Ethics Violations

One of the biggest little problems in government ethics is filtering out situations where the benefit to an official was or would be very minor. Ethics violations based on minor benefits are called "de minimis" violations. Because it is impossible to define "de minimis," determining this is usually left to the discretion of an ethics commission or ethics officer. Usually, they are permitted to dismiss a complaint based on a de minimis violation. The ethics commission may choose to send the official an [educational or warning letter](#), or require an additional training session. Investigating, holding hearings, or reaching a settlement regarding allegations of de minimis violations wastes an ethics commission's or ethics officer's limited time and resources. Ethics administrators need to be able to use their judgment in deciding when not to investigate such allegations.

The place to provide this discretion is in the provision dealing with newly filed complaints. In other words, it's not part of the description of a conflict; it's part of the complaint procedure.

Some jurisdictions try to define "de minimis," but no definition can anticipate all the forms minor benefits and violations can take. For instance, Boise uses the following definition in its disclosure section:

A pecuniary benefit is de minimis if it does not exceed the value of fifty dollars incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality

This seriously complicates the issue, using a dollar figure that makes it appear concrete, but then bringing in such vague concepts as risk and impartiality. A dollar figure will seem high in some situations, but low in others.

But the real misunderstanding here is that de minimis refers to a benefit or to a violation. A de minimis benefit is still a benefit, and a de minimis violation is a violation just like any other. Whether something is de minimis is a question that arises when an ethics commission needs to determine whether or not an allegation is worth investing resources in

or how to recommend to an official how to handle a conflict situation. The determination is specific to the circumstances and, with respect to complaints, also to the commission's caseload and its current budget and staffing. The ethics commission is not saying that there would be no violation if the allegation were true, only that, even if it were true, it would not be worth investigating. Instead, a letter or training requirement is the best way to resolve the matter.

Seattle's ethics code recognizes this in the following provision from its Purpose section:

This Code shall be interpreted and applied to allow inadvertent minor violations to be corrected and cured without full hearing in conformance with the spirit and purpose of this Code.

Philadelphia's regulations offer a different look at what *de minimis* means:

The Executive Director may dismiss or suspend further processing of a complaint or other investigation if, in his or her judgment, the alleged violation is trivial, typographical or clerical, or in other respects a *de minimis* violation...

And here is the City Ethics Model Code language:

. . . if the Ethics Commission determines that an alleged violation is so minor that it is not worthy of investigation, then it will dismiss the complaint with notice to the complainant.

It's worth noting that the Philadelphia regulation expressly requires the ethics board to "report regularly to the Board on the number and nature of complaints dismissed or suspended under this subsection." Dismissals should not be taken lightly, especially when a true violation may be involved. One man's *de minimis* can be another man's serious violation. I've been involved in a few serious disagreements about the *de minimis* nature of an official's conduct, taking different sides in different circumstances.

New York City's rules allow the conflicts of interest board to refer a matter to an employee's agency if it deems it a *de minimis* matter. This works especially well with

gratuities, which are more of an administrative than an ethics matter. The acceptance of gratuities is often common within an agency or with respect to particular kinds of work, such as teaching or waste removal.

Rochester has an interesting procedure for determining whether an interest is minimal. This procedure effectively makes the ethics board chair an ethics officer for the purpose of quickly determining whether an interest is minimal.

This [recusal] provision shall not apply to any City officer or employee whose interest in the proposed or pending matter is minimal, provided that these procedures are followed strictly:

(i) The City officer or employee shall identify his or her interest, that is, the benefit or advantage that would be gained or lost if the City acts on the matter in various ways, and the underlying basis of it, such as ownership, an investment, a contract or claim, employment or a relationship, if any.

(ii) The City officer or employee shall completely and specifically describe and disclose his or her interest and its underlying basis, if any, in writing, to his or her immediate superior and the Chairperson of the Board of Ethics in advance of his or her participation in the matter.

(iii) If either the City officer or employee, or his or her immediate superior, or the Chairperson of the Board of Ethics thinks that the disclosure reasonably raises a question whether the interest is minimal, the question shall be submitted to the Board of Ethics for an opinion, prior to which the officer or employee shall not participate in the matter.

Failure to disclose property or abide by the opinion of the Board of Ethics shall make any participation of the officer or employee in the matter null and void.

Remote Benefits

Sometimes, benefits are certain and relatively direct, but the relationship between official and beneficiary is considered too remote to require the official to deal with it by withdrawing from the matter. For example, the beneficiary is a second cousin, the client of a business associate, or a close friend's sister.

However remote the recipient of a possible benefit might seem to an official, the beneficiary may appear to the public as far less remote. Take this example from Los Angeles.

An airport attorney, who reviewed the paperwork submitted by four companies bidding on airport concessions, was married to an attorney with a law firm that represented one of the bidders. The possible conflict involves a client of the official's husband's law firm, whom the husband does not himself represent. On first thought, this seems pretty remote.

But one cannot stop at this point, where the relationship is presented to make it appear remote. One must look at it from the public's point of view. And one must look at it from the airport attorney's point of view. Not from how she would view the relationship after the fact, but how she might approach her job differently due to the relationship.

The airport attorney is charged with reviewing bids for the airport. One of the bids comes from a company represented by her husband's firm, that is, the bid was presumably written or reviewed by one of her husband's colleagues, which is a close relationship. Let's say the airport attorney finds something wrong with the bid. Does she say something and embarrass her husband's firm, possibly causing it to lose the client and blame the husband for what his wife did, or does she keep it under her hat and protect her husband and his firm? Is this conflict situation good for the public? And is it fair to put the airport attorney in this uncomfortable position?

Or let's say she finds a minor error in another company's bid. Does she suggest the bid be resubmitted or does she let it go? If she suggests resubmittal, it might look to the bidder like she's making life hard for the client company's competitors. On the other hand, she might feel she needs to appear extra fair and let an error go that she would normally consider serious enough to require resubmittal.

These are only two of the possible ways in which what might appear at first to be a remote conflict can have a direct effect on how the official approaches a matter, or how she is seen to have approached it if a controversy arises (and bidders are always looking for a good excuse to protest a bid, thereby costing the local government more time and money). This is why the official should recognize that, although not required to withdraw, it is best for the airport, the public, and herself if she lets someone else review the bids.

In addition, from the public's point of view, which is the most important point of view, a spouse's law firm is effectively the spouse itself. Although the firm does not directly benefit from the success of the bid, there is no remoteness to the airport attorney's perceived bias in favor of the firm's client and the firm's work.

Benefits Shared with Others

What is known as “the class exception” to conflicts gives rise to serious disagreements. The class exception should be set forth right in an ethics code’s basic conflict provision, something like this:

... benefit not shared with a substantial segment of the city's population

That is, if a benefit is shared with a lot of people in the community, then it is not a special benefit and it should not be the basis of an ethics violation. For instance, there is no problem when a council member over 65 votes on whether or not to give seniors in the community a property tax break. Nor is there a problem when a planning board member who owns a house in town makes a decision that affects homeowners in general.

Where the disagreements occur is over how large a “substantial segment” of a city or county’s population is. Seniors clearly are a substantial segment, but what about elderly veterans or seniors with certain disabilities? Parents of school-age children are clearly a substantial segment, but what about parents of special needs children? Government employees? Teachers? Lawyers? Realtors?

Another consideration, which arises especially with budgets, is whether the matter at hand involves only the industry or profession in which an official or family member works, or whether it covers a much broader group or involves multiple issues. A budget benefits numerous industries and unions, but this should not mean that every council member involved in one of the industries or unions should withdraw from participation in budget discussions or votes. Only when a relevant item is being discussed should a council member withdraw.

A council member in Franklin, Virginia felt the city should stop charging interest on delinquent property taxes, since so many taxpayers were under financial duress. The council member happened to be one of those delinquent taxpayers. Does it matter exactly how many people owe back taxes? If so, what percentage would be enough? Twenty percent? Ten percent? Would it matter what percentage of council members were delinquent? All of these are legitimate considerations in determining whether a council member has a conflict that requires withdrawal from participation in the discussion about charging interest. It is also important to consider whether the public will think the council member is merely

thinking of his personal interest, rather than the public interest in collecting taxes from everyone.

Homeowners are a substantial segment, but what about downtown business owners, or business owners on a particular street? With respect to road improvement or transit decisions, how many people have to benefit from the improvements or a particular bus or subway stop in order to allow the participation of an official with a business on the road or the route, or near a stop?

These are not easy questions to answer, but they are important issues to raise when such a situation arises. If it's a difficult decision to make, there is public concern, and it is too late to seek ethics advice from the ethics officer, the most responsible thing for the official to do is withdraw from participation in the matter. In some cases, limiting participation will be sufficient. But the best thing to do is to anticipate that it will become an issue, and seek advice from the ethics officer as early as possible.

This is an area where informal ethics advice and formal advisory opinions can be very useful in providing concrete guidance to a local government's officials, and not only the one to whom the advice is given. If officials are not seeking advice, this is a good area for an ethics commission to anticipate problems and put together a memorandum or general advisory opinion using local situations and situations it finds in advisory opinions from other cities and counties, to let officials know how to deal with a situation depending on how they might specially benefit from it.

It is better to do this than to approach the problem in the form of one or more detailed exceptions, as many ethics codes do. For example, here is the Rhode Island exception provision, which applies to local officials:

A person subject to this code of ethics does not have an interest which is in substantial conflict with the proper discharge of his or her duties in the public interest ... if any benefit or detriment accrues to him or her or any person within his or her family or any business associate, or any business by which the person is employed or which the person represents, as a member of a business, profession, occupation, or group, or of any significant and definable class of persons within the business, profession, occupation, or group, to no greater extent than any other similarly situated member of the business, profession, occupation, or group, or of

the significant and definable class of persons within the business, profession, occupation or group.

There might be many storeowners or lawyers in town, but how many gun store owners or land use attorneys? If there are two gun stores in town, should a council member who owns one of them participate in the consideration of a law regulating them, because his store won't be any more affected than the other store? If there are five land use attorneys in town, should a land use attorney participate in matters that affect the practice of land use attorneys in town? All businesses, professions, and groups are not the same, and the situation their members may end up in do not lead to the same appearance of impropriety. It is better to make a class exception short and simple, and have the ethics officer and commission provide advice and build up a list of examples that make the exception increasingly concrete.

Transportation issues are probably the area that leads to the greatest amount of controversy regarding the class exception. The reason is that businesses depend on good transportation and parking nearby. One vote could mean hundreds of thousands of dollars a year for a business owner, and a remarkable number of local business owners, from retailers to realtors, sit on local government boards that deal with such issues.

With respect to issues that affect particular properties, a popular solution is to be mathematical and precise by including within an ethics code what is known as a "proximity rule," that is, a rule that requires officials to withdraw from any matter dealing with property or improvements within a certain distance from property they own or rent (this can be extended to property their business or their immediate family owns or rents). But how many feet or yards do you choose? California uses 500 feet. Telluride, Colorado uses 150 feet, while Aspen, Colorado uses 300 feet. Any number that is chosen is basically random or, worse, intended to make officials withdraw in fewer situations, even where there is a clear appearance of impropriety (note that all these figures are low). For more on the proximity rule, see [the Proximity section](#) later in this chapter.

One kind of "substantial segment" that should never be excepted from a conflict rule is government employees. For example, if a company doing or seeking business with the government offers discounts or free tickets to all local government employees, not focusing the benefits on those who might directly benefit them, this should not be considered

acceptable just because hundreds or even thousands of individuals benefit. Nor should a school board member be able to participate in a matter involving a spouse's raise because the teacher contract gives raises to hundreds of other teachers, as well. In order to make it clear that government office is not being used for officials' personal benefit, government officials should not accept special benefits or participate in giving government benefits to family members. The City Ethics Model Code expressly excepts government employees from the term "substantial segment" of a city's population.

Unavoidable Conflicts

Sometimes there are conflicts that are unavoidable. For example, council members vote on their own salaries. They could ask a neutral individual or body to research council salaries in similar cities, and make a recommendation. But it is the job of council members to vote on budgets. It is important that it be done openly.

Sometimes, however, conflicts are declared to be unavoidable when a little thought and research would make it clear that they are not. For example, in Ohio in 2010 nearly everyone in government, including the inspector general, argued that state legislators must vote on pensions, despite the fact that many of them, or their spouses, had pensions coming to them besides their pensions as retired legislators. People said that government pension plan members are the same sort of class as taxpayers, drivers, and real-estate owners.

A bit of research would have shown state officials that ten states have separate pension plans for legislators, and ten other states do not provide retirement benefits to legislators at all. So to remove this conflict, Ohio's legislature could have followed the lead of these twenty states and chosen one or the other of these solutions. Voting for one's own pension plan would have remained unavoidable (just like voting on one's own pay), but the pension plans for the rest of the government (often including local pension plans) would be like any other matter, so that those with particular conflicts could withdraw. The number of legislators with an avoidable conflict would have been greatly reduced.

But sometimes an unavoidable conflict like a pension can be used to try to make an official look unethical. In 2013, the chair of a North Kansas City, Missouri hospital board of trustees testified that the city's mayor had a conflict with respect to selling the hospital, because he had a police pension, and the city would use proceeds from the sale of the hospital to cover its pension obligations.

It is true that a limited number of people have such pensions. Therefore, they are special personal benefits. What is not limited is the situations that may arise where the city raises revenue that might be used to shore up the city's pension obligations. Anything a city government does can be seen as helping the shore up its pension obligations. Therefore, if having a pension was considered a conflict, no one with a pension now or in the future could be in a position to make decisions for the city. Therefore, the argument for a conflict fails.

Blind Trusts

It is common for high-level officials at the federal level to put their investment assets into a blind trust, in order to prevent the appearance and, hopefully, the reality of a conflict when their activities may benefit or harm companies in which they hold stock. Blind trusts are much less common at the state level, and very rare at the local level. However, it is something that a wealthy official in a large city or county may want to consider. It is certainly not a perfect solution. It would be better to sell off stock in companies that do business with or are regulated by the local government. Anyone considering a blind trust may start by checking out the [New Jersey guidelines for setting up a blind trust](#) (Appendix F).

For those who want to create a blind trust, or a law requiring blind trusts for high-level officials, here are five important safeguards that should be seriously considered. They are derived from Phil Claypool's [March 2013 analysis](#) (pages 3-4) of a Florida blind trust bill.

- 1) The trustee should be prohibited from investing trust assets in business entities that the trustee knows are regulated by or do a significant amount of business with the official's agency.
- 2) The trust should contain only readily-marketable assets, so that the trustee is able to sell the assets originally put in the trust by the official. How can a conflict be eliminated if the official knows that a particular piece of land or partnership interest is still owned by the trust (and thus still benefits the official)?
- 3) The terms of the trust should be reviewed and approved by the ethics commission, as to whether they meet the requirements of the law.
- 4) The public should be informed of what assets are being placed in the trust.

5) The trustee should be required to provide a guarantee that he or she is aware of the requirements of the blind trust law and will comply with them, so that the law can be enforced against a trustee who passes information to the official.

Robert's Rules and Common Law Conflicts

Even if there is no conflict provision in your local ordinances or state statutes, there is a conflict provision in Robert's Rules, which generally applies to local board and commission meetings. Here is the language, from §45 (Voting Procedure), in the first subsection on Rights and Obligations in Voting (Perseus Publishing, tenth edition, pp. 394-395):

No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization. For example, if a motion proposes that the organization enter into a contract with a commercial firm of which a member of the organization is an officer and from which contract he would derive personal pecuniary profit, the members should abstain from voting on the motion. However, no member can be compelled to refrain from voting in such circumstances.

This is a very limited provision (it recognizes only direct conflicts, and withdrawal is voluntary rather than required, and it is limited to voting), and certainly not a replacement for a conflict provision, but it is important to know about when a conflict arises in a local government body where there is no applicable law.

There is also something known as common law conflict of interest law, which is essentially case law on conflicts that is not based on statutory construction and, in most cases, precedes the writing of ethics codes (only a few existed before the mid-70s). Since the common law conflict law has been superseded in most jurisdictions by ordinances and statutes, and since it requires a lawyer to figure out what the requirements and prohibitions are, it is rarely taken into account by local governments. It too is something to be aware of more than to make use of.

2. Indirect Benefits

“There is ... no good reason to believe that connections that are proximate and explicit are any more corrupt than connections that are indirect and implicit. The former may be only the more detectable, not necessarily the more deliberate or damaging, form of corruption.”

—Dennis F. Thompson, *Ethics in Congress*

Harder to see, understand, and handle are conflicts that involve indirect benefits, that is, benefits that do not go directly to an official or employee. There are so many different kinds of indirect benefit that it is very difficult to include all of them in an ethics code. The most common indirect benefit is a financial benefit to an official’s household or immediate family member. It’s easiest to see how this benefits the official, because whatever benefits one’s household benefits oneself. But an official also benefits when other close family members benefit, when her business or employer benefits, and when others with whom she has a special relationship benefit. There are indirect financial benefits, there are favors done that are part of every relationship (without any specific quid pro quo), and there is the direct benefit of helping someone who matters to you. From the public’s point of view, indirect benefits go to those who are important to an official, when it should be the public, and only the public, that receives the benefits of government decisions.

Benefits to a Spouse

Benefits to officials’ spouses have become much more common in recent years, because women have increasingly become business owners and professionals as well as local government officials. The public feels that a financial benefit to an official’s spouse, as a benefit to her household, is the same as a financial benefit to the official herself. This is the easiest of indirect benefits to understand.

However, many officials do not accept this clearest of indirect benefits. Instead, they argue that government ethics should not extend to a spouse’s business or to any benefits a spouse might receive even outside of his business, for example, gifts. This might be a good argument if the public’s point of view could be ignored and if officials had no fiduciary duties. But when an individual seeks public office, she must work with her spouse to fulfill her obligations to the public, which can mean either withdrawal from matters involving her

spouse or sacrifices on the part of her household, from not bidding on a contract to not accepting legal work from a developer.

The most extreme form of the argument against considering benefits to one's spouse as creating a conflict situation was made to me by an officer of the Michigan Townships Association. She wrote that, "Several court cases and Attorney General Opinions indicate that a public official will not have a legally recognized conflict of interest when the person who may be affected by the decision, financially or otherwise, is the spouse or other family member of the public official. These rulings are based on the principle of law that a spouse or other adult family member is considered an independent person entitled to own, retain and enjoy his or her own earnings separately. (Public Act 216 of 1981, MCL 557.21; *Thompson v. School District No. 1 of Moorland Township*, 252 Mich. 629 (1930); *Rupert v. Van Buren County*, 296 Mich. 240 (1941); Michigan Attorney General Opinions 316, 4869, 6151, 6206, 6630, 6736)."

These cases and opinions are based on a statute recognizing that a married woman's income are hers alone. But government ethics does not seek to take money away from a married woman (or man). It seeks to have government officials deal responsibly with conflicts. Conflicts are based on relationships, and there is no closer relationship than a married couple, especially in the financial sense. The legal recognition of a woman's right to her income is irrelevant to dealing responsibly with conflicts.

As I show in [my blog post](#) on this situation, I do not believe that the Townships officer properly applied this reasoning to the situation she was writing about, nor did she properly cite the attorney general opinions. In other words, she was wrong about the application of the women's income statute to conflicts of interest in Michigan.

I have not seen such laws used in this context in other states. However, local government officials across the nation argue that their spouse's affairs are not their own, that a spouse should not suffer by, for example, losing business or not having the opportunity to apply for a job that has to be approved by the official's board.

An argument elected officials sometimes make is that voters knew what their spouse did when they ran for office. This simply isn't true. Outside of very small towns, few voters even know what a candidate does for a living. And even if they know, they don't know what the ramifications might be with respect to conflict situations.

Another argument that is made is that the official and his spouse keep their money separate. Does that mean that when the spouse pays for a new furnace, it doesn't keep the official warm at night? First of all, no one knows how another household's finances work. And second, the directness of the benefit is only one issue. Even if an official and spouse are living apart and have no children, they may have an important personal relationship that creates an appearance of impropriety.

The public understands that it is wrong for an official to use her office to help her spouse's business or to get her spouse a job, no matter what their household finances are or how independent a person the official's spouse is. This is why ethics codes do not distinguish between the financial situations of spouses, although many do distinguish between children and other family members living in or outside the official's household.

It is the areas where the public understands government ethics more than officials (or, at least, more than officials let on) that cause the most controversy. This is because, when these controversies arise, too few officials take into account the appearance of impropriety that accompanies their conduct.

A typical conflict situation involving a spouse is where one spouse is a member of the school board and another is a teacher. This situation also occurs when a member of a local legislative body is married to a local government employee who is a union member. The board member is conflicted when labor negotiations come before them. It is a more difficult question if one spouse teaches in a different town than where the other spouse sits on the school board. There is no direct conflict, but the unions of the two towns may have the same umbrella union and the same negotiators, and the teacher's dues go to the same union. The teacher himself may have, or be seen to have, a bias toward his umbrella union and its negotiator, but would the teacher's spouse? This is a question that should be determined either by an ethics officer or commission or, if there is no ethics program, at a public meeting of the school board. And this should happen when a teacher's spouse is elected to a school board, not at the time that labor negotiations first are discussed by the board.

Other Spousal Conflicts

From the public's point of view, there is little difference between official and spouse. Yes, a spouse has his or her own opinions and work, but couples usually support each other and

work together toward common goals. When a spouse does something an official is not allowed to do, it appears that the official is acting through the spouse.

Take the case of a St. Charles, Illinois school board member whose spouse was an officer of a group promoting a referendum to build a school in the official's district. The wife wore two hats: the hat of school board member's spouse and the hat of major school referendum supporter. To someone who opposes the referendum, it looks as if the husband is pushing for it through his wife, no matter how independent she might actually be. The appearance is of a government official manipulating public opinion indirectly, since by law he could not do it directly.

This is not a problem that can be solved through withdrawal. Although the spouse is an independent individual, as the spouse of an official she should also deal with her conflict responsibly and stop being so involved with the referendum. The fact that no ethics commission would have jurisdiction over her or that she is allowed to express her own views does not mean that she has no obligations or that it is right for her to get so involved with a matter so close to her husband's official work. If she insists on leading the movement in favor of the referendum, it puts her husband in the position of having to resign and promise not to run in the next election. Then there would be no conflict, and the spouse would be free to do and say anything she liked.

Benefits to Immediate Family

Unless a relative lives in the official's household, a financial benefit to the relative does not as directly, financially benefit the official as a benefit to a spouse does. This is why many ethics code apply only to benefits to an official's household.

But there are ways in which benefits to family members who do not live in the household provide direct benefits of a different sort. There is (i) the satisfaction of benefiting family members, (ii) the lessening of the need to pay for care to parents or help to children (help with school costs, a mortgage down payment, etc.), and (iii) in the case of parents and sometimes siblings, money can come back to the official in the form of a future bequest, or at least there is an expectation that this will happen.

Even where there does not appear to be a possible financial benefit to the official, where there is a benefit to someone with a close relationship to the official, there is an appearance of a misuse of office to benefit one's close relative, at the expense of others and

possibly of the public interest. Conflicts, after all, are based on relationships, and these are usually the closest relationships of all. Even when the benefit is indirect, it seems no different to most people whether an official is giving a position or contract to a spouse, a sibling, a parent, or an adult child.

Officials look at their immediate families very differently. One important pillar of family relationships is mutual aid. It is often hard to see how being a government official should be an obstacle to helping one's family just as one would in any business or profession. This is especially true when everyone around you is getting their children and siblings jobs or connections with their companies or with companies they do business with.

Parents are rarely the beneficiary of an official's decisions, but it does happen. For example, the mother of a Columbia, South Carolina council member obtained a federal low-interest loan, administered by the city, to purchase an office building without disclosing her relationship to the council member. Since the federal empowerment zone conflicts of interest policy expressly included both direct and indirect benefits, when her relationship was discovered, she was forced to pay back the loan. But she wasn't happy about it, even though she had clearly violated the provision. She said, "This has nothing to do with who we know or who we're related to. We're citizens of Columbia." Yes, but citizens of Columbia saw her as a council member's mother.

Benefits to Other Family Members

Although most government ethics codes limit conflicts to household members or immediate family members, this is not how the public sees it. Their view of close relations does not stop at the boundaries of the old-fashioned nuclear family. It includes step-family members, in-laws, aunts and uncles, nieces and nephews.

That is why many ethics codes, including the City Ethics Model Code, include additional family members. The City Ethics Model Code includes all children, whether children or adult, in the home or on their own, as well as domestic partners, siblings and step-siblings, step-children and foster children, parents and step-parents, nieces and nephews, uncles and aunts, grandparents and grandchildren of the official, spouse, or domestic partner. The code also includes the employer or business of any of these people.

This list may seem too long, and it may seem unfair to include a spouse's family. But remember: the brother-in-law is the archetypical individual helped by a government official.

And yet government officials in most jurisdictions can legally give their brothers-in-law contracts or get them government jobs.

It's hard to know where to draw the line. For example, there are two kinds of brother-in-law. Helping a sister's husband is helping a sister, who is immediate family. Helping a spouse's brother is not helping a spouse, at least not financially or directly (but since one lives with a spouse, it could be argued that it is more directly beneficial to a government official to make one's spouse happy than it is to make one's sister happy). In New York City, among other jurisdictions, an official may not benefit the first kind of brother-in-law, but may benefit the second kind of brother-in-law. This is not a very satisfactory way to draw the line. In the public's view, a brother-in-law is a brother-in-law, even if it's a step-sister's husband or a spouse's step-brother.

No law can really do justice to the variation in step-relationships. Some people grow up with their step-siblings from the day they're born. Others don't acquire step-siblings until they're middle aged, and they hardly know them. But to the public, reading a headline about an official giving a no-bid contract to a step-sibling, such differences don't matter at all. The difference is personal, not public. The public would be forced to take the official's word for the closeness of the relationship, under circumstances where the official might be under pressure to exaggerate the distance of the relationship in order to help her step-sibling.

To leave out domestic partners and step-family is to ignore the modern family. Sticking your head in the sand is not a good thing to do when it comes to government ethics. In fact, there are special family relationships that can be primarily financial in character, but which are left out of ethics codes (except a proposed Wayne County, Ohio provision): "a former spouse or an individual with whom the public servant has had a child in common." These are people to whom officials owe alimony and/or child support. A government benefit could save such an official a lot of money. And the relationship may be a close one.

Sometimes an ethics code can be too modern. For example, Broward County, Florida is one of the relatively few jurisdictions that allows domestic partners to be formally registered. But then it limits ethics jurisdiction to registered partners, effectively encouraging officials not to register their domestic partners if that might cause problems with conflicts down the road.

Grandchildren and grandparents might seem out of place, and usually they won't be a factor because of the age difference. But when there are grown grandchildren, we all know the place they have in a grandparent's heart. If the grandchild is too young, then there won't be any conflict situations, and there's no problem.

Family members are perceived by the public as being principal beneficiaries of government officials. After all, in many countries family expect to be hired (as employees or contractors) by those who take office, and it would be a serious blow if they were not hired. It may even be the reason a family member runs for public office. Such family relationships are still the norm in many uniformed departments, and it is this situation that is the principal reason nepotism is not prohibited in every local government.

So when a family member, even one not on the conflicts provision list, comes before an official, the responsible thing for the official to do is withdraw from the matter. It's not worth insisting on one's distance from a relative. Family relationships are seen to be so strong that, even when they aren't a factor for an official, the official needs to accept how the public views the relationship.

Some local governments, and even the Missouri constitution, follow the International Municipal Lawyers Association Model Ordinance and include as "relatives," generally or only in such instances as gift-giving, anyone within up to the fourth or even fifth degree of consanguinity. This term is inappropriate in an ethics code because of its unfamiliarity, its difficulty, and its legal role for determining incest, not to mention its extension of conflicting relationships to distant relations. To be in the fifth degree of consanguinity, two individuals' first common ancestor must be no more than a total of five generations away. For example, if my grandfather (two degrees) is your great-grandfather (three degrees), there are five degrees of consanguinity between us. Another reason consanguinity is not appropriate to government ethics is that, because consanguinity is intended for the purpose of defining incest, it does not include relationship by marriage. However, relationship by marriage is relevant to government ethics.

The closeness of a particular relationship can be relevant when the relation is a relatively distant one, but the relationship is close. For example, a deputy mayor in St. Petersburg, Florida was involved in the purchase of property for the city from his grandfather's second's wife's daughter, whom the deputy mayor called "Aunt." This relationship would not be considered close enough to merit full withdrawal from the

matter, but it would require that the deputy mayor not consult with his “aunt” about the matter (which he did) and that everyone be extra careful about following the procedures. As with so much in government ethics, dealing responsibly with a possible conflict is often not cut-and-dry. If there is a relationship of any kind, following the formal process and staying at arm’s-length from the matter becomes especially important, so that there will not be an appearance of preferential treatment.

Many people feel family loyalties are important, and there is no reason why they should be thrown aside just because you work in government rather than in a business. There are many ways in which family relationships can be harmful to government, some of which are mentioned above and some of which are mentioned in [the section on nepotism](#) in the next chapter. But one that should be emphasized is that helping family members is often the start of a pattern of behavior that extends to other special relationships. Just because we have a warm place in our heart for family relationships does not mean that they should be the basis of decisions regarding contracts, permits, grants, licenses, or jobs.

Nepotism

Nepotism, which will be [dealt with later](#), is a subcategory of indirect conflicts. There are two aspects to nepotism that distinguish it: hiring and promoting, and supervision. An official’s participation in hiring or promoting or giving a relative a raise (when this is done alone, not as part of a board or commission) is no different than giving a relative any special benefit. It is simply dealt with differently under nepotism provisions.

Supervising a relative is a different story. There may be no financial benefit from an official supervising a relative, if others are left to decide on hiring, promotion, and raises, but since the people making these decisions would also likely be supervised by the official, they do not appear truly independent, nor do their decisions appear independent and unbiased. They are also put in a tough, conflicted position themselves.

Supervision of a relative adds another kind of misuse of office, which is very important despite the fact that the public interest is not directly affected. Supervision of a relative often means that fellow employees will feel that they are not being treated fairly. This undermines morale in the department or agency. And poor morale means poor government service, which is not in the public interest.

The Flip Side of Favoritism

This is a good place to introduce the flip side of conflicts and favoritism. The flip side is like the dark side of the moon: no one sees it. The assumption behind prohibiting participation in matters that involve relatives is that officials will be seen as favoring their relatives over others. But there are family members we can't stand or, at least, have little respect for. The last thing we'd like to do is give a contract to our good-for-nothing nephew, or a job to that uncle who's always treated our mom so badly.

There are two important things to think about with respect to this situation. One, advocating or voting against a relative you hate is also favoritism. And two, is it really in anyone's interest to be involved in a lose-lose matter such as this? If you vote or speak out against your nephew, your sister will hate you. If you bite the bullet and vote for him, you'll hate yourself and you'll be doing harm to your community.

This leads us to one of the most important facts about government ethics: it protects the official as well as the public. It protects the official who has no respect for his nephew, or who disagrees with his own employer's lack of concern about the environment, or who wishes his law firm had never represented that bastard. It also protects the official who might lose his reputation by making a stupid, selfish decision. It just takes one decision that appears self-serving to lose not only a position, but the respect of the community necessary to push for what you think is important. The requirement to withdraw when an official is stuck between a rock and a hard place (another way of describing a conflict) is a good thing not only for the public, but also for the official.

Benefits to an Official's Business

With elected officials and members of boards and commissions, financial benefits to an official's business (the language for this in the City Ethics Model Code conflict provision is "outside employer or business") are often a bigger problem than direct benefits. Full-time government employees generally do not have businesses; in fact, they are not allowed to in many jurisdictions. Therefore, this is less of a problem for them.

The easiest cases, because the benefits are the most direct, involve the situation where an official who owns a business or is a substantial partner in a business would benefit directly from any business the company does with the local government, or from any contracts permit, grant, license, or other benefit it receives. Although some courts will not

look through the “corporate fiction” that a company is, this is done for the purposes of government ethics, because the public certainly sees through the corporate fiction.

Similarly easy is the case of an official who is a lawyer, accountant, or other professional who either works solo or is a partner with a small firm. Anything that may directly benefit the firm, or indirectly benefit it via a client, gives rise to a conflict situation.

Beyond these easy cases, there are numerous, more difficult cases. For example, an official who works for a company, but has no ownership interest in it, does not directly benefit from the benefits that company obtains from the local government, unless she gets a commission on sales in which she participates or a bonus related to such sales. There may be no direct benefit to the official, but using one’s position to help one’s company get a local government contract or permit certainly puts you in good stead with the bosses, raising the likelihood of a raise or promotion. Companies hire former officials to use their contacts to get more business. Having a current official is even more valuable, at least if there is no ethics program to prevent the official’s participation in any matter involving the company.

In addition, the company’s employee, even when her benefits are speculative, is caught between loyalty to her employer and fellow employees, and the obligations that come with public service. Even without a clear benefit, this is a classic case of conflict of loyalties.

And the public’s view of the situation is the same. Even when there is no money directly or indirectly involved, the public sees the employee-official as someone bound to help her employer. And it isn’t just about feelings of loyalty. The public knows how hard it would be for an employee to speak out or vote against her employer’s interests, even if she wanted to. It is clear that an official cannot be expected to act fairly, without bias, in a matter that involves her employer.

As clear a conflict as this might appear, many ethics codes do not expressly cover this situation. And those that do generally do it via an Incompatible Employment provision, like this:

No person subject to this code shall accept other employment which is incompatible with the proper discharge of official duties or will impair his or her independence of judgment as to his or her public duties or employment.

The problem with this language is that it prohibits conflicts rather than requiring officials to deal responsibly with their conflicts. Those who draft and pass such language do not recognize that conflicts themselves are not the problem. As I said at the beginning of this chapter, there is nothing wrong with having conflicts, at least up to a point. Because conflicts do become a problem after a certain point, those who want an employment provision should instead choose language such as the following:

No official or employee may engage in any private employment, including the provision of any business, commercial, professional or other types of services, when the employment can be reasonably expected to require more than sporadic withdrawal.

The other advantage to this language is that it refers directly to the problem — the necessity to withdraw too often — rather than to the idea of impairment of judgment. Few people believe their judgment can be impaired, and most people would feel uncomfortable alleging the impaired judgment of their colleagues. And “incompatibility” is a vague term that allows officials to insist to themselves, and honestly to the public, that there is nothing incompatible about their employment at all, because they have the integrity to make the best decision for the city. (See above for a [discussion of impairment of judgment language](#).)

Another problem with incompatibility provisions is that they often require the official to choose between her government position and an outside job on which the official depends. There are many occasions where it is necessary to make this choice, but this should not be the default way to deal responsibly with employment conflicts.

What exacerbates the problem caused by incompatible employment provisions is that its underlying belief that conflicts are themselves the problem is usually picked up by the news media, causing them to seriously criticize an official with a conflict, thereby undermining public trust and escalating an ethics situation before the official has had an opportunity to deal with the conflict in a responsible manner.

It is better to focus on dealing responsibly with conflicts, than on employment itself. For example, Seattle requires withdrawal by officials who work for, rather than own or lead, companies seeking benefits from the local government:

[Officials may not] participate in a matter in which a person that employed the Covered Individual in the preceding 12 months, or retained the Covered Individual or his or her firm or partnership in the preceding 12 months, has a financial interest

Baltimore goes beyond ownership of or employment by a business to include other relationships, such as (1) the situation where an official “has applied for a position, is negotiating employment, or has arranged prospective employment” with a company doing business with the local government; (2) a contractual relationship between an official and the company doing business (but only where “the contract could reasonably be expected to result in a conflict”); (3) a financial relationship between an official’s company and a company doing business (for example, where the official’s company is partially owned by a company doing business); and (4) the situation where an official has an interest in a firm, and a company doing business has an interest in the same firm. These relationships are problematic even where the official’s close family member is involved rather than the official, as long as the official knows. Dallas has a similar provision, which is included as part of the basic conflict provision.

This detailing of indirect benefits is highly useful. Usually, as in the City Ethics Model Code, the detail appears in the definition of “outside employer or business” or whatever equivalent term the ethics code uses. This makes the ethics provisions less overwhelming. But it is valuable to provide this level of detail either in the code, or in comments, regulations, or a general advisory opinion, so that officials are given as clear guidelines as possible for this difficult area of business-related indirect benefits. But every official should be told that, no matter how great the details or numerous the examples, they may face situations that were not anticipated, and should seek advice about them.

There is another sort of indirect benefit that is harder to prohibit. To appreciate this sort of indirect benefit, it is valuable to look at benefits to businesses not just in terms of conflicts, but also in terms of pay to play. In the case of an official who owns a company, pay to play occurs when an official makes it known (often without any direct communication) that business should be directed to the official’s company if people want the official to support its developments, contract applications, grant requests, and the like. When the official has direct influence over matters involving these people, a well-written conflict provision should prohibit the official from participating in a way that would be helpful to

these people. However, the language usually excepts retail customers, since there are usually so many of these. It is difficult to prevent companies seeking benefits from the government from choosing to eat at the mayor's restaurant.

Another difficult situation is when the official's influence over matters is not direct. Consider this example, from Broward County, Florida. A county supervisor wants to take a sales job with a company that provides private clerical workers and emergency dispatchers to local governments. This means that the supervisor would spend his time selling a product to other local officials in the area. He says he will be "as hands off as possible" in his own county, "limiting himself to making preliminary introductions between city officials and company executives." But these are city officials with whom he works and over whom he has some sway, due solely to his government office.

Let's assume that he will never say a word to anyone in his county about his company. It would still be known that he would look kindly on a city that outsourced work to his company, and not so kindly on a city that outsourced work to a competitor. Officials who spoke out against outsourcing work to his company might worry about being seen as speaking out against the supervisor, who might affect funds going to the city. And those who supported outsourcing to his company would be seen as the supervisor's supporter. In this way, there would be an appearance of impropriety even without any active participation on the official's part. The side job could end up becoming a political football, increasing partisan tensions and undermining the relationship between the county and the cities within the county.

With respect to sales in neighboring counties, a high-level local government official is given many opportunities to develop relationships with other high-level officials in the region, through political parties, regional bodies, local government associations, etc. These relationships are formed only due to the individual's office.

To choose a side job that allows an official to take advantage of these relationships is using one's office for one's own financial benefit. An ordinary individual would have much less of a chance to get a foot in the door, not to mention make a sale. A county supervisor is attractive to such a company not only because of any sales prowess he may have, but because of the personal and professional relationships that non-officials would not have.

Atlanta goes one step further in dealing with such outside employment, for certain high-level officials. It prohibits them from taking any outside employment, unless they

obtain approval from the ethics board. In effect, this is a waiver process, except that it does not appear that the official has the burden of proof. Here is the language:

§2-820(d). Commissioners, deputy commissioners, department heads, chief operating officer, deputy chief operating officers, chief of staff, deputy chiefs of staff, bureau directors, and employees of the office of the mayor who report directly to the mayor shall not engage in any private employment or render any services for private interests for remuneration, regardless of whether such employment or service is compatible with or adverse to the proper discharge of the official duties of such employee. However, the employees named in this paragraph may engage in private employment or render services for private interests only upon obtaining prior written approval from the board of ethics in accordance with this paragraph. ... City employment shall remain the first priority of the employee, and if at any time the outside employment interferes with city job requirements or performance, the official or employee shall be required to modify the conditions of the outside employment or terminate either the outside employment or the city employment.

Here is yet another kind of indirect benefit to an official's business. Just as officials have parents and siblings and children, the companies they own or manage also have parents and siblings ("affiliates") and children ("subsidiaries"). These should be treated just like they were the official's company. An official who works for rather than owns a company may have no direct relationship whatsoever to a parent, affiliate, or subsidiary company (although who is to know?), and yet not only is there an appearance of impropriety, but also there might very well be an indirect benefit to the official, because helping a related company is often a way of furthering one's career. Money is, after all, fungible. There's no telling whether the benefit did not actually go to the official's company, using the subsidiary, affiliate, or parent as a conduit.

Even nonprofits can be related in ways that make a relationship indirect, or more indirect. For example, in 2009 the mayor of Brookings, South Dakota worked for the South Dakota State University Foundation, raising money for the university, which is his city's major employer and gets money from the city. The city attorney said that there was no conflict of interest with respect to matters involving the university, because the mayor did not directly report to the university. But who else but an attorney would make this

distinction? Conflicts need to be handled responsibly from the point of view of the public, not from the point of view of an attorney.

Or consider a situation in the Unified Government of Wyandotte County and Kansas City, KS (“UG”), where a UG commissioner was the paid director of a community development organization that received funds from the government. When the commission passed a new ethics policy that barred the commissioner from voting to benefit her organization, the organization created a separate entity to receive UG funds. This was considered acceptable, because indirect benefits were not covered by the ethics law.

To the public, whether the organization breaks into two or twenty different corporations doesn't matter. In fact, creating a new entity in order to allow the commissioner to keep her job looks like a sneaky way to accomplish what the law prohibited. This should not be an acceptable way to handle a conflict situation.

In government ethics, these technical distinctions do not hold water. Indirect business relationships are generally no different, and are seen as no different, than more direct business relationships. The situation of related companies, profit or nonprofit, shows how important it is to have a conflict provision include indirect benefits in an open-ended way.

Some ethics codes include government agencies under the definition of “business entity,” so that an official is required to withdraw from a matter involving a government agency that employs someone with whom he has a special relationship. It is true that an official may be seen as biased with respect to a vote on a union contract when an immediate family member, especially a spouse, is a member of the union. However, it does not seem right to keep a council member out of every matter involving the school system.

There's an important difference between a situation where a family member works for a contractor seeking a contract, and one where a family member works for an agency that is part of the same government. An official who helps a family member's company get a contract is seen to be favoring the family member, because (1) it will be a feather in the family member's cap, and (2) companies seeking government approval may hire such family members in order to get what they want.

On the other hand, approval of a new information system has nothing to do with a customer service representative in the IT department who happens to be a council member's

sister. However, a 50% increase in the IT budget might be seen as a way to get the sister a good promotion.

In other words, each situation needs to be considered separately. There is no rule that can apply across the board. And yet there has to be a rule.

There are two approaches that can be taken. One is to have the conflict provision apply to government agencies, and require officials to seek a waiver from the ethics commission relating either to each family member in the government or, where the ethics commission feels this is not sufficient, for each matter or sort of matter that relates to the family member's agency or department. This allows an ethics commission to require withdrawal with respect to an agency budget, but to allow participation on other agency issues. Or it could, say with respect to the head of a program in a department, prohibit participation only with respect to that program, and provide a waiver with respect to other matters.

The other approach is to allow high-level officials to participate in matters involving their family members' departments or agencies, unless the family member is an appointee or a member of a certain civil service class or higher, that is, someone who can be assumed to have sufficient influence in the department or agency. However, whenever a matter involves the department or agency of a lower-level employee, the official is required, or strongly encouraged, to seek ethics advice from the administrator, in order to make sure there would not be too strong an appearance of impropriety under the particular circumstances.

These approaches appear to be the same, in that they give discretion to the ethics commission and take the onus of looking like one is helping one's family members off the official's shoulders. But there are two important differences. One is that a waiver process usually requires a public consideration and vote. Informal ethics advice does not. Two is that a failure to request a waiver is a violation of the law, while a failure to seek advice, unless it is required, is not. Since the law allows participation unless the official chooses to withdraw, there can be no ethics violation. The more thoughtful officials, and those concerned about their reputations, would seek advice; others would not.

Therefore, I prefer the waiver approach. This works well in the context of close family members, because there aren't too many of them.

Benefits to a Public Company in Which an Official Owns Stock

Stock ownership in a public company is very different from ownership of a company. Very few people have a substantial interest in a public company, to the extent that it can be considered their company. And yet the success of such a public company does have special meaning to someone who holds a large dollar amount of that company's stock (even if that amount is large only for the individual, not for the corporation). Ownership of what to an official is a substantial amount of stock can both bias them toward a company and make them appear to the public as biased toward the company. This is why, especially at the federal level, high-level officials often create [blind trusts](#), so that they do not know their stock ownership.

It is common to include in the definition of an “outside business or employer” a public corporation in which the official or employee's ownership interest is more than either (i) stock valued at \$10,000 or (ii) five percent of the outstanding stock. In effect, this is a definition of what constitutes a de minimis stockholding. With respect to public companies, a percentage alone is insufficient, because very few people directly or indirectly (through their businesses and close family members) own even 1% of a public company.

It's good to have guidelines, but I think it is better for an ethics officer or ethics commission to decide in specific situations whether stock ownership is de minimis. In making this determination, an ethics officer can advise an official to either disclose and not withdraw, disclose and withdraw, or sell the stock.

Another consideration is how much a certain matter means to a public company, in terms of how it might affect the price of its stock. Very few local government matters will do this, and it is the effect on a company's stock price that would most benefit a stockholding official. The one exception is where a decision would set a precedent that might have repercussions across the state or the country, for example, a large city's decision about billboards or cable television.

Whatever the rule, it is important for officials to look at their stock portfolio when they take office, and to consider any stock purchase they make while in office, in terms of how it might appear to the public. For example, a council member should not have stock in any cable company if the city is involved in contracts with cable companies, or in any company that owns billboards, if these are regulated by the city. Similarly, a planning commissioner should have no holdings of stock in development companies that might come before them (and they might be seen as biased against the company's competitors).

In 2013, a Los Angeles council member who owned stock in a large billboard company said that he did not realize the company whose stock he owned had a billboard division. He thought the company just owned radio stations. However, googling “Clear Channel” tells you immediately, without even opening a webpage, that Clear Channel has two divisions, media and outdoor advertising. Therefore, the council member had reason to believe that Clear Channel Outdoor was part of Clear Channel Communications. And a high-level official should have a positive obligation to determine whether his stock ownership might create conflict situations.

One of the reasons financial disclosures are required annually is to remind officials of their ownership interests and cause them to consider the conflicts that may arise from them. Not checking even the principal activities of a company is negligent. It should not be accepted as an excuse for failing to disclose the ownership and deal with it responsibly.

But let's say you own General Electric. Even people who work there don't know all the businesses it owns. This is where it's important to have applicant disclosure. If a division of General Electric wants something from one's board, it should be required to disclose that it's owned by General Electric. If this is done, then officials will be in a better position to know whether they might have a conflict. This is even more important when it comes to developers, who often create a special company for a particular project. They should be required to disclose the principals of this company and its relationships with other companies.

As it turns out, the Los Angeles council member realized his small stock holdings weren't worth the bother and disposed of them before an opposing mayoral candidate raised the issue. It is best if these decisions are made as soon as possible.

Benefits to an Official's Client

Many elected local officials are attorneys, or other professionals, whose firm has clients that are or may soon be seeking special benefits from the local government. The professional-client relationship is a very close one, and it is ongoing. That is, it does not matter whether the client is currently seeking, say, a zoning permit. If the client is a developer, its lawyer or architect will be, and appear to be, biased toward that client with respect to issues involving zoning as well as with respect to planning decisions that may affect the developer's future projects.

An attorney nominated to be chair of the new District of Columbia ethics board in 2012 said about his firm's representation of clients before the city, "I would recuse myself from Board consideration of any matter involving the specific government employee or official with whom the firm is negotiating or requesting relief." The problem with this apparently responsible handling of such situations is that the world does not consist of a law firm's current matters and isolated government officials in the midst of a negotiation. Conflicts of interest are the result of relationships, and relationships are ongoing series of contacts and mutual favors. It is important for lawyers to cultivate relationships with those who may be of use to their clients not only now, but in the future.

A negotiation with an assistant agency director will affect one's relationship with the director and with others in the agency. An ethics proceeding, and even an advisory opinion, will affect one's relationship with the official who is the respondent, and with officials who request an advisory opinion. A matter handled by one's partner or associate also affects one's relationship with the officials involved in the matter.

Every individual sits in the midst of a web of relationships, where direct and indirect, past, present, and future, all matter equally. And this is the way people view the world and how they determine whether government officials are using their offices to help themselves and those with whom they have special relationships. Separating pieces out of the web is not a realistic or responsible way to deal with conflict situations.

A lawyer who will be seeking benefits from officials for his clients will be thinking of the beneficial and harmful effects on future clients (and, therefore, on himself and his firm) of his interactions with officials. And the lawyer will be seen as thinking this way whenever he acts in his role as ethics commission member in a way that could be considered showing favoritism to an official (in the member's questions, in his support for or opposition to an investigation, in his vote on probable cause, in his participation or lack of participation at a public hearing, in his final vote).

Understanding how relationships work, citizens have every reason to believe that an attorney sitting on an ethics commission would act in such a way as to protect his clients by not undermining his relationship with any official before whom he or his firm might represent someone in the future. One owes this to one's clients. This does not make the individual bad; it merely recognizes the obligations that arise from an attorney's relationships with his clients.

Firewalls

“Firewallism,” also known as “Chinese walls,” are one way local officials seek to separate themselves from their co-owners or partners, so that their firms or companies can do business directly or indirectly with the local government (by “indirectly,” I refer to business down via clients of lawyers, accountants, and other professionals). A firewall is intended to separate the official from both involvement and information regarding a matter where there would otherwise be a conflict.

Firewalls can also be used within government offices. In this situation, the firewall is placed between an official and staff in his office who are working on a particular project where he has a conflict. Another internal use of the firewall is to allow an elected official to separate her legislative activities from her campaign fundraising, so that there will not be an appearance of impropriety regarding who gives money and how the legislator votes and otherwise acts. Usually the wall is placed between legislative and campaign staff members.

There are four principal problems with firewalls. The first and most important is the fact that there is no way for the public, or anyone else, to know whether the firewall is actually in place or not. Firewalls are completely self-enforced. They work on the honor system. A firewall is more of a screen than a wall, something the official can easily peek over, around, or through, or simply slide out of the way.

It is difficult to keep a firewall in place even if you honor it completely, because it goes against the propensity of business and political colleagues to discuss matters, to pass on information, directly and indirectly, to protect and inform and support each other. You can say that your left hand doesn't know what your right hand is doing, but that is just an expression. You do know what your right-hand aide is doing and saying, even if he doesn't tell you directly. Politics and government management are simply too much about communication to ensure that matters behind a firewall will not be communicated in one form or another. Even what is left unsaid can speak volumes.

The second problem is that, although in theory a firewall deals with the appearance of impropriety, in fact it does not. Because it cannot be seen or enforced, because it is a screen rather than a wall, a firewall does not satisfy many people's suspicions. In fact, it can look like worse than nothing, that is, like a ruse or a cover-up. A firewall cannot work unless the

people involved are already trusted. This solves nothing when an official is considered untrustworthy, or where there is a general lack of trust in the local government.

And if it turns out that the firewall wasn't in place after all, the scandal becomes that much worse. This happened in San Diego, when an agency president said she was not involved in a project, and the agency chair found out that she was involved. The agency chair found himself in the untenable position of either trying to push this fact under the rug to protect his agency's reputation (a common "solution" to problems in San Diego at the time) or disclosing the fact and causing a big scandal.

The third problem is that, even to the extent it keeps things above board, a firewall ignores the fact that benefiting your business associates or contributors is a problem even if you personally are not directly involved. The public sees an official's aides and business partners as effectively acting in the official's interest. So it doesn't matter what the official actually knew or said or did.

And when it comes to a firewall that is intended, among other things, to separate a former official from the money earned by his law firm for a case he dealt with, behind the firewall, as an official, how is this separation actually accomplished? Partner percentages are not just the results of mathematical computation. They also have a lot to do with power in the firm, with an official's ability to bring in business, whether he participated in the matter or not. In other words, there is no way to calculate whether or not an official was rewarded for bringing in a client seeking benefits from the government or for attorney fees paid by the official's government, if the firm is representing it.

Firewalls can be a way not to protect the public, but rather to allow an official's firm to have its cake and eat it, too. Without the firewall, the official's firm would not be able to represent many clients in many matters, and there would not be any incentive in either hiring government officials or supporting partners in their attempt to become government officials. The availability of the firewall thereby allows there to be far more conflicts in local government than would otherwise be possible, and far more opportunities for government officials to use government service to get business for their firm.

Firewalls can work with investments in the form of blind trusts, but at the local level officials don't deal very often with the sort of national firms in which people own stock, so this isn't as much of an issue as it is at the national or even the state level.

Firewalls don't really work. They do not succeed, from the public's point of view, in making a deal look like something other than a way of benefiting yourself and your business partners.

Benefits to an Official's Business Associates

A serious appearance problem is created when an official's decisions financially benefit a business associate, that is, someone with whom an official has a special business relationship, as a client, partner, vendor, or whatever. There are reasons for this that go beyond mere favoritism to a friend. One is the fact that officials benefit from improving their relationship with business associates. An official helping a business associate often leads, in the future, to the business associate helping the official, for example by sending her a client or customer. This is the way business works, and everyone is aware of this.

A second reason is that there might be a more direct benefit. Business associates often share profits based on their whole range of projects or clients. Even if an official is not directly involved with a particular project or client, the business associate's profits from this project or client may be shared with the official, especially if the official had a role in benefiting the project or client. Essentially, one never knows the basis of business associates' dealings with each other, so one must assume there are mutual benefits whenever one of them receives a benefit partially from the other's involvement.

Of course, the closer the relationship, that is, the more projects and clients the official shares with the business associate, the more likely there is to be mutual benefit. If they were only involved once in a minor project or shared one relatively minor client, one cannot assume a mutual benefit. Nor will there be a serious appearance of impropriety.

Often with the help of lawyers, officials can be very clever when it comes to creating what appears to be an arm's-length relationship with a company owned by a business associate. Take the sheriff of Lafourche Parish, Louisiana. In 2009, when the matter came before the state Ethics Adjudicatory Board, he co-owned an ignition interlock device sales company. The device, which prevents drunken individuals from starting their cars, is required to be used by certain people who have DWI charges against them. In order for there not to be a direct conflict, the individual with whom he co-owned the company started a separate company to do business in Lafourche Parish, and the sheriff didn't get a penny

from the sales of this separate company. But that did not prevent the sheriff from benefiting the co-owner and, possibly, indirectly, and apparently himself.

Here's how it worked. When you were ordered to obtain one of these devices, you asked where you could get one. The deputy at the jail told you to go to the Chevrolet dealer or the co-owner's company. You went to the Chevy dealer, who didn't sell the devices (the sheriff's company had an exclusive distribution agreement), and the Chevy dealer gave you a number to call: the sheriff's cellphone number. This does not pass anyone's smell test. It creates an ugly appearance of impropriety.

But in a very legalistic opinion, the state board unanimously found that the sheriff "did not use his office to make money selling devices designed to keep drunken drivers off the road." And it dismissed the case. The only consideration was directly profit, ignoring all the considerations involved in benefiting business associates. This is why it is important to include in a basic conflict provision any action benefiting one's business associates, not only a business one owns with someone. If the benefit would be small or remote, the official can ask for a waiver.

Chicago has a provision that is much like a nepotism provision, at least in terms of hiring (and contracting), that applies not to relatives, but rather to those with whom the official has a business relationship:

§2-156-111(b). No elected official, or the head of any City department or agency, shall retain or hire as a City employee or City contractor any person with whom any elected City official has a business relationship.

Another kind of business relationship is where the official or employee acts effectively as a representative of the business, bringing it clients and usually getting a percentage of the action or a finder's fee. The most common example of this is a first responder who recommends a towing company. For example, there was a finder's fee of \$300 per customer in Baltimore in 2010, when over thirty police officers were charged with taking kickbacks. More macabre is the coroner who recommends a funeral home. These relationships can greatly increase an official's income at the expense of people in the midst of a crisis. The first responder or coroner tells himself he's providing a service, but in fact he is

providing himself with a second income. Officials are already paid for providing services to citizens.

Generally, a landlord-tenant relationship is not considered a business relationship, at least if the tenant is paying a fair market value for the lease. But there are instances where an appearance of impropriety arises from a landlord-tenant relationship. For example, in 2009 a pension fund manager and a pension fund board member in Los Angeles rented apartments in the same building, owned by an investment company whose funds the pension board decided to invest in. Despite paying apparently fair rents, it looked fishy that two pension fund officials, both of whom came to the city from the state pension fund, found apartments in the same building owned by a company seeking business from their board. Since there can also be an argument over what is a fair market value for the lease, it is best if officials do not rent from anyone doing business with their board or agency and, if they do, that they withdraw from matters involving them.

Litigious Relationship

A suit can place an official in a relationship with another official or a citizen that would require withdrawal if a matter involving that other official or citizen were to come before him. But usually, there has already been a special relationship, and that relationship forms the basis for the suit. For example, a partner in a business sues his partner, who happens to be an official. But there are instances where the relationship that existed would not necessarily have created a conflict on its own. For example, a normal landlord-tenant relationship. However, if an official were sued by a landlord for failure to pay rent, the suit would create a special relationship that required withdrawal, because it would be perceived by the public that the official might either act to harm the landlord or use his position to effectively pay the landlord what was owing in rent.

The fact that a suit creates a special relationship can, like most things, be abused. For example, an individual could create a special relationship by suing an official and, thereby, prevent her from being able to participate in a matter involving that individual. This happened in Harlingen, Texas in 2009, when the city attorney sued a city commissioner for defamation and then accused him of having a conflict that would prevent him from “taking part in any discussion or vote as a commissioner, that pertains to any personnel issue

regarding [the individual's] position as city attorney." Once the commission agreed with the city attorney on a retirement contract, the city attorney withdrew the suit.

To make this situation worse, the city attorney was the city's ethics administrator.

Other Indirect Beneficiaries

The basic City Ethics Model Code conflict provision includes a list of those whose receipt of a benefit leads to an official's conflict:

1. himself or herself;
2. a member of his or her household, including a domestic partner and his or her dependents, or the employer or business of any of these people;
3. a sibling or step-sibling, step-child or foster child, parent or step-parent, niece or nephew, uncle or aunt, or grandparent or grandchild of either himself or herself, or of his or her spouse or domestic partner, or the employer or business of any of these people;
4. a person with which he or she has a financial or business relationship, including but not limited to:
 - a. an outside employer or business of his or hers, or of his or her spouse or domestic partner, or someone who works for such outside employer or business;
 - b. a client or substantial customer;
 - c. a substantial debtor or creditor of his or hers, or of his or her spouse or domestic partner;
5. a person or entity from whom the official or employee has received an election campaign contribution of more than \$200 in the aggregate during the past election cycle (this amount includes contributions from a person's immediate family or business as well as contributions from an entity's owners, directors, or officers, as well as contributions to the official or employee's party town committee or non-candidate political committee); or
6. a nongovernmental civic group, union, social, charitable, or religious organization of which he or she (or his or her spouse or domestic partner) is an officer or director.

As you go down the list, the beneficiaries become less commonly found in ethics codes. The first four are relatively common. Clients and substantial customers, substantial debtors and creditors, should be included, because they have very important financial relationships with the official, but often they are not. Think how it would look to you if an official became involved in decisions involving someone to whom he owed a substantial amount of money, or someone who owed him a lot of money and was far more likely to pay it if he got a job or contract. Think how it would look to you if an architect's or realtor's developer client came before the zoning board on which the architect or realtor served.

Large campaign contributors are a group that citizens generally feel give to local politicians in order to obtain favoritism in their dealings with the city or county. A large contribution creates an obligation, even if it is not specific to one matter or vote. Making large contributors have to give up the politician's participation in matters relating to them prevents the serious appearance of impropriety that arises from the official's obligations to large contributors. But few local legislatures are willing to pass such a provision, because it would make it much harder for their members to raise campaign funds. The best known local provision is that in Westminster, Colorado, a city of 110,000 (see my [blog post](#) on its approach). New Jersey has a similar rule for state officials, [§19:61-7.4\(c\)](#), which requires withdrawal through to the end of the official's term in office. [See below](#) for more information about treating campaign contributions as giving rise to conflicts.

Another area where citizens see a strong appearance of impropriety is when officers of local organizations vote on matters involving their organizations. Yes, they rarely receive any financial benefit from such a vote, but someone who becomes an officer of an organization is usually seen as very committed to it, and will be seen as doing whatever is in its interest, often with as much loyalty as to their own business or employer.

However, when the organization is limited to a particular matter (as opposed to, say, a chamber of commerce), such as the environment or supporting a particular development, it often happens that an officer of the organization runs for government office in order to get the result the group is seeking. In this case, there is no conflict, because the official was elected in order to further the organization's cause. But otherwise, it is a bad idea for an official (especially an unelected official) to be or become an officer of an organization that itself will have matters, or whose members (especially they are members based on their

business interests) will have matters, that are likely to come before the official. The official should remember that, despite his or her opinions, it is important to be seen as representing the entire community, not an organization within the community.

Benefits to Friends (Cronyism)

Because it is impossible to define a “friend,” friends are rarely included in basic conflict provisions, at least by name. However, that does not mean that conflict situations do not arise from relationships with friends. Government officials should deal responsibly with these conflict situations. In fact, in government ethics terms a “friend” could be defined as anyone to whom an official gives preferential treatment. There is even a special word for this, especially when jobs and contracts are involved: cronyism.

Even though there are few laws against cronyism, it causes a lot of anger and undermines trust. To the public, it means that to get a good job in or contract from the local government, you have to have a personal or political relationship with elected officials. It also sends the message that friendship is more important than competence. In other words, officials do not share the public’s interest in effective government.

In addition, everyone knows that when you give a friend something, he is obligated to give something back. This means that giving a plum position or contract to a friend, at the public’s expense, will probably end up benefiting the appointing official(s) somewhere down the road.

Here is one law against cronyism, which also includes nepotism, but is limited to employment, leaving out contracts, grants, licenses, and permits. It’s from Oakland, California:

No official, manager or employee may engage in cronyism and/or attempt to influence the City or any official, manager or employee, to hire, promote, or change the terms and conditions of employment of any individual with whom that person has a family relationship, consensual romantic relationship or cohabitant relationship.

Cronyism is defined by Oakland as “participating in any employment decision that may be viewed as a conflict of interest, such as one involving a close friend, a business

partner, and/or professional, political, or commercial relationship, that would lead to preferential treatment or compromise the appearance of fairness.”

This provision is problematic. “Close friend” is not defined, or definable, and political relationships are outside the province of government ethics. In addition, the phrase “compromise the appearance of fairness” is vague and aspirational. It is the sort of thing one might be told by an ethics officer when asking for advice, but not language that can be enforced. But what it prohibits is definitely conduct an official should not engage in, whatever his local ethics code says.

Here’s a case that shows another way of looking at the effects of friendship on the way things work in government. In Sparks City, Nevada, a council member voted for a hotel/casino development, for which his close friend and past campaign manager acted as a consultant. Although voting for the development would not even necessarily benefit the consultant, if looked at from a different perspective, there appears to be a serious conflict. What better way to get a council member’s vote than to hire his buddy as a consultant, and what better way to get your buddy work than to let people believe that hiring the buddy was a way to your heart? This sort of win-win deal happens all the time, and everyone knows it. But it is difficult for an ethics code to prohibit.

If you think the situation in Sparks City was minor, think again. The case went all the way to the United States Supreme Court in 2011. (For more about this case, [see below](#).)

As I said above, ethics provisions should be viewed as minimum requirements. Just because conduct is not prohibited, that doesn’t mean it’s responsible behavior. That doesn’t mean it won’t undermine the public’s trust in their local government. This is why it is so important that government leaders make it clear, by word and example, that cronyism and other benefits to friends are not acceptable behavior, and explain why they are not expressly prohibited in the local ethics code. This is also a good example to include in a training program.

An ethics commission, especially when faced with complaints that involve cronyism, can make recommendations to the local government’s governing body, or a charter review commission, to institute hiring, procurement, and zoning practices that will create serious obstacles to cronyism. An ethics code is not the only place to deal with certain kinds of ethical misconduct.

Take hiring, for example. Especially in larger jurisdictions, there are appointment procedures that are hidden and obscure and, therefore, prone to being used to favor those with personal and political connections to high-level officials. Consider the case of property receivers in New York state, who are effectively government consultants providing oversight of distressed properties. They are selected by elected judges, they do very little but hire managers, and they get sizeable sums of money. They are not chosen randomly from an approved list of individuals with the proper credentials. Most of them are campaign contributors or have a special relationship with a high-level official at the local or state level. Most troubling is the fact that no one knows how much these supposed providers of oversight work or how exactly they are chosen. When a process such as this is hidden in the shadows, an ethics commission can do a great service to the public by holding a hearing on the process and asking both appointers and appointees pointed questions. As a result, officials are more likely to feel they have to make the process more fair, transparent, and cost-effective.

Benefits to Other Officials

Oddly, despite the serious appearance of impropriety they cause, it is rare to find in conflict provisions the inclusion of indirect benefits to other local government officials and employees, that is, to those with the special relationship of colleague. Milwaukee does expressly include “other city employees” (*sic*) in its conflict provision. But for some reason it still does not include city officials. And the term “other city employee” does not include the police and fire departments.

The argument against including officials and employees as indirect beneficiaries is that, although it is clearly an ethics violation for a city employee to get a special benefit, it is that employee who is responsible, not the official or employee who helped that employee get the special benefit. I would agree wholeheartedly, as long as there is a complicity provision, that is, a provision that holds officials and employees responsible for aiding their colleagues in their ethics violations (see [the section on complicity provisions](#) in the following chapter).

A complicity provision does the same thing as including colleagues as indirect beneficiaries, and I believe it’s a better way to handle the problem. Otherwise, even when a

colleague is seeking an appropriate benefit, an official would not be permitted to be involved in approving it.

Ethics codes should also have provisions prohibiting transactions between officials or employees and their subordinates (see [the section on this provision](#)).

Benefits to Members of Associations

Sometimes actions by an official benefit an individual or entity (or multiple individuals or entities) with whom the official may have no direct relationship and yet, as a board member or high-level employee of an association of which the individual or entity is a member, there is a special indirect relationship. Such associations include trade associations, unions, and chambers of commerce. Professional associations are generally a different story, unless the matter involves rules that apply to a particular profession.

If, say, the executive director or president of a local chamber of commerce sits on the council, and the chamber is pushing for a transit project that will help its members, it looks to the public as if the council member is favoring his association's members and that he is acting not for his constituents but for those who pay his salary or those who elected him president. The situation is worse if the official is paid by the association. If the official had been a local business owner before being elected, then he could be expected to support projects that benefit business owners in general. But if his livelihood depends on pushing the association's causes (and he might even act as its lobbyist, even if not on this matter), this presents a serious conflict.

In addition, paid association positions are often used to reward officials for supporting their goals. The appearance that this might have been how the council member got his job further undermines public trust.

If an official wants a paid position with an association, he should be prepared to withdraw from matters involving association members and matters that the association is involved in as a special interest group.

Too often, chambers of commerce are seen as organizations that care about their communities. And they often are major supporters of good services and good government. But it cannot be forgotten that they are an interest group, with goals that are often very different from those of ordinary citizens.

Unions are another sort of organization that can cause officials problems. Union officers need to pay close attention to perceived conflicts. In Lorain, Ohio, in 2010, a firefighter who retired and became an officer of the local firefighter association, was a council member who participated in a matter that involved saving the jobs of four firefighters. Since it is in the interest of the firefighters association to preserve the jobs of its member firefighters, there is clearly a conflict in the eyes of the public. By voting on this matter, even if the ethics code did not clearly prohibit it, the council member brought not only himself into disrepute, but also the council, the firefighters, and their union (one commenter on the *Morning Journal* website, “What do you expect from the UNION brotherhood?”). Such a vote is not worth the harm that it does. Its legality means little.

It is important to recognize that, when an official or employee sits on an association or other sort of board *as* a representative of her government, there is no conflict, because the official or employee is representing her constituents in both her roles. She wears the same hat on both bodies. This situation commonly occurs with local government associations and with regional and sometimes state boards, especially those relating to transportation, development, and ports.

Benefits to Local Government Associations

There is one very special sort of association which can cause some serious conflict problems: the local government association. The best-known ones are statewide associations whose members are generally the CEOs of local governments. But there are also associations of managers, clerks, assessors, police and fire chiefs, and other professional groups. And there are regional (within a state or among states) and national associations, as well. These associations have several purposes, including education, sharing information, and lobbying jointly for local governments.

Even though the association’s board members are there as representatives of their local governments, that is, with no conflict because of their board membership, the associations can be abused. Abuse of these associations is important because of how these associations are funded: by dues that come out of city and county budgets. Therefore, a member or staff member of one of these associations has exactly the same obligations with respect to use of association funds as any local government official has with respect to city or county funds.

Here's one instance of how problems can arise. A 2010 state auditor report on the Kentucky Association of Counties found a "self-serving" culture that resulted in more than \$3 million in excessive or questionable spending over a three-year period, including "\$334,300 to pay board members for meetings, \$278,154 for legal defense for convicted officials, \$247,944 for a sports advertising contract, \$83,000 for donations and sponsorships, and \$12,600 for use of two condominiums."

Another state auditor report, this time of the Kentucky League of *Cities*, found a "staff-driven" organization with weak board oversight and inadequate policies governing ethical conduct, compensation, spending, conflicts of interest and procurement. "This lack of oversight resulted in executive staff receiving unprecedented salaries and exorbitant retirement bonuses that cost more than \$500,000; spending more than \$350,000 in excessive or questionable spending; and developing numerous conflicts of interest – including inappropriate relationships with KLC vendors." Here is a selection of KLC conflicts that were found:

\$1.4 million for legal services with a law firm where the spouse of KLC's executive director is a partner.

\$28,600 at a restaurant owned, in part, by the spouse of the executive director.

Several family members of the chief insurance services officer either currently work or previously worked for vendors of KLC.

In other words, high-level local officials did not institute any ethics program in the KLC, nor did the board of either association responsibly manage the expenditure of taxpayer funds, in one case primarily benefiting officials, in the other case primarily benefiting staff employed by a board of officials.

Officials should be required by their respective local governments to take full responsibility for management of local government associations and to ensure that they have an effective ethics program. The official who represents each local government should make an annual report to its local legislative body, as part of a request for the budget item pertaining to association dues and fees, on the local government association's budget oversight and ethics program. Any official who is a board member of an association that

misrepresents money or engages in ethical misconduct should be held responsible for it as if he had engaged in the misconduct himself. If he benefited financially, he should make full restitution.

Local government associations can also be used to persuade or pressure state representatives not to pass strong ethics laws or programs that apply to local officials. This appears to the public to be not in the public interest, but rather in the officials' personal interests. The responsible way to handle this conflict is for such associations to give their opinion (and dissenting opinions) publicly, expressly recognizing that their members have a personal interest in the result of the legislation and that, therefore, they should not confuse their conflicting roles by in any way lobbying privately or otherwise using their influence privately with respect to local government ethics laws.

Another problem with many local government associations is their associate members or corporate partners. These are primarily companies that do business with local governments and seek to influence association members and obtain their business. Local government associations should have nothing officially to do with such businesses except, perhaps, selling them exhibit space at conferences (and there should be limits there, as well). Associations should not sell advertising or website space to those who do business with their members, and they should not take money from such businesses in any other way. If it would create an appearance of impropriety for a restricted source to give a mayor or council the money for its association dues, the same money should not be given directly to the association, thereby lessening the dues or, even worse, providing pay, services, or perks to the officials who are representing their local governments or those with whom they have special relationships.

Beyond the issue of the conflicts involved in vendor payments to local government associations is the opportunity they provide for pay to play, that is, the fact that a local government association can use its position to pretty much require advertising and other payments from those who want to do business with its members.

It may sound helpful for an association to have a contractor or developer advisory committee, to get input on policies from the businesses' point of view, but chambers of commerce and other business, trade, and professional associations serve this role already. The more arm's-length the relationship between government officials and those they do business with, the better.

Local government associations need to face their conflicts and deal with them responsibly, just as their members do.

Political Benefits

Our political system does allow one kind of personal benefit: political benefits. An elected official is allowed to do just about anything to benefit her career and her party's fortunes. She can make misrepresentations, break promises, take popular positions that are harmful to her community, and run an ugly campaign. She can hire the most incompetent aides, even the children of her biggest supporters. She can throw her personal support to other members of her party or faction.

Elected officials' personal political interests are involved in almost every discussion and vote they participate in. Their desire to get re-elected, or become the mayor, is irrelevant for government ethics purposes. In our society, politics for politics' sake is not above reproach, but it is above government ethics, at least in terms of what is legal.

In other words, there is, legally, no conflict between an official's obligations to her community and her obligations to her party or even her obligations to her own political career. That doesn't mean that she can hand out regular jobs or contracts to party members without their having to go through the formal processes required for a position or contract. But she does not have to withdraw when a party colleague or political supporter's son is up for a job or a contract (however, in some jurisdictions, a large political supporter is considered to be a close relationship for the sake of voting).

When there are job or contract requirements, these politically connected individuals must meet the requirements, take the tests, or file a bid. But ethics laws cannot themselves set standards, require tests, monitor, or set up procurement systems. These are the work of personnel and procurement rules, practices, and departments. Personnel and procurement rules and practices can limit hiring and contracting with people who lack the necessary background, the cronies most damaging to the public interest, those who create waste and can get the local government into serious trouble. Fortunately, these are also the cronies most people find most objectionable. Good procurement practices, including competitive bidding and the exclusion of both officials and contractors from the process of writing specifications, take the opportunity for much damaging political favoritism away from elected officials.

It's important for ethics commissions to recognize that, just because these hiring, procurement, and land use rules and practices have no place in an ethics code, this does not mean that the ethics commission cannot make recommendations to the local government's governing body, manager, or charter review commission, to institute hiring, procurement, and zoning practices that will create serious obstacles to damaging political favoritism and other behavior that is outside the commission's jurisdiction.

But the fact is that political favoritism itself is acceptable under many circumstances. And when it comes to professionals seeking to do work for a government agency, because they are usually not subject to procurement rules, political favoritism is, in many places, the norm.

The Government as Competitor

There are times when the benefit being sought by an official is not a contract, permit, license, or grant from her own government, but is still problematic. This is the case when the official is competing with her government for a benefit that is coming from the state or federal government, or some other entity. For example, a program run by the mother and sister of a Bridgeport, Connecticut school board official (the program was associated with the church for which he was minister) was competing with the school board for a state preschool contract. This situation should be handled just as responsibly as it would be were the contract with the school board itself.

The Desire for Good Relations

In 2009, a police watchdog group in Riverside, California filed an ethics complaint asking that the chair of the city's Community Police Review Commission be removed because the private ambulance company he works for has large contracts with both the city and the county, and therefore it is in the commissioner's interest as an employee of the company to "maintain good relations" with the city and county governments. This presumably would make the commissioner less likely to do anything that would anger city or county officials.

At first thought, this might seem absurd, especially when applied to an employee. But it is true that many board members have an interest in maintaining good relations with the local government for a variety of reasons. Some are involved in businesses that have or desire contracts with or grants from the government, others are professionals with clients

who do business with the government, and others are applicants for everything from building inspection approvals to zoning changes.

Each such board member has reason not to rock the boat too much, not to take a strong stand against those in power and their supporters. And in communities where the same people have been in power for years (especially smaller communities), this extends beyond those who do business directly with government. Anyone who does business in town may fail to oppose those in power for fear that they may lose business as a result. Sometimes this fear is implicit, but sometimes it is the result of active intimidation.

However, like politics, the desire for good relations is another accepted, although problematic, interest that often conflicts with the public interest, but which is beyond the scope of a government ethics program, both because it is too vague a concept to enforce and because it is too common and tacitly accepted.

Indirectly Providing Benefits

There is another form of indirect benefit: benefits made in an indirect fashion. For example, an official may benefit herself or others not by participating in a matter or voting for the benefits, but by trading votes with her colleagues to get votes on a matter in which she has a personal interest, while not voting herself. In some cases, the trade will involve matters where colleagues have a personal interest. For example, you vote for my brother to get a contract, and I'll vote for your sister to get a contract. When this occurs, withdrawal by the conflicted official is meaningless.

Similarly, an official may have a subordinate act in his stead. The subordinate will do what is necessary to please his supervisor. Or an official might have a business associate or family member act on her behalf, so that the official is officially only wearing the hat of an official.

In the alternative, the benefit might not go directly to someone with whom the official has a special relationship, but rather to an intermediary, who then benefits the official, often in a way that has nothing to do with the original transaction. For example, the intermediary might be a subcontractor or client that, in return for a subcontract or piece of a deal, agrees to give a job to an official's son. Games can also be played with parents, affiliates, and subsidiaries of companies, so that special relationships are lost in the shuffle and there would appear to be no conflict.

This is why a conflict provision should include the phrase “directly or indirectly.” An alternative to repeating this phrase throughout an ethics code is employed by San Antonio:

§2-51(b). A city official or employee shall not violate the provisions of this code of ethics through the acts of another.

Using someone to accomplish what might be discovered if one did it oneself can be triply unethical. It violates a provision, it does it in a sneaky manner, and it often abuses one’s power over another individual, co-opting them into a scheme to violate the law. This is as bad as ethical misconduct gets.

Another form of indirect benefit involves giving a benefit to someone completely unrelated, but which changes the rules in a way that would benefit an official. One common example is a change in pay or perks to members of one union local that will likely have an effect on the negotiations involving an official’s related local. Another example is a sale of county water to a reseller of water that will affect the price that an official who owns a water reseller will get when his company’s contract comes up for renewal. The official can withdraw from participation in the sale of water to his company, but by participating in sales to others in the same situation, he can ensure a better deal for his company or, at least, be seen as doing this.

To deal with all these situations, it is important that, in one way or another, an ethics code includes indirect action to benefit someone (including oneself).

There is another way for officials to indirectly benefit themselves or others. This sort of conflict is based on the official’s authority over the agency handing out the benefit, often an agency that is independent and not even subject to the ethics code. This odd type of conflict is usually ignored. But in 2013, San Antonio’s mayor recommended a good way of dealing with it. The proposed reform would prohibit city officers (mayor and council members) from having a financial interest in a contract or other transaction with an entity whose governing body is selected or nominated by the mayor, the council, or single council members. In other words, an official is not allowed to obtain benefits not only from his agency, but also from an agency whose governing body has members the official selected, individually or along with other council members.

Too often, the conflicts of high-level officials are limited to city or county transactions. But independent agencies and authorities are often controlled by such officials' appointees, and this relationship can lead to ugly scandals.

3. Non-Financial Benefits

Most indirect benefits are part of a larger category of benefit, the non-financial benefit. That is, although indirect benefits usually benefit someone financially, the official or employee himself does not benefit financially.

Many ethics codes limit conflicts to situations where there is a financial benefit to the official, and others limit conflicts to situations where there is a financial benefit to the official, a member of the official's household, or the official's business or employer. The assumption is that the official will benefit in a financial manner by money coming into the household, the business, or the employer, since an employer will favor an employee that helps the business, either directly via a commission, bonus, or partnership share, or indirectly through a raise or promotion.

Other ethics codes limit conflicts to direct or indirect financial benefits, without more detail, which can make it difficult for officials to know which situations involve indirect benefits. These are the situations where the official should ask for advice. However, such a conflict provision makes it hard to enforce violations in the gray area where it is not clear whether or not a benefit is indirect, especially if there is not an ethics adviser to provide timely advice. Having an ethics officer and publishing advisory opinions regarding the gray areas provides guidance and allows for better enforcement.

The fact is that even some important direct benefits are non-financial, such as benefits to one's reputation. Nothing is more valuable to an elected official, or to most people for that matter, than their reputation in the community.

In addition, most people get a direct emotional benefit from helping a family member or a friend. Yes, officials also get an emotional benefit from helping their district get a new playground, but that is not favoritism, it's part of their job.

Another kind of non-financial benefit can be seen in the common situation where a council member is asked to vote on the appointment of a family member to a board or commission whose members are not paid. There is no immediate financial benefit in this matter (although service on an important board can lead to business opportunities down the

road), but there is a conflict here which should be handled by withdrawing from participation in the matter. The conflict is the basic one of wearing two hats, one of official, the other of family member. Whenever an official votes for the family member, the public will assume the official is wearing his family member hat, and that, therefore, family members and others with connections are preferred over ordinary citizens. That is a terrible message to send.

There are other types of non-financial benefit. For instance, a council member in a small California city voted on whether or not to unseal two confidential memos written by the city attorney on the subject of whether the council member had a conflict. The council member clearly had a personal interest in the outcome of this vote, but in the midst of a discussion about conflicts, somehow this benefit was overlooked because it was non-financial in nature.

Or take this case, from Tacoma. Before taking office, a council member worked on drawings submitted to the city in a bid to renovate the city's baseball stadium. He was not paid for his work and would not, presumably, receive any money were the bid to be accepted. And yet there would be an appearance of impropriety when someone advocates for a bid he worked on, whether or not any money was involved. Not only would he be seen to favor a bid he worked on, but it would be a reasonable assumption that if the council member approved the bid, he would be more likely to get paid work from the architect who hired him. It is the relationship with the company bidding that matters, more than the amount of money he was paid.

Sometimes non-financial conflicts are worse than many financial conflicts. Here's an example from a town in Connecticut. Someone brings a censure motion against the town's first selectman (effectively the mayor) to the board of selectmen, which has three members. The first selectman, who chairs the board, refuses to let the censure motion be considered, even after the person who made the motion says he has a conflict and should not do this. The law in the town supports his view, because it only recognizes financial conflicts. But no one would agree that he did not benefit by preventing the censure motion from being considered, especially at a televised meeting.

Here's another serious non-financial benefit issue. Community TV companies may be nonprofit, but they can be very politicized. The committee that oversees this sort of company is often appointed by, or includes, officials that they film, and the company

manager is often politically active, chosen for her political affiliation or required to back the party in power. This can lead to videos that are seen as damaging by the party in power going missing or lacking audio or being shown less often. However, the benefit to officials is not financial. These nonprofits should be as independent as possible from politics, for example by prohibiting politically-involved officials on the oversight committee, so that when videos do go missing, there isn't a question whether it was negligence or an official trying to hide something from the public.

These are the reasons why the basic City Ethics Model Code conflict provision covers both financial and non-financial benefits, using the language “may result in a personal or financial benefit,” defining “personal benefit” as “benefits other than those that are directly financially advantageous.”

There are also non-financial interests based on relationships and actions that, although there may not be direct benefits, are based on mutual interests and benefits, and create a serious appearance of impropriety. For example, a council member who files an affidavit on behalf of a developer suing the city should not participate with respect to that suit. Nor should a council member who is a fellow party officer of a contractor participate in matters that involve that contractor. Withdrawal would not be required by most ethics codes, but it would be the responsible way to handle the situation.

However, it is important to recognize that some personal interests do not involve benefits that are considered in government ethics. The principal interest of this kind is a political interest, [discussed above](#).

The same thing goes for ideological interests. The fact that a council member has a strong interest in preventing a development from being built, due to environmental issues, cannot prevent that council member from participating with respect to that development. In fact, it is likely that the council member was elected for these very views.

Similarly, an official's views of other officials, or even desire to see another official be removed, is not an interest that is relevant to government ethics. It might be a great benefit to the official to get rid of someone who is a thorn in her side, but unless the replacement has a personal relationship with the official, this is not a benefit relevant to government ethics.

In 2009, an Indianapolis council member filed an ethics complaint against the mayor, city attorney, and communications director because they all sat on the board of a nonprofit

that received substantial funds from the city. The council member knew that the city's ethics code did not cover non-financial benefits, and the complaint was dismissed, but the council member felt it was an effective way to express his concerns about high-level city officials self-dealing even in ways that brought them no direct financial benefit. One of the officials resigned from the board, and possibly the complaint will lead to a change in the city's definition of a conflict to include non-financial benefits.

The value of an unpaid nonprofit position can be seen from a 2012 Oklahoma case. The unpaid CEO of a social service agency, who was also a member of a state human services board that approved contracts to social service agencies, left the human services board after he was reprimanded for participating with this conflict (another nonprofit official did the same). Just because one is not paid does not mean that a job does not provide important benefits, even indirect financial benefits.

Relationships between local government and nonprofits can also become an issue when the money goes in the other direction, that is, when the city gets money from the nonprofit. For example, in Pottawattamie County, Iowa in 2009, a county board member sat on the board of a foundation that gave grants to, among other institutions, the county and the county seat, Council Bluffs. Would it be sufficient to withdraw from participation when the foundation's board dealt with a county grant request? Perhaps not. A Council Bluffs council member wondered how this foundation board member would deal with competitors of the county, such as the city. The assumption is that he would be seen as biased toward the county and, therefore, against other possible grantees.

Even where you receive no financial benefits, positions, even with nonprofits, give you obligations and loyalties. Wearing two hats puts in question any decision you make for one entity that affects the other entity, or its competitors.

Membership of a club, community organization, or house of worship can cause the appearance of a conflict, but does not generally require withdrawal, any more than does sharing with someone race, religion, gender, or age. However, there are situations where such an organization is seeking benefits from the government, and it may appear that an official is seeking to help his organization or even himself, due to lower membership or school fees (and the member may also feel uncomfortable having to possibly vote against his organization).

For example, in 2012 in Wallingford, Connecticut, a matter came before the council involving funding for the wall of a church parking lot that was also used by ordinary townspeople. Council members had various affiliations with the church.

It's easy to deal with an individual in a paid position with the church. But what about an unpaid member of the board? Since a member of the church board would have likely made the decision to support the bill, this position would clearly be sufficient to require him to withdraw from the matter when it came before the council. But what about a member of the board of the church's school? This board may not have taken a position on the bill, but since the school is part of the church, its board members would be equally identified with the church's interests. Therefore, it would be best for a church school board member to withdraw.

Even church members are in a conflict situation. If the funding were approved, church members would not have to pay to fix the wall (a substantial amount of money was involved). Whether or not a particular family actually gives much money to the church is not really relevant. What is relevant is the perception that this is the family's house of worship, and that anyone is seen to favor her house of worship over the public interest in having a church wall fixed by the church. This is a difficult issue to deal with in an ethics code, but it is important to consider such conflict situations publicly and ask for advice that goes beyond the ethics code's minimum guidelines to consider the appearance of impropriety.

Relationships more tenuous than membership, such as having gone to the school as a child, having a grandchild in the church school or even a child that attends classes there (as opposed to attending the school as a full-time student), or a spouse who once taught at the school, may create an appearance of a conflict, but would not, I think, require withdrawal. What is best in such a situation is seeking advice, so that it is an independent ethics adviser rather than the official herself who decides when a relationship is too tenuous to require withdrawal.

Sometimes an institution will be over-represented on a local government body. If there are substantial sums of government money or there is a serious dispute involved, the body can vote not on the project itself, but rather on turning the matter over to a consultant to determine whether the project is in the public interest. The body would still have the final vote, but at least the public would be assured that a neutral expert had studied the project and concluded that it was in the public interest.

4. Indefinite Benefits

Conflicts arising from indefinite benefits is probably the most difficult gray area in government ethics. It is because of the existence of indefinite conflicts that I often speak in general terms not merely of conflicts, but of “possible conflicts” as well as “conflict situations.” That is why the highly important word “may” precedes the verb “benefit” in the City Ethics Model Code’s basic conflict provision. This concept is well stated in the Tulsa ethics code (§603): “The possibility, not the actuality, of a conflict shall govern.” There need be no benefit to anyone; a reasonable possibility of a benefit is enough.

In practice, an official with an indefinite conflict may see a possible conflict situation — which might be beneficial or harmful to them, depending on what happens in the future — as something he or she does not have to deal with at the present time. There are more pressing things to worry about than a situation that might never be beneficial to him, or to anyone else.

But the public tends to see indefinite benefits as something the official is hoping or even expecting to get, and they want the official to deal responsibly with the situation or, in some cases, say clearly how he plans to deal with it. With conflict situations, you cannot wait until you see how things turn out. You have to deal responsibly with them when you realize they exist, and recognize that although the language refers to benefits, conflicts are often based on obligations and relationships, which are usually there from the beginning.

It is with respect to indefinite benefits that the language of “interests” can be useful. If you have an interest in a company, and the company is involved, it doesn’t matter how a decision will affect the company. You still must withdraw from any matter involving the company. But there are other situations that are not so clear.

Candidacy

One situation that can make a conflict indefinite is candidacy. For example, in 2010 a council candidate in Tampa was the executive director of a nonprofit organization that had a large contract with the city to build affordable apartments. As the candidate said, the situation was “a someday, might possibly happen, down the road. First the campaign has to go forward and the elections have to be completed. I have to be elected for this story to have any meaning.”

But her opponents argued that, if elected, she would have to choose between her position and her job. The executive director said that the state ethics commission had told her that all she'd have to do is recuse herself from any matter involving the contract. But Tampa has a stricter rule than the state, making a conflict-related violation grounds for recall.

The fact is that it doesn't matter exactly what the law says. The conflict is still problematic. Not only would the candidate's organization soon be renegotiating a contract with the city, and be seen to be helped by his inside influence, but the housing staff would have to oversee an organization led by a council member (if goals were not met, housing staff would have to ask the council member to return funds).

As "down the road" as the conflict is, the responsible thing for the candidate to do was to clearly explain how she would deal with it if she were elected. And despite what the state ethics commission said, withdrawal would not clearly be sufficient.

Proximity

One typical indefinite benefit has already been mentioned: proximity to a development or project, including transportation projects. Any particular property, and its owners, may benefit from being near a new bus or subway stop, a parking garage, or a street improved with brick sidewalks and fancy streetlights. And the value of any particular property may be harmed by putting a garbage dump or chemical factory nearby, or by a commercial or housing project that brings lots of traffic into a quiet neighborhood.

Proximity is a difficult area because, despite the proximity to a project, there may be no benefit at all, or there could be benefits and harms, such as, for a business, more people drawn to the area, but also less parking and more competition for one's customers. For a nearby home, a development is more likely to be harmful, but for the owner of nearby undeveloped commercial property, the value is likely to go up. If it's not certain there will be any benefit or harm from the development, does that mean there is no conflict?

The answer is No, because what is important here is not the actual concrete benefit or harm, but rather how the official's presumed expectation of benefit or harm is perceived by the public, based on the only concrete thing the public has to go on: the position the official takes on the project. If an official supports a development near her business, it is assumed that she expects to benefit from it. If she opposes the development, it is assumed

that she expects it to harm her business. Since the official is presumed to know best (even if she turns out to be wrong), the assumption is that she is putting her interests ahead of the public interest. Neither her level of certainty nor the correctness (or even the actual existence) of her expectations are relevant.

The idea that there has to be a definite benefit in order to withdraw from a matter can cause serious appearances of impropriety. For example, in Cincinnati, there was a streetcar project that would likely help an official's family firm if it went near the firm's undeveloped property. The state ethics commission felt it had to decide that there would be a definite impact on the property in order to find an official in violation due to voting with a conflict. If a streetcar route is uncertain at the time of the vote, there is no direct, certain benefit. But there is a clear conflict based on the official's (or, in this case, the official's father's) expectations and the appearance of the official's participation from the public's point of view.

A popular way to include proximity in an ethics code is to be mathematical and precise in drafting what is known as a "proximity rule," that is, a rule that requires officials to withdraw from any matter dealing with property or improvements within a certain distance from property they own or rent (this can be extended to property their business or their immediate family owns or rents).

But how many feet or yards do you choose? California uses 500 feet, for example. Telluride, Colorado uses 150 feet, while Aspen, Colorado uses 300 feet. Any number that is chosen is basically random or, worse, intended to make officials withdraw in fewer situations, even where there is a clear appearance of impropriety. As it is, all of these figures happen to be low, as far as I'm concerned. The number a council picks should not itself make it look like the council is not serious about requiring withdrawal in situations where the public would consider the official to have an interest.

Should officials be required to go out and measure the distance between the edge of their property and the edge of the other property, or the new addition or out-building? And if the official's house is nowhere near the relevant property edge, would that matter with respect to the measurement process? If just a number is selected, these questions still remain to be answered.

One problem with a rule such as this is that while providing relatively clear guidance, it ignores the spirit and purpose of the code. After all, everyone knows that people,

especially business owners, have a special interest in nearby businesses or housing developments expanding, because it affects the value of their property or business. That is really what matters here. The number of feet is only one factor, and hardly the most important one, in determining whether an official needs to withdraw from the matter.

Therefore, proximity should be considered an issue to be raised and weighed rather than a number chosen without respect to the particular situation. Even though they supply clear guidance, numbers are too mechanical; they do not really have a place in an ethics code.

Probability of Benefit

The probability of benefit or harm is a relevant consideration. If the probability is slim, or if the say of the official's agency or board in the matter is minor, then an indefinite benefit should be treated as a de minimis benefit.

But even where the probability is small, it is important to explain clearly, honestly, and publicly what the possible benefits or harms are, how likely they are to occur, and how much authority the official or her board has in the matter. It is also important to seek advice from an ethics commission or ethics officer, and to share that advice with the public. The more responsibility an official shows in dealing with a conflict, the less likely it is that the public will think the official is hiding something or presenting a false picture of the situation.

It is important to remember that any possibility requires disclosure and some kind of action. Rulings of New York City's conflicts of interest board have found that there is a violation if an action has a more than a 0% chance of benefiting an official or associated person. If officials see that they have to deal responsibly with indefinite conflict situations, then they will seek advice and thereby save the government from bad press and scandals.

After all, nothing gains the public's trust as much as officials who recognize that even the best, most honest explanations can sound like hogwash to a skeptical public. The more the public thinks there is a great deal to be gained or lost in a matter, the more skeptical it is likely to be about an official's motives, and the more important it is for officials to withdraw even when it is not clear whether or not their relationship to a matter will benefit them, harm them, or have no effect whatsoever.

Benefit to an Employer

Another common kind of indefinite benefit has been referred to above: a benefit to one's employer that will not lead to any immediate benefit to the official or to a member of the official's family. Officials in this situation often say there is nothing in it for them, but the public sees it different. People know that if you bring business to an employer, that could mean a promotion or bonus down the road. In fact, the public will usually assume that there is an expectation of such a benefit. This is why it is unnecessary to draw even a dotted line between a benefit to an employer and a benefit to the official. It is enough that the benefit goes to the official's employer.

Former Partners, Current Competitors, and Expertise

A more difficult form of indefinite conflict can be seen in a case from Carbondale, Colorado. A member of the town board had been a partner with people in a development project that went nowhere. Some of his former partners became involved with a new development that required approval from the town board.

If the new group of partners included only one person who had partnered with the town board member in the past, the relationship would be tenuous. But if the same group of partners is involved with this development, it is reasonable for the public to believe that, if the town board member were to help his former partners, they would be more likely to include him in the next development project, which might very well be in another town, where the official would have no conflict. Even more certain would be the town board member's exclusion from further projects of this group if he were to oppose the current development.

No ethics code is going to cover such a situation. But there is still an appearance of impropriety, because people know how business works. You help your former partners, and you're likely to get included in the next partnership. You stand in their way, and you're out.

More common are situations where an official has an interest in a company that is in competition with a company that is seeking benefits from her agency. For example, the Los Angeles city controller pushed for the council to block a Home Depot project, even though she held a 50% share in a family building supply business nine miles away. It would be reasonable for the owner of such a business to be biased, and seen as biased, against a chainstore seeking to open another store in competition with her own. It would be best for her not to participate in any matter involving that store's area of business. There was talk

about the fact that the store was nine miles away (a bit more than the common 500 feet). But with the involvement of a chain like this, that already had multiple stores in the area, it is hard for anyone with an independent store not being strong biased against the project.

Too often a relationship with a competitor is ignored. This is especially true in the real estate business. Someone who works for or represents a developer may not be involved in a project, but it's likely that one of her company's or client's competitors is involved. This is why someone involved with development has no place on a planning or zoning board.

This is less of a problem with contracts, at least if they are competitively bid. It doesn't matter if an official has a relationship with a competitor who chooses not to bid. One possibility, however, is that an official could use his influence to affect specifications in such a way as to exclude a contractor with a relationship to an official from the other party, simply out of spite. This is, however, a situation where the interest is personal, but solely in a political way. Because it is political, it is not a conflict in government ethics terms. In any event, it would be impossible to prohibit.

If a contract is not bid out, however, an official's special relationship with a competitor of the chosen contractor very well could give rise to a conflict situation. Relationships with competitors must be taken seriously.

Here is an example of a relationship with a competitor in the land use field. A developer sits on a zoning board, which is about to consider a new development. The zoning board member has nothing to do with the development and has never done business with the developer. But the developer of this new project is a competitor of the zoning board member's business. Its owners may have bid against the zoning board member for other properties in other cities. They might be trying to get into a part of the business the zoning board member is in. In addition, the zoning board member has an interest in how the zoning board's decisions will affect his future developments. The zoning board member may not have a relationship with the developer or any obligations toward it, but he has enough conflicting personal interests to require his withdrawal from this matter.

These conflicting interests also suggest that he may have to withdraw from many matters and, therefore, should consider resigning from the zoning board. It is best not to have anyone involved in a business on a board that regulates companies in that business, even if the person is willing to withdraw from any matter in which he is directly or indirectly involved.

But, say many officials, expertise is invaluable. It is important to have board members who know the business they're regulating. This is an advantage provided by retired developers and by professionals who are exclusively involved in projects outside the city or county. But expertise usually is accompanied by conflicts, and often by so many conflicts that it is not practical to withdraw each time there is a conflict. Such an expert, if responsible in handling his conflicts, will be of little use to the board.

On the other hand, experts can be useful if they do not sit on the board, but rather provide testimony or advice to the board. As advocates and advisers, they have no say in how the board decides, and yet their expertise is put at the board's disposal. In short, expertise and power need not go together. The real issue is not a choice between expertise and government ethics, but how best to employ available expertise so that there is not an appearance of impropriety.

It is important to acknowledge that many individuals use public service, especially as a volunteer on a board, as a way to make contacts and do favors that will pay off for their business. A lawyer or realtor wants to have it both ways. They want to use their expertise to serve their community and they want to increase their business at the same time. But to do so, they become involved in numerous conflict situations, because the expertise of an active businessperson comes with strings attached. It also creates an uncomfortable situation for fellow board members, who see these people not only as expert advisers, but as interested parties and colleagues of the people coming before them. It is better for everyone if experts are not colleagues of those they advise, but rather external advisers alone.

There is a responsible way for a professional, as opposed to a developer, to handle such situations in advance. A professional can act as if he had two clients, clearing every matter with both of them, and with the ethics commission or ethics officer, as well. The professional can let each client know that the government comes first, that he has to deal responsibly with any sort of conflict, even if it means not handling a particular deal. This will not lose him too many clients, because such a limitation is offset by his authority in the community, which comes, in part, from his government position. And, hopefully, for every client that would abandon him because of this limitation, other clients and potential clients would gain increased respect for him.

Solicitation of Employment

Soliciting a job offer is a form of indefinite benefit that can create a serious appearance of impropriety if it comes out. Who would trust an official to be unbiased toward an individual or entity for whom he would like to work, not to mention has solicited a job offer from? Sure, he may not get the job. But he will likely do what he feels is necessary to get the job offer, or not do what may jeopardize his being hired.

San Antonio feels soliciting a job offer is important enough include in the city's basic conflict provision (§2-43(a)), ninth on a list that otherwise looks very much like the City Ethics Model Code's basic conflict provision. San Antonio includes the official's spouse, as well as direct and indirect solicitation (that mutual friend who will get the ball rolling) and any solicitation within the past twelve months.

The San Antonio language does not make it clear whether this is limited to soliciting job offers for oneself, or for anyone, including a family member, friend, or business associate. Since an employee is more likely to solicit a job for a son or daughter than for herself, such a solicitation should be clearly included as a conflict.

But is it enough to make the solicitation of employment a conflict requiring withdrawal? After all, by the time one solicits a job, or receives an offer, the damage might already be done. The reason that the official believes he might get a job, or the reason the job offer is made, might be that the official has already done a great deal to help the potential employer. The permit or contract might be pretty much in the bag and, therefore, withdrawal would only be for show, or would be too late altogether. In such a case, prohibiting solicitation of a job from any interested party would be more appropriate, as in the following language derived from a Stamford, Connecticut provision:

An official or employee may not solicit employment with any individual or entity that has, or has had, a substantial matter pending before his or her agency.

Valuing a Benefit

In some situations, it's not at all clear whether an official will benefit. Take, for example, a council member who is reimbursed for the rent on a district office in a building he owns. It might appear that an official would not benefit as long as he is paying the going rate. But it is often hard to determine the going rate with enough precision to determine whether the official is benefiting or not. And it's possible that the space would not have been rented at all

if the official hadn't rented it to himself. Since hard evidence can be hard to provide (and to be believed), it is best that an official consider that renting from himself will be seen by the public as inappropriate self-dealing, whatever the valuation.

Valuation is a problem difficult for even an ethics adviser to solve, other than by recommending that the official rent or buy from someone else. It is best not to be in a position where paying the going rate or the fair market value is one's only defense, unless it is a common product with a relatively stable price. See the section of [valuation of gifts and discounts](#).

5. Special Conflicts

The specifics of conflicts in a procurement program are different from those for a planning commission or a local legislative body. This is why Los Angeles has [a unique system of conflicts of interest codes](#) that take into account the differences in conflict situations among agencies, departments, and boards.

These conflict codes are limited to disclosure, which is inadequate. But they do provide a good idea of the different sorts of conflict situation to look out for. Therefore, they provide more concrete guidance as to what conflict situations may arise and, when they do, require the seeking of advice from the ethics commission's staff. These differences do not need to appear in the form of different codes. In fact, this causes lots of problems, including with the creation of precedents. But it would be useful for officials if some of these differences were set out in FAQs for each department and agency.

The Convention Center code, for example, requires the disclosure not only of relationships with companies that do business with the convention center, but with any company that “Manufactures, sells or leases any furniture, supplies, materials, machinery or equipment of the type utilized by the Los Angeles Convention Center” or any company that “Provides consulting and/or contractual services, including but not limited to the following: a. crowd handling or control, ticket taking or ticket selling; b. security; c. electrical and/or electronics installation, maintenance and repair....”

Convention centers are notorious for contract problems. Therefore, the L.A. convention center wants to make sure that its officials and higher-level employees disclose, and recognize as problematic, a relationship with any company that may seek business from the convention center. There is even a requirement that an official disclose a relationship

with a company that “Is or within the past twelve months was a *competitor* [emphasis mine] of any person or business entity in any of the above.” It is unusual, but very mature, to recognize that being involved with the competitor of someone seeking or doing business with a government agency can itself cause problems, both in fact and in perception.

It is important to ensure that any process for dealing with specific sorts of conflict situation not be used to weaken government ethics rules. It should only be used to apply them in a way that provides more guidance, more understanding and, therefore, more responsible handling of conflict situations.

B. Preferential Treatment

Ridding government of preferential treatment (also referred to as “special consideration” or “favoritism”) is a central goal of government ethics. Nothing sours the public on the fairness of their local government more than feeling that some people are being given special consideration, privileges, exemptions, short cuts, and jobs that normal citizens do not have. And yet, despite being so basic, the preferential treatment provision is one of the most problematic ethics provisions. Here is a typical preferential treatment provision:

An official or employee may not, directly or indirectly, in a positive or negative sense, treat anyone, including himself and his family, preferentially, that is, other than in a manner generally accorded to city residents.

The problem with this sort of provision is that it is so open-ended. It is essentially an extension of the basic conflict provision *ad infinitum*. It takes a prohibition of the misuse of office to provide benefits to someone with whom an official has a special relationship, and extends this prohibition to cover benefits to anyone. This opens up several cans of worms.

Therefore, a preferential treatment provision belongs in the aspirational Declaration of Policy section of an ethics code, as it is in the City Ethics Model Code, rather than in the enforceable section. As an essential element of government ethics, preferential treatment should be considered by officials in determining how to deal with a situation and by ethics officers when giving ethics advice. But when it comes to enforcement, the provision’s coverage is too broad, the language provides insufficient guidance and, therefore, it can be

used as a blunt weapon against an official or it can be a trap into which an official may unknowingly fall.

The fact is, however, that because the misuse of office to favor people is such a central government ethics issue, a preferential treatment provision does appear in one form or another in the enforceable section of many local ethics codes. Therefore, it must be reckoned with not just as a goal, but as an ethics provision.

The principal issue with respect to a preferential treatment provision is how much, and how, to extend the prohibition of benefiting family members and business associates so that it covers forms of preferential treatment that benefit others. If it is too open-ended, people will use it to attack almost any sort of behavior they don't like. If it's too narrow, it is no longer a preferential treatment provision, but rather one of the many enforcement provisions that are simply focused, narrow preferential treatment provisions, including misuse of government property, misuse of confidential information, and product and company endorsement provisions.

Sometimes the benefit deriving from preferential treatment is limited to financial benefits, as in this provision from the Massachusetts Conflict of Interest Law:

No current officer or employee of a state, county or municipal agency shall ... use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

Adding more detail does not necessarily provide much more guidance. Here is the relevant International Municipal Lawyers Association Model Code provision:

No public servants shall use or attempt to use their official positions improperly to unreasonably request, grant, or obtain in any manner any unlawful or unwarranted privileges, advantages, benefits or exemptions for themselves, or others, and no public servants shall use, or attempt to use, their positions to avoid the consequences of illegal acts for any person....

One thing that distinguishes a preferential treatment provision from a basic conflict provision is that it covers more conflict situations that cannot be cured by withdrawing from

a matter. In most cases, once a preferential treatment provision has been violated, it is too late to handle the conflict responsibly. At this point, the issue becomes handling the *violation* responsibly, that is, owning up to it, apologizing for it, and trying as best as possible to reverse the preferential treatment or make restitution for it.

Those who draft such a provision must not only recognize its importance, but also recognize the many ways in which it can be abused in order to hurt an official's opponent. Abuse of a preferential treatment provision can cause unnecessary scandal and call into question the ethics code itself. Both of these results are damaging to the public's trust in the government.

Therefore, when an ethics code includes a broad preferential treatment provision among its enforceable provisions, it is important that comments make it clear what areas it refers to and what areas it does not refer to. Written (and easily accessible) advisory opinions are especially important with respect to such a provision. And the advice should be gathered in a general advisory opinion that includes a variety of situations, including situations that have occurred elsewhere but provide useful guidance.

San Antonio has a valuable addendum to its preferential treatment provision: "A city official who represents to a person that he or she may provide an advantage to that person based on the official's position on a board or commission violates this rule." This could be called the Braggart Rule.

Many ethics, and even criminal, provisions can usefully be looked at as special versions of a preferential treatment provision. For example, patronage is preferential treatment toward those who help an official get elected. A gift is essentially an official allowing himself to be preferentially benefited due to the position he holds. Bribery differs from a gift because it involves two-way preferential treatment. One way is the same as a gift; the other way involves an official giving preferential treatment in return, by helping the gift giver get a contract or a permit.

Common forms of preferential treatment, such as ticket fixing by police officers, are often prohibited by personnel or other departmental regulations. But when ticket fixing is given to government officials and employees, it is more serious than the amount of the ticket may suggest. It suggests that favoritism is common in the government. In other words, the expectation and provision of special treatment is an indication of institutional corruption.

Also, when the charge is not just speeding or going through a light, but driving while intoxicated, leaving the scene of an accident, or other sorts of conduct that can seriously affect an official's personal reputation in the community, there is a benefit to the official's reputation, which is worth far more than the price of a ticket. The value of reputation should not be ignored.

Here's a thought experiment that shows how preferential treatment can be problematic even when it does not create a conflict situation. Let's say a city decided that, to end police favoritism or the acceptance of bribes to rip up tickets, it would charge \$1,000 to rip up a ticket. The city would benefit, but no police officer would personally benefit. However, this would still be unacceptable, because it would be seen as favoring the wealthy. Tickets and other legal sanctions should not be for sale, any more than places in a special public school.

Areas Excluded from Preferential Treatment

Three areas that should, by comments or advisory opinions, be excluded from coverage by a preferential treatment provision are management decisions, political matters, and constituent services.

Management decisions include decisions to go forward with a particular project as opposed to another project. These decisions clearly show the preference of one project over another, but such decisions must be made. What is important with respect to such decisions is that the projects be discussed openly, that citizen input be allowed, that the reasons for preferences be publicly stated, and that officials with conflicts withdraw from participation.

Similarly, politics involves preferring your party or faction members over others. Many appointments, such as legislative aides, are political appointments, and there is no problem giving them to people who helped in the official's campaign. But civil service positions are a different story. With such positions there are requirements, including tests, that must be followed. It is with respect to these positions that people feel insiders should not be given special consideration. Exempting a person from having to take a test or changing job requirements to suit a particular individual involves a serious misuse of office. Creating special jobs or hiring paid advisers, special assistants, or consultants in order to provide jobs to campaign workers and contributors also creates an appearance of impropriety. As discussed in the following subsection, preferential treatment is especially

problematic when it is done in a manner that is out of the ordinary or does not follow formal processes, which are set up to ensure fairness and competence.

Constituent services should also be excluded from the coverage of a preferential treatment provision. This sort of personal help, such as putting citizens in touch with the appropriate government employee, is fine, as long as it is offered to all constituents. El Paso's preferential treatment provision expressly excludes constituent and other basic governmental services, using this language:

This provision does not preclude officers or employees from acting in any manner consistent with their official duties or from zealously providing public services to anyone who is entitled to them.

But it's important to remember that a principal defense to accusations of preferential treatment is that the official was only doing "constituent services." Looked at closer, the services both were going to someone with a special relationship to the official (sometimes a large campaign contributor) and were beyond the usual help with the provision of government services. Usually these so-called constituent services involve special deals, permits, contracts, licenses, and grants. These are not areas for constituent services. These services involve doing business with and regulation by the government.

It is worth considering whether constituent services should be the province of elected representatives. This is rarely questioned. However, local legislators are elected to determine policy, not to deal with nitty-gritty issues. This is what administrators are supposed to do. The provision of constituent services allows local legislators to justify preferential treatment by simply saying they were helping a constituent, even if they would most likely not have given so much attention to the needs of an ordinary citizen. Considering how important constituent services are to re-election, this area of government blurs the line between governance and election campaigns. Also, those who live in the districts of more senior legislators tend to get better service than those who live in the districts of junior legislators. This is unfairness in support of power and incumbency.

When you start thinking about constituent services, it seems more reasonable for them to be provided by an office under the city or county manager or chief administrator. This would lead not only to better service overall, but also fewer legislative aides who are

effectively working for re-election campaigns and making government service appear something that those with money and connections can have to an extent others cannot.

Following Formal Processes

An important sign of preferential treatment is not going through the required formal process, whether it involves a contract, an approval, a license, or the hiring of personnel. If there is not a formal process at all, this is a sign that officials want to be able to do as they please, that is, help those they please.

Without formal processes, officials have discretion to do what they please. And money goes to those who have discretion. Loopholes in processes, especially those left intact after they have been pointed out, are another way officials leave open the possibility of helping others without doing anything illegal or having to throw their weight around. When there is no formal process, or it has big loopholes, an informal process operates instead.

Informal processes, or unwritten rules, usually exist to allow for preferential treatment. One example is the land use approval process that was employed in Gwinnett County, Georgia. The county had what a grand jury called a “custom of district courtesy.” This custom, more common in large cities (in Chicago it is known as “aldermanic privilege”), provided that no land acquisition matter would be put on the agenda for review by the county’s legislative body unless staff received the approval of the commissioner for the district in which the land was located.

This gave each commissioner the power to effectively extort money from developers (pay to play), who could not proceed with their projects without the district commissioner’s approval. This sort of informal, unethical process often leads beyond preferential treatment to criminal behavior.

Most important, what this sort of process does is make land deals and contracts not the county’s, but the district representative’s. In other words, it replaces the public interest with an official’s personal interest. The district representative comes to think of what happens in his district as somehow separate from the county, including its formal processes, and he tends to think of what happens in other districts as none of his business. Creating fiefdoms in this manner limits oversight and makes accountability narrowly applicable to the district. This is very damaging to our democratic political system.

There are other kinds of “courtesy,” which become norms in some departments or agencies. There is the “courtesy” that some police departments give, better known as “ticket fixing.” And there is the “courtesy” that some officials give to those who do business with the local government, in order to help them save money on taxes, even when the savings are not due them. For example, you can only get a forced-sale tax exemption if your property has been condemned, so some governments, when they purchase property, refer to the process as “friendly condemnation,” a way of saying it’s not really condemnation, while using this magic word so that the seller can take a tax exemption and refer to the document if the I.R.S. audits him. There is also what is referred to as a “courtesy letter,” a letter that uses certain language so that it can be used by someone doing a transaction with the government to lessen his taxes, even when the transaction alone would not allow the tax reduction. These courtesies are usually given as part of an ongoing exchange of favors that make government service of personal benefit to those involved.

Access to discretionary funds (such as council district funds), as well as the power of local legislators to personally promise funds or approve bids and sales of land, lead to a great deal of ethical misconduct. Individual officials should not have such discretion. It should be shared and, as far as possible, be in the hands of professional administrators, such as a procurement or grant office, or an independent committee, such as a bid committee, rather than elected officials.

When unwritten rules are the norm, even following the written rules can sometimes constitute preferential treatment. There are times when an investigation is going on, or a watchdog is watching, that it is not safe to go by the unwritten rules. If you are favored, those in charge let you know that you better follow the written rules for this transaction.

Letting you know there is trouble is normally an ethical act. And it does make people follow the rules. It is also perfectly legal. And yet it is deeply unethical, because it protects the unwritten rules from being discovered, and it prevents a lot of favored people, who usually do not follow the written rules, from getting caught. It’s effectively the call of the lookout man, letting everyone know the cops are coming and they better stash away the guns and the loot. That’s a good thing for the gang, and for anyone who might be hanging around with them, but its intent is to preserve the gang, not a way to move forward toward a healthy ethics environment. And it’s a way to provide security to those who support the personal system, which would not work if the people involved felt that the jig might be up

any minute. If they know they'll be given warning, then they can more comfortably go along with the unwritten rules and ignore the formal processes. They also know that they'll be alerted when the coast is clear.

One way to deal with the unwritten rules regarding land use is to provide a clear guide to the formal land use process, including the names of all officials involved and their ethical obligations, to be placed on the ethics website. The laws are not enough; they can be found and understood only by lawyers. The process has to be explained so that citizens, civic organizations, the press, and officials and employees can fully know what the formal processes and rules are and, therefore, can ask the right questions and better tell when the rules are not being followed.

In a perfect world, the guide would also include the unwritten rules, even if they are no longer being followed. There is no reason to act as if they never existed. Even when an ethics environment has been improved, the unwritten rules live on in the memories of many people in the community. And they can easily become the norm again. They should live on in a guide, as the rules that are *not* to be followed, the rules the community has tried to put behind itself, so that they can be recognized if they return.

C. Withdrawal from Participation

The essential action in government ethics is withdrawal from participation in a matter when an official or employee has a possible conflict. Withdrawal from participation means that an official or employee who (1) has a conflict with respect to a matter before, or that will be coming before, her board or agency or, if a high-level official, before the government, and (2) has some ability to influence the matter, should publicly disclose the conflict and should not formally or informally, privately or publicly, communicate, act, or vote with respect to the matter. The official's only communication regarding the matter should be disclosure of the conflict and, if there is a question about how to handle the conflict situation, a consultation with an official ethics adviser or a request for an advisory opinion from the ethics commission.

Sometimes, the board or commission on which an official sits will not want to delay consideration of a matter until ethics advice can be obtained. In such cases, they may either

vote on the matter or let the board member decide for herself, for the purpose of that meeting alone. But when there is a question, the best decision is to withdraw. The worst thing is to talk about one's personal integrity and ability to act without bias.

The reason withdrawal is the essential action in government ethics is that, in most instances, it is the most responsible way in which an official or employee can act so as not to use, or be seen as using, his position to benefit himself, a family member, business associate, or anyone else that others might consider to be receiving preferential treatment. That is, if an official or employee is in a position to benefit himself or those with whom he has a special relationship, he must withdraw fully and immediately, so that he does nothing to provide such benefits. If the official only partially withdraws or withdraws late in the process (for example, when the matter comes up for a vote), he may be unfairly benefiting himself or another even though he has withdrawn.

It is important that an official cannot simply decide for himself what withdrawal consists of or when it should begin and end, at least to the extent that this means less withdrawal rather than more. For example, in 2009 in Escondido, California, a council member who was married to a police officer decided that, although she would join in all debates on police matters, she would not vote on them, unless her vote was needed to break a 2-2 tie. That is, she would participate, but not vote, except when her vote would determine the decision. An official should never choose this sort of extremely limited withdrawal.

And yet many council members supported their colleague's extremely idiosyncratic and self-serving personal interpretation of such an important rule. People are uncomfortable disagreeing with others' personal feelings about something. But withdrawal rules are not about personal feelings. They are a means of putting the public interest ahead of personal interests and concerns. They are rules like any other, which are meant to be followed, not a suggestion that officials can deal with as they choose.

1. The Abstention-Only Approach

When an official is only required to abstain from voting on a matter where he has a conflict, as some ethics codes require, he is free to misuse his position to advocate for the action in public, enlist the help of other officials in private, provide advice, draft or edit relevant documents — that is, the motion, ordinance, report, contract specifications, permit, etc.

— bargain with other board members to get their votes, and the like. This is hardly a responsible handling of the official's conflict, nor does it do anything to increase the public's trust, except to the extent all this activity occurs in secret, which itself undermines the public's trust as well as the information it can use to effectively participate in the governance of its community.

Voting is the most public face of withdrawal, but it is not even necessarily the most important, because most of what occurs in government comes before a vote, and most government action does not involve a formal vote at all.

Nor is voting on, say, a contract or permit the only means by which an official can help to benefit someone with whom he has a special relationship. On most matters, elected officials don't just have one vote. There are motions, amendments, and committee votes, in addition to final votes. There also votes to trade, as well as other authority, such as the power to prevent matters from even being discussed that comes from chairing the council or a committee.

In fact, most appointed officials and employees have no votes at all. They research, draft, discuss, and act. Abstention is meaningless when it comes to them. It is amazing that anyone would think an abstention-only approach to withdrawal could be relevant to the great majority of officials and employees and, since they work for higher-level officials, to those who have authority over what they do.

The appearance of impropriety of a conflicted official trying to persuade his colleagues to vote for a contract or grant, while he himself would not be able to vote, is just as great or greater than if the official were to vote. Think how hypocritical an official appears when, after the official abstains from voting, the local newspaper discovers that he's been using his influence to get everyone on board to vote for the action, thereby making his vote unnecessary. This kind of misconduct not only undermines the public's trust in the local government, but also its trust in the effectiveness of the local government's ethics program.

Some withdrawal provisions do not even require that abstention from voting be accompanied by disclosure of the underlying conflict. Abstention without disclosure keeps the conflict secret, as if it were something to be ashamed of. In fact, it is laudable when an official deals openly and responsibly with a conflict. If officials do this on a regular basis, it increases the public's trust in government. It reassures them that officials are acting in the public interest rather than in their own interest.

It is important that a conflict is not kept secret because advice was sought from a government attorney, making it supposedly privileged and confidential. Because an official's conflicts are public information (this is the policy behind annual disclosure), an official who seeks advice should be required to waive any privilege that might exist. Or the ethics code's requirement of disclosure should be considered to override any privilege. The alternative is to turn government attorneys into black boxes, and requests for ethics advice into a way to undermine government transparency.

Even an official's resignation should not change the requirement to disclose a conflict at the time she resigns, if the conflict is relevant to the resignation.

Here's an exchange involving a government attorney who took an abstention-only view and a board member who took a full withdrawal approach. The situation that led to the exchange involved a property to be leased by an independent authority. The vice-president of the listing agent for the property was a board member of the authority and would, therefore, benefit financially from the transaction. The authority attorney defended the listing agent by saying that the agent "did not vote on anything dealing with the cargo building." Another board member responded, "The voting isn't the issue. The issue is whether he took part in the negotiations and whether or not he disclosed that he was going to gain financially. ... If I'm a realtor, I'm on this board, and that lease is going to be part of the deal, I [would] recuse myself from anything. I wouldn't even be in the goddamn room when it was being talked about and that's what should have been done."

Focusing on voting instead of withdrawal is naive, ignorant, or disingenuous. Too many people use abstention from voting as a smokescreen to hide the irresponsible handling of a conflict. An abstention-only approach has no place in a local government ethics code.

2. The Permitting Abstention Approach

Some local governments, and state laws that cover local officials, even compromise on the issue of requiring abstention from voting when an official has a conflict. They use the word "may," allowing the official, or the body, to decide whether or not to abstain from voting.

An individual in the midst of a conflict situation is the worst-situated person to make such a decision. We all have [blind spots](#) that prevent us from seeing ourselves as the public sees us. That is why it is so important to get independent ethics advice. It is best for the

community if the decision comes from an independent ethics adviser rather than from a conflicted official.

A good response to someone who prefers “may” to “shall” in front of the word “withdraw” or “recuse,” is that an ethics code normally prohibits the use of one’s office to benefit oneself and others. When a matter comes up that would provide an official with such a benefit, how can the official act consistently with this prohibition without withdrawing from the matter? There is usually no responsible alternative.

The principal argument for letting the official decide whether or not to abstain from voting is that an official who discloses a conflict and still votes risks being thrown out of office by the city or county’s voters. This assumes a lot. It assumes that the official or employee was not appointed or hired (even though far more public servants are appointed and hired than elected), that the official will be opposed in the next election by a legitimate candidate, that the failure to abstain was reported in local news media accurately and with sufficient explanation so that the situation can be clearly understood by the average voter, that most voters actually see or hear this coverage, directly or indirectly, and see it as anything more than common politics, that voters can correctly determine the truth, and that even those who know, understand, make a correct determination, and care about what happened remember it at election time, care enough so that it makes the difference in their support, believe the opponent has cleaner hands, and actually vote. And the fact is that heavily fined politicians as well as indicted, even convicted criminals are sometimes re-elected. Enforcement at the polls is simply not a good argument.

Another argument for voluntary abstention and withdrawal is that officials should be trusted to make such decisions themselves. After all, they were elected or appointed to make decisions for the community. Why should this decision be any different? One reason is that the official is in a conflicted situation relative to the community. It is not only difficult for such an official to make a decision; it is also damaging for the public to see a conflicted official choosing to benefit himself or others.

3. The Disclosure-Only Approach

Some local governments require from an official with a conflict nothing but disclosure. Sometimes the disclosure need not even be made public or the public disclosure is nothing

more than “I have a conflict.” (See [the section on transactional disclosure](#) for more on what constitutes disclosure of a conflict.)

A disclosure-only policy is effectively no ethics policy at all. An ethics policy requires the responsible handling of conflicts so that officials are not seen to be misusing their office for personal purposes. Simply requiring disclosure of conflicts does nothing to change the impression that there is such misuse of office. What it says is that it’s fine to misuse a public office as long as you say that’s what you may be doing. It draws the legal line short of any sort of limitation, allowing officials to say that they are following the law and acting ethically, even if what they are failing to deal responsibly with their conflicts, and the public considers them to be misusing their office for the benefit of themselves or those with whom they have special relationships.

Disclosure is a good thing. It provides transparency. This is important when it comes to campaign contributions, relationships and assets included in an annual financial disclosure statement, lobbying, and the like, that is, with respect to conduct that is both legal and ethical. But when a matter arises with respect to which an official is conflicted, disclosure is not enough. It is like setting up a desk at a school entrance, asking students to take out their drugs and guns, and then letting them take them into school with them.

Disclosure-only provisions are compliance provisions. Government ethics is not a compliance program. It is a program based on training and advice, whose goal is to have officials act in such a way as to preserve the public’s trust in the government. Disclosure-only provisions relating to conflicts undermine the public trust and do not allow for enforcement of the irresponsible handling of conflict situations.

As Elisabeth Rosenthal wrote in a January 21, 2012 *New York Times* column, “disclosure requirements merely get information onto the table, but themselves demand no further action.” Disclosure-only requirements make disclosure not a step but “an end-point in the chain of responsibility, an act of compliance with the letter of the law....” By itself, disclosure leads citizens to suspect officials’ motives without providing a constructive way to restore trust.

In addition, the goals of disclosure are not clear. No guidance is provided. There is just a form that has to be filled out, not a responsible act.

Knowing they would have to let the public know they are acting in their personal interest would, one would think, deter officials from acting with a conflict. But when the

law says disclosure is enough, the officials can defend their conduct by saying that they complied with the law. This leaves the public grumbling that these guys write the laws to help themselves. In other words, the public sees officials acting doubly in their personal interest, writing the laws and then following them in order to serve their personal interest. This is not a way to increase the public trust and, therefore, has no place in a local government ethics program.

4. The Prohibition of Abstention Approach

There are state and local governments that actually prohibit withdrawal from a vote, except in relatively extreme situations. Michigan is one of these states. [Charter Township Act §42.7\(6\)](#) requires charter township board members to vote, except on a vote to appoint oneself to a township office. Only a unanimous vote of the board can even allow a board member to abstain. That means that a board can never *require* a board member to abstain; it can only *allow* her to do so when that is what she wants.

Florida has [§286.012](#), which prohibits any local government official present at a meeting from abstaining, unless there appears to be a possible conflict of interest, but only a conflict according to state law, not one according to a local law. This complicates conflict and withdrawal situations for local ethics commissions. The result is that some local ethics codes make room for §286.012, both by limiting abstention to state conflicts and by allowing officials with a conflict according to local law to vote.

For the most part, statutes such as this (from 1947) predate the modern era of government ethics. They place the duty to vote (and supposedly represent one's constituents) ahead of the duty not to use your position to help your family and business associates (which is not representing one's constituents). But some of these statutes are still on the books, and there are still many officials who hide behind the "duty to vote." Some officials even argue that voting with a conflict is just the sort of difficult, unpopular decision legislators are sometimes required to make.

When this argument is made, the response should be that this is *not* the sort of decision that is contemplated when one speaks of difficult, unpopular decisions. Those decisions involve policy issues. This is a procedural, practical issue: dealing responsibly with one's conflict situation.

Other arguments for requiring officials to vote include:

(1) Abstention disenfranchises constituents. However, a representative seen to be voting for her personal interest is also effectively disenfranchising her constituents, who voted for someone to represent the public interest, not their personal interest.

(2) Abstention is considered a negative vote in some jurisdictions. Therefore, requiring an official with a conflict to abstain does not merely remove one vote; it helps defeat a motion. A simple solution to this problem is to change the rule so that an abstention is not a negative vote.

(3) Separation of powers and legislative immunity arguments (see [the section on these complex topics](#)); and

(4) A First Amendment free speech argument. In June 2011, the U.S. Supreme Court, in [Nevada Commission on Ethics v. Carrigan](#), put to rest an argument that local legislators have a First Amendment free speech right to vote, despite a conflict. The Court made it clear that local legislators also do not have a free speech right to speak about a matter in the legislature when they have a conflict. But the Court said nothing about rights that might affect the other aspects of withdrawal from participation.

A serious problem with statutes and ordinances that require voting is that they focus solely on voting, providing no guidance with respect to the rest of an official's handling of a conflict. Does an official withdraw from the matter and then vote? Or does the duty to vote include the duty to advocate for a matter even though you have a special relationship with someone involved in the matter? These statutes show no sign of there having been a balancing of the obligation to constituents to vote against the obligation to constituents not to vote, or be seen as voting, for one's personal interests over the public interest.

In New York City, members of the council are permitted to vote with a conflict, but they cannot otherwise participate in the matter and they must disclose their conflict both on the record and to the conflicts of interest board. This is the most responsible way to deal with a situation where voting is required. But it is best not to require voting at all.

5. How to Withdraw from Participation

Terminology

Withdrawal from participation is commonly referred to as "recusal," a term originally applied to judges (a less-used term, "disqualification," is also primarily a judicial term). I choose not to use the term "recusal," because it is not familiar to non-lawyers (it does not

even appear in my edition of Webster's dictionary or in my word processing software's spell-check), and it is commonly used strictly with respect to voting (even though in the judicial context it means full withdrawal, because for judges there is no other choice).

Therefore, using the term "recusal" makes it appear that all an official has to do is abstain from voting and she has responsibly handled her conflict. Since citizens, including the news media, do not understand the term, they accept whatever definition the city or county attorney gives to it.

It is important that the concept of "participation" is included, to prevent the common misunderstanding that voting is all that matters.

How and When to Withdraw

If a conflicted official sits on a board or commission, including a legislative body, the official should, when the matter where he has a conflict comes up for discussion, disclose the conflict on the record and leave the table, or even the room, while the matter is being discussed or voted on. If the matter comes up in an executive session, the official should leave the room. If it is the only item on an executive session agenda, the official should not attend.

It is a best practice for a board chair, when a new matter comes before a board, to ask if anyone may have a conflict, that is, if anyone has a special relationship with anyone involved in the matter. This makes disclosing and handling a conflict a regular part of the board's dealing with a matter. It makes the responsible handling of a conflict a ritual little different from seconding a motion. It also makes it an official expectation that each board member will deal responsibly with her conflicts, and makes discussion of conflict situations a common and, therefore, comfortable occurrence. This both removes the emotional, defensive aspect of conflicts, and educates officials so that they better understand, and can better anticipate, conflict situations and how best to deal with them responsibly.

If a member discloses a relationship he has, or someone else states the belief that a board member has a relationship, the member may (1) choose to withdraw; (2) ask for permission to table the matter so that she can ask the ethics officer for advice; or (3) if the matter is urgent, ask that the matter of withdrawal be discussed and determined by the board.

Following this procedure does not mean that withdrawal need begin only at the moment the matter formally comes before the board, or that the conflict should not be disclosed earlier. As soon as the official becomes aware that a matter might be coming before her board, she should not participate in any discussion about it, ask that she not be copied on memos about it, and let the chair know that she will not participate in the matter in any way. In case anyone asks when the official decided to withdraw, it would be best to put this disclosure to the chair in writing. When the matter comes up before the board, the chair can then read or summarize the letter, and make the letter part of the minutes.

If the official or employee works in a government agency or department, he should similarly disclose the matter to his supervisor, have nothing to do with the matter, and certainly not discuss it with a subordinate or other colleague to whom the matter has been assigned. Any practical guidance the official gives, when this is necessary to hand the matter over to another official, should be given in front of at least one uninvolved individual, in order to prevent there being any attempt to persuade or coerce the official who will be handling the matter. This does not mean that an official will consciously try to push his interest, but rather recognizes that people unconsciously do this, and that this can best be prevented through oversight that makes an official more self-conscious of what he is doing and what he is not permitted to do.

The disclosure and withdrawal should occur as soon as the official knows about a matter and that he has a special relationship with someone who may be involved in the matter or that he is otherwise conflicted. For example, if a procurement manager knows that his brother might be interested in bidding on a contract, the manager should have nothing to do with preparing the contract for bidding. He should not wait for the brother to decide about making a bid, or to actually make a bid. If the brother decides not to bid, the procurement manager can then get involved in the matter. Withdrawal from participation is not permanent.

One thing most ethics codes ignore is how to disclose a conflict. I like the way the Anchorage ethics codes puts it: “in narrative form.” In other words, the official must effectively tell a story about his relationship to people who may be involved in the matter, any interest he or these people may have in the matter, and any benefits or harms that may arise out of the matter and affect he or these people.

And the official should answer questions people may have about the conflict situation, to the extent they are relevant. For example, if the official says that his brother is a co-owner of a company, it does not matter what the percentage is or how much it may be worth. It is the interest and the co-owner's relationship with the official that matter.

What Is a Matter?

Everything that comes up before a board or agency is not a "matter" that requires withdrawal. A matter is only something on which the board or agency will possibly act. For example, if a board decides to discuss a member's conflict, this is not a matter it will likely act on. It is simply discussing the matter to help the member make the decision correctly (a decision that may, of course, be to seek ethics advice). It would be absurd to ask the member with the potential conflict to withdraw from the discussion about his conflict. It is important to get his input with respect to the facts and to his views of the situation. But if the board does decide that it will make the decision (or if the ethics code gives the board this responsibility), the conflicted official should stop participating, except to answer questions the board directs to her.

A matter does not require withdrawal if the official has no decision-making authority. For example, a clerk may stamp a document given to her by a relative, and a public works employee may fix a street in front of his house if directed to by a supervisor. A secretary may take the minutes of a meeting that involves a family member, but someone from the board or agency should review the minutes to make sure her bias is nowhere in evidence.

It is also important to determine exactly what the matter is. For example, there was a case in New London, Connecticut where in a council executive session regarding a department head's personnel issues, the department head wanted a council member to withdraw because the council member intended to criticize the department head's actions with regard to her. But the council member would not benefit in any way from the department head's personnel situation, which is clearly what the matter involved (this is why it was conducted in an executive session). The fact that the council member was critical (or might be critical) of the department head's actions toward her was not the matter under discussion in the executive session, and it did not create a special relationship that would prevent the council member's participation.

Some officials think that it is only important to withdraw from controversial matters that are of special interest to the public. But one never knows which matter is going to become controversial, and it is more likely to become controversial if someone discovers that an official did not handle a conflict situation responsibly. Officials should act as if full attention will be brought to any decision they make. In any event, it is best to make a habit of dealing responsibly with conflict situations, so that it is the default response in the most important situations, where the pressures are greatest to act irresponsibly.

What Aspects of a Matter to Withdraw From

There is sometimes an important and difficult issue regarding which matters to withdraw from when an official has a conflict situation. For example, take a situation in Billings, Montana. The mayor's wife created bike trails for a city-county agency. Should the mayor have withdrawn from any matter involving bike trails, or only from matters involving funding of his wife's salary?

Council members disagreed among themselves. One council member felt that the mayor was hurting his own cause by participating and voting on bike trail-related matters. A second felt that the mayor's participation made it awkward for the council, while a third felt the mayor was making it awkward for his wife. A fourth felt it was no big deal, and a fifth just wanted to put the issue to rest.

A good argument could be made that, especially since there was already a law requiring developers to put aside land for bike trails, the wife was not about to lose her job due to lack of need for her work, no matter what the mayor did. This argument would lead to the conclusion that the mayor should only withdraw from a matter involving his wife's salary or a change in the bike trail law.

And yet no one clearly favored the mayor's participation in matters involving bike trails, for a variety of reasons, all of them practical, none of them legal.

The lawyers, however, did not agree. One attorney for the mayor said there would be no conflict unless the mayor or his wife were to benefit personally. Two other attorneys went so far as to declare the conflict policy unconstitutional, because it deprived the mayor of the duty to vote on matters that did not affect him or his wife (adding that she could be deprived of a property right). Presumably, they would say that only a matter involving the wife's salary should require the mayor's withdrawal.

In addition, the city's board of ethics said, in a nonbinding advisory opinion, that there was no legal reason for the mayor to withdraw, although one member said she would in a similar situation. The board's only requirement was that the mayor withdraw if his wife were to testify. It did not require withdrawal even if the wife's salary became an issue.

The responses to this situation show very clearly how useless legal arguments can be for someone trying to deal responsibly with a conflict. You can talk about legal requirements and constitutionality all you want, but when it comes down to it, what matters is how the situation looks to the public, and how the situation affects the participants, the matter, and the city government.

Two citizens commenting on an article about this situation felt that it did not pass the "smell test." One citizen wrote, "I am puzzled why the Mayor would jeopardize 'public perception' in order to vote on trails. There *must* be some sort of pay off for him to do so or he wouldn't continue to push to vote on something so controversial. Is he that unprofessional to choose voting over 'public confidence?'"

The council members and citizens made good arguments for the mayor's withdrawal even from matters where there was not a direct benefit to his wife, but where it looked like he might favor trail-building because this was what his wife worked with.

But not all the citizens agreed. Others thought the whole exercise was just nitpicking, that there are many more pressing issues. This is a common response, since few people understand the importance of procedural issues and focus exclusively on substantive issues.

And other citizens thought all this conflict talk "hamstrung" the mayor, that the mayor should have more freedom and power than he has, not less. This preference for strong mayors is common, partly because our popular culture focuses exclusively on strong political figures (mirroring our tendency to see political leaders as father figures).

It is important for officials to learn to recognize and anticipate the various responses to conflicts, because it not only allows them to deal with them responsibly, but also to explain why it is important to take particular action, even when it is not legally required. The worst thing is to only consider the legal arguments. The best thing is to focus on the most important aspects of a conflict situation, such as, in this case, the husband-wife relationship, the public nature of a mayor's decisions, and the importance of the official's participation to the administration the project (what would really be lost if the mayor said nothing about bike trail matters and abstained when they came up for a vote?).

Participation

Participation is not limited to meetings or communications with officials, employees, and individuals involved in the matter. Participation includes any formal or informal communication with anyone, anywhere, at any time, where there is any question that such participation might (if known) be seen as an attempt to influence anyone at any level of government, individuals and entities involved in the matter, or citizens. This means that an official who withdraws should not write a letter to the editor about the matter, or talk about the matter before a local civic group or political party members. Other than (1) completely private conversations with individuals with no direct or indirect relationship with a matter or its players, such as a conversation with one's spouse, (2) a conversation with an ethics officer or other adviser regarding how to deal with the conflict situation, or (3) conversations where the official is providing factual or procedural information that cannot be obtained from others (and in these situations, someone else should be present), an official should stay clear of the matter or topic altogether.

It is important to remember that a public official's personal opinions cannot be separated from his official opinion. A public official cannot simply take off his official hat and say he is speaking only as a private citizen (this happens far too often). An official who is dealing responsibly with a conflict by withdrawing from participation in a matter has no free speech right to do otherwise. If the official would prefer to persuade others regarding a matter where he has a personal or financial interest, he is free to resign and say anything he wants (at least if he isn't paid for it; see [the section on post-employment provisions](#)). This removes the conflict, and could even be considered simply another form of withdrawal from participation as an official.

Who Must Withdraw

Not everyone who has a conflict must withdraw from a matter. The City Ethics Model Code conflict provision says that an official or employee "may not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action." This means that an employee who is not using his position, who cannot take action, and cannot influence others to take action does not have a conflict that requires withdrawal.

Many employees are not in a position to act or influence. They are charged with filling out forms, typing and sending letters, accepting and filing documents and other administrative, non-discretionary work. A form might be for a relative, a letter to an organization on whose board he sits, or a document from his law firm, but he can fill out the form, type the letter, and accept the document despite the conflict.

In addition, an official whose apparent conflict is based on a situation where the official is acting solely as an official does not need to withdraw. For example, in 2012 there was a controversy when it turned out that a district attorney who was a member of the state ethics commission was a member of an organization that lobbied legislators and, therefore, was under the ethics commission's jurisdiction. What at first blush appears to be a serious conflict turned out not to be serious at all, because the district attorney was a member of the organization only in his capacity as a district attorney. It is only when a situation involves an official as an individual apart from his office that there is a conflict requiring withdrawal.

“The Vote Doesn't Matter”

When a conflicted official does not abstain from voting, the official will often say that since she voted with the large majority on her board (or was a lone dissenter), her vote didn't make a difference, so it's no problem that she didn't withdraw. This argument often works, because many people care more about how something turns out than about how it is done. The ends rather than the means. The idea is that if the official with a conflict didn't make a difference, she did nothing wrong, even if she didn't follow the withdrawal rule in the code of ethics.

There is a problem here beyond the importance of means and following the law. The official might have used her influence (or be seen to have used her influence) to create the large majority on the board, instead of staying out of the matter altogether. Not only are some board members more influential than others, especially when they know a lot about a matter (which is generally true when one has a conflict), but a lot of horse-trading goes on, especially on legislative bodies. An official with a conflict should not be helping her sister's organization get a grant in return for her help in getting another council member's pet project off the ground.

In other words, a lot goes on behind the scenes (including multiple votes at multiple levels on multiple occasions) that is more important than the final vote (and often than any

vote). It is this behind-the-scenes activity that the citizen doesn't know about (although he may have his suspicions), at least until the scandal hits the front page a year later. By following the withdrawal rule even when there is likely to be a unanimous vote, an official makes sure that she does not influence (and is not seen as influencing) the vote in any manner. Looked at from another point of view, it is pointless not to withdraw when one knows one's vote will be meaningless.

In any event, when the decision to withdraw arises, there is no way of knowing how the vote will come out, or even whether there will be a vote. By the time a matter does come to a vote, unanimous or very close, most of the damage will have been done. Even if the law requires only abstention, it is best to follow the law whether or not your vote will make a difference.

Ongoing or Recurring Conflicts

It often happens that someone with special expertise is appointed to a board or hired for a position where conflicts arise with regularity, because that expertise means that the individual has relationships with many of the individuals and entities that will come before his board or agency, due to his current or recent employment or other activities, or the employment or activities of someone with whom the individual has a special relationship. It is best that such individuals do not accept such positions, but when they do, the responsible way to deal with the situation of ongoing conflicts is to either resign from the position or, if possible, cease the outside employment or activity that creates the conflict (this applies to a spouse if it is the spouse's position that creates the ongoing conflict).

I say "if possible," because for many people in such situations, there are relationships, and the apparent obligations that go with them, that no ceasing of employment or activity will change. Therefore, in many cases, the only responsible way to deal with ongoing conflicts is to resign.

For example, if a zoning board member's husband is a big developer in town, every time that developer, or even a competitor, comes before the zoning board, the board member would have a conflict. A zoning board member cannot keep withdrawing. In such a situation, the official should resign from her position. The same problem arises if the member or her husband is a realtor or land use attorney in town.

Here is the City Ethics Model Code provision on ongoing conflicts:

An official or employee whose outside employment or other outside activity or relationship can reasonably be expected to require more than sporadic withdrawal must resign or cease such outside employment or activity. If the ongoing conflict involves a relationship, the official or employee must resign. An official or employee should not begin employment or an activity or relationship that can reasonably be expected to require more than sporadic withdrawal. If a prospective official or employee is in such a situation, he or she should not accept the position.

How often is “more than sporadic” depends on the situation. For example, a zoning board member may have conflicts relating to only two cases in a year, but if they involve the building of a fence and a garage by neighbors, it doesn’t matter. If those two cases involve major developments and take a great deal of the board’s time, with many hearings and votes that the member with a conflict will not be able to participate in, it matters a lot and something needs to be done.

Consider the case of a Las Vegas council member who was president of a construction union. In 2007, the Nevada Commission on Ethics allowed the council member to keep his union position, and yet recommended that he drop it because he “would have to abstain so often that his constituents would be deprived of their voices.” One of the commission members told the council member, “I’ll guarantee you, you’ll be back here in front of us, whether you like it or not.” And the commission chair said that the council member would be “walking a field of land mines” and that, “if he were to find himself before the body again, the ethics commission would not look kindly on him.”

Needless to say, the council member retained both his positions and, two years later, someone filed an ethics complaint against him. And needless to say, the council member got a green light from the city attorney rather than going back to the state commission for advice he didn’t want to hear. And needless to say, the council member came before the commission again.

Los Angeles has language that puts the onus regarding frequent conflicts (based on ownership rather than employment) on high-level officials that hire or appoint, and indirectly recommends that officials in such a position divest the assets that led to the conflict situation:

§49.58.8. Every City agency shall make every effort to avoid hiring or appointing City officials who hold, and are unwilling or unable to sell, assets that would present significant and continuing conflicts of interest.

This is a useful approach, but deals only with a limited number of ongoing conflict situations.

Indianapolis uses not the language of frequency but rather the language of importance:

An official, appointee, or employee shall not knowingly ... accept other employment involving compensation of substantial value if the responsibilities of that employment ... require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be substantially impaired...

Problems with this approach include (1) the requirement of substantial compensation, and (2) the limitation to the official's employment, that is, failing to include immediate family members or business associates.

Ongoing conflicts should not be taken lightly. If an official has one, he should ask the proper authority for ethics advice each time he would prefer not to withdraw from a matter related to his industry, because each situation may have a different best way of handling the conflict. But if the advice is to withdraw, again and again, the ongoing conflict needs to be dealt with in a more comprehensive manner, such as resignation.

The best time to deal with ongoing conflicts, if they are foreseeable, is before a position is accepted or before someone runs for a particular office. This is one reason why it is important to provide ethics training to candidates and new officials and employees, and to require them to file a disclosure form as soon as possible. It's also important that a candidate make it clear during her campaign how she is dealing or will deal responsibly with her ongoing conflict.

The Rule of Necessity

There are times when multiple board or commission members have a conflict, or when there is a bare quorum and only one member has a conflict. The result of withdrawal would be loss of a quorum and an inability to consider the matter.

Multiple conflicts occur especially in a company town, that is, a city or county that has one major, dominating institution, for example, a company or university, for which a large percentage of the town's citizens work.

When a quorum is lost due to conflicted members, the Rule of Necessity comes into play. The Rule of Necessity is originally a common-law judicial doctrine that deals with the problem of a biased judge in a court of last resort where there is no possibility of selecting another judge. Here's the way the Rule of Necessity appears in the City Ethics Model Code:

If withdrawal would leave a board with less than a quorum capable of acting, members must disclose their conflicts on the public record, but they may then vote. If an official or employee is the only person authorized by law to act, the official or employee must disclose the nature and circumstances of the conflict to the Ethics Commission and ask for a waiver or advisory opinion.

The Rule of Necessity rarely appears in ethics codes. However, even when it is not there, it is a common rule that people can turn to.

There is a variation on the Rule of Necessity, which applies, for example, in California, where only the number of conflicted members necessary to create a quorum are allowed to participate. The selection of those who may participate is made by a random drawing. In Loma Linda, California, for example, where in 2009 four of five council members worked for Loma Linda University, the four conflicted members would choose straws, and then the two that won, plus the one without a conflict, would discuss and vote on the matter. This makes the conflict public on a regular basis, and gives citizens the choice of having regularly conflicted officials or not.

An interesting supplement to this rule in California is that any member who must withdraw due to a gift cannot be allowed to participate. This is intended to prevent a party to a matter from giving gifts to all members so that those members who have an existing relationship with the party may be allowed to participate (see the [CA Attorney General's Office 2010 treatise on conflicts of interest](#), p. 22). It's important for ethics advisers to know about this, because you never know who else will come up with this clever scheme.

When considering employing the Rule of Necessity, it is important to recognize that it is unfair and potentially damaging, because it allows officials to act or be seen to act in their personal interest. Therefore, it is important to seek other ways of dealing with a matter before invoking this rule.

One way to prevent the need for employing this rule is to have one or two alternates on important boards and commissions, especially in company towns. This includes ethics commissions. Alternates make quorums easier to obtain, whether or not there is a conflicted member. They also make it easier for members with conflicts to withdraw without being concerned that their withdrawal will make it hard for the board to act. And there is the bonus of having a way for members to gain experience, and not having to vote before they have a basic understanding of the board's responsibilities and subject area.

Another way to deal with this problem, especially in company towns, is to have a backup plan, for example, another body or individual that can make a decision in the event there are multiple conflicts.

A third solution provides that a court, body, or individual be charged with appointing one or more temporary board members to act in the particular matter. It would be best if this possibility were to appear in the board's bylaws, but even if the situation were not anticipated, a board could turn to a court or the council for such a solution.

These solutions are based on ideas in [a law review article by Arnold Rochvarg](#), "Is the Rule of Necessity Really Necessary in State Administrative Law: The Central Panel Solution" (*Journal of the National Association of Administrative Law Judges*, Vol. 19, No. 35 (1999)).

In any event, even when it is necessary for officials to vote, this does not mean that it is necessary for them to participate in the matter in other ways, as long as they remain at the table to preserve a quorum. The Rule of Necessity applies only to the voting aspect of withdrawal.

When Withdrawal Is Wrong

There are times when the most responsible way to handle a conflict is to participate. This is the case when, by not voting, a conflicted official on a board would prevent a decision or action that would have harmed him had he participated and acted in the public interest.

An example of this occurred in Stamford, Connecticut in 2011, when a member of the finance board, who had refused to withdraw when it suited him, chose to withdraw

when the issue involved approving the city's ethics board request for funding sufficient to hire counsel for an ethics proceeding where the finance board member was the respondent. Without counsel, it would be difficult for the ethics board to hold a hearing where someone would argue that the respondent violated an ethics provision.

This was a case where the official had an obligation to vote against his interests or honestly show his constituents, by voting against the counsel, that he wanted to prevent the ethics process against him from moving forward. To do this by appearing to be handling his conflict responsibly was clever, but irresponsible.

When Withdrawal Is Insufficient

There are many situations where withdrawal is not a sufficiently responsible way to deal with a conflict. Of course, this is generally the case when a conflict is created by events, for example, by the offer of a gift. The responsible way to handle this is to refuse the gift, not to accept the gift and withdraw.

Withdrawal is insufficient when an administrative official is responsible for the matter, such as hiring or entering into a contract. For example, if a procurement official is charged with selecting who will get a contract, and one of the bidders is his brother, she cannot withdraw and hand the matter over to a subordinate. The reason is that this puts the subordinate in a differently, but equally conflicted situation. The subordinate has a personal interest in not having his boss be angry with him. It is unfair, and harmful to the public interest, to put a subordinate in this position. In addition, the public will not believe that the subordinate is not doing the supervisor's bidding, so to speak. Therefore, the responsible way to deal with the situation is either to have the brother drop out of the bidding or have an individual or body that does not report to the procurement official make the decision (if this is practicable).

Another situation where withdrawal was insufficient involved the mayor of Denton, Texas (pop. 113,000) in 2008. The mayor's two-partner law firm had done collections for the city before he was elected, and the contract came up before the council during his first term. He withdrew from the matter, but his firm was given the contract. Not only does it look wrong to give a mayor a city contract, but a mayor should not be collecting city taxes, and the council should not be put in the position of managing the behavior of the mayor as a lawyer representing the city. One of the council members who voted against the mayor

getting the contract said, “This is about something that’s higher than a legal standard. It’s about the integrity of the chair and the office of mayor in our city.”

Another situation involved a council member in Allen County, Indiana, whose car was stopped by a sheriff’s department officer. After a call to the sheriff, the council member was allowed to leave without taking a drunk-driving test. The council member said he would withdraw from matters involving the sheriff’s department, but this would not be sufficient. The problem was not a conflict based on the council member’s relationship with the sheriff, but on the preferential treatment given to the council member due to his office.

Every decision to withdraw should be examined to see if it is just a matter of trying to make things look right, or whether it is really the most responsible way to deal with the conflict situation. As with everything in government ethics, withdrawal is not a mechanical decision. When there is a question, it is important to ask for advice from an ethics officer who has seen and dealt with other situations such as this, and who knows the reasons why withdrawal may be insufficient and what the alternatives to withdrawal are.

Resignation and Sale

Sometimes officials will choose to deal with a conflict not by withdrawing or doing something else as an official, but rather by getting rid of the other hat. This includes such things as selling stock or resigning from a position or a job.

In most cases, this will remove the conflict and allow the official to participate in the matter. But in many cases, this will not. For example, selling stock in a public company will remove the conflict if that company is before one’s board. But if it’s a private company and the official has a substantial ownership percentage, the relationship with one’s co-owners is still there, even if the ownership interest has just been sold. And the stock can easily be repurchased in a way that is very different from repurchasing public stock. Anyone can purchase public stock at the listed price. But not anyone can purchase an ownership interest in a private company, at any price. A former business owner can easily become an owner of the business again.

Consider this situation from Saybrook, Illinois. In 2008, two members of both a sportsman's club board and the village board of trustees resigned their sportsman's club membership so they would have no conflict participating in a motion for the village to annex

the club. The two members reserved their right to rejoin the club after the annexation issue was dealt with.

When, as here, there is no apparent financial interest, but a strong interest nevertheless in an organization, strong enough to participate on its board, then resigning would not be enough to negate the conflict. It would certainly do nothing about an appearance of conflict, and there is no indication that one's loyalties and feelings of obligation would not still be divided. If the club membership were sufficient to create a conflict (and this is not certain), resignation followed by becoming a member again would not remove the conflict. In fact, it would make the officials look like they were trying to fool the public via a meaningless resignation.

Resignation and sale are often the most responsible way to deal with a conflict. But they are not magic incantations. Certainly, if a conflict will clearly lead to more than the very occasional problem down the road, it is right to resign or sell or whatever it takes to get rid of the conflict. But there are relationships and obligations you can't get rid of, at least not without an appreciable amount of time passing.

6. A Summary Case Study

Here's an historical case study, from Long Branch, New Jersey (pop. 30,000), whose facts present a range of special and not so special relationships that might or might not be the basis of a conflict sufficient to require withdrawal from participation. The names, which are made up, are included to make it easier to keep the characters straight.

The situation involves the reappointment of a volunteer sewerage authority commission member, George. George was a founder and is a director of a local bank. He is also a large contributor to the campaign of Mayor Enrique. Reappointment is made by the council, which includes the mayor.

One of the five council members, Joan, is the bank's chief financial officer and also a fellow bank director of George's. Another council member, Tom, works part-time as a messenger for the bank, and a third, Francine, owns a few shares of stock in the bank.

The city attorney, Defacto, who advises the council, is also a fellow director of the bank and a major stockholder. The city attorney told the council that none of its members had a conflict sufficient to require their withdrawal from discussing and voting on George's reappointment. There is no local government ethics program.

Which of these officials should or should not withdraw from consideration of George's reappointment, and why? Think about this on your own before reading what I have to say about the possible conflicts involved.

Although Joan would likely not financially benefit in any way from George's reappointment, as an officer and director of the bank she is a close business associate of George's, would appear to be biased and, therefore, should not participate in any way.

Francine, as a small shareholder in the bank, need not withdraw, because she neither could financially benefit from George's reappointment nor does she have a special relationship with him. But she should disclose her stock ownership, even if not required by law, and explain (or, better, have someone else explain) why this does not create a special relationship or possible financial benefit worthy of her withdrawal.

Tom, the part-time messenger for the bank, raises a more difficult question. He gets paid by the bank, but it's part-time work and he would not likely have any contact with a member of the bank's board of directors, not to mention a special relationship. But there is an issue of financial benefit that would, at least from the public's point of view, create the appearance of a conflict. It would appear that Tom may feel obliged to vote for, or be afraid to vote against, a board member of his employer. In fact, he is in a lose-lose situation: if he votes for George, he'll be seen as having felt obliged; if he votes against George, he could jeopardize his job. If I were him, I would withdraw, not because of any ethics provision, but because he is conflicted, and would be perceived to be conflicted, in a personal way that an ethics provision could not describe.

Mayor Enrique's only relationship with George is as the beneficiary of large campaign contributions. Some local governments formally consider this a conflict (in fact, this is the case for *state* officials in the mayor's state). Legally, the mayor would not have to withdraw. But whether or not contributions legally create a conflict, they certainly create an appearance of impropriety. Citizens hate cronyism, in this case giving government positions to major contributors. It makes local government look like a club of connected, wealthy people, with others left out in the cold. A mayor who recognizes this, and withdraws when major contributors come before the council (and, in other situations, does not nominate people who have given him or her large campaign contributions), will not only be acting responsibly, but also be very popular with citizens (although not, perhaps, as popular with certain campaign contributors). More important, doing this sends the message to the entire

government that other considerations, such as merit and diversity, trump connections and, to those who want to sit on a board or commission, it sends the message that making large campaign contributions is not necessary. In fact, the opposite is true.

The city attorney, Defacto, as a close business associate of George's, should have withdrawn from the matter from the beginning. But since he already participated, and gave poor advice, which was in the interest of George, withdrawal is not a sufficiently responsible way of dealing with his conflict or his conduct. Without an ethics commission, the council should hold a hearing regarding the city attorney's conduct, and censure him. When a government attorney not only ignores his own conflict, but provides ethics advice that is both wrong and in the interest of a close business associate, an example needs to be set. It has to be made clear that government ethics, more than any area of city activity, should be free of conflicts.

And, I think, the council should determine that the city attorney has so tainted George's reappointment that the council should not even consider it. In fact, the best thing for George to do is take his name out of contention.

You can see from this case study that all possible situations and relationships cannot be anticipated by an ethics code, or even by a huge book such as this one. This is why it is so important to have an experienced, independent ethics officer to provide advice.

IV. Other Conflict Provisions

A. Gifts

Reciprocity is an important part of every culture. It is something that everyone expects from their relationships with others. It is what makes our relationships seem fair.

One of the principal elements of reciprocity is mutual gift-giving. It is part of our day-to-day personal, business, and professional relationships to give each other gifts. We take each other out to lunch or a ballgame, invite each other over for dinner or a party, help out each other's kids when we can. We give holiday gifts to those who do things for us, including our customers and our clients. Lawyers invite clients to their country clubs, and businesses send customers on vacations, or give them free rides in their jets. Gifts are a way of cementing relationships and making people who matter to us (personally or financially, or both) feel special. They express our gratitude.

In their book [*Out of Character*](#) (Crown Archetype, 2011), David DeSteno and Piercarlo Valdesolo discuss experiments that have shown that not only are people who feel grateful to someone more likely to help that person, but people who are grateful for something someone has just done for them are also more likely to help a stranger. No one has a good enough character to fend off gratitude. And why would anyone want to? It's one of the things that keeps families and communities together. But gratitude has its place.

A gift also makes the recipient feel good. When we receive a gift, our brain secretes oxytocin, the neurotransmitter that prepares women for motherhood. Oxytocin makes us less selfish, but only with respect to our group, which includes those who give us gifts. It makes us trust them more.

Local government officials don't have customers or clients that need to be won and kept by the giving of gifts, nor are they customers or clients of anyone. They have citizens and constituents for whom they work, but they are not supposed to be obliged to one citizen or constituent more than to another.

Therefore, the very sorts of relationships that are important to business and professional life are what, in government, give rise to conflict situations. Therefore, the gifts that help cement these relationships are, for the most part, prohibited. They are prohibited

because they make these business and professional relationships conflicted even without a specific matter coming before the official at the time of the gift, and because the public sees officials who accept gifts as “so many pigs feeding at the trough,” not something that furthers their trust in those who govern their communities.

Here’s another way of looking at gifts. When someone does business with, seeks approval or a grant from, or is regulated by government, they are not doing business with, seeking approval or a grant from, or regulated by officials. When someone lobbies an official, they are trying to convince the government, not the official. Officials are merely part of the government, individuals sitting in government positions at the moment. They are doing, or supposed to be doing, nothing but their government work, and to be paid nothing but what the budget says they are paid. In other words, officials do not personally act and should not personally benefit from what they are required to do as part of their public role. They should not be given special treatment, that is, no tickets, invitations to play golf or go on a vacation, or the like, because they should do nothing special for anyone. They should not be involved in reciprocity or feel gratitude to anyone in their role as an official.

But officials are human, and they are used to functioning in a reciprocal, gift-giving social world. They also like to be treated specially. They like to be given tickets, flights in corporate jets, dinners at fancy restaurants. They often feel they deserve such perks because they take lower salaries in government than they could get in the private sector (although this often isn’t true). This is why officials waste a lot of energy seeking exceptions to gift provisions, so that they continue to get gifts. Exceptions and loopholes are a big problem in ethics codes’ gift provisions.

Unlike bribery, which refers to gifts given in return for a promise of official action or inaction, that is, where there is a direct relationship between one gift and another, in a relationship of ongoing reciprocity, there is no such direct relationship between gift and official action. The other thing that distinguishes bribery from gift-giving is that it is extremely difficult to prove bribery.

What matters to government ethics is that gifts from those seeking special benefits from a local government give the impression of bribery, even when bribery cannot be proven. And the appearance that government officials are taking bribes is very damaging to the public's trust in government.

It is unfortunate that limiting or prohibiting gifts makes some who seek influence or pay to play look for alternate legal means to make or receive large gifts, for example, bundled campaign contributions or gifts to favorite charities. But these can be dealt with, too.

It is important to recognize that gifts create conflict situations by creating both a relationship between gift giver and recipient and the appearance of a relationship, with the commensurate obligations. But unlike with a pre-existing conflict, which can be handled responsibly by withdrawing from matters involving those with whom one has a conflicted relationship, the way to deal responsibly with a gift is to reject or return it. The way to deal responsibly with a gift is to prevent the relationship from coming into being. If there is already a relationship, a gift only strengthens the official's obligations to the gift giver and makes it difficult for the public to believe the official is not somehow favoring the gift giver.

Once a gift has been accepted, however, not only does the gift have to be returned or paid for. The recipient must also withdraw from matters that involve the gift giver.

Officials often reject limits or bans on gifts by insisting that they can't be bought. When they do, tell them that's not the point of a gift ban. A good way to see how meaningless it is to say, "I can't be bought," is to ask the person saying it to name the people in the room who also can't be bought. If she says, "No one on this council can be bought," respond, "How do you know? Are you willing to put your position on the line, to resign if anyone on the council is found to have done something for someone who gave him something of value?" If an official can only assure citizens that she herself cannot be bought, it is meaningless. "I can't be bought" is nothing but words that few people believe. That's why we need gift bans. We need to assure the community that its government is not for sale.

1. Gift Bans

The easiest way to prevent loopholes in gift provisions is to dispense with exceptions altogether, at least with respect to those doing or seeking business with the local government, those regulated by or seeking benefits, licenses, or approvals from the local government, their principals and officers (and their immediate family members), affiliated firms, and those who represent them (commonly referred to as "restricted sources" or "interested parties"). Here is the principal part of the City Ethics Model Code gift provision:

An official or employee, his or her spouse or domestic partner, child or step-child, parent, or member of his or her household, may not solicit nor accept anything of value from any person or entity that the official or employee knows, or has reason to believe, has received or sought a financial benefit, directly or through a relationship with another person or entity, from the city within the previous three years, or intends to seek a financial benefit in the future. If in doubt, the official or employee should refrain from soliciting or refuse a gift, and should first inquire into the person or entity's relationship with the city.

The provision includes an official's immediate family members, because it is very easy to give an official a gift indirectly by giving the gift to a family member.

The provision includes not only accepting a gift, but also soliciting a gift. This protects people and businesses from the pressure of officials who demand gifts in return for contracts, approvals, and the like.

The provision applies to those who are seeking, have recently received, or intend to seek a financial benefit from the local government, which includes not only contracts, but also grants, approvals, licenses, and permits that add value to property or that allow work that could not otherwise be done.

Due to the phrase "directly or through a relationship with another person or entity," the provision also applies to gifts from those who have a special relationship with a restricted source, for example, a close relative, business associate, or association in which the restricted source is a member, such as a chamber of commerce, state or national association. Otherwise, the owner of a restricted source may provide a gift through another company that he owns, as was done to the then mayor of New Orleans. If only direct gifts are prohibited, there is a huge loophole that allows gifts to be made in all sorts of ways. When a complaint was filed regarding the gift to the mayor, all he and his colleagues learned is that this was an effective way to get away with ethical misconduct. This is true of most exceptions as well as of gift rules that are limited to direct gifts.

The gift provision does not allow an official to say he didn't know who actually made the gift. This is necessary, because no one can know what an official actually knows. The gift ban applies even if the official merely had reason to believe, and it expressly requires officials to inquire before accepting a gift if they are not sure. This is important because the public is

doubly disgusted when an official says he didn't know the person who paid for his family's vacation in the Caribbean was seeking business with the local government. The public reasonably believes that no one offers such a gift unless they want something in return.

Some jurisdictions define "gift" to include job offers; others prohibit job offers from restricted sources in a separate provision. Job offers should be treated separately from outside employment that an official had before taking office. Such employment need not, in most cases, be given up; however, it should require withdrawal from any matter involving the employer or its clients.

Some gift bans use not the language of benefits sought by those making the gifts, but rather the fact that they are subject to the government. I think it's best to be consistent as possible in the use of "benefits" language, but adding "subject to" language can make it more clear who are the targets of the ban, which is helpful to both officials and to restricted sources. Here is the Texas gift ban, which applies to local officials (the section continues with other gift bans involving officials involved in litigation, procurement, and judicial matters; these gift bans use the language of "interest").

Texas Penal Code §36.08(a). A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

An important advantage of a gift ban is that it is straightforward and relatively easy to comply with. It lessens the confusion regarding the valuation of gifts and it means that city officials do not have to keep a tally of each gift they get from each individual or entity, so that they can make sure no one entity (including its employees) gives them more than the dollar limit specified in the gift provision.

For the purpose of gift provisions, as well as to help deal with conflicts in general, it is very useful for a local government to create and regularly update a list of restricted sources (including their owners and officers) and make the list easily available online, both for officials and for the public to consult. A list like this can make life much easier for local government officials, and prevent officials from insisting they didn't know or have reason to know that someone who gave them a gift was or worked for a restricted source.

Of course, the fact that someone who is not a close friend, family member, or business associate is offering a gift should instantly give an official reason to believe they want something from the government and, therefore, that they are a restricted source.

This points to a principal purpose behind gift provisions: they prohibit bribery without having to make the difficult proof that there was a quid pro quo, for example, that the gift was given to ensure a specific vote. Like the average person, a gift provision assumes there is something wrong when a gift is given to a government official by someone who has something to gain from the official's action or inaction (past, present, or future). And like the average person, a gift provision is mature enough to recognize that mutual obligations do not take the form of quid pro quos. People give and take in many ways, at various times, without the need to say that this makes you obligated to do that. Bribery provisions cover only a tiny part of gift transactions in a country, such as the U.S., where bribery is not the norm. As the federal Office of Governmental Ethics said in a 2012 report on exceptions to the federal gift provision:

[I]t is increasingly recognized that the more realistic problem is not the brazen quid pro quo, but rather the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients.

A gift provision also dispenses with the need for evidence of a quid pro quo, which is required in a bribery case and is hard to obtain without a sting operation.

And yet many local government ethics codes prohibit only gifts where there is a clear quid pro quo. Sometimes these bribery prohibitions are included in addition to gift bans. This is not only unnecessary, but confusing. Bribery prohibitions belong only in criminal codes.

Some local governments prohibit both sides of a gift transaction (as soon as a gift is accepted, even if it has not actually been given, it becomes a transaction). Even though it is the official who has special obligations to the community, it is good to let people know that they are not supposed to put officials in the position of having to refuse gifts. Including both sides of a gift transaction also gives restricted sources protection from pay to play: to an official who asks for something in order to get their support for a contract, permit, license,

or grant, one can simply say, “I’m prohibited by law from making a gift.” Here is how the Miami-Dade County gift provision begins:

No person shall offer or give to any public official or employee, directly or indirectly, and no public official or employee shall solicit or accept . . .

It is often overlooked that elected officials often try in many ways to influence appointed officials and employees in order to obtain preferential treatment to them and to their family members, business associates, and political supporters. For this reason, Miami-Dade County also prohibits gifts from officials to employees:

No county public official shall offer or give anything of value to a member or employee of a county department or entity, while that member or employee is associated with the county department or entity, and no member or employee of a department shall solicit or accept from any such person anything of value from a county official or employee.

Total Gift Bans

A total gift ban prohibits gifts from anyone, not only restricted sources. Many ethics codes have a total gift ban. This means that those who drafted the code did not understand that it is only gifts from restricted sources (directly or indirectly) that matter, that gifts are restricted because they create and deepen (and appear to create and deepen) relationships and obligations between government officials and those who seek benefits from the official's agency or, with respect to high-level officials, the government. If someone making a gift has nothing to gain from the government, then the obligation that is created or deepened is purely personal, and there is only one reason to restrict it: it may be an indirect gift from a restricted source.

A total gift ban is almost always accompanied by numerous exceptions. These exceptions open up many loopholes, undermining the ban and leading to many scandals. The possibility of indirect gifts, if that is what the total gift ban is seeking to prevent, can be better dealt with by a requirement that officials inquire about the original source of questionable gifts, that is, any substantial gift that is not from someone who would normally

give them a substantial gift (and how many people is that?!). If the official is not certain that the gift is not from a restricted source, she should refuse the gift. If she accepts the gift and it is an indirect gift from a restricted source, then she is responsible for accepting it.

Total gift bans are problematic not only because they are overly restrictive, but also because, due to their many exceptions, they are not restrictive enough. In addition, these exceptions can have unintended consequences, and they can require numerous waivers to be given. For example, a total gift ban in Alaska has a compassionate gift exception, but this only applies to gifts up to the gift limit of \$250. A few years ago, a state representative needed a kidney transplant. But the law wouldn't let him have one. That's ridiculous not because gifts to officials shouldn't be banned, but because they should only be banned from people and entities that have something to gain by making a gift. It's highly unlikely that a lobbyist was offering his kidney to the legislator.

Chicago's total gift ban has lots of exceptions, including gifts from a "personal friend" (an undefinable term) and gifts "related to official city business," whatever that means. The vagueness of language in gift ban exceptions can make it difficult to enforce against any gifts.

Some popular exceptions can create very ugly situations. For example, because exceptions for public service awards are usually unlimited, a big contractor or developer could make an annual gift of a car to an official for being Ethical Official of the Year, and it's perfectly legal. It is far easier simply to prevent any gifts from contractors and developers seeking benefits from the government, whatever the so-called purpose.

In any event, total gift bans only prevent certain kinds of indirect gifts. Ethics laws cannot place a total gift ban on gifts to immediate family members, and yet they are a great way to make a gift to an official's household or someone very important to the official. A gift provision based on restricted sources can prohibit gifts from restricted sources to an official's family, business, and even a pet charity. A total ban cannot.

Also, officials see total gift bans as intrusive into their personal life, and their fight against gift bans can turn fuel their opposition to an ethics program in general.

In addition, total gift bans are hard to remove because it can be argued that they're the "toughest." But the "toughest" doesn't always mean the best or most responsible.

A total gift ban sometimes forces an ethics commission, seeking to be fair, to squeeze a situation into an exception that wasn't meant to apply to it. For instance, in Colorado in 2013, [a draft advisory opinion](#) would have allowed gifts to a legal defense fund to be

permitted under the “special occasion” exception, which reads, “The prohibitions in ... this section do not apply if the gift or thing of value is: ... (g) Given by an individual who is a relative or personal friend of the recipient on a special occasion.” This exception was intended for birthdays and anniversaries, not legal defense funds. The ethics commission had to make additional rules to prevent restricted sources, even though the law did not allow for this.

Gift Provisions That Seek to Prevent Influence

A popular way to complicate a gift provision is to have it be effectively a bribery lite provision. Here is a New York State Municipal Law provision (§805-a(1)):

No municipal officer or employee shall ... directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more ... under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.

Instead of specifying which people officials should not be accepting gifts from, this sort of provision specifies the circumstances in which officials should not be accepting gifts. Such circumstances are those “in which it could be reasonably inferred” that influence was intended or that the gift “was intended as a reward,” and those in which a gift “could reasonably be expected to influence” the official. This adds two unusual elements to ordinary ethics provisions: the elements of intent (to influence or reward) and expectation (that a particular gift would influence a particular official).

The result is both complex and vague, providing little guidance to officials or to ethics officers and commissions, and also providing many ways to argue that the provision does not apply to a wide variety of situations. Intent is an internal state that is not only very difficult to prove (or to “infer”), but even difficult for an individual to know about himself or be honest with himself about (“the official is someone I like, and it’s his birthday, after all”). And how is an official to know what could be reasonably inferred, or what could be reasonably expected? How can a provision like this be fairly enforced?

Consider this example. In 2010, the mayor of Tulsa accepted free legal services from a city contractor. The Tulsa ethics provision requires an official to determine what might be reasonably perceived, rather than simply prohibiting him from accepting a gift from a city contractor. Since the mayor perceived the matter as a public service, he had no reason to consider that it would be perceived any different by others. Had the provision simply said the mayor could not accept any gift from a contractor, he would have had no reason to accept the gift.

Note the difference between the use in the New York provision of “could reasonably be inferred” and the use of “has reason to believe” in the City Ethics Model Code provision. In the model provision, the reason to believe involves a fact: the giver’s business relationship with the local government. In the New York provision, the reason to infer involves intent and expectation, which are neither facts nor within the official’s ability to know, only to guess.

In other words, you can ask someone who offers you a gift what his relationship with the local government is. If you ask him his intent or expectation, he’s certainly not going to confess that he was trying to influence or reward you. He’s going to say he’s helping out the city by subsidizing your trip to a conference or getting you to a meeting more quickly on his corporate jet. He’ll say he’s helping you draft an ordinance, and why not work on it at Chez Cher, so he can get his city work done during work hours?

The New York gift provision is really an aspirational provision, telling officials they should not take gifts that might look bad. This is exactly the advice an ethics officer would give. But this language does not work as an enforceable ethics provision. That might be why this sort of language is popular.

When the Alabama legislature passed an ethics reform act in 2011 that added a provision saying that officials could not “solicit or receive anything for the purpose of influencing official action,” even this was too much for many state senators. The Senate tried to add the word “corruptly” to the provision, so that it would read “for the purpose of corruptly influencing official action.” It’s hard to enforce the current law; it would be next to impossible to enforce the amended law. In addition, it would send the message that it’s okay to take gifts from lobbyists and others seeking to honestly influence officials by giving them gifts.

There is a second important problem with trying to limit only gifts intended to influence. Such a provision ignores the other principal problem with gifts to officials: pay to play. Often a lobbyist or, say, a developer does not make a gift in order to influence an official. Often the gift is given because it is required by the official, expressly or tacitly, before the official will consider the lobbyist or developer's requests. Such a gift is effectively extorted from the giver, not given to influence. By focusing on influence, this sort of provision makes an exception for pay to play. It legalizes pay-to-play gift giving.

Here's how pay-to-play gifts work, from testimony given in a bribery trial involving a \$25,000 contribution to a charity, requested by a Miami-Dade County commissioner:

Prosecutor: "The fact that you had a matter pending in front of the commission at that particular moment, was that raised at all by the person you talked to in the commissioner's office?"

"Not at all, no."

"But yet, I could assume it would be fair to say that it must have been on your mind, because you turned around and called [your partner] . . . It was actually his project."

"I'm ashamed to tell you that, yes. I'm ashamed to tell you . . . it was not one of my finer moments, Mr. Scruggs."

The developer went on to say that he made the donation to the charity affiliated with the commissioner because it appeared to be a good cause, and because he was loathe to turn down the request. "I didn't see a reason to poke her in the eye and tell her no." At least from the developer's point of view, there was no intent to influence. There was only an intent not to be on the wrong side of an official. That is worth a lot of money.

The language of "influence" means that someone doing business with government is not required to say No to a pay-to-play request. Like a New York Yankees spokesperson said in 2010 regarding tickets given to the governor, "The burden has to be with the public official. We can't be the ethics police." New York state law prohibits giving gifts, but only gifts "intended to influence." This means that when an official asks, a contractor has no legal reason to say No.

And then there is the matter of intent. Intent is not what matters in government ethics. And intent is very difficult to prove. What matters in government ethics is

appearance, and there is no difference, from the public's point of view, between gifts intended to influence and gifts that have been extorted. They may feel very different to the official and the restricted source, but this difference doesn't matter in government ethics. Government ethics accepts the fact that neither the public nor the ethics commission can reasonably tell the difference between an intent to influence and an intent to go along with an official's demands. Both kinds of gifts need to be prohibited. A gift from a restricted source is a gift from a restricted source, whatever the intent or expectation.

Two Special Kinds of Gift

There are two kinds of gift that are ignored by most ethics codes, but are worth acknowledging as special problems. One is a gift given anonymously. When a gift is given anonymously, an official is put in an especially uncomfortable position. The gift cannot be returned. An official who hands the gift on to the local government has to insist that he has no idea where it came from, making it look as if he were trying to hide the giver's identity, when in fact he is dealing responsibly with the situation (which is not quite a conflict situation, because it's not clear (1) who the conflict would be with or (2) that the giver has anything to gain).

More often, however, the official has a good idea who sent it (or finds out indirectly), but since he doesn't *know* that a restricted source sent it, he may in fact accept it. If discovered, he can insist he didn't know where it came from and, therefore, that the gift could not have influenced him in any way. In other words, an anonymous gift can be a way of allowing an official to accept a gift, at least legally, if not ethically. But the public won't believe that the official doesn't know where the gift came from. They know that it is unlikely anyone would give an official a gift unless he had reason to believe the official would know who it came from.

The only local government I know of that prohibits anonymous gifts is Chicago (§2-156-040(a)).

Chicago also expressly prohibits the other problematic kind of gift, the cash gift (§2-156-040(c)). [As discussed below](#), the fact that most gratuities are paid in cash makes it difficult to control them. Cash gifts do not leave any paper trail. It is, therefore, difficult to enforce a prohibition on cash gifts, but it is worth letting officials know they are problematic, at least when there is a minimum gift amount (as there is in Chicago).

2. Gift Amount

There is a mistaken idea that a local government official's "price" is somehow relevant to a gift provision. Politicians constantly insist that you can't buy them for the price of a lunch or a ticket to a basketball game. The fact is that people are more inclined to support someone who takes them out for a drink, not to mention lunch or a basketball game. It isn't a matter of buying; it's a matter of our deep-seated feeling of give and take. Just sitting through lunches together creates a special sort of camaraderie.

Gifts are not about amounts. If you take someone fishing, you don't expect him to take you fishing in return, or spend on you the cost of the gas to drive to the lake. The fishing trip is part of a series of exchanges that are part of what relationships are all about.

When an official says she can't be bought by the cost of a dinner, ask her for a full accounting of her relationship with the person who paid for it, every meeting, phone call, help with legislation. Or ask her how much her spouse paid her to get married. Or her pet to be cared for. We can be "bought" in any number of ways.

When people talk about the amount of a gift, mention how valuable a stock tip can be, or a recommendation of a child to a school or company, even if they cost nothing at all.

Gifts are not about money, they are about relationships. Not surprisingly, government ethics is also about relationships. Government officials are human, and the exchanges common to a good relationship are very important to them, just as they are to the rest of us. The growing recognition that relationships are what matters is behind the fact that more and more local governments are requiring that their officials keep a public record of all their meetings with lobbyists and other restricted sources. Gifts are just one piece of the puzzle, but a piece of the puzzle for which there are receipts, that is, clear evidence.

Gifts also involve preferential treatment. Ordinary citizens don't have lunch with their representatives. And if they did, they wouldn't expect to pay for their representative's lunch. Why is it different for lobbyists and other restricted sources? What reason do they have to act different, or be treated different, from ordinary citizens? Yes, they have reason to meet with officials, to inform and persuade them about matters important to them, but why can't they do it in the same government office where ordinary citizens meet with officials?

Former Georgia state representative Roger Hines recognized all this in a 2012 op-ed column about the state's \$100 limit on gifts from lobbyists: "I didn't like the feeling I had after accepting the tickets. Not everything that's legal is right or wise to do. Every citizen in Georgia has the right to go to the Capitol and influence legislation, but most don't have the time or money to do so. ... The gift-giving is corrupting, and the writer of this sentence, and every reader of it, is corruptible."

And why can't the government pay for its officials' business lunches and dinners, not to mention their tickets, when the official is doing government business or fulfilling a ceremonial function? It's more than worth the money when you consider how much it benefits the public trust.

Despite the fact that the amount of a gift has little relevance to a gift-giving relationship, many ethics codes allow gifts up to a set limit. There are two parts to any gift limit amount: the amount per gift and the aggregate amount per year. Many gift provisions only include the amount per gift, which is usually \$50 to \$100. Anything less than this amount is considered to be of insufficient (*de minimis*) value to make a difference. But if it doesn't make a difference, why is it being offered to or requested by the official? If it's such a small amount, why can't the government foot the bill?

The reason for an aggregate gift limit is that per gift limits allow for frequent lunches and dinners, or even tabs at local restaurants, which can add up to hundreds or even thousands of dollars a year. In a city without an aggregate gift limit, an official could conceivably go to any restaurant in town whenever he wanted and never pay for a meal. He could simply choose which tab to charge it to. And what lobbyist, contractor, or developer could turn down a request to set up a tab if a tab were perfectly legal?

There is a third aspect to gift amounts that comes up again and again: the value of a gift. What is the value of a seat in a luxury box at a sports event, a seat that you cannot buy and that is accompanied by a buffet dinner and drinks, cover from sun and rain, closed circuit television, and perhaps attractive young individuals to socialize with? What is the value of a seat on a corporate jet, or a good ticket to the Super Bowl, which is worth far more than its face-value price? These are thorny questions that lead to poorly written or very complex code provisions, endless disagreements, ethics complaints, and bad press for local governments. Banning gifts from restricted sources means that no one has to worry about determining such values, and all that controversy is prevented.

If a local government is going to allow gifts, it should provide detailed information on how to value at least the most common gifts that raise questions, such as a skybox ticket, a ticket to a charitable event, and a flight on a private plane. [Arkansas'](#) ethics code does this, complete with examples.

Some gifts have no monetary value, or at least no ascertainable amount, yet are very valuable. Take a recommendation or job offer. "Keep doing what you're doing, Joe, and I'll give your son a good sales position." That may be music to an official's ears, but what is the dollar value, especially when the pay is on commission? Gifts from people seeking benefits from government are gifts, whatever their certain monetary amount. (See [the section on gifts with no financial value](#), below.)

Discounts

Sometimes it's not even clear whether something is a gift or not. For example, to determine whether a loan to an official is a gift or not, it has to be determined whether the loan was made at the market rate. This can be difficult to determine. For example, there are different market rates for different individuals and companies. Therefore, it is better that officials not accept loans from restricted sources at all. Some local ethics codes do prohibit such loans, or limit them to a low amount, for example, in San Diego \$500 if there is a formal loan document, \$250 if not.

There is a similar problem with rent. If an official rents from a restricted source, it is often difficult to determine whether the rent is at or below market rate. Only the difference between the rent and the market rate would constitute a gift, legally speaking. But the real gift may have been making the space available at all when space was scarce in the area. The gift may, in other words, have been preferential treatment rather than dollars. Again, it's better that an official not rent from a restricted source and, if the official is already renting from a restricted source, it is appropriate, although rarely required, for the official to withdraw from any matters involving the landlord, in whatever capacity the landlord is acting.

In fact, this problem arises with respect to almost any transaction between an official and a restricted source, short of a regular retail purchase at a store. It's always hard to know whether a discount has been given or preferential treatment has been shown, whether in the purchase of property or in the provision of professional services.

It's important to remember that a gift is a transaction, although only one piece of it. If officials should not be transacting business with restricted sources, they should not be accepting gifts from them, either. And if they are accepting gifts (and this is allowed), this creates a conflict, requiring the official to withdraw from any matter involving the restricted source. But that would put an end to the gifts, at least to the gifts prohibited by law.

Giving an official a discount can look worse than giving her a gift, because it shows favoritism to officials over other customers or clients. Using one's office to get a discount does not go over well with the public. When it came out that U.S. Senator Christopher Dodd had been put on a bank's list of special customers, who were treated specially with respect to loans, the public was angry, and Dodd decided not to run for office again.

Second, a discount is a hidden way of giving a gift. It looks designed to get around gift provisions. The one thing worse than an official accepting a gift from a restricted source is an official accepting a sneaky gift from a restricted source.

One way to deal with this problem is to require an official who wants to purchase anything from a restricted source, other than a product with a set, non-negotiated price, to declare the purchase as if it were a gift. Then the restricted source should be required to prove to the ethics commission that no discount was given. The restricted source can better handle this burden, since it has better access to the necessary information. At the end of this process, there will either be no more appearance of impropriety, or the official will not make the purchase, or take the apartment or loan.

Sometimes the discount is 100%, and what is given is not a product or labor that creates a product, like a house addition. What is given is services, legal, accounting, palm-reading, whatever, at no cost. Since there's no sign of the services, no invoice, no fixed-up bathroom, these gifts are difficult to see. Accepting a gift such as this should be seriously penalized, and full restitution should be made.

Gifts with No Financial Value

Gifts are almost always defined as being transactions that provide a financial benefit. But some of the best things in life are not only free, but cost nothing and provide no financial benefit. For example, a developer intercedes to help a zoning board member's child or sibling get into a good university. It costs the developer nothing and provides no financial benefit to the child or the official (in fact, it might cost the official a lot of money). But it is a

gift that creates a strong feeling of obligation, not to mention, if it becomes public and the official supports the developer's project, a strong appearance of impropriety.

As with any ethics provision, a gift provision is only a minimum requirement. If it is limited to gifts with a financial value, that does not mean that gifts with no financial value do not create an appearance of impropriety. It just means it is difficult to anticipate and describe the situations where this would occur.

In fact, helping to get an official's child into a school is more problematic than giving her money or offering her work, because she cannot refuse or return the gift. Once the deed is done – even if the child decides to go to another university – it's an unreturnable gift that creates a special relationship. There cannot even be restitution later on.

If someone helps get an official's child into a school, the official needs to recognize that this creates a special relationship and, therefore, tell that someone (and the public) that she will have to withdraw from any matters involving him, his business partners, or his clients. If someone offers his help, the official needs to tell him that this would require her withdrawal.

We are told by our parents, "It's the thought that counts." When it comes to gifts to public officials, our parents were right. What doesn't count is the motive behind the gift. It might have been done out of friendship, love, or pity, but it is the fact that it was done that creates a conflict situation.

3. Acceptance and Rejection of a Gift

Accepting a gift is very different from acting in order to obtain a benefit. A gift, unless it is a bribe, does not require any action by an official other than acceptance. Acting in order to obtain a benefit may require months or even years of action to get, say, a development approved or a bid accepted.

While it is impossible to describe the great variety of conduct that constitutes action to obtain a benefit, it is relatively easy to describe acceptance of a gift. One can also describe what it means to reject a gift. This is helpful information, and it can be further clarified and applied to examples in the form of advisory opinions. However, few ethics codes include such a description. Fortunately, for those looking for such language, San Diego has a detailed description of acceptance of a gift, which it calls, confusingly, a "benefit" (§27.3522). The version below uses the word "gift."

- (a) A gift is “accepted” when the recipient knows that he or she has either actual possession of the gift or takes any action exercising direction or control over the gift.
- (b) In the case of a rebate or discount, a gift is “accepted” when the recipient knows that the rebate or discount is not made in the regular course of business to members of the public.
- (c) Discarding a gift does not negate receipt or acceptance of the gift, except when the gift is a pass or ticket and subject to the exception set forth in section 27.3525(m).
- (d) Turning a gift over to another person does not negate receipt or acceptance of the gift.
- (e) A payment made to, or on behalf of, an elected City Official or a candidate for an elective office of the City for his or her food constitutes the acceptance of a gift.

I would add to (a) that acceptance must include not only knowledge regarding the gift, but also knowledge regarding who the giver is. This is especially important if the gift is made indirectly, through a representative or go-between who is not a restricted source. But it also needs to be said that, if it’s not clear who the giver is, an official must ask.

I would change (b) to include not only knowledge of a discount, but a reasonable belief that there is one, and then the failure to ask whether there is one, and get an answer in writing. If a restricted source offers an official a loan, for example, the official has an obligation to make sure that there is no discount or any special terms. U.S. Senator Christopher Dodd’s long political career ended due to his failure to ask.

More thought goes into accepting a gift than returning a gift. The Minneapolis Ethical Practices Board includes on its website [a simple form cover letter](#) for returning a gift. The letter explains exactly why the gift must be returned. Every ethics commission should have such a letter on its website.

What to Do with an Illegal Gift

What should an official do when she receives a gift in violation of the ethics code? This too is rarely specified in an ethics code, even in San Diego’s. When possible, the gift should be

immediately returned with a cover letter stating that it was made in violation of the gift provision. It is not sufficient to make a payment of the difference between the value of the gift and the gift limit (for example, if the gift is a \$100 ticket and the gift limit is \$50, it does not make the gift legal to send the giver a check for \$50).

When the gift is not returnable – either because, for example, it will quickly spoil, it is not material (e.g., a discount or a job offer), it has already been consumed (before realizing it was illegal; remember, gifts to family members are included, and they have not had ethics training), or it cannot be undone (e.g., extra work done on one’s house beyond what was contracted for) – there should still be an immediate response, refusing an immaterial gift or pointing out that the gift is not worth returning or has been consumed, but still pointing out that the gift was illegal.

If a gift has been used or consumed before the official learns who it came from, the official should immediately notify the ethics commission of the gift and settle the matter without the need for an investigation or proceeding. Disclosure of receipt (and return or refusal) of the gift should also be given to one’s supervisor or chair. In fact, public notice should be given of any offer of an illegal gift. This is a way for an ethics commission to see what is happening, to see which restricted sources are tempting officials, and to give officials warning. Such information may form the basis for a broader investigation or a public hearing on gift-related issues.

There are some local governments that insist on having illegal gifts given to the city. Of course, this is not always possible, for the same reasons that many gifts are not returnable. Oddly, Chicago requires that illegal gifts be turned over to the Comptroller, “to be added to the inventory of City property.” But this raises another issue, which is discussed below in [the section on gifts to local governments](#).

4. Gift Exceptions

The City Ethics Model Code recommends five exceptions to the gift ban. The first exception is for gifts from immediate family members who happen also to be restricted sources. The second is for gifts up to an aggregate value of \$50 during any twelve-month period, but this is here only because it is common, not because it is recommended (a general de minimis rule will prevent enforcement against small gifts; see [the section on de minimis benefits](#)). The third exception is for gifts to the local government that are transferred to the local

government (that is, gifts accepted by an official only in his official capacity, not for his use). However, see [the section on gifts to local governments](#), which discusses problems with this exception.

The fourth exception is for gifts up to \$50 for solemnizing a marriage ceremony, which applies primarily to mayors and justices of the peace. This depends on the custom in a particular local government. And the fifth exception is for public awards from charitable organizations, up to a value of \$100 (again because it is so common; but there is a question whether a charitable organization that, say, has a social service contract with a city should be giving awards to city officials at all, even if the award is just a piece of paper).

The City Ethics Model Code does something very different from other ethics codes: it places these exceptions not in the gift provision, but in [an all-purpose exclusions section](#) (§102). Doing this means that when an official consults the gift provision, she sees a gift ban rather than a long list of exceptions. In many gift provisions, the ban is followed by so many exceptions that there doesn't seem to be a ban at all.

Once you start thinking of reasonable exceptions to a gift ban, it becomes very difficult (1) to decide where to draw the line and (2) to use language that will prevent what was intended to be a narrow exception from being turned into something you can drive a truck through. The following subsections take a critical look at common gift exceptions.

a. Gifts from Lobbyists. You would think that, of all people, lobbyists would be the least likely group to be given an exception to a gift ban. As an Alabama lobbyist once pointed out, “lobbyists don't give anything to public officials but for the purpose of influencing official action.”

New York City has one of the best ethics codes in the country, and yet there are 14 exceptions to the lobbyist gift provision, ranging from gifts of no substantial value, which could be covered by a general de minimis rule (see [City Ethics Model Code §213.1](#)), to “invitation to attendance at professional or educational programs as a guest of the sponsoring organization” and “travel-related expenses from a private entity which is offered or given as a gift to the City rather than to the public servant.”

When one imagines the situation where an organization invites an official to participate at a conference, and pays her way because her expertise is valuable, one imagines

a professional organization making the invitation for nothing but the most upstanding of reasons.

But try imagining it differently. The organization is seeking to stop an ordinance from being passed, and its lobbyist wants to use the conference as an opportunity to get into the council president's good graces. Imagine the headlines when the trip comes out: "Lobbyist Fighting Ordinance Hosts Council President at Swank Oceanfront Hotel." Why should a gift provision allow this?

Of course, the fact that the organization lobbies the local government may not mean that anything nefarious is going on. But if the lobbyist or organization pays for the trip, it will look that way. If it's important to the city for the council president to attend, then the council budget should pay the conference fee and all the related expenses, including hotel and transportation. If the lobbyist is holding a private party during the conference, the council president does not need to attend. How could that possibly help the city?

One sees how hard it is to defend gifts from lobbyists by listening to what lobbyists say when people question such gift-giving. Instead of maturely commenting on the issue of special relationships and how they give rise to appearances of impropriety, they tend to present the government ethics viewpoint as a cartoonish picture of shark lobbyists preying on weak, corrupt officials. After drawing this horrific picture of themselves, they call it "insulting" as they hadn't drawn the picture themselves. This is what I call the *Jaws* version of [the Straw Man Fallacy](#).

b. Educational Function. It is important to consider what an exception means in practice, well beyond what it appears on its face to mean. Sometimes a single term can make all the difference between a reasonable exception and a major loophole. One example is the phrase "educational function" in the 2010 Alabama gift provision amendments, as follows:

[A] public official and a public employee may accept any of the following: ...

(4) Waiver, payment of, or reimbursement for actual and necessary transportation and lodging expenses, registration fees, and similar fees in connection with the public official's or public employee's attendance at any of the following functions if no reimbursement is made by the public official's or public employee's agency:

a. An educational function. ...

In order to make a large gift to an official, all a restricted source needs to do is make the gift a vacation somehow tied to a conference, seminar, or anything else that can be considered to have an “educational function.” Ditto for an official who wants to get a restricted source to pay up, and keep the whole thing legal. Considering the educational functions that go on every day at or near the world’s fanciest resorts, it does not require a lot of maneuvering to get around the Alabama gift ban, which applies to local officials.

Some jurisdictions do not allow a gift that is tied to an educational function, unless the official is speaking or participating on a panel. This sounds much more responsible, until you learn how easy it is for a company or lobbyist to arrange for officials to speak or participate on a panel. What happens is that companies send officials a list of panels to choose from. They don't have to indicate any special knowledge or experience, they don't have to be asked, as is common at conferences, they just sign up.

This is what investment firms did for members of the Baltimore Employees' Retirement System board. Instead of thinking that it is a good thing for officials to sit on panels and make speeches, it is better to think whether it is a good thing to allow restricted sources to be paying for this. Here’s what one member of the Baltimore board said, “The sponsors of the conferences pay for part of the expenses because they want access to the trustees; that’s why they pay — they want business.”

Why should those doing business with government pay for officials’ training or for officials to train others? If officials are not receiving sufficient training, why don't they ask the government to provide more training? If restricted sources care so much about helping the government with training, why don't they give the government a gift to pay for training (with the government free to make decisions about training) instead of using educational functions as opportunities to develop personal relations with officials? In other words, why must supposedly helpful gifts have the quid pro quo of personal relations?

c. Widely Attended Events. Take another exception in the 2010 Alabama law, for “widely attended events,” that is, dinners and receptions at which more than a hundred people “with a diversity of views or interests” are expected. That sounds like everything is above board until you realize that these diverse people only need to be invited; they don't have to actually come. So a gun manufacturer could invite dozens of liberals who wouldn't dream of showing

up, and thereby wine and dine the fifty people they really wanted to invite in the first place. Or a contractor can invite dozens of officials, most of whom don't even deal with contracts, so they won't bother attending. Remember that, in local government, most companies and their lobbyists aren't trying to preach to those who oppose their goals; they're trying to get projects approved, contract specifications geared toward them, and particular changes made to laws by those who generally support their views, say, on development.

d. Sports Events. And then there is attendance at sports events. It is a common exception to allow officials to attend events if their attendance "serves a public purpose" or has "a ceremonial function." There are occasions when the mayor is required to throw out the first pitch, celebrate the retirement of the football coach, etc. But these occasions are rare enough, and limited to a small number of officials, that they could be dealt with through an annual or semi-annual waiver request to the ethics commission. There is no need for an exception.

Sometimes, a gift provision exception refers not to the official's function, but to the occasion or the event, for example, whether it is a "ceremonial occasion" (Los Angeles), "in the interest of the city" (New York City), or "related to official City business" (Chicago). This is more problematic, because although the occasion may be ceremonial or in the city's interest (as determined by department heads or the deputy mayor in NYC), a particular official may have no real public function there. In most cases, these terms are not defined. Officials tend to see whatever they do as official and in the city's interest.

Sometimes just the ticket is allowed to be accepted, sometimes transportation, food, and drinks, as well. Sometimes there is a separate gift limit. Sometimes the ticket may be accepted as long as the official declares it as income (but who is going to check? tax returns are not public documents).

Attendance at sports events, paid by a restricted source (and sports teams are major restricted sources), is sure to appear on the front page. If it's the mayor throwing out the first pitch of the season, okay, but beyond that, no one wants to see city officials getting lots of luxury box and courtside seats to games, even if there is an arguably public or ceremonial purpose. The only other truly acceptable purpose is wooing businesses to move their offices or factories to the city or county. But then the local government, as the host, is the one who pays. (See [the subsection below on luxury boxes](#).)

It is best for the city to pay for attendance of its officials at occasions of value to the city. Public disclosure is valuable when the city pays, because it's good to make sure that officials do not too often take advantage of the city buying them entertainment.

Even if it is legitimate for an official to appear ceremonially at a sporting event, there is a question of what should happen after the ceremony is over (or before it starts if the ceremony occurs after the game). If attendance is not limited to the ceremonial act, perhaps attendance should not be an exception in that instance, or at least the official should have to report it. Staying for a meal or the game, at the expense of a restricted source, is truly acceptance of a gift, and such a gift should be prohibited. The official or the government should pay for it.

e. Hosting. A serious exception in the Texas Local Government Code §176.003(a-1) permits, without even a disclosure requirement, gifts to officials and their family members for “food, lodging, transportation, or entertainment accepted *as a guest*.” As long as the host is there, a gift is acceptable. What makes this exception so odd is that it would be better that the restricted source not be sharing the official's meal, flight, or entertainment. It is such long meetings, for the purpose of influencing decisions, that create the sort of relationships that lead to conflict problems. These are the most important gifts to prohibit.

Better that a hosting exception be limited to nominal gifts made at the offices of a restricted source, for example, refreshments, the validation of a parking ticket, or the use of electricity to recharge a cellphone. Better yet, the restricted source should visit the official, rather than the other way around.

f. Timing. Some gift provisions prohibit gifts only during certain periods, for example, during a contract award period, or when someone is seeking or doing business with the government. And it is the norm for gift bans to end when an official leaves office, although one form of gift, a job with a restricted source, is sometimes prohibited in a post-employment provision.

What these time restrictions do is allow officials to be rewarded after the fact, that is, after the contract runs out, or the development has been approved, or the official has left office, retired, or moved on to another job.

Preventing this would require not only removing time restrictions, but also adding gifts to the post-employment provisions and creating a pre- and post-doing business period that would apply to restricted sources giving gifts. Such a period, say two years, would be added to the gift provision so that a gift could not be given a year before or after a restricted source began to seek government business or approval, and then two years after the business was done or the final approval was given.

g. Campaign Contributions. The most common gift exception of all is also the most abused: campaign contributions. In ethics codes, campaign contributions are usually sacrosanct, because campaign contributions are dealt with in campaign finance laws, usually at the state level, and because they are part of the political world and protected by the First Amendment. Those are a lot of good reasons for a campaign contribution exception to a gift ban.

But large campaign contributions from restricted sources, including their lobbyists, executives, and employees, are seen by the public as gifts and often become big news stories. The fact that they're perfectly legal doesn't make them look any less corrupt.

What most officials say when they make a decision that benefits a large campaign contributor is, "I can't be bought."

It is not honest or reasonable to say that one doesn't have a price, since different sums of money are constantly being accepted from people who benefit from officials' decisions. It isn't about having a price. It's about representing constituents at the same time one is running for office and one is being lobbied by those seeking special benefits from one's government. One involves influence and the other involves money. If those trying to influence are those giving money, then it means nothing to say, "I can't be bought." From the public's point of the view, officials *can* be bought. From a practical point of view, each sort of act and each sort of vote has, at least potentially, a price.

And from the official's point of view, politics is a matter of give and take. It's complex and ongoing. Give and take is not made up of single transactions where something is bought for a specified amount of money.

What an official should say who has made a decision that benefits someone who gave a substantial amount of money to that official (or gives such money afterwards), even legally, should instead say to the public, "Unfortunately, since I'm not independently wealthy, I have

to take campaign contributions in order to represent you. If I refuse to take contributions from those seeking benefits from the government, I will not have enough money to run. Unless I withdraw from too many important matters, I will be making and influencing decisions that will benefit some of these contributors. Making these decisions will look bad. I would like to do it differently, but until enough officials vote for public financing, and agree to openly criticize anyone who pays for independent ads favoring them or attacking their opponents, I have to look like I can be bought, or the reason I won't be able to be bought is that I will not be in office. Where, by the way, I think I do a damn good job representing you.”

Some campaign finance laws make it illegal for contractors or lobbyists to make contributions to candidates, but such provisions do not cover many restricted sources. Campaign finance laws tend to ban or limit contributions from contractors because contractors have a special ongoing relationship with the government, one that others, including developers, lobbyists, grantees, and those seeking (but not currently holding) contracts do not have.

But there is another approach. I call it the Westminster Approach, after the town of Westminster, Colorado, where it was first instituted (see my [blog post](#) on its approach). The Westminster Approach uses a gift provision to turn a campaign contribution into a conflict of interest. Very clever, although still far from foolproof.

The Westminster Approach makes an interesting assumption. If a contribution was not intended to influence the candidate, then the contributor won't mind that the candidate cannot participate or vote on any matter dealing with the contributor's interests. At the same time, the candidate will not be placed in the position of appearing to favor someone who gave him a sizeable contribution or — and this is certainly possible if the candidate is truly independent — having to vote against a strong supporter. It's a win-win situation for everyone, so long as there was no intent to influence.

The way the Westminster Approach deals concretely with this assumption is to say that any contribution over a certain amount (the amount is \$100 in Westminster) creates “a conflict of interest with regard to that Councillor's vote on any issue or matter coming before the Council involving a benefit to the contributing person, organization, or agent, unless such interests are merely incidental to an issue or question involving the common public good.” Not elegant language, but it will do.

What's especially nice about this rule is that it places no restriction whatsoever on a person's campaign giving. It only restricts the candidate who receives the gift, assuming the candidate wins, of course. And this is not a restriction on the official's right to vote but, like any conflict of interest, it is instead a protection of constituents against the official's voting to benefit someone who has benefited the official.

What's wrong with this approach? For one thing, it does nothing to prevent a contribution given the day after a vote, nor for that matter does it affect an official's participation in a matter up to the receipt of the contribution, even if a contribution is promised before the vote. The first problem can be fixed by adding a prohibition of contributions for a period of time after the decision has been made. The second problem can be partially fixed by including promised or pledged contributions.

The Westminster provision also does nothing about contributions from individuals who do not directly benefit from a vote, for example, from employees, spouses, and potential subcontractors. That is, like most conflict provisions, it does not provide for situations where a gift would create an indirect or indefinite conflict. But such a provision could deal expressly at least with indirect conflicts by adding the word "indirectly."

The biggest weakness of the Westminster Approach is that council members who expect to run again are very unlikely to vote for it. But New Jersey, which in 2012 was [named by the Center for Public Integrity](#) as having the best procedures in place for a transparent government meant to prevent corruption, has a similar rule for state officials, [§19:61-7.4\(c\)](#), which requires withdrawal through to the end of the official's term in office.

The City Ethics Model Code takes a Westminster Approach to campaign contributions, but includes it in [the basic conflict provision](#) (§100.1(a)(5)).

While running for president in 2012, Mitt Romney essentially agreed with the application of the Westminster Approach by local governments. He said, "the person sitting across the table from [a teachers union] should not have received the largest campaign contribution from the teachers union themselves ... [It's] an extraordinary conflict of interest."

Along with public campaign financing, which prohibits large contributions from anyone, another approach to dealing with the fact that large campaign contributions from restricted sources can cause a serious appearance of impropriety is to require any elected official to publicly disclose the recent receipt of a large contribution before voting on a

matter involving the contributor. This approach was raised in Corpus Christi, Texas in 2009. Council members complained that “complying with the rule would make meetings long and they would be likely to forget who had given them \$1,000.”

This is effectively an admission that council members receive so many large contributions from restricted sources that disclosing them would take a significant amount of time and that they either could not recall such large contributions or a list of them would be a burden to carry with them, even on their cellphones. When the mayor suggested that the city do this work for council members, the council still unanimously opposed the idea.

When restricted sources are allowed to make campaign contributions, there is a more limited approach, which is used, for example, in New York City. The mayor and council submit to the city’s Conflicts of Interest Board a list of officials who are barred from soliciting political contributions because of their role in policy matters. This list makes it clear to policy aides that they cannot be seen soliciting contributions from individuals and entities that are lobbying them. It makes what is often a gray area black-and-white, and keeps them out of trouble.

There is one kind of campaign contribution that is usually ignored by ethics programs: contributions to campaigns for national positions in local government associations. These campaigns can be expensive, and it is common for officials to turn to restricted sources for quick and easy cash. For example, when a member of the Mariposa County, Arizona board of supervisors campaigned for officer positions in the National Association of Counties, he was given one \$25,000 contribution, and fifteen others between \$3,000 to \$24,999. After this supervisor’s campaign, the association limited campaign travel expenses to \$25,000 to prevent such huge gifts. All national associations need to make rules restricting both expenditures and contributions from restricted sources. In addition, gift provisions should not exclude these gifts. They should be prohibited, at least above a certain small amount.

h. Legal Defense Funds. Another exception sometimes found in a gift provision is for legal defense funds. This exception allows officials accused of ethics or criminal violations to raise large sums of money from restricted sources. For example, a Los Angeles mayor once used a legal defense fund to pay off a \$50,000 city ethics fine for improper fund-raising by raising funds from contractors and from officials the mayor had himself appointed. This sends the

message that it is proper to do something improper in order to pay off a fine for doing something improper. This is not the sort of message an ethics program wants to give, or that the public wants to hear.

In many jurisdictions, restricted sources are not only permitted to make contributions to a legal defense fund, even if it was dealings with these same restricted sources that gave rise to the ethics complaint. The restricted sources are also allowed to raise money from others for the legal defense fund, giving rise to even more obligations from the official.

Conflicts relating to legal defense funds can get really ugly. For example, the chair of the Detroit ethics board accepted a seat on the mayor's legal defense fund committee, despite the fact that complaints against the mayor had been filed with the ethics board. Of course, when this became controversial, he quickly had to resign, but much of the damage had already been done.

In addition, a legal defense fund is allowed to file suits itself. This means that a legal defense fund can be employed as a way to file SLAPP suits, that is, suits intended to intimidate others, including whistleblowers and political opponents (see [the section below on SLAPP suits](#)). If gifts to legal defense funds are excepted from a gift provision, those doing business with a local government can be involved in trying to silence officials and citizens who are speaking out against them and their allies in government.

Legal defense funds are also inherently unfair and effectively a misuse of office for personal gain. Most elected officials, not to mention unelected officials and employees, lack the network of contacts and supporters necessary to have a legal defense fund. Only the most powerful, or those under the wings of the most powerful, can use a legal defense fund to pay for their defense, fines, and litigation. Without their high office and the favors they had given or promised, no one other than close friends and family members would contribute to a legal defense fund.

Some local governments place limits on contributions to legal defense funds. For example, the limit in Los Angeles is \$1,000. If legal defense funds are to be allowed, an even lower limit is recommended, so that it will not appear to the public that the contribution gives rise to a serious obligation to the contributor (legal defense funds can also be used for pay to play if large contributions are allowed). Restricted sources should either be

prohibited from making contributions, or limited to a very low figure, as in a gift provision, no more than \$100.

If legal defense funds are allowed, there should also be rules separating them as much as possible from the official and the government. For example, a ruling in New York State in 2009 made the following requirements for legal defense funds:

To not be considered an illegal gift, the defense dollars must go into a trust solely for the purpose of defraying pending legal expenses. The money must be managed by a custodian who cannot be a legislative employee, and who must maintain records and pay bills by check. Checks must be signed by the fund manager and countersigned by another non-legislative employee. The defendant cannot have any say over the account or ability to draw from it, and cannot be told who is contributing.

But it cannot be expected that the official will actually not know who is making the contributions. The spokesperson for the defendant in question acknowledged “that he didn't think it was a secret who the contributors to the fund are.”

It is important that anyone who founds or sits on the board of a legal defense fund not be in a position such that the public would see this participation as a payback for favors given them by the official involved, or as a possible in-kind gift for benefits down the road. In other words, a founder or board member of a legal defense fund should not be in a position to benefit from anything the official or government could do for her.

A legal defense fund sends some very bad messages. One, it says that high-level politicians don't have to pay for their defense or for their ethics fines. They effectively have a Get Out of Jail Free card. Contrast this with what a Los Angeles council president did in 2011: pay his ethics fine himself. He said, “While I paid the full cost of the awards show tickets, I messed up when it came to the dinners afterward. That's my mistake, and I'm personally paying for the cost of these three dinners now to clear it up.”

Second, a legal defense fund says that large gifts from restricted sources are okay in some circumstances. Third, it tells lesser officials that, when it comes to ethics enforcement, they are indeed lesser, because they don't have enough power to raise money to defend against ethics complaints or pay ethics fines.

And fourth, it tells other high-level elected officials that the only sanction they will receive for an ethics violation is some bad publicity. And even the publicity may not be as bad as it would otherwise be, because with extra resources they are more likely to ensure themselves a dismissal or a settlement that will make their misconduct look better than it was.

It is difficult to get a local legislative body to prohibit legal defense funds related to ethics proceedings, because its members are among the few who might be able to make use of a legal defense fund. If elected officials start legal defense funds when confronted with ethics and criminal proceedings, thereby effectively limiting the ethics commission's enforcement power against them to bad publicity, the ethics commission should work to get good government and other local organizations to band together and make a big stink about legal defense funds. And they should try to bring more transparency to the ethics enforcement process so that there is bad publicity at each step in the process.

5. Indirect Gifts

Indirect gifts are gifts that can get around even a gift ban (as well as gift disclosure) provision that has very few exceptions. There are two sorts of indirect gift, (1) gifts made via an intermediary (an individual or entity, including a company employee or affiliate), and (2) gifts made to an individual or entity that has a special relationship to an official.

It is important to recognize that an owner or officer of a restricted source is a restricted source himself, and can no more make a gift than the company itself. One need not personally seek benefits from a government to be a restricted source.

Gifts made via intermediaries can be dealt with using language like that in the City Ethics Model Code: just the words “directly or indirectly” will do. But this language is rarely found in ethics codes. And using others to get around what cannot be done directly is the most popular way of eluding ethics rules. An important reason is that lawyers are trained to find ways of doing indirectly what cannot be done directly. If lawyers would simply say to their clients, or to themselves when they are officials, that such cleverness has no place in a government ethics context, indirect gifts and the like would be far less of a problem. But legal ethics rules rarely say anything about this sort of inappropriate cleverness, and few lawyers treat clients who are public officials different than clients who are not.

A related problem arises when lobbyist and campaign finance law gift provisions treat lobbyist and client separately, allowing twice the ordinary gift limit and twice the ordinary campaign contribution limit, instead of recognizing lobbyist gifts and contributions as being client gifts and contributions made through an intermediary.

Gifts to those close to the official include gifts to immediate family members, to related businesses and business associates, and to favorite charities. The most common form of gift to family members is work rather than things: legal or other professional work, properties to represent, or a job. The problem is proving that these are gifts rather than simply the ordinary course of business.

It is no coincidence that so many spouses of elected officials are realtors. This should always be suspect, and such spouse-realtors should be asked to disclose all of their clients and to not represent restricted sources. But the problem of laundering gifts through professionals and family businesses goes well beyond realtors.

It is common to include gifts to immediate family members in a gift ban. This prevents ugly situations such as the one in Virginia in 2013, when a pharmaceutical company seeking state approval of a dietary supplement spent \$15,000 on the wedding of the governor's daughter, and he defended it by insisting that none of the money went to him. Not a single person in Virginia could possibly have believed that the gift was not made for the benefit of the governor. Gifts to children, even children who have left the household, need to be included in a gift ban.

When a scandal occurs, the failure to prohibit indirect gifts comes to look like the huge loophole it is.

Gifts to officials' businesses, business associates, favorite charities, and other family members are, however, too rarely seen as effectively gifts to the official. The issue becomes whether the official benefited from the gift, and this is difficult to prove. But this sort of indirect gift raises a lot of appearance of impropriety issues in local governments across the country.

San Antonio has valuable language in its gift provision that ties the official to the acceptance by others of gifts, "A city official or employee shall take reasonable steps to persuade: (1) a parent, spouse, child, or other relative within the second degree of consanguinity or affinity, or (2) an outside business associate not to solicit, accept, or agree to accept any gift or benefit..." (§2-45(d)). Although not sufficient, this is a useful addition

to prohibiting these gifts. It focuses each official's attention on the need to be assertive in getting those close to her to understand their role in a government ethics program.

The typical sort of gift to an official's business is given in such a way that it is not clearly a gift. For example, a restricted source hires the official's law firm to do work that is unrelated to a matter before the official. Just a coincidence? Or the restricted source gives a subcontract to a company the official works for, in a project out of town. Just a coincidence?

In such instances, the official receives no direct benefit, unless she's on commission or, if a professional, can use the work to get a larger partner percentage (information that is usually not accessible). But if it comes out, it appears to the public that the unrelated work might have been offered to the official as a form of influence, or because it was demanded as pay to play. It's always beneficial for an employee to bring business to her company. The benefit might show up later as a raise, bonus, promotion, or larger partnership percentage. The gift is effectively indefinite as well as indirect, but a gift nonetheless, and one that can seriously undermine public trust.

It's important to look at gifts not just from the point of view of who benefits, or even from the public's point of view. Try putting yourself in the shoes of the restricted source. A bill that would give you a lot more bus bench advertising business is up for consideration before the council. You want a strong advocate on the council for the bill, there's an architect on the council, and you need to hire an architect for a project you are working on that has nothing to do with bus bench advertising. So you hire the council member's firm rather than another firm. You give up nothing, and the council member gets extra work. You know that it's a gift, but legally it's not a gift because presumably the architect is being paid the going rate. And the design job is so unrelated to bus bench advertising, no one is likely to notice. So there won't be any problem, at least giftwise (hiring the firm could require the council member to withdraw from the matter, but only if the city has an unusually good conflict provision).

Clever minds can turn indirect gifts into win-win-win situations. One of the most clever was put together by the Connecticut House speaker a few years ago. After he became House speaker, he was given a job fund-raising for a national charity. The organization agreed to pay him \$67,500 if he raised \$200,000 in a year. It didn't take him long to raise that money, since all he had to do was contact a few restricted sources, who were delighted to give money to the new speaker's favorite charity. What was so clever is that the speaker

was not paid on commission, but was only paid if he reached the agreed amount, making his pay effectively a 33% commission, but legally a salary. The charity got a quick \$133,000, the restricted sources gave the speaker far more than they could otherwise legally give him, and the speaker was \$67,5000 richer for very little work. Only the citizens of Connecticut were losers in this deal.

Another clever scheme was concocted by a member of Congress. He founded two hunting clubs that included primarily lobbyists and executives of companies that had business before the committee he chaired. Via his second club, he paid more than \$1 million for a 1,500-acre ranch. Members paid for the mortgage via membership dues. The congressman never benefited directly. But he did get the benefit of two hunting clubs and their facilities, as well the companionship of those who looked to him for benefits. The House ethics committee approved of both clubs, of course, but a local ethics commission need not approve such a scheme, even if the local ethics code does not clearly prohibit it. The reason is that the clubs were just conduits for gifts to the congressman. An ethics commission should look through such conduits and focus on actual benefits and relationships.

Because it is hard to anticipate all clever schemes and thereby prevent all sorts of indirect gifts, ethics training and the use of ethics advice are necessary to prevent serious appearances of impropriety that are not actually ethics violations. If officials know they are supposed to ask before they play these games, they will have no defense when they don't. If they fail to get their schemes approved, they cannot argue that they thought their schemes were perfectly legal.

Gifts to Officials' Pet Charities

Far more common than the Connecticut example, where the official was paid by the charitable organization, is the situation where an elected official has, or has even set up, a favorite charity or charity event that allows him to effectively accept, and often require, large gifts from restricted sources. This is a clever way to get around gift rules and to ensure that those seeking special benefits from the local government must pay in order to play. The mayoral golf tournament has become the icon for this sort of indirect gift.

It is good for an official's reputation to be identified with a charity. It's a good use of one's time, better in some ways than campaigning. To those seeking something from the

local government, such a charity is a beacon, attracting support from anyone who wants the official to approve his contract, project, grant, license, or land use request.

It is also hard for anyone to criticize such contributions. The official does not benefit financially (although there are many cases where he or, more often, his family members do). The charity does good things for the community (although this too can sometimes be more appearance than reality). Only a heartless good government extremist would criticize such a situation.

But to those who understand government ethics, there is a lot to criticize. Officials who associate themselves with charitable organizations violate two essential ethics provisions: misuse of office and preferential treatment. It is a misuse of office for an individual in that office to use it to favor a charity she personally favors. And it is preferential treatment for an official to support one charity over other charities.

Here is what a [2010 Florida grand jury report](#) said about the practice of gifts to official charities by winning contractors:

We received testimony about how procurement contracts could be awarded to a bidder who may then contribute to an elected official's charity of choice. We heard this is in fact common and that it has been upheld in litigation. A contractor or vendor who has been awarded a contract may be prohibited from donating directly to an official's campaign; so in order to circumvent this, a donation is made to the public official's charity. ... Since it is unlikely that there was ever anything stated between the contractor and the public official, proving any unlawful quid pro quo would be difficult. Rather, the problem is that there is an appearance of impropriety and this appearance needs to be addressed.

This is true not only of contractors, but also of other restricted sources.

In addition, charitable organizations are not purely good things. First of all, most of them are very opaque. Neither their list of contributors nor their expenditures are public information. And even when a charity is relatively transparent, a charitable contributor can choose to remain anonymous or at least keep the amount of the contribution secret; a campaign contributor cannot. And it is hard to expect charities to disclose donors who ask to be anonymous, because this would seriously affect their ability to get donations. This makes charities the perfect black box for gifts to government officials.

Take this example from Rialto, California. The son of a member of Congress sat on the Rialto council. He was CEO of a foundation that bore his father's name. It had a good cause: to give away scholarships. But in 2008, it gave only \$36,000 in scholarships while paying the council member \$51,800 (according to IRS documents; the son said he was receiving only half that amount, which would still be a lot relative to the foundation's expenditures). In 2008, the foundation also gave \$20,000 in fire equipment to the council member's city, reportedly paid for from a contribution by another nonprofit, which was funded primarily by sub-prime mortgage lenders and was the sponsor of an initiative to promote Latino homeownership. This initiative was, in turn, the creation of the Congressional Hispanic Caucus Institute. The council member's father chaired the Congressional Hispanic Caucus.

The nonprofit had also benefited from the council member's father cosponsoring a bill that would allow the nonprofit's seller-financed downpayment assistance program to become legal after it had been prohibited. And the foundation raised money from a biofuel company that wanted to build a new plant in Rialto. The council member voted to endorse federal assistance for the project.

Once an official has set up a nonprofit to benefit get around gift restrictions and benefit his family, it is a short step to use it for all sorts of purposes and in ways that involve other kinds of misuse of office and create further conflict situations.

Not all nonprofits that high-level officials get involved with are charities in the usual sense. Some are professional and business associations, think tanks, and the like. When a local politician embraces one of these, it sends the message to restricted sources that their gifts to the association or institute is effectively a gift to the politician.

For example, in 2010 the mayor of Madison, Wisconsin accepted an invitation to co-chair a committee to raise funds for a national conference of urban designers and developers to be held in Madison. One job for the mayor was to raise funds from companies and individuals, including restricted sources.

One can talk on and on about whether the funds raised by the mayor would influence him, would constitute pay to play, or would create an appearance of impropriety. But the fact is that this is no role for a mayor to play. A mayor speaks to welcome people to a conference; he doesn't raise funds for it, because he's too busy raising and managing the city's funds. If the city is full of companies and individuals who do business with the city and

want the conference to be held in their city, a conference that will benefit them and their investments, why shouldn't *they* sit on the committee and do the fundraising themselves? Even symbolically, there is no place for a mayor on the letterhead of any organization other than the city, if for no other reason than it shows favoritism based on the officeholder's personal or professional preferences.

There are not many laws focused on charitable fundraising. However, there are some that limit at least lobbyist participation in charities that involve officials, even if they are fairly weak. For example, Maryland has a law that prohibits lobbyist involvement "in any charitable fundraising activity at the request of an official or employee." The problem with this language is the "request" part. Officials don't have to make such a request; lobbyists and other restricted sources will offer to help out all on their own.

One unforeseen result of the word "request" in the Maryland law was that a tradition of organizing a series of sketches performed by legislators, for which lobbyists would buy lots of tickets, was turned over to a panel of former legislators, some of whom happened to be lobbyists. This was not an improvement.

One of these lobbyists (also vice chair of the scholarship fund that received proceeds from the event) collected ticket money for the event, but insisted that he did not break the law because (1) he did not actually sell any tickets and (2) no elected official asked him to raise funds. No one had to ask him anything. After all, he sat on the organizing committee and the scholarship board of a legislative charity. But what is a lobbyist doing there?

The legislative ethics committee counsel said that "Lobbyists selling tickets to legislators is not the same as legislators selling tickets to lobbyists." To which one might respond, When it comes to the perception that legislators are in bed with lobbyists, does it really matter which side of the bed they sleep on? Either way, it's all about personal reciprocity. It's a matter of lobbyists doing things for legislators, helping their charity, running their show, putting legislators further in their debt.

As so often is the case, lawyers focus on the technicalities of sleeping positions, while government ethics professionals focus on how to keep them out of bed altogether. Better that they sit together at a table and talk.

Another approach is to place the prohibition on elected officials, as in this provision from Fort Lauderdale: "No member of the city commission shall knowingly solicit or accept any donation for any third party from any person or entity that is doing business with the

city.” But this still allows restricted sources to make donations to favorite charities, as long as they are not solicited by or given directly to an official.

The best way to prevent such situations is via a provision prohibiting high-level officials from any high-level involvement with a nonprofit, directly or indirectly, including through their immediate family and business associates. This sounds mean-spirited. But think about it for a few minutes and you realize that, when an official publicly supports one charity over other charities, this is an instance of preferential treatment. Is it any different from the mayor being a spokesperson for one business rather than for all the businesses in one’s community, a situation that is sometimes expressly prohibited in ethics codes?

An individual has the right to prefer one community charity to another, and to establish relationships through fundraising. A government official has the obligation not to show special preference to charities and not to establish relationships with restricted sources, especially through money changing hands.

A compromise approach would be to require that any official who wants to be involved in any way with a nonprofit get the ethics commission's approval, promise to quickly refuse or return donations by a restricted source, and make monthly reports of all donations and expenditures, swearing each month, under penalty of repaying treble damages without a hearing, that no donation was accepted from and no expenditure went to any entity, or any person who works for a firm, seeking a special benefit from the local government, or that any such donation has been returned.

Any of these approaches might put a stop to mayoral charities altogether, and thereby protect both mayors and the public from the scandals they seem inevitably to lead to.

Breaking ties with particular charities while in office is an excellent example of the sort of sacrifice that officials need to make when they become public servants. It might help them and make them feel good to be identified with a charity, even if they have no thought in the world of using it as a vehicle for pay to play. But even without any corrupt intent at all, it is still preferential treatment.

Lower-level officials and employees should be free to participate in charities, but if there is any question, they should seek advice or a waiver before joining a board or doing more than limited fundraising.

Many elected officials insist that they are important to charitable fundraising in the community. And it’s true that they could lend their name and time to any charity that asked,

so that there is no preferential treatment (although I've never actually heard of this being done). But is this really the role of a government official, especially considering that some government services are contracted out to nonprofits, so that many are themselves restricted sources?

The most unethical aspect of the misuse of charities is effectively making nonprofits' employees and board members co-conspirators in a pay-to-play scheme. Officials have an obligation not to make use of well-meaning people like this, who have their own obligations and conflicts.

For more on this topic, see [the section on charities](#) in the final chapter.

6. Gratuities

Most government ethics issues do not affect the average local government employee. When one does not have much decision-making authority (technically speaking, when one's "functions are only ministerial"), any conflict an employee may have usually does not become operative. That is, an ordinary employee rarely has to withdraw from a matter.

Gifts from restricted sources are also unlikely, since there's not much the ordinary employee can do to help them. But gratuities can be a big issue.

There is disagreement whether gratuities belong in a government ethics code. Most gratuities are given not to influence employees in order to get preferential treatment, but rather to reward them for doing their job. The public trust is usually not undermined if parents give small gifts to teachers or sanitation workers. Nor is there an issue of personal versus public interest. Therefore, the usual ethics issues are not present in the case of most gratuities.

But there are important issues involved. The question is whether they should be treated as ethics issues or as human resources issues, that is, whether prohibitions and limitations belong in an ethics code or in an employee code of conduct or personnel or departmental rule.

The most important issue is that, when gratuities are allowed, citizens sometimes feel compelled to give them. This is not a good thing. It is enough for citizens to pay their taxes. They should not feel obliged to give more than this, or feel bad that they cannot. And they should not have to wonder how much to give or what can be given. For example, they

should not have to fear that their failure to give their child's teachers gifts will result in less attention being given to their child.

A related issue is that, when gratuities are allowed, employees could use their position to put pressure on citizens to give gratuities, either by saying something or leaving an envelope. Even if no threat is made, there is an implied threat that services may not be given, or may be given more slowly or with less attention, if no payment is made. This turns gratuities into required bribes. Such bribes are part of everyday life in many countries around the world, but not in the U.S., where they are criminal violations.

Another issue is the difficulty of knowing the difference between an innocent reward and a payment for preferential treatment, that is, services beyond what is required, for example, removing leaves along with garbage. One likely difference would be that the payment for preferential treatment would be larger than the ordinary gratuity, but if gratuities are acceptable and in cash, it would be hard to know the amount.

Which leads to another serious problem with gratuities: since they are almost always in the form of cash or goods, this is a very difficult area to regulate. It is probably easier to enforce it from the other side, especially with respect to public works. That is, it is easier to enforce ethics rules on the use of public machinery and vehicles, on moonlighting, and on what may be done during work hours. Doing this prevents employees providing certain kinds of preferential treatment, such as doing work for citizens outside of work hours or lending them equipment, in return for money. But it is far more difficult to prevent preferential treatment toward students, in recreation, and the like.

Finally, there is a difference between an environment where tipping is prohibited and where tipping is common. Tipping creates a different relationship between citizen and government. Even when it is not corrupt, it can be uncomfortable for many people. This is a good reason to have a clear rule that is well publicized and enforced.

If gratuities are allowed, it is important to set limitations on amount and type (for example, no liquor), to let citizens know about these limitations, and to make them consistent for all government employees, so that citizens can remember the rules. And beyond prohibitions, there can be positive guidelines to citizens and public servants alike with respect to appropriate gifts, such as a class gift for teachers and team gifts for coaches, rather than individual gifts. It should not be assumed that parents will know what is

appropriate. It is easier for parents and others to make gifts together when they know there is a formal process to follow and guidance in following it.

Although I don't think an ethics commission should enforce gratuity rules, if the ethics commission receives numerous complaints from citizens, it might be valuable to hold a public hearing to consider the issue and alternatives for dealing with the problem.

7. Disclosure of Gifts

Many gift provisions merely require the disclosure of gifts, at least of gifts over a certain amount, or of certain kinds of gifts, such as travel. The idea is that no official will accept a gift if disclosing it might hurt her reputation.

One argument against this is that disclosing gifts online actually increases the amount of public distrust. They see concretely that their officials are accepting substantial gifts from restricted sources and, without any other information, it looks like a lot of bribery is going on. This does not further any government ethics goal.

To the extent this information is not put online, but has to be viewed individually during the work day, it does not create an effective deterrent to accepting gifts. Of course, there are good government groups, newspaper reporters, and bloggers who can do the work for the public, but it's amazing how rarely such databases lead to articles and posts when there is no particular scandal involved.

The organization most likely to make public inappropriate gifts is the other major political party or, sometimes, another faction in the same party. It is in their interest, more than anyone else's, to embarrass elected officials. Therefore, a disclosure-only approach effectively politicize ethics enforcement, which is not a very good way of gaining the public's trust. It just looks like more partisan rancor, and people don't know what or whom to believe. The result is less rather than more trust in the government.

Another problem with the disclosure-only approach is that it assumes that, if an official does take inappropriate gifts, he will be punished at the ballot box (known as "vertical accountability"). But this assumes that most people are paying attention to what is written about the gifts, that they will remember at election time, and that a gift or two, as opposed to the official's abilities and policies and those of other candidates, will be the determining factor in their voting decisions. These are a lot of assumptions on which to base an approach.

The ballot-box argument also provides only one sanction, and it is an extreme one: removal. There are no fines and no restitution. Those who make the gifts are not sanctioned at all.

The ballot-box argument also assumes, in a district election, that a council member's constituents are the only ones who have an interest in protecting the integrity of public offices. This is not true. Every citizen of a city or county has an interest in having the officials who run their community act in the public interest. And the conduct of one council or board member reflects on the rest of the council and board, affecting the public's trust in the entire government. As for appointed officials and employees, that is, the great majority of those under an ethics code's jurisdiction, they are not even elected, so the gift receivers among them cannot be tossed out by voters.

The fact is that, in jurisdictions with disclosure-only rules, large gifts are made and the officials who receive them are usually re-elected.

One alternative in discussing which kind of gift approach to take – disclosure or other means of enforcement – is to look at them in terms of who enforces the rules: the public, political parties, or an ethics commission. It would seem more fair and more effective to have a rule enforced in a set manner according to formal rules by independent professionals than to have a rule enforced haphazardly by untrained, partisan individuals. Having an ethics commission enforce ethics laws is known as “horizontal accountability.” It is every bit as important as vertical accountability.

Where there is gift disclosure, it is important to make sure that the restricted sources that are required to disclose are not only entities doing and seeking business with the local government, but also the principals and officers of the entities, and their immediate family members. Where this is not made explicit, language can be interpreted to limit gift disclosure to gifts from companies, as was done in Baltimore in 2009. There, the city solicitor filed an affidavit saying that city officials did not need to disclose gifts from people who control business entities that are regulated by or do business with the city. That essentially means that disclosure is not required at all.

8. Gifts to Local Governments

Gifts to local governments are, in general, not controversial. In fact, some ethics codes include a requirement that officials turn gifts over to the local government. It is common for

local companies to make gifts to schools, especially for particular projects or programs. It is good advertising, similar to making contributions to local charities. And it appears to be a way for businesses, especially those who gain from their relationship with the city or county, to show their gratitude and their loyalty to the community. Executives say that their companies feel it's right to make donations to communities where they operate, but where such companies operate, they are in a position to benefit from or be harmed by government action.

It would actually be better, in a government ethics sense, if companies were to make gifts to communities where they did not operate and had no plans to operate. These gifts would be accompanied by no appearance of impropriety. But that is not going to happen.

The reason that gifts to local governments is a problem is that officials are loyal to their governments and communities, and feel that someone who makes a gift to the community is owed something in return. Not something specific necessarily, such as support for a permit to allow a factory to expand. But it is certainly hard to oppose the request of a company that gives a fieldhouse to a school.

Officials are also loyal to their parties, and the party in power, and its leaders, usually receive credit for large gifts to the community.

When government contractors and local developers seeking government approval make such gifts, it can be seen by the public as an attempt to buy influence, even if no official directly or indirectly benefits from the gifts. Take an example from Richland Hills, Texas. An energy company negotiating a lease to drill on city property wanted to give the city \$200,000 to rebuild a community center. Some council members said they would not accept the gift until the lease had been finalized. But the damage had been done; the offer was on the table before the negotiations were over and therefore would be seen as affecting the negotiations even if the gift was not formally accepted until afterward.

In any event, the relationship between city and energy company does not end when the contract is signed. The company's operations will be regulated by the city, and the lease will come up again and again for extension. It's hard to toss out so charitable a company (or perhaps put the lease up for bid) in preference for a company that has done nothing for the community.

In addition, mayors often request gifts to the community, the way they do gifts to favorite charities, knowing that it is difficult for a business seeking a contract or approval to

say no. It is an effective way of getting local businesses to supplement their taxes, but it appears to businesses as pay to play, since mayors usually take credit for bringing in the gifts. Local businesses should not be expected to pay more than what they pay in taxes. And they should not be placed in a position where they feel coerced into making a gift.

Sometimes requests for gifts can be specific. It would certainly be considered a problem if officials were to solicit gifts for their agency from those doing business with their agency. If a fire chief were to ask a truck company for a free emergency vehicle, that would look like coercive pay to play. In 2010, for example, the Metropolitan Atlanta Rapid Transit Authority asked its contractors to each give from \$5,000 to \$10,000 for a holiday party for the authority's 4,400 employees. Holiday spirit is one thing, using one's power over contractors to pressure them into making gifts for the benefit even of thousands of individuals is a misuse of office.

Sometimes gifts are specifically directed to departments with which the gift giver is or has been involved. For example, a car given to the zoning enforcement officer by a car dealer who has just been involved in a zoning matter. Such a gift was approved by the Middletown, Connecticut council in 2010, and was defended in committee on the basis that the landowner rather than the dealer applied for the permit, even though the permit benefited the car dealer. The mayor asked that the car be given back, saying to the local newspaper, "It's just not worth giving rise to an ethical question. Do I think anything unethical was going on? No. But if you think there's a problem, that's enough. . . . We are better off buying a car and not raising ethical questions."

A more insidious form of such a gift, which rarely requires outside approval, is a gift of free services, usually legal. For example, in 2012 Baltimore's comptroller accepted the pro bono services of a firm whose most prominent member is the owner of the Baltimore Orioles baseball team, in other words, an important restricted source. The legal services were for a suit against the mayor, alleging that a large telephone contract was not competitively bid. The comptroller insisted that the legal services were not for her benefit, but for the benefit of the city's residents. She also insisted that the Orioles owner does no business with the comptroller's office, and that she would withdraw from any matter involving him or his businesses or properties that came before the comptroller's office or the Board of Estimate, on which she also sits. But withdrawal does not cure a gift. Only rejection or return of a gift can do that.

Another instance of a gift of free services, funded by a foundation and companies with a special economic interest in school decisions, occurred in Philadelphia in 2012. It led to an ethics complaint, not on the basis of a gift or conflict, but rather on the basis of failure to file as a lobbyist. The complaint alleged that a foundation both funded and entered into a separate contract with a consulting firm hired by the city to make recommendations to its school district. In addition, the complaint alleged that other donors were involved, including real estate developers, who may or may not have an interest in using closed schools, and organizations and individuals involved with charter schools, which have an interest in how much the recommendations may lead to an increase in charter schools in the city.

Although there are rarely ethics provisions relating to the acceptance of gifts by local governments or their agencies, there is sometimes an open-ended prohibition on officials soliciting gifts from restricted sources. This prohibition does not usually say who will be receiving the gift, whether the individual, a family member, a friend, a business associate, a charity, or the government itself. Therefore, an ethics commission can apply such a provision to gifts to local governments that have been solicited. But officials should be told this in advance, not surprised with this interpretation after they have solicited a gift for the government. The limitation of such a prohibition is that it only applies to active and, usually, direct solicitation, which is often unnecessary and difficult to prove even when it does occur.

Gifts to a local government can also be made in such a way that they are directly beneficial to an official. For example, in 2009 the mayor of Sacramento, California sought to increase his personal staff with money from private sources. Donations over \$5,000 have to be disclosed (a state law), but that is the only restriction. Especially in a council-manager form of government, where the mayor is weak, an increased staff means more power, since the mayor's principal form of power is through relationships and communication.

It should be noted that one of the most serious local government scandals in recent years arose from a gift of gift cards made to the office of Baltimore's council president, for the purpose of distribution to the poor. The cards were given by two developers, who were seeking tax breaks from the council. The council president used some of the cards for personal purposes, was convicted, and resigned. The council president should have told the developers to take their gift cards elsewhere. It's not her responsibility to distribute gift cards to the poor, or even to the appropriate agency. She should not get any credit for them, on the basis of her relationship with developers, nor should she be tempted by having what is

essentially cash in her hands. The developers should have been told to make their gifts to community charitable organizations, just like everyone else.

Baltimore is also the home of another way the irresponsible use of gifts to a local government can occur. Baltimore had a city foundation even most officials did not know about, and which had little oversight even within the foundation. It acted as a secret slush fund to allow those seeking benefits from the city to make gifts that certain officials could spend as they chose (that is, secret earmarks). It was also a way for agencies to get around competitively bid requirements by putting city funds into the foundation, where they could be spent without having to follow city rules.

Gifts can also have strings attached. For example, a Moore County, North Carolina commissioner gave his company's software to the sheriff's office, but entered into a no-bid maintenance contract and appears to have used the sheriff's office to show customers his software in action. And having his software at the sheriff's office kept out competitors from his backyard, which would have been embarrassing. Overall, the deal might have been good for the county, but it was set up to help the commissioner's business. It appears to have been less a gift than an investment. Many gifts to local governments are a combination of public relations and investment.

A common means of obtaining gifts from local businesses is a local education foundation. These foundations are a great way for citizens to fund school programs the school system cannot afford. But they are also a way for school board members and other officials to directly or indirectly put pressure on companies doing business with the government. Local education foundation boards often include local officials, including school board members or members of their families. They also often include individuals who do business with the government or represent those who do business with the government, providing them with an opportunity to show their and their clients' loyalty to government officials by raising funds for programs important to these officials. What looks like a win-win situation can actually be a legal way to obtain influence or a way to insure that those doing business with the school system or the local government pay to play.

In addition, school board members and other officials often take credit for bringing their schools gifts. What might look like a boon for the city's schools can actually cost the city money. For example, a school board president might suggest to a company whose contract is reaching the end of its term that if it pays for a new grandstand for the high school

football field, the president will see to it that the contract is not bid out, but instead renewed. This will save the company more money than the grandstand costs, and city taxpayers will, unknowingly, pay the difference.

Finally, gifts to governments can be nothing but bribes. As part of its extensive bribery of local officials in Mexico, according to an investigatory article in the *New York Times* in April 2012, Walmart de Mexico made payments to local governments totaling \$16 million between 2003 and 2005. The payments were made to facilitate the obtaining of licenses and permits, and often were made at the same time as bribes to officials.

It is important to remember that gifts given to governments are not always used to benefit its citizens. And even when they are, they may still benefit high-level officials by keeping down tax increases, which makes re-election much easier.

It is hard to prohibit gifts to governments by those doing business with it. There is often a great deal of pressure on local legislators to accept such gifts, since rejecting them appears to harm the city or county. But there are other ways, beyond disclosure, to deal with the more problematic gifts. One way is requiring that all such gifts be discussed at a public meeting, with citizen input, and be voted on by the legislative body. At least questions can be asked, and the more questionable gifts may lead to citizen protest and rejection of the gift.

The best way to do this is in the form of a waiver process. The waiver process places the burden on the gift giver to explain why the particular gift has been chosen rather than, say, money that can be used as the school board chooses. Or a gift of money to a local charity. The timing of the gift may also become an issue. The waiver process allows not only the rejection of a gift that may create an appearance of impropriety, but also a settlement whereby the government structures the gift to its advantage rather than to the gift giver's.

To prevent the pressure that is on local legislators to accept gifts to city agencies, it is better that the waiver process be handled by the ethics commission. Here is a provision based on that in the Baltimore ethics code:

The prohibition on gifts from those seeking special benefits from the city government does not apply if:

(1) it is for the benefit of an official governmental program or activity or a city-endorsed charitable function or activity; and

(2) it either:

- (i) is expressly allowed by a rule or regulation of the ethics commission; or
- (ii) otherwise has been approved in advance by the ethics commission, on the written request of the official and his or her agency.

For more information on how such a waiver process might look, see [the Baltimore gift regulations](#).

Another approach is to require that gifts go into the general government or school budget rather than into particular agencies, departments, or schools, or even worse into particular projects. This will prevent officials from seeking gifts that would help them directly or their pet projects, and it will also prevent businesses from determining local government priorities or using their gifts to advertise their particular products or services.

And yet there are occasions where a large gift to a particular agency for a particular purpose can be extremely helpful, and can be done without harm to the public trust. One type of instance is when an agency is sued and lacks the resources to defend its program. For example, when a government ethics commission is sued on the basis of an allegedly unconstitutional campaign finance provision, the cost will likely be greater than the board's annual budget. And the local government will usually lack the necessary expertise. It is common for a law firm or law school with the necessary expertise to volunteer staff and time to work on the case. This would be problematic only if the ethics commission were to feel obliged to hire the firm or professor for other work, but this would be unlikely. The only issue here is, who would be able to approve the acceptance of this gift? See the discussion of [dealing with ethics commission conflicts](#), below.

9. Federal Gift Prohibition

A federal statute allows federal prosecution of those who give gifts to local officials in an amount greater than \$5,000. Proof of bribery is not necessary, but evidence needs to be shown that the gift was given “corruptly . . . with intent to influence or reward.” This is somewhere between a gift provision in an ethics code and a bribery provision in a criminal code. The local government must have received federal funding, but this is true of most local governments, especially the larger ones. 18 U.S.C §666(a)(2) reads as follows:

(a) Whoever, if the circumstance described in subsection (b) of this section exists ...

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

This is a good statute to know about in jurisdictions where there is no independent ethics program or where the gift provision requires proof of a quid pro quo. It is also a good statute to know about when drafting an ethics code, because when officials push for the gift provision to require a quid pro quo, someone in the know can say that the federal government may prosecute for less than this and, therefore, the ethics code should require even less evidence.

An ethics code gift provision should set a higher standard than criminal laws (with lesser sanctions and lower costs) and prevent bribery (which is extremely hard to prove) as well as the appearance of influence and pay to play by prohibiting the giving of gifts to officials above a very low amount, without the need to prove intent to influence or reward, or to show evidence of a specific quid pro quo.

B. Confidential Information

The confidential information provision is a relatively straightforward ethics provision, except for two things: a very common misunderstanding and the definition of “confidential information.” The City Ethics Model Code confidential information provision is as follows:

An official or employee, a former official or employee, a contractor or a consultant may not use confidential information, obtained formally or informally as part of his or her work for the city or due to his or her position with the city, for his or her own benefit or for the benefit of any other person or entity, or make such information available in a manner where it would be reasonably foreseeable that a person or entity would benefit from it.

A confidential information provision deals with situations where an official uses or allows others to use information that specially benefits them because it is not commonly known or available. By using or allowing others to use this information, an official misuses his office to provide preferential treatment to people who most likely have a special relationship with him (if they did not already have a relationship, providing them with advantageous confidential information creates such a relationship, as well as an obligation to reciprocate in some manner).

When we think of bribery, we think of a contractor paying money to officials in returning for helping the contractor get a contract. But sometimes what is paid for is not action, but information. Information about such things as other bids is very valuable. It is the misuse of this sort of information that confidential information provisions are intended to prevent.

What information is “confidential”? The term is often defined as information that is not generally available to members of the public and/or that an official or employee is not authorized to disclose, except to designated individuals or bodies. Pursuant to this definition, it includes information that is not available to the public pursuant to state or local transparency or sunshine laws, as well as pursuant to criminal laws or personnel rules, to the extent those laws or rules do not contradict transparency laws.

With respect to government ethics, the first part of the definition, its availability to the public at large, is much more important than whether distribution of the information is legal or authorized. In fact, for the purposes of government ethics, what is most important about confidential information is not its confidentiality, but rather favoritism given in the distribution of information. That is, confidential information matters only to the extent it can be used by certain people to benefit themselves. Information that is generally available

cannot be misused, unless it is not generally known that the information is generally available.

Therefore, it is better to define “confidential” here in terms of the information’s availability and value rather than in terms of the legality of its distribution. If the information has appeared in the newspaper, it doesn’t matter whether it was supposed to be kept within the confines of the council or even whether it was illegally leaked.

The focus on the legality of “confidential information” is the basis for the principal misunderstanding relating to this provision. In many jurisdictions, what is prohibited is not the *misuse* of confidential information for the benefit of specific individuals or entities, but rather the *distribution* of this information. Whatever problems may arise from the distribution of confidential information, this is not a government ethics issue.

It should be considered to whom confidential information is given and why. If confidential information is put out on the internet, it may be improper and damaging to the government, but there is no conflict between personal interests and the public interest, unless someone may benefit specially from the disclosure of this information (and this would be an odd way to let one person know the information). If the official has acted simply out of spite or anger, he should be disciplined, but this discipline should come from his supervisor or the body on which he sits.

If, on the other hand, the official gives confidential information to someone trying to get a permit for land development or a company bidding on a contract, this is clearly intended for the benefit of a favored individual or entity. The only reason it matters that the information is “confidential” is that its value is based on the fact that only one bidder or developer has the information. The placement of all bids on a newspaper’s website is usually of no advantage to any one bidder. If the bidding period is not over, then all bidders can equally amend their bids.

In fact, there are sometimes good reasons for the distribution of what is commonly considered “confidential information,” particularly information presented at a closed session or contained in documents covered by attorney-client privilege. The principal reason can be seen in an exception to New York City’s confidential information provision (§2604-b(4)): “provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest.”

In other words, there are times when it is important and responsible to disclose confidential information in order to prevent ethical or criminal misconduct, or to enforce laws that prohibit such misconduct. That is why the Dallas ethics code, which wrongly prohibits disclosure of confidential information, at least makes an exception for “the confidential reporting of illegal or unethical conduct to authorities designated by law” and “any disclosure, not otherwise prohibited by law, in furtherance of public safety.”

It is no coincidence that ethics provisions that prohibit all disclosure of confidential information are sometimes enforced against whistleblowers. For instance, in Winker County, Texas, a nurse was accused of misuse of confidential information for reporting improper medical treatment by a doctor. In that case, the confidential information provision had language that went beyond a prohibition against disclosing confidential information in order to benefit someone. It also prohibited disclosure that would harm someone, in this case, allegedly, the doctor. But of course the intent was not to harm the doctor, but to prevent further misconduct that would be harmful to others. The nurse was acquitted, but not before losing her job.

In Milwaukee County, Wisconsin a county supervisor disclosed the fact that the county administrator for public health had concerns about housing violent male psychiatric patients with vulnerable female patients. The disclosure was made in a discussion about a federal inspection report that had found multiple instances of patient sexual assaults. In other words, the disclosure was appropriate to the occasion, and in no way benefited the supervisor, his family, etc.

The disclosing supervisor opposed a proposed rule to prohibit all disclosure of confidential information. She said that a rule prohibiting the disclosure of information from closed sessions could lead to the abuse of closed sessions. “It's just one more step to make sure everything's done behind closed doors. ... They are actually clamping down on the public's right to know.”

Another county supervisor said that making disclosure a punishable ethics offense “could stifle discussion of important public issues. It may also lead to improperly labeling documents confidential to avoid public scrutiny.” It is also done to avoid scrutiny by those with oversight and enforcement authority.

In other words, especially in combination with abuse of closed meeting rules, which is rampant, prohibiting any disclosure of confidential information seriously undermines

transparency. Just because information is shared in a closed session does not make it worthy of being confidential. Similarly, information shared with a government attorney does not make it worthy of being confidential. The only legitimate reason for a confidential information provision in an ethics code is to prevent its use as a form of preferential treatment.

It is important to recognize and understand the place of confidential information in the mindset of a government official. Access to information others do not have, whether it should be confidential or not, has an effect on government officials very similar to the effect of power. As Daniel Ellsberg, the government official who let us know about the Pentagon Papers, wrote, “First, you feel exhilarated by access to information you never even knew existed. Almost as quickly, you feel like a fool: for having analyzed these subjects for years without a clue about information this crucial, for having worked daily with people who did have access and kept the secrets so well. But once you get used to your new access to whole libraries of hidden information, you are aware of the fact that you have it and others don't — and view anyone else as a fool to whom you, in turn, are bound to lie.”

These are very chilling words. Confidential information is not simply something legal. Confidential information is power, and its confidentiality is abused more frequently than its disclosure.

We tend to think of this problem occurring at the federal level, with access to classified information. But the same thing happens at the local level. High-level officials have access to people and information others have little or no knowledge of. When citizens come before them, many officials hardly listen, because they know how ignorant the citizens are. Special knowledge can be one more way to justify acting against the public interest, because only those who know all the facts have the right to say what is best for the public. The arrogance that comes with access to confidential information is a serious problem at the local level.

Special knowledge does not justify this sort of arrogance and contempt. Those who have special knowledge have an obligation to inform and teach the public. An ignorant public, a public that does not understand, is a public that cannot participate effectively and, therefore, cannot provide the necessary oversight. Confidentiality is one way that officials benefit themselves and others, at the expense of the public and to the harm of our democracy.

Applicability

Another notable thing about the City Ethics Model Code confidential information provision is that it expressly applies to former officials and employees as well as to contractors and consultants. Benefiting oneself or others through use of one's office ends when an official or employee leaves office, but benefiting oneself or others through the use of confidential information does not. It is important to make this clear not in a definition or jurisdictional provision, but right in the confidential information provision itself. In addition, the post-employment provision should list all provisions applicable to former officials and employees.

As for contractors and consultants, they have access to much confidential information, and can abuse it just as easily as officials. This is especially true of professionals, such as auditors, outside attorneys hired by agencies, and engineers hired by public works departments.

C. Representation and Appearances

Representation and appearance provisions deal with conflicts that arise when an official represents someone other than his local government in a local government matter, or appears before the local government on behalf of anyone but himself or the local government. Simply speaking, these provisions deal with matters where an official is wearing two hats.

Most local government ethics codes do not have separate representation and appearance provisions, because in most cases where an official is representing someone, he appears before a government official or body. The City Ethics Model Code has separate provisions for four reasons:

1. The Model Code representation provision deals with situations where there is representation without an appearance.
2. The appearance provision provides more clarity. Whereas the typical provision deals only with representation, it is much more clear when an "appearance" has been made than when there is a "representation" relationship. Appearance is a concrete

and usually public act; representation can be private and can include a wide variety of situations.

3. The representation provision includes the representation of private interests outside of the city's own boards and departments, when it is against the interests of the city, usually but not exclusively when the city is a party to a transaction or a proceeding. These situations generally do not involve appearances before a local government official or body.

4. The appearance provision applies to appearances where the official is representing himself or herself, but it is not clear which hat the official is wearing.

Here are the two City Ethics Model Code provisions:

100.6. **Representation.** An official or employee may not represent any other person or entity before the city, nor in any matter not before the city but against the interests of the city. However, it is acceptable for elected officials to represent constituents without compensation in matters of public advocacy.

100.7. **Appearances.** An official or employee may not appear before any city department, agency, board or commission, except on his or her own behalf or on behalf of the city. Every time an official or employee appears before the meeting of any municipal body, or when he or she writes a letter to the editor or other publicly distributed writing, he or she is required to disclose before speaking or clearly on the writing whether he or she is appearing in an official capacity or as a private citizen. If the speech or writing is in response to criticism or other communication directed at or regarding his or her official role, the official or employee may respond only in his or her official role.

The general rule is that if others would see a local official's relationship with a person or entity as "representation," with respect to a matter that involves the local government, the official should not have that representational relationship, because it would be perceived as a conflict with his principal role of representing citizens as part of the local government. Similarly, an official should appear at a government meeting only as an official or, when he personally has a matter before the official or body, only on his own behalf.

Why are officials restricted from appearing before boards or agencies other than their own? Because restricting only appearances before your own board or agency would, for example, allow a code-enforcement official or a city attorney to represent private clients before the city planning board, because those officials are not members of that board. It would be very difficult to list every possible instance where an appearance before other boards and agencies would be inappropriate. When there would be no appearance of impropriety, an official should obtain a waiver from the ethics officer or ethics commission. These provisions should give rise to more waiver requests than any other provision.

It is important to make an express exception for constituent work, because this is the most common form of representation of others. But this exception should not be used to represent businesses seeking special benefits from the government; these individuals and companies can pay for their own representatives. If there is a question of need, and it is not the officials' agency or body that is involved, the official should seek a waiver.

What about volunteers? Isn't it a lot to ask of a volunteer board or commission member to forgo the opportunity to represent clients before other boards and commissions in one's city or county? The answer is that in many cases it is a lot to ask, and a waiver should be provided. But a waiver is not automatic. If an official regularly needs a waiver, a general waiver can be provided so that the official need not keep making requests. For example, if a land use attorney sits on a library board, she should be given a general waiver to represent people before planning and zoning boards.

Or there can be a general rule that part-time volunteers are restricted only to representation before their own boards or agencies, with clear exceptions. A volunteer attorney on the planning board should not be representing clients before the zoning board of appeals or before the council with respect to real estate matters. Nor should an engineer on the planning board be consulting to a developer in a suit against the city. A planning board member should represent only the local government's interests with respect to real estate matters before the local government.

New York City has a special law for its planning commission, §192(b). This law defines a planning commission member's agency as both the commission and the city planning department. Thus, no firm in which a member has an interest may appear before not only the member's commission, but also the planning department. Nor may a planning commission member represent someone before the planning department. This is an isolated

example of the kind of rules that need to be added to a general rule against conflicts that relate to an official's agency.

Individuals who represents clients in matters that relate to the area in which their board or commission is involved should either not sit on such a board or commission, or should limit their representation to clients who do not have matters before their local government. If it's a big city or county, the individual should volunteer to sit on an unrelated board or commission. It may seem that specific expertise is important to helping one's local government, but too much expertise can mean too many conflicts. A lawyer or accountant can easily learn a field outside her own, and can expand her knowledge (and, after public service, even her clientele), while providing useful, conflict-free public service. Citizen boards and commissions require from their members not expertise, but willingness to do the work and learn what is needed to do it.

There are boards and commissions that could be excluded from these provisions, such as a library board, but these boards usually don't have members who represent individuals before the local government. The general rule should apply to nearly all government bodies, because it doesn't look good when any government official is involved in actions against their government or is actively seeking approvals, grants, licenses, and exceptions for their clients, making use of their position and contacts to help obtain them.

Some jurisdictions limit their appearance or representation provision to the official's board or agency. That is, the official can represent people before any other board, even if it is in an area dealt with by the official's board, and even if it involves a matter that was before the official's board or might come before that board. Of course, the latter situation would create a conflict that would require the official to withdraw from the matter if it did come before his board.

El Paso has a provision that prohibits officials from appearing, in order to represent another's personal interests, before "a board which has appellate jurisdiction over the board of which she or he is a member, " such as a board of zoning appeals or a council. This is a good idea.

San Antonio has one of the better representation provisions (Section 2-47 of its [ethics code](#)) without distinguishing between representation and appearance. It made a reasonable compromise with respect to volunteer board members by limiting them not only from representing people before their own board, but also before city staff involved with that

board and before boards that have appellate jurisdiction. It also prohibits the board member from representing someone in litigation involving the city, where the interests of the client are adverse to the interests of the city and the matter is substantially related to the board member's official duties.

San Antonio prevents other officials and city employees from representing anyone else before the city or in matters adverse to the city's interests. This is important, because representing clients in suits against a local government creates a conflict that especially infuriates the public. No one wants to see local government officials and employees involved in matters where they are arguing against their local government's (that is, their constituents') interest, or taking money out of the pockets of their own taxpayers.

Appearance should be interpreted to include appearance as an expert witness. Local governments might want to make this clear, either in the ethics code or in an advisory opinion.

One of the curious things about representation and appearance provisions is that although they are sometimes left out of ethics codes, former officials and employees are commonly prohibited from representing people before their boards or agencies in post-employment provisions, the topic of the next section.

D. Post-Employment

“You do not take pizza from the oven and put it straight in your mouth. I believe that we should not take our legislative service and put it right in our own mouth.”

—Missouri State Senator Jason Crowell

It is common for ethics codes to have a special provision that limits the conduct of officials and employees after they leave their positions or jobs. Post-employment, or “revolving door,” provisions are intended to prevent officials and employees from giving special treatment to individuals and entities while in office, in order to get jobs or contracts with them after they leave public service. They are also intended to make it harder for individuals and entities to use a job offer to get this special treatment or unfair advantage.

In addition, these provisions are intended to prevent individuals and entities from obtaining undue influence or unfair advantage by hiring former officials to make use of their personal relationships with members of governmental agencies and boards.

In terms of public trust, a post-employment provision is intended to prevent the appearance of impropriety that arises when an official takes a job with a firm that had business before his or her agency or board. More generally, the revolving door between government and the businesses that benefit from government contracts, grants, licenses, and permits sends the message to citizens (1) that people run for office in order to win the corporate lottery, that is, they use their time in office, and their power over government's transactions with and regulation of businesses, to ensure themselves well-paid jobs when they leave government, and (2) that businesses use their economic power to influence officials through the prospect or offer of jobs or professional work, and to use the officials' personal influence to push their own commercial interests. The revolving door undermines the public's confidence in government-business relations and in their representatives putting the public interest ahead of their own interest in post-government work.

Officials are seen as using their government service as a stepping stone to help themselves as well as the firms that do business with the government, a win-win deal for everyone but the public. The revolving door puts a question mark at the end of everything the official did in office: what are officials giving away in order to get a personal reward? When they act, advocate, and vote, are they thinking of their future or what's best for the public?

In terms of appearance, post-employment work opportunities are indistinguishable from bribes, although the quid pro quo is very hard to prove. Job offers and understandings that an official's services will be employed when she is out of office are not put down in writing. Fortunately, in government ethics, there does not need to be proof of a quid pro quo. Post-employment provisions are a perfect example of how government ethics rules can do something criminal laws cannot. By prohibiting conduct without any need to show a quid pro quo, ethics codes prevent misconduct and, if the rules are not followed, make proof far easier, which in turn prevents misconduct.

The only problem is that the situation can usually be dealt with only after the fact, after the official has left public service. Some ethics codes do expressly state that a job offer or even discussion of a job constitutes a conflict (in Seattle, for instance, this is in the basic

conflict provision, §4.16.070(1)(a)). Some ethics codes instead require disclosure of any such discussion, and others prohibit any such discussion with a party to any matter before the official's department, agency, or board. These rules allow job offers to be dealt with by withdrawing from matters involving the prospective employer or, when the matter has already moved forward, prohibiting any discussion with the potential employer at all.

It's worth going beyond the narrow idea of employment, however. There are other relationships besides employer-employee that can create the exact same sort of conflict situation. These relationships include contractual relationships, consultant relationships, professional-client and vendor relationships, partnership or investment arrangements, purchase of a business, a place on a board, and rental and referral arrangements. Post-employment language should either be open-ended or should specify a variety of these relationships and arrangements. This can be done by defining "employment" to include all these relationships. But one has to be careful, because other uses of "employment" in an ethics code may not include these relationships. Therefore, it is best to speak in terms of relationships rather than employment. Here is sample language:

An official or employee who is discussing, has been promised, or has an arrangement concerning a special relationship with an individual or entity seeking a benefit from the government must withdraw from any matter involving that individual or entity. Such "special relationship" includes employment, a contractual, vendor, consulting, rental, or referral relationship, a professional-client relationship, a partnership or investment arrangement, a position on a board, the purchase of a business, and other similar special relationships.

Where there is no such rule, or where there is no actual discussion of a job, just a tacit expectation for which there could be no evidence, it is only when the official actually benefits, not when she acts in ways that put her private interest ahead of the public interest, that government ethics enforcement can occur. In these circumstances, enforcement can occur only after the official has left government, and pursuant to a post-employment provision.

There are three principal ways the relationship between official and potential employer works. In one scenario, a business wants to get a contract or grant, or get a

development approved. In return for help in doing this, it raises the possibility or likelihood of a future job or work for the official or for her company or firm.

In another scenario, an official takes the initiative. He lets a business know that it will not get a contract, grant, or approval unless it promises to give the official a job or work when he quits or when his term ends. In a variation of this scenario, known as a “soft landing,” an official who wants to move on or realizes he will have to, often due to an impending change in administration, decides to help potential employers in order to increase his chances of employment.

Both of these two scenarios are different from the ordinary conflict situation in one principal way: when the gift is actually made, the official or employee is no longer an official or employee. Were the gift to involve a job to the official’s wife or the employee’s brother, while the official or employee was still in his position, then there would be a conflict based on an indirect benefit. Were the gift to involve work on the side for the official or employee, then there would be a conflict based on a direct benefit. In either situation, there would be an ordinary violation. A post-employment provision allows there to be a violation even if the benefit does not occur until after the official or employee has resigned.

A third scenario involves a former official working as an employee or lobbyist, using contacts and confidential information to help individuals and businesses obtain benefits from the government. Knowledge of the intricacies of such things as contract specification writing, and relationships with former colleagues, subordinates, and mentees, are invaluable to those doing business with government.

Clearly written revolving door provisions can be self-enforcing, especially with respect to elected officials in a partisan environment, and especially in jurisdictions that have good, independent ethics enforcement. Knowing that political opponents are likely to criticize companies who hire elected officials, companies are not likely to hire such officials, at least not for a while. However, they can always hire former officials from both parties or multiple factions, and thereby short-circuit any partisan criticism. Therefore, an ethics commission needs to keep its eyes open for officials violating post-employment provisions.

1. Examples of the Revolving Door

In Hartford, a former corporation counsel is hired by a law firm that has hundreds of thousands of dollars worth of contracts with the city.

In Los Angeles, an official negotiates a job with a company that has pending business with the city.

In California, a former member of a pension fund becomes a placement agent, a middleman who wins his former colleagues over for the sake of the investment firms who are his clients.

After a contract is awarded for what appears to be three times the amount it would have gone for had it been properly bid out, a Montreal council member is given a job with a different company owned by the contractor's principal.

A revolving door situation that became the center of attention a few years ago involved election officials who went to work for voting machine vendors or acted as lobbyists for the voting machine industry. This conflict was considered central to the problems involving the newfangled voting machines.

Sometimes post-employment situations coexist with conflicts and possible gift/pay-to-play situations. For example, in 2009 the Boston mayor's son and brother worked for a city contractor, and his former top advisor and his longtime redevelopment authority director went to work for the same contractor. Even if no one relationship would necessarily require the mayor to withdraw from matters involving the contractor (and the mayor may not, in any event, have to deal directly with such matters), this group of situations creates a serious appearance of impropriety that is difficult to deal with responsibly. Each part of the situation needs to be dealt with before it occurs. A mayor's immediate family should not be given jobs by a city contractor, nor should his aides go to work for one. Otherwise, it would have to be determined if the jobs were given due to pay to pay (in which case, the four individuals should be dismissed and the mayor should be seriously penalized) or to influence the city (in which case, the contractor's contracts should be voided). This is yet another reason why it is so important for contractors to be brought into an ethics program. If the contractor is required to disclose such hirings to the ethics commission, and possibly get formal permission, then they can be dealt with as they occur (or be clear violations), rather than years down the road.

The typical post-employment situation involves a company, but sometimes a governmental agency is involved. For example, in Pierce County, Washington, a council member who helped put through a transfer of waterfront parkland from the county to a park district was hired to head the park district two months before his council term ran out (due

to a term limit policy). The job requirements were even changed so that the council member could qualify. Despite such situations, some post-employment provisions make an exception for governmental agencies and authorities, rather than requiring officials to seek waivers when they are offered a job by an external governmental agency that does business with his government.

Nonprofits can also cause problems. Those that get grants from local governments often hire former officials as high-level employees, lobbyists, or consultants. In fact, the biggest employer and seeker of permits in a community is likely to be a nonprofit university or hospital. Such a nonprofit is also a lobbyist, an exceptionally powerful and prominent lobbyist that has many interests in legislation, regulation, and planning decisions. It is a high-level official's connections (and, at least from the public's point of view, the official's favoritism) that make her a serious candidate for a high-level position with a local university, hospital, or other major nonprofit. If the job is taken, a whole new light is shed on decisions and other conduct by that official while in office.

The general counsel, chief legal adviser, and chief administrative law judge to the Indiana Utility Regulatory Commission (all one person) was allowed to take a job with the regulatory division of the state's largest electric supplier days after leaving his government job. How could this possibly happen? Because the state's post-employment provision only applies to officials who have made a decision regarding the employer. An official who has investigated, overseen, or made recommendations regarding the company, that is, has had a serious effect on decisions regarding the company and has had oversight responsibility regarding the company can still go directly to work for it. Post-employment provisions should apply to investigators, staff members, attorneys, consultants, and other advisers, in addition to decision-makers.

In fact, staff members and advisers generally have more to do with how a matter is handled than those who cast the votes to approve what these other people drafted, put together, and advised them to do. This situation in Indiana provides a good example why limiting post-employment prohibitions to decision-makers is wrong, and why it is so important exactly how revolving door provisions are worded.

2. Revolving Door Provisions

Revolving door provisions are longer than most provisions, because they apply a range of government ethics issues to former officials and employees. One or two sentences cannot come close to dealing with all these issues.

A revolving door provision should have two principal sections, one involving representation, or acting on behalf of an individual or company, the other involving employment. The employment section should be divided between employment by a contractor and employment by others who have benefited from an official's involvement in a matter. Here are the two principal sections of the City Ethics Model Code's post-employment provision:

Representation. For a period of two years after the termination of his or her government service or employment, an official or employee may not, on behalf of any other person, for compensation, directly or indirectly, formally or informally, act as agent, attorney, lobbyist, or other sort of representative, to or before his or her former agency, department, authority, board, or commission. For the purposes of this provision, a mayor or executive, chief of staff or vice-mayor or -executive, local government manager or assistant manager, council member or council aide is deemed to have worked for every local government department, agency, authority, board, and commission. Acting indirectly includes action by a partner, associate, and other professional employee of an entity in which the former official or employee is a partner, associate, or professional employee, as well as acting by a member of the former official or employee's immediate family.

Employment. An official or employee, or a member of his or her immediate family, may not accept employment with, or with the help of, (a) a party to a contract with the local government, within two years after the contract was signed, when he or she participated personally and substantially in the preparation, negotiation, or award of the contract, and the contract obliged the city to pay an aggregate of at least \$25,000; or (b) an individual or entity who has, within the previous two years, benefited directly from any decision made by, or based on advice or information supplied by, the official or employee or by a subordinate. An elected or appointed official, or a member of his or her immediate family, may not accept employment if the body of which he or she is a member or was a member within the previous two years had any role in filling the job, including an advisory role. A mayor or executive, chief of staff or vice-mayor or -executive, or council member, or a member of his or her immediate family, may not, for two years after

termination of local government service or employment, except any full-time compensated position with the local government. For the purposes of this section, “employment” includes full-time and part-time jobs, and professional and other work for hire, given directly or indirectly.

In addition, prohibitions on a former official’s ability to represent someone in a matter depend on the official’s involvement with the matter. There are two levels of official involvement: personal involvement in the particular matter, and involvement through having had official responsibility over the particular matter, that is, authority over those personally involved in it. Here are the City Ethics Model Code provisions that relate to official involvement:

Particular Matters. With respect to particular matters on which the official or employee personally and substantially worked while in city service or employment, the foregoing prohibition is permanent.

Area of Responsibility. With respect to matters for which the official or employee had official responsibility, but were not personally and substantially involved, the foregoing prohibition is for a period of two years after termination of city service or employment.

With respect to determining involvement, higher-level officials should be treated differently from lower-level officials. A former board member need be banned only from appearing before his or her board, and a former agency employee need be banned only from appearing before his or her agency. There is, however, an exception: the board member or employee cannot appear in a matter she was personally involved in, even before another board or agency.

High-level officials should be considered to have worked for every agency and board, because their jurisdiction, connections, knowledge, and power were so broad that their influence can be felt throughout the government, their personal relationships exist throughout the government, and people they have appointed, directly or indirectly, are in positions throughout the government, giving rise to many personal obligations. Thus, they

should be prohibited from representation of or employment by those doing business of any kind with or seeking any kind of special benefit from the local government.

Chicago goes further with its representation-oriented post-employment provision ([§2-156-100\(a\)](#)). With respect to matters an official was personally and substantially involved in, she is prohibited from representing or even assisting someone in any proceeding involving the city or any of its agencies. The role of adviser is usually overlooked, but using inside information and contacts to advise can be just as important (or valuable), or even more so, than actually representing in a proceeding, which does not necessarily make use of personal relationships or confidential information.

Some revolving door provisions also prohibit doing business with one's government. For example, San Antonio and Dallas have provisions that prohibit former officials from selling anything to their government or entering into a no-bid contract with their government for one year after termination (it's six months in Nashville). Seattle prohibits bidding on any contract an official was involved with, for one year after termination. A prohibition on bidding prevents an official from writing specifications so that he or his company will be in the best position to win the contract.

Other cities have a specific revolving door provision to prevent elected officials and political appointees from using their positions to get a regular job with their government. Here is the language from Windsor, Colorado's provision:

No elected or appointed official shall become a full-time employee of the Town at any time during the term of office, or for two years after leaving office.

This provision should be extended to include consulting contracts, known as "sweetheart deals," where the former official is hired by his buddies, but on a contractual basis.

Dallas also has a provision that prohibits an official or employee from acquiring an interest in any matter affected by an official action of the city for a period of one year after the date of the official action, whether or not the official participated in the action. It's not clear what "an interest in a matter" means, but it could be assumed that this means an interest in any company, property, or contract involved in the matter.

3. Indirect Benefits

Most post-employment provisions are limited to direct benefits to a former official. But just as with conflicts, benefits can be indirect, as well. It looks just as bad when a former official's spouse or son gets a job or legal work from a contractor or developer, as it does when the former official gets the job or legal work.

Indirect benefits can also occur when the benefit comes not from the company that did business with the official's agency, but either from the owner of the company, another company owned by the individual or affiliated with the company, or even a company or individual that is doing a favor for the individual. Favors are often given indirectly. You help me get a contract, and I help your son get a job with someone who owes me a favor. The job can be with anyone.

Of course, it is harder to trace the benefit if it comes from someone apparently unrelated to a company doing business with the local government. But that doesn't mean that such a benefit should not be considered an ethics violation if someone knows about the arrangement and reports it to the ethics commission.

This is why it is important to include language in a post-employment provision that includes indirect benefits (note how "indirectly" is defined in the Representation subsection of the provision, and the repetition in the Employment subsection of the phrase, "or a member of his or her immediate family.")

By including indirect benefits, it becomes more clear that a post-employment provision is nothing more than a conflict provision that applies to a former official or employee. That is, government ethics, just as the appearance of impropriety, does not end when an official or employee resigns, does not run again, or is not re-elected. Termination is not a magical event when officials turn back into pumpkins.

4. The Cooling Off Period

Setting the time period, often called the "cooling off" period, during which officials cannot do certain work, or cannot work for certain individuals and entities, requires an important, but often misunderstood weighing of considerations. The considerations in determining the cooling off period include the appearance of impropriety on the one hand and, on the other hand, the effect a long period of prohibition might have on the willingness of individuals to enter public service. It is common for the period to be one or two years across the board,

but no one period is appropriate for all revolving door matters, which is one reason why it is important to allow requests for waivers.

One year is too short a time period to make the public believe that the official is not being rewarded for work done for her employer. One year looks cosmetic, a short enough time to wait for one's reward. But the longer the prohibition, the more difficult it might be to hire qualified officials or find qualified candidates for office. People are concerned about limitations on their employment when they leave their job or office, especially if they have sacrificed work during their period of public service. Whether or not they intend to attract the attention of, or help, businesses through their government work, they do often see their government work not as an end, but as a stepping stone to a better or more lucrative career.

The City Ethics Model Code uses two years for the ordinary representation and employment bans. This is the period used, for example, in Baltimore, Jacksonville, and in at least four Texas cities, San Antonio, San Jose, El Paso, and Austin. Two years is a reasonable compromise between effectiveness and the burden on government officials.

But when an official has been involved personally and substantially in a particular matter, revolving door prohibitions relating to that matter should be unlimited in time. Any involvement at any time would create a clear conflict between the official's public and private work, and serious opportunities for abuse. This is what is recommended by the City Ethics Model Code.

Especially if the cooling off period is short, it is important for officials to recognize that a time limit is the law, not the best ethical practice. The appearance of impropriety in getting a job or representing someone based on what an official or employee did in office is so great that each official and employee should err on the side of not seeking or accepting, at any time, work with people or firms that had business before his or her agency or board, especially if he was personally involved.

As [the Indiana situation above](#) showed, it is also important not to limit revolving door prohibitions to decision-makers. They are the most public of people involved in government matters, but they are usually not the most important people involved. Elected officials depend heavily on full-time staff, board and commissions depend heavily on legal and other staff, and department and agency heads depend on their subordinates. Counsel and other advisers can make all the difference in how a matter is handled and how contracts,

specifications, and other documents are worded. And wording can make millions of dollars of difference.

A cooling off period is also a good idea for a situation where a high-level official decides to seek a professional contract or job with her local government. When, say, a council member decides to put her name in the running for a contractual or full-time local government attorney position, it is not enough to withdraw from the matter as a council member. If she is chosen, it will look to the public as if she used one position to get another position that paid a lot more. It is best that the council member wait at least a year before seeking to become the city or county attorney.

5. Exceptions and Waivers

The City Ethics Model Code includes five exceptions to the revolving door prohibitions. Exception is made for former officials willing to do volunteer work for the local government, those acting on behalf of other governments, those testifying without compensation, those providing technical information at the government's request, and those who, when in office, performed only ministerial acts, that is, had no effect on policy and were not involved substantially in matters that may give rise to an appearance of impropriety.

Another way to except those who perform only ministerial acts is to have revolving door provisions apply only to, as El Paso's ethics code puts it, positions that "involve significant reporting, decision-making, advisory, or supervisory responsibility."

Some post-employment provisions extend the exception to work done for an official's own government as a paid consultant. Even though this would not create a conflict, this sort of work allows sweetheart deals between the local government and former officials, who normally have the edge in competing with individuals lacking their contacts. Effectively, they themselves are the company they are providing an unfair advantage to. In addition, there is sometimes the appearance that a consulting position was created specially for a former official, as a way of providing him with continuing income until he gets a full-time job. In fact, a consulting position can be used as the bridge between public service and a job is illegal during the cooling off period. For this reason, a former official should consult to the city only on a volunteer basis for the first two years after public service. If an official's services are crucial, the agency can apply for a waiver.

Because post-employment provisions can create a serious burden for former officials, especially for volunteers, this is an area where waivers are relatively common. But because the appearance of impropriety surrounding the revolving door is so strong, waivers should be given only in exceptional cases and only after public discussion. There should be no executive sessions even if past personnel matters are considered, and the decision should clearly set out facts, considerations, and conclusions. The ethics commission should show clearly that there would be no undue influence and that nothing the official did while in office could be seen in a different light after knowing that she was offered employment shortly after the termination of her public service. In other words, there should be no appearance of impropriety.

A former official who is not certain whether this provision applies to work he is seeking or is requested to do, and who does not want to turn it down, should ask the ethics commission for a waiver rather than an advisory opinion. Post-employment matters should be dealt with in the form of a waiver, due to the more public nature of the waiver process and the special concern there is with revolving door situations.

Because post-employment provisions tend to be complex, it is useful for an ethics commission to put together a special publication that includes links to the relevant provisions, both in local and state law, as well as a checklist, waiver decisions, advisory opinions, and other relevant information. [Ohio has such a publication.](#)

6. Related Ethics Provisions

Many local governments, as well as the City Ethics Model Code, expressly include former officials and employees in their confidential information provisions. For former officials, especially, it is important that such provisions apply to confidential information that benefits not only the official, but anyone, including companies the official advises or for which the official works.

Post-employment provisions should, at least in a comment, make reference to the confidential information provision and any other relevant provisions, so that former officials can find all their prohibitions in one place.

There is a revolving door situation that involves a conflict requiring withdrawal, and sometimes a separate provision is included to cover this situation. When an official is discussing employment with an individual or entity doing business with the government,

that official must withdraw from participation in any matter that directly or indirectly involves the potential employer, even if the jurisdiction has no post-employment limitations. Here's sample language from San Diego's ethics code:

It is unlawful for any *City Official* to make, participate in making, or use his or her official position to influence a decision involving the interests of a *person* with whom he or she is seeking, negotiating, or securing an agreement concerning future employment.

San Diego also deals with the other side of the transaction by prohibiting companies with matters pending before the city from negotiating future employment with officials involved in the matter.

Massachusetts includes former local officials in its gift ban when gifts are "because of official action." But this is very hard to prove. If the matter was only within an official's area of responsibility, the gift ban lasts only one year. Why not a year-long gift ban altogether. There would appear to be few reasons why a former official should get a gift from a restricted source. If there is a reason, the official can ask for a waiver.

San Jose prohibits former officials from receiving "any gift or payment which would be prohibited under Chapter 12.08 from any person who was, in any way, involved in or affected by the work of the official or employee during the twelve months prior to the termination of service." This prohibition lasts for two years after termination of service. This is much better language than that in Massachusetts. But even here, for high-level officials, who have influence throughout the government, whose "work" involves everything the government does, the language is too limited.

Lobbying laws often have their own revolving door provisions, which apply either to lobbying a former official's board or agency, the entire government or, in the case of former county officials (especially county legislators), any local government in the county.

7. The Other Direction

The governmental revolving door, unlike those in stores and office buildings, revolves in both directions. That is, people also go from the business world into government, and this can create an appearance of impropriety, as well. Revolving doors (the ones we walk

through) have a speed control — called a “governor” — to keep them from going too fast. The same thing is necessary for government revolving doors. If they move too easily, a lot of people get hurt, both those going through the doors, whose reputations might get hurt even though they intend to do nothing untoward, and the public, who become cynical about government when they see it as a way for companies to get their people into high government positions for a while, to effectively be inside lobbyists.

This direction cannot be dealt with in a post-employment provision, of course, but language may be added to a basic conflict provision. Here is language for that purpose:

It is a violation of this code for an official or employee to, within one year of entering local government employment or service, participate in the awarding of a contract or in any other matter that directly or indirectly benefits a person or entity that, within the two years prior to being hired or elected, employed him or her, full-time, part-time, or as a contractor.

Los Angeles has an interesting provision that effectively makes other officials responsible for not allowing the other direction of the revolving door to affect a contract. Section 4.-9.13.A provides that no official may

knowingly make, participate in making, or attempt to use his or her official position to influence any governmental decision directly relating to any contract where the City official knows or has reason to know that any party to the contract is a person by whom the City official was employed immediately prior to entering government service within 12 months prior to the time the official acts on the matter.

This is a valuable provision, although it would be more appropriate for the time period to apply to the beginning of the procurement process affecting the official’s employer rather than to the other official’s action in the matter.

8. Government Attorneys

Government attorneys have their own revolving door provisions in the Rules of Professional Conduct for attorneys. This rule applies to both directions of the revolving door.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees.

(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) [on confidential information]; 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.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(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 and 1.9; 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; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Unfortunately, Rule 1.11 shows full faith in firewalls, which I do not share (see [the discussion above](#)), and its focus is on confidential information, not its misuse (see [the discussion above](#)).

E. Misuse of Government Property

The most common ethics violation is the misuse of government property, that is, the use of government property for personal rather than public purposes. This is the only violation that is committed by just about every local government employee. It includes everything

from sending personal e-mails on a government computer to bringing home a pen or tool to using a government vehicle for personal purposes.

Because it is so common, this is also the area where the concept of de minimis benefit ([discussed above](#)) is most important. Most uses of government property are minor and should be handled not as an ethics matter, but as a personnel matter. This is why this provision should have a de minimis exception, if there is not a general de minimis provision in the ethics code.

But there are many instances where misuse of government property is very serious and gives a large benefit to government officials and employees, and their family and friends. The most common government property used for personal purposes, at least in a way that is not de minimis, is government vehicles, including cars and pickup trucks, and vehicles used for construction and public works projects, that is, vehicles that are expensive to rent.

Misuse of government property is a classic instance of preferential treatment, one that is so specific in its coverage that there is no problem of vagueness. If you work for the city or county, or you have a special relationship with someone who does, you have access to government vehicles and equipment that others cannot use. Although common, this is seriously resented by the public. They see government equipment, and, even worse, employees working on their neighbors' property, and word gets around. The word is that government exists for government officials, employees, and their friends and family. What taxpayers fund, they take for themselves.

The City Ethics Model Code provision reads as follows:

An official or employee may not use, or permit others to use, any city funds, property, or personnel for profit or for personal convenience or benefit, except (a) when available to the public generally, or to a class of residents, on the same terms and conditions, (b) when permitted by policies approved by the local legislative body, or (c) when, in the conduct of official business, used in a minor way for personal convenience. "City funds" includes travel and other expense reimbursements, which may not be requested for nor spent on anything but official business.

One thing notable about this provision is that it does not apply only to officials and employees, and their family, business associates, and others with a special relationship. People with connections often get use of government property from employees they don't even know. "Joe sent me," can be enough to open the door. And here there is no exception for politics. Party members can get no preference when it comes to government property.

Like a preferential treatment provision, a government property provision applies to anyone who gets a personal benefit from public property that is not available to the public on the same terms. That is, for the provision to apply, the public either cannot use or have access to the property, or the public has to pay for it (it would then be preferential treatment to provide use of the property either free or for less than is ordinarily paid). Jumping ahead in line in the use of equipment, for example, fixing potholes on officials' streets before they are fixed on other streets, would also be a violation of this provision.

The entire public does not have to get equal treatment. Lower fees for senior citizens, for example, is an acceptable form of preferential treatment. But government employees should not generally get lower fees than other citizens, although government employees who do not live in the city or county are often allowed to use government property on the same terms as local citizens. If any exceptions are made, they should not be made by agency heads or the head of personnel. They should be made by the legislative body.

The property this provision applies to is not limited to concrete things such as trucks and equipment. The provision also applies to government funds, such as reimbursements. Misuse of reimbursements is all too common. Dealing with this misuse via criminal proceedings is usually overkill. In fact, district attorneys are not very interested in officials padding their expense accounts or misusing their credit cards unless it rises to the level of serious embezzlement, or can be used for partisan advantage. In most cases, ethics enforcement is both more efficient, more fair, and more likely to actually be done.

1. Use of Government Personnel

The most serious kind of misuse of government property is the use of government employees for personal purposes. This includes everything from asking a secretary to babysit for one's children to asking an assistant to work on a political campaign to asking public works employees to do work on a brother's house, or the house of a party officer.

Even when the government employee is not working on government time, so taxpayers are not footing the bill, using one's position to coerce work from a subordinate is a serious form of abuse, because it puts the subordinate in a very difficult situation. A government employee only has obligations to a superior with respect to government business. In fact, a government employee has no obligations to the individual who is his superior, only to the position that individual fills. When an agency head asks a subordinate to do personal work for her, the agency head is confusing her personal needs with the government's needs, and forcing that confusion on her defenseless subordinate. Even if the request is made in a friendly manner, it is intimidating. It shows an unhealthy [sense of entitlement](#). And it requires a sort of personal loyalty that is out of place in a government agency.

A superior who asks a subordinate to work for him is more likely to ask a subordinate to work on his campaign, keep quiet about ethical misconduct, and even to participate in ethical and criminal misconduct. What might seem like a relatively innocent request sets up a special relationship that is both more personal and more coercive than relationships in government should be. The existence of these relationships is a mark of an unhealthy ethics environment.

2. For Campaigns

One of the most common forms of misuse of government property and personnel is for political purposes. It is very hard for government officials and employees to run for office without using any government property, unless they simply ignore their government obligations and stay away from their office. Now, they can use a personal or campaign cellphone, but they are surrounded by useful equipment, stationery and, most of all, personnel.

This sort of misuse of government property is usually, although not always, dealt with in a separate ethics provision (see [the Political Activity section](#) below).

3. Luxury Boxes

One typical misuse of government property that always causes problems involves luxury boxes (also called "skyboxes") at sports events. Many local governments effectively purchase a luxury box as part of a contract with the owners of a local sports team when a

new facility is built (sometimes the local government actually owns the stadium, and allocates itself a luxury box). The problem is that there is almost no way to use a luxury box that does not create an appearance of impropriety based on misuse of government property and preferential treatment. Even the inclusion in a stadium contract of a luxury box for the government, especially without additional provision of free seating for children who could not otherwise attend, makes it look as if government officials were preferring themselves over others in the community. And whatever the deal, it would have meant more money for the government (and lower taxes) had the luxury box been sold to someone else.

A luxury box could be used for government business, but a government is not a business seeking to woo customers or clients. A government is more often the customer and client. It should not be entertaining vendors, permit seekers, or their representatives, even if it has business to do with them.

There are some legitimate business uses, such as entertaining business people interested in investing in the city; rewarding people who have done a lot of work for the community (such as people who have picked up a lot of garbage or cleared trails in public parks); and making nice with, say, local union leaders.

The box could be used to reward government employees and their families, just as is often done with corporate boxes. And in many cities, a box *is* used as a morale builder for employees. But this makes it seem that some of the taxpayer funds spent on the sport facility are being used by government employees for their own personal benefit. Use by government officials and employees should be carefully balanced with use by others in the community, and those who use it should be chosen either by lottery or as a reward, using a formal process. Careful track should be made of any use by officials and employees, and this information should be made public. Otherwise, people will think the worst.

The box could be used by civic organizations, such as scouts and public sports leagues, but why would a government choose to have an expensive luxury box for this purpose rather than simply a section given over to free tickets for the community? Some governments do choose a section instead. This causes fewer problems.

It would seem that the least controversial use of a luxury box would be to make it available to citizens on a lottery basis. But I'd be surprised if this is done, at least exclusively, anywhere.

Luxury boxes are a symbol of the stratification of our society, moreso than the traditional box and nosebleed seats in a stadium. Recognizing this, is it ever right that governments own or use luxury boxes, not to mention have the boxes at the disposal of their officials?

It should not be an ethics commission's job to enforce the code against the use of a luxury box, but if a local government cannot seem to handle the responsibility of allocating its use, and it becomes an issue, an ethics commission could provide a valuable opinion on how best to use this unusual, desirable form of government property.

Atlanta's ethics code prohibits the inclusion in a contract, such as with a sports team, of tickets, but not of luxury boxes these tickets may be attached to. Such a provision should make it clear that neither tickets nor a box may be included in a contract.

4. Real Property

Local governments own a great deal of real property, and they often lease out all or part of certain of these properties. It is important that officials not misuse their office, and the government's property, by getting (or giving) preferential treatment in the leasing of it. Since it is extremely difficult to know the value of government property, some jurisdictions have decided to prohibit officials from leasing it, or at least require them to go through an independent waiver process. Here is the language from Miami-Dade County:

No county public official or employee and no business in which that county public official or employee has a ten percent or greater interest shall enter into a lease of real property with the county

This prohibition should be extended to include anyone with whom a high-level official, or an official involved in the leasing process, has a special relationship.

5. Official Title and Insignia

It is important that officials do not use their title or the local government insignia or letterhead to further their business or that of others. It's okay to be the mayor, but not to run The Mayor's Diner or even advertise your law firm as the one where the county attorney is a partner (of course, on his webpage the attorney can be identified as being the

county attorney). A title and insignia can be considered to be government property, but to be safe (especially where there has been abuse), some local governments choose to deal with this issue in a separate provision. Here's the one from Pittsburgh:

No public official or City employee shall use or permit the use of his or her official title, insignia or position in connection with any private business from which the public official or City employee receives compensation.

6. Freedom of Information Laws

When you think about it, what are freedom of information (FOI) laws (also called “transparency” or “sunshine” laws) but laws that require that everyone is given equal access to public documents and public meetings. Public documents are government property and, therefore, should be made available to everyone. FOI laws usually require a request and payment for these documents, which is burdensome, but was necessary in pre-Internet days. Today, there is no reason that important public documents not be made available online, with no requests or fees involved.

Public meetings are not so clearly government property, because they have no concrete existence. But the philosophy is the same: when boards close their meetings, or act together via e-mails or other non-public means, they are acting for their own personal convenience rather than the convenience of the public. In other words, they are misusing meetings for personal purposes. Officials benefit in many ways from secrecy: there is less embarrassment and fewer questions, less time and self-control is required, and it is easier to act in one's own interest or in the interests of those with whom one has a special relationship when no one knows what you are doing.

F. Political Activity

A political activity provision is essentially a misuse of government property and personnel provision applied to political campaigns. The reason that this is often separated from the ordinary provision is that this misuse of property and personnel is so common and so often

considered acceptable. Therefore, it is important to provide guidance about political activity, and make it clear what can and cannot be done.

It is hard for government officials and employees to run for office without using any government property, unless they simply ignore their government obligations and stay away from their office. But that does not make it acceptable. Giving political activity a separate provision emphasizes that it is not an exception to the government property rule, but rather a problem deserving of its own rule.

In political machines, employees are expected to participate in campaigns. In fact, they are often given their jobs to reward them for their participation in campaigns. This is known as “patronage.” Campaign work is effectively part of their job description. Even when there isn’t a machine, government employees are close at hand, they're known quantities, they're loyal, and the candidate or an ally often controls the time of many employees, directly or indirectly.

Similarly, government computers, printers, and the like are close at hand and they're free. Equally important, neither the personnel nor the facilities are available to outsiders, certainly not for free. This kind of preferential treatment has a direct effect on the political campaigns at the heart of our political system.

Here is the City Ethics Model Code’s political activity provision:

An official, employee, or municipal candidate may not knowingly request, or authorize anyone else to request, that any subordinate or potential future subordinate participate, or not participate, in any political activity, including the making of a campaign contribution. Nor may he or she engage in any political activity while on duty for the city, with the use of city funds, supplies, vehicles, or facilities, in uniform, or during any period of time during which he or she is normally expected to perform services for the city, for which compensation is paid.

The word “knowingly” here means that neither an official nor a campaign committee is required to cull the names of municipal officials from voter registration lists it mails to. However, a targeted mailing to municipal officials is prohibited.

Similarly, candidates are barred from soliciting from appointed officials and employees who may fear reprisal, such as being fired, if they refuse to aid the candidate's campaign, even if they do not currently work under that candidate.

It is important that not only the solicitation of political activity be prohibited, but also pressure *not to participate* in political activity, such as supporting candidates or referendums a superior opposes. This flip side of political solicitation is not usually taken into account.

It is important that this provision not be limited to candidates, because candidates, especially those not currently in government, often work through other officials, who together deliver them the services and contributions of employees throughout the government. It is also important that this provision include not only the actual subordinates of an official, but also those employees who would become subordinates of an official if she was to be elected. Pressure can equally be placed on a current or a future subordinate, especially when an incumbent is not running and she has a favored successor.

Political solicitation of subordinates by an official fosters the appearance, if not the reality, of coercion. I have been told that there is case law that says that any time a supervisor asks a subordinate (directly or indirectly), the burden shifts to the supervisor to show that the request was not coercive. That is, coercion is presumed.

Some political activity provisions refer only to coercion of subordinates, but actual coercion, such as a threat, or even an order, is the exception. In fact, the norm is the hardest to deal with: the tacit understanding most employees have that they are expected to make contributions and volunteer their services in their superiors' political campaigns, whether they like it or not. Look at the campaign reports of the incumbents in your area; you will see that a sizeable percentage of their contributions come from government employees (much of the rest comes from restricted sources).

Prohibiting coercion is essentially prohibiting nothing, because no one considers his requests to be coercive, and coercion is very hard to prove. The fact is that, from the subordinate's point of view, any time a superior asks a subordinate to do something, there is an element of coercion and a possibility of reprisal if they refuse the request. What feels to a superior like a request feels to a subordinate like an order. Therefore, any request at all, direct or indirect, should be prohibited.

Another way of looking at this issue is by acknowledging that, although the involvement of a subordinate in a campaign does not mean that there was coercion, it is impossible to know which instances involve coercion and which do not. It is a coercive

situation, it appears to the public like a coercive situation (and a personal use of city employees), and therefore it should be treated as such.

It is rare for a local government to prohibit such contributions or the volunteering of services outside of work hours and outside of government facilities. These are generally considered to be protected by the First Amendment. However, there are some jurisdictions, most notably Philadelphia, where employees are not allowed to participate in political campaigns for positions in their local government.

Although rules on political activity by government employees are often not enforced, when they are, it is usually via criminal prosecution, often in a very partisan manner, thereby seriously undermining public trust. The way to deal with conduct this common is not to prosecute it (especially when it is politically convenient). The best way, I think, is to recognize that this conduct is here to stay, and then regulate it.

The first step is to recognize that there are two issues involved in the use of staff in campaigns. One is the misuse of government resources for nongovernmental purposes. The other is the misuse of office to coerce subordinates. The second step is to recognize that it is far worse to abuse people than it is to abuse government resources, even though it is wrong to do both.

Here is an unusual solution that would deal with both issues. Every high-level elected official should be required to designate a set, limited number of aide positions to be held by individuals who are hired to work both for the government and for campaigns. Such an aide would not be coerced (or appear to be coerced) into working on campaigns, because it would be formally part of her job description. Each aide would keep careful records of how she uses her time, like a lawyer, including whom she talks with and for what general purpose. This information would be public. For all the hours an aide worked for a campaign, the relevant campaign would pay her. For all the hours the aide worked for the government, the government would pay her. Unlike other staff, such an aide would work on an hourly basis, with a cap. And such an aide would be permitted to make use of government resources, within reason and with payment by the campaign (in amounts determined by the city manager or administrator's office and made public).

Once this setup has been established, ethics commissions (and prosecutors, where such misconduct is treated criminally) should very strictly enforce the apparent coercion of

subordinate and misuse of government resource provisions. There will be no hypocrisy and less politics involved.

Some local governments also limit or prohibit political activity by individuals and entities that are funded by the government. Such limits rarely appear in an ethics code. Rather, they appear in contracts and grant materials. Here is a reference to this process from the Anchorage ethics code:

Entities receiving municipal funding shall be subject to any covenants and restrictions on political activity set out in the contractual documents supporting the municipal funding, and applicable state and federal law.

There are ways to get around a political activity provision, which an ethics commission should watch out for. For example, a Miami-Dade County mayor, facing a recall election, excused twelve county employees from their regular jobs to participate full time — while still collecting their salaries — in a loosely defined committee tasked with informing workers about “the current political upheaval and controversial budget that triggered the recall campaign.” Effectively, they were helping the campaign against the recall.

Since “political activity” is a vague term, it can be helpful for an ethics commission to define it more clearly, with examples, and to provide guidance with respect to what officials and employees should and should not do in particular instances. A good place to find this sort of guidance is in [Philadelphia’s political activity regulation](#). But even this 25-page regulation too narrowly defines “political activity,” primarily because the city’s prohibition is so strong. Where the prohibition is weaker, it would be better to include referendums, recalls, and petitions (although not signing them), where there may be no candidate or clearly partisan involvement, but where the stakes are often high and important to particular elected officials and their election or re-election.

The Hatch Act

There is a federal law dealing with local government employees’ political activity. Amended in December 2012, the Hatch Act prohibits a local official, whose salary is federally funded in full, from being a candidate for public office in a partisan election. The

purposes of the Hatch Act include preventing the use of federal funds to affect elections, ending patronage, and avoiding the appearance of corruption. Its other two principal rules are as follows:

Employees cannot use official authority or influence to interfere with or affect the results of an election or nomination

Employees cannot directly or indirectly coerce contributions from subordinates in support of a political party or candidate

Note that only the coercion of contributions is prohibited, not requests for contributions that feel coercive to subordinates. Also note that although employees in agencies that are federally funded cannot run in partisan elections, officials can, and it is officials who usually have power, directly or indirectly, over government employees. Also, most city and town elections are nonpartisan, so this first rule is not applicable in most local elections.

The Hatch Act is rarely enforced.

Use of Social Media

An area where ethics programs have recently been trying to provide guidance is the use of social media by government officials and employees. Two cities that have done this are [Seattle](#) and [Philadelphia](#). However, while Philadelphia's policies came from its ethics board's, and apply principally to individuals, Seattle's were promulgated by the council and apply principally to departments and elected officials. In other words, they complement each other; therefore, both should be consulted.

Seattle has a [blogging policy](#) in addition to its [social media use policy](#) and standards specific to different social media tools (Twitter, Facebook, CityLink, and video posting; the standards are linked to in the social media use policy document). Seattle even has a [webpage that contains links](#) to the blog and social media sites of elected officials, departments, and agencies.

The issues that these policies deal with include use of government resources and time, solicitation of campaign contributions, use of government office title in publicly sharing political opinions, an approval process, appropriate uses and inappropriate content,

anonymity, the responsibilities of blog moderators, the role of the information technology office, application of public records, record retention, and ethics laws,

G. Patronage

Patronage is effectively a subcategory of political activity and, therefore, is not expressly mentioned in most local government ethics codes. But since it has been a serious problem in many local governments, it is valuable to separate the issue out and make it clear to government officials and employees alike that patronage is not acceptable. It is a provision that will rarely be enforced, but if it is not clearly made an ethics violation, then officials can tell potential supporters that it is both legal and ethical.

Here is the City Ethics Model Code patronage provision:

No official or employee may promise an appointment or the use of his or her influence to obtain an appointment to any position as a reward for any political activity or contribution.

Here is alternate language from San Diego (§27.3570):

It is unlawful for any *City Official* to use or promise to use his influence or official authority to secure any appointment or prospective appointment, to any position in the service of the *City* as a reward or return for personal or partisan political service.

The reason a patronage provision is so rarely enforced is that, unless phones or offices are being tapped, it is almost impossible to prove that a position has been promised to someone, and that it is a reward for political activity. Nor is it easy to enforce the flip side of this: the threat of firing if a government employee refuses to actively support a superior or the superior's choice for office. Even the [Shakman Decree of 1983](#), a judicial settlement, did not put an end to the infamous Chicago patronage system: patronage just went underground. It was twenty years before the new, more complex patronage system, based on fraud, was uncovered and prosecuted.

And yet patronage involves a basic conflict in government: the conflict between being beholden to the individuals in power and being beholden to those who elected the individuals in power. A city government based on patronage cannot have a healthy ethics environment, because most of its officials and employees are there on the basis of a quid pro quo relationship that makes them loyal not to the public, but to the individuals they helped get into high government positions and who then gave them their jobs.

Since the Shakman Decree is the most well-known, long-lasting document involving patronage in recent history, it might be worth seeing how it defined patronage:

1. Conditioning, basing or knowingly prejudicing or affecting the hiring of any person as a Governmental Employee (other than for Exempt Positions), upon or because of any political reason or factor including, without limitation, any prospective employee's political affiliation, political support or activity, political financial contributions, promises of such political support, activity or financial contributions, or such prospective employee's political sponsorship or recommendation; or
2. Knowingly inducing, aiding, abetting, participating in, cooperating with the commission of any act which is proscribed by this paragraph, or threatening to commit any act proscribed by this paragraph.

This definition does not rely on proof of a promise, although there does have to be a quid pro quo of some kind. What really distinguishes this definition is how broad its coverage is. Patronage can exist under this decree even when an individual is rewarded simply for his political affiliation, that is, I assume, his party affiliation or even affiliation with a faction within a party. It's also notable that the definition includes complicity and threats.

Fayette County, Georgia has a nice, simple ethics provision that prohibits not only patronage, but also its opposite: threatening to dismiss someone on the basis of political activity:

No county official, whether elected or appointed, shall promise an appointment or threaten the dismissal from any county position as a reward or punishment for any political activity.

H. Nepotism

Another way in which officials can give preferential treatment to individuals in terms of hiring is the hiring of relatives, known officially as nepotism (this odd-sounding word is derived from the Latin for “nephew”; it comes from the days when Popes gave their “nephews” high positions in the Catholic Church; see [the Wikipedia page on nepotism](#) for more on the word’s origins). Nepotism is also a way to benefit family members, that is, it creates a conflict situation.

And yet, nepotism is often considered harmless and sometimes, in the case of the uniformed departments, desirable. People defend nepotism in uniformed departments as a national, family tradition, which is hard to oppose. But there is another related tradition involved: racial and ethnic discrimination. Family members usually share the race and ethnicity of those who run the department, and giving them jobs prefers their race and ethnicity over others’. A tradition is not good just because it is a tradition. It has to be good for the community. And it has to appear to be fair and inclusive. That is the more important national tradition.

Another issue that comes up with respect to uniformed departments is their paramilitary-like structures, which insulate top officials from direct supervision over personnel. But direct supervision is not required for nepotism laws to be necessary. The public does not differentiate between direct and indirect supervision, and they have reason not to. After all, how can the public be assured that there is no favoritism being shown to relatives in testing, training, promotion, assignment, or pay? Such assurance would amount to nothing but having faith in the related officers, who put their personal interest in benefiting their relatives ahead of the public interest in not having this situation exist. There is little difference between a paramilitary structure and a [firewall](#), which is really not a wall at all. It stands solely on the basis of trust. A government ethics program seeks to maintain trust, not assume it.

Where nepotism is common, the public comes to see government as a way for officials to get their family members jobs, whether they are the best candidates or not, and this undermines trust and respect in local government.

Nepotism consists of two separate but related problems: hiring and managing family members. Nepotism in hiring creates what appear to be dynasties at best, and employment for incompetent relatives at worst. It also discriminates against people who are not in a

position to get government jobs from members of their families. This discrimination applies both to individuals and to ethnic, racial, and religious groups.

In local governments with unhealthy ethics environments, not only are the best applicants often turned down for jobs in favor of officials' relatives, but many capable individuals, believing they or their kind are not wanted, apply for a job elsewhere. Either way, this means a serious loss to the community.

In addition, the acceptance of nepotism in government hiring naturally leads to nepotism in contracting, which means a failure to competitively bid, or bid-rigging. This further undermines a government's ethics environment, and it can cost taxpayers millions of dollars a year.

Managing family members in a department or agency can ruin morale. Those who are not family members feel that they are being mistreated, relative to family members, every time they don't get a raise, promotion, or desirable duty. And it is easier to act corruptly, hide what one is doing, and intimidate others when one has family members helping out. In addition, an official is more likely to believe he can get away with doing what he wants.

Nepotism is not consistent with a healthy ethics environment. The culture of loyalty and secrecy that flourishes within families has no place in government. In government, loyalty should be to the public. And there should be little secrecy. Transparency protects the public from ethical and criminal misconduct, and allows people to participate in government.

When there are controversies, and an agency, especially a uniformed department, comes together to defend its own, it will appear that they are defending not just their honor, but their families, with family appearing more important than the public. Family should be important, but family obligations do not belong in government and cannot be solved by withdrawal from participation or even by rules regarding direct supervision of family members.

No other ethics issue requires so much explanation. The reason is that nepotism is the norm in most of our society. Children often go into a parent's business or profession, and this is something many parents encourage. Successful individuals help out their less successful family members by giving or helping them get a job. These are positive things, but when applied to government, they go against the spirit of fairness and democracy. A

government is not a family business, and the public knows this. Although many people like dynasties in politics, people hate nepotism in government jobs.

The argument against nepotism that is most rarely mentioned is that its practice puts officials in an awkward position when they don't want to hire a relative, but feel it's expected of them. Nepotism provisions, like all ethics provisions, protect officials as well as the public.

Probably the major reason nepotism provisions do not appear in many local ethics codes is that they are strongly opposed by uniformed departments and their supporters, which are many, since the support of police and fire unions is often essential to being elected. Sometimes when there is a nepotism provision, uniformed departments are exempted. And even when good nepotism provisions are passed, current family relationships in departments are usually grandfathered in.

Here is the City Ethics Model Code nepotism provision:

No official or employee may appoint or hire, or participate in influencing the appointment or hiring of, his or her spouse or domestic partner, child or step-child, sibling or step-sibling, parent, or member of his or her household for any type of employment, including by contract (unless competitively bid), with the city. No official or employee may supervise or be in a direct line of supervision over his or her spouse or domestic partner, child or step-child, sibling or step-sibling, parent, or member of his or her household. If an official or employee comes into a direct line of supervision over one of these persons, he or she will have six months to come into compliance or to obtain a waiver.

Nepotism prohibitions can be extended to other family members, including in-laws, nephews and nieces, and the like. It is useful to note in a comment to the provision that officials should not be involved with the hiring or supervision of relations not covered, even if this is not a violation. Similarly, officials and employees should not be in a position to supervise contract work done by a relative. It is always best to stay out of any dealings that involve relatives.

Sometimes there are unwritten rules that make nepotism more likely. In 2012, the [New York State Commission on Judicial Conduct looked](#) at common practices among judges with respect to hiring for administrative positions. What the commission found was

that vacancies for administrative jobs typically had been posted not in advertisements or on the court website, but only in internal rooms at the courthouse that are not accessible to the public. This unwritten rule strongly favored the relatives and friends of those already employed by the court system. In addition, some judges took hiring out of the hands of the Clerk of Court and put it into the hands of the judge's executive assistant. This meant that no hiring panel would be involved, that is, no disinterested individuals would be involved in the process.

Such unwritten rules should be dealt with not only by drafting and enforcing nepotism and withdrawal rules, but also by requiring advertisement and online announcement of jobs and the use of hiring panels selected by outside individuals or organizations.

1. Waivers

The nepotism provision is sometimes the only provision in an ethics code that expressly provides for waivers, even though the provision of waivers is a good idea for all ethics provisions, as long as the waiver process is fair, independent, and transparent.

When waivers are allowed, an ethics commission should be very clear about why it allows a waiver and should take into account the politics, both partisan and personal, of each situation. That is, even where there appears to be a compelling need, the appearance of impropriety that accompanies a situation may require an ethics commission to reject a request for a waiver.

Waivers are sometimes best for the public, especially in situations where enforcing this provision would mean the resignation of a valuable employee. As important as it is to prevent nepotism, this prohibition should be balanced against other important considerations.

For example, here are three such reasons from Denver:

- (1) The relative who was proposed to be hired was certified through a competitive process conducted pursuant to law, and the officer, official, or employee who would make the appointment did not influence or affect the certification.

(2) The officer, official, or employee who would officially make the appointment is acting ministerially and did not select the relative or attempt to influence the person who did.

(3) The relative who would be in the line of supervision was already working in the agency before the officer, official, or employee came into the line of supervision, and the officer, official, or employee can and will abstain from participating in any personnel actions involving the relative.

These reasons sound good and fair, but they do not take into account the appearance of impropriety. Nor are they very realistic. Certification is only one factor in hiring, what is necessary to apply for a position in the first place. Rarely is hiring a ministerial act, and there is no way to know whether an official has attempted to influence someone who hires her relative. And it is impossible for an ethics commission to monitor an official's participation, directly or indirectly, in personnel actions involving a relative.

Additional exceptions for nepotism appear not to be fair or reasonable. They exist because nepotism is considered acceptable. Additional exceptions are intended to allow nepotism to continue, not to be fair or reasonable.

Waivers for nepotism are more common in smaller jurisdictions, where there are fewer people available to hire and to serve on boards and commissions. But even there, where possible, relatives should try to get jobs in the governments of neighboring local governments. There is nothing wrong with a police officer's child working in the same profession. But there is something wrong with a police officer's child working under his parent. Working in the next town over preserves the tradition without creating appearance and management problems.

The more power the senior official or employee has, the more important it is not to allow a waiver, because however the situation is dealt with, it will appear to the public and to other government employees that the hired relative would be given special treatment, and this would undermine both public trust and morale.

One situation where a waiver of a nepotism provision might be appropriate is where two members of a department or agency get married. If both are valuable members of the department or agency, they are respected and already have separate relationships with their

colleagues, and they would not be a team running the department or agency, then it is likely that keeping their skills would be more valuable than requiring one of them to resign.

It is possible for an ethics commission to assign someone to monitor a nepotism situation, but the monitoring individual must have independence, full access to personnel and documents, and confidentiality so that employees will be honest. The monitoring individual should file a report with the ethics commission annually, and make recommendations about possibly ending the nepotism situation or making changes to ensure that it is being handled responsibly. The difficulty and expense of monitoring means that it should be done only when there is a seriously compelling need for both relatives to work in the same agency.

What cannot be allowed is having another official be assigned to monitor a nepotism situation. This puts the official in a difficult position (especially if the official being monitored is a position of greater authority), and it is unlikely that the public will truly believe that the situation is being properly monitored.

See [the Waiver section](#) for a full discussion of waivers.

2. Indirect Nepotism

One limitation of nepotism prohibitions is that they do not apply to indirect nepotism, which is a common aspect of what is known as cronyism, that is, the hiring of friends, supporters, and their families. What is not prohibited is the hiring of a family member of a colleague, something that can be mutual, so that relatives of officials work throughout government, only not under the relative's supervision or with the official's active involvement with the hiring.

This sort of nepotism creates just as serious an appearance of impropriety (and anger among citizens), as well as, in many cases, discrimination, but it is hard to prevent through ethics codes. This is conduct that can, however, be prevented by ethical leadership, that is, by a mayor or city manager making a clear policy that this sort of cronyism is not acceptable.

3. Oversight of Relatives

Another area that nepotism provisions generally do not cover is oversight relationships. All the stress is on supervision. Of course, someone who works for an agency's overseer, say,

an inspector general's office, can always be kept off a direct investigation of a relative's agency. But there is a chilling effect of having a family member on an overseer's staff, especially when one or both are high-level officials or employees. If employees are asked to report possible ethical or criminal misconduct, and given assurances of confidentiality and whistle-blower protection, will they actually believe the assurances and testify or file a report to an office their boss's relative works for? It's very unlikely.

The same thing should be considered when ethics commission members and staff are being selected.

4. Human Resources Approach

Sometimes nepotism rules do not appear in the form of ordinances, but in the form of human resources rules (often found in personnel manuals) or employee standards of conduct. The problem with this is that there is neither independent enforcement of these rules, nor independent advice, nor an independent and transparent waiver process. A human resources department can do a good job with nepotism, but it may also be swayed by political and personal pressures. And the question needs to be asked why one central ethics issue is handled differently than all the others. This implies, once again, that nepotism is somehow different from other conflict situations, without having to actually make this argument and openly convince the public.

I. Incompatible Offices

"Incompatible offices" is a form of conflict that is usually left out of ethics codes. One reason is that there is a common law prohibition against officials holding incompatible offices. But whether or not it is common law or an ethics code provision, the incompatible offices conflict should be included in ethics training so that it is fully understood. It should also be a topic for which officials seek ethics advice.

There are many offices that one individual should not hold, and multiple reasons why one individual should not hold them, but the term "incompatible offices" refers to only a subsection of these offices and a subsection of the reasons they may be seen as

incompatible. It also does not refer to offices held by couples, business partners, or boss and employee that might well be considered highly incompatible.

There are two questions that need to be answered each time an official seeks or is asked to take a second office. One, are these the sort of offices that may be considered incompatible under the incompatible offices doctrine? And two, are the offices actually incompatible?

Before considering this provision further, it's worth pointing out that there is another provision in many ethics codes that uses the word "incompatible," but in a different context. Such a provision prohibits an official from accepting other (that is, non-government) employment that has responsibilities inherently incompatible with the responsibilities of his office. This sort of provision refers not to conflicting offices, but to conflicting employment outside of government (see [the section on this sort of incompatibility](#)).

Public Offices

Offices that may be considered incompatible, pursuant to the common law doctrine, include only what are often referred to as "public offices." Here is the California definition of "public office," which is based on court decisions:

An office (1) which is created or authorized by the Constitution or some law; (2) the tenure of which is continuing and permanent, not occasional or temporary; and (3) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state.

The most important difference between a public officer and a government employee is that a public officer is not an employee, but an official who exercises power directly, usually as a member of a legislative body, board, or commission, or in an executive role.

But this is not the only way to define "public office." In fact, the same California statute (§1099) defines "public office" the other way around, by expressly excluding from an office that can be incompatible any "position of employment, including a civil service position," as well as membership in a governmental body that has "only advisory powers." This emphasizes that a "public office" does not include regular civil service jobs, nor does it

include membership of an advisory board, even if it is a permanent or long-term advisory board.

As with anything in government ethics, if it is not clear whether a particular office is a “public office,” it would be best if an official assumed it was.

Incompatibility

The next question is whether two public offices are incompatible. Here are the three considerations that California’s statute applies to this question, again based on common law principles. Any one of these makes two offices incompatible:

- (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
- (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.
- (3) Public policy considerations make it improper for one person to hold both offices.

The second and third principles require interpretation. This means that, if it’s not clear that two offices are not incompatible, an official should either not seek or accept a second public office, or should first ask the appropriate ethics authority for an interpretation. However, if someone seeking to hold the same two public offices has already obtained an opinion from the ethics authority, and it is publicly available, the official may depend on this opinion. This is an important reason why every ethics authority should make its advisory opinions easily accessible online, searchable and with an index.

A good example of an interpretation of “incompatible offices” can be found in a 2011 opinion by California’s attorney general, interpreting the second principle. The offices considered by the AG were, on the one hand, a seat on the state’s High-Speed Rail Authority and, on the other hand, the mayor of Anaheim, members of the board of the Orange County Transportation Authority, and members of the board of the Los Angeles County Metropolitan Transportation Authority.

The AG determined that as long as there is a possibility of any significant clash of duties or loyalties, then two offices are incompatible. It does not matter that the official

could withdraw from participation in one or more particular matters. Nor does there have to be an ongoing, structural conflict. As the AG puts it, offices are incompatible “when the chances of each agency dealing with each other are substantial.”

The AG’s opinion cites an earlier opinion that provides another useful interpretation of the “incompatible offices” doctrine: “a county supervisor may have an entirely different responsibility in reviewing a county project on behalf of the county than in acting upon that project as a member of a regional coastal commission.” That is, officials with two offices have a problem when their responsibilities with respect to a matter are not the same. If the official was appointed to a regional commission in order to represent the county (and her successor would hold the same seat), then there will usually be no conflict in her responsibilities. But if she was simply appointed as an individual, then she is put in the conflicted position of having to decide to do what is best for the county and what is best for the region, which may lead to very different results.

And here is yet another useful perspective from the same opinion:

One person may not serve two masters. The duties of loyalty and fidelity to the public interest—the soul of public service—cannot survive in an atmosphere in which the holder of multiple offices must disregard the interests of one constituency in order to serve the interests of another.

Thus, an official who is elected by constituents to represent them on a council may also represent the same constituents at the state level, but may not represent either some of these constituents or a group of jurisdictions, say two towns, even if one of those towns is the one whose council he sits on. The constituents of both positions must be the same.

There is also the possibility of self-dealing, for example with respect to grants given by one level of government to another. No official should wear two hats at once.

The questions officials should ask themselves when faced with the possibility of two public offices being incompatible include the following. Will they be in a position where they would have to disregard the interests of their constituents when they make decisions in the second position, representing a different group of constituents? Would their responsibility as an official in their current position be any different from their

responsibility in the other position? Would such an official ever effectively be serving two masters or, perhaps even worse, reporting to or overseeing himself?

This last question makes it clear why no government official or employee should sit on an ethics commission: she would be overseeing herself, her colleagues, and her supervisor.

Sometimes an official is, by law or charter, required to hold a second, incompatible position. For example, in Vancouver, B.C., the mayor is required by provincial law to chair the city's police board. In 2010, the mayor observed, "It's difficult for me to advocate directly to the mayor on behalf of the police board because I am the mayor." Similarly, in my own town the first selectman sits on the town's board of finance, which is responsible for criticizing and changing the first selectman's budget.

A mayor in this situation can recommend a change in provincial law, or the first selectman can call for a charter revision commission to change the charter. But in the meantime, the mayor or first selectman can resign from or refuse to take the incompatible position.

The mayor wanted to sit on the board as an *ex officio* member, but even this would mean wearing a second hat. All transactions between board and mayor should be at arm's length, with the mayor wearing only one hat. If he wants to attend a meeting, no one would stop him. There are too many *ex officio* positions in local government. They are unnecessary.

Some jurisdictions expressly prohibit elected officials from holding a state government job. The reason is less due to oversight issues or a possible clash of loyalties than it is due to misuse of office for one's own benefit, and patronage. When a council member gets a job with the state, it looks like he used his position to get the job, trading favors that may not have benefited the local government and making it seem that the state favors local elected officials for its jobs. This appearance of impropriety cannot be fixed by withdrawal; in fact, the odds are that there will not be situations where such a council member would have to withdraw. Therefore, the situation must be prohibited.

One of the most difficult situations with respect to incompatible offices arises when a high-level official or a body appoints a government employee to a regional authority's board or some other sort of position where the employee would be representing not the city or county, but rather a different regional constituency. An elected official appointed to

such a position could be expected to represent the city or county's interests (although an official elected by a city district may be conflicted between representing the district or the city). But an employee selected by the mayor would be seen as following the mayor's policies and, therefore, be acting politically and, sometimes, against her own judgment of what is in the public interest. High-level officials should not put employees in such a difficult conflict situation.

In addition, when city staff are part of a body that has problems, it is difficult for policy-making elected officials to trust the information the staff member provides to them. This is a different sort of trust issue – an internal trust issue – but no less important, because representatives need trustworthy information on which to base their decisions of what is in the public interest. Biased information can be damaging, and a lack of trust within government can hamper its effectiveness.

An Exception

The California statute provides an exception from the incompatible offices prohibition when holding the offices is expressly authorized or compelled by law. This is an important exception, because there are many occasions when a mayor, say, is required by law to sit on a regional utility board as the city's representative.

But it is important to remember that, just because a statute, ordinance, or charter provision provides for the holding of dual offices, or a state's or local government's laws make such an exception as California has made, that does not mean that an official is compelled to hold both offices. Each official may make an individual decision to refuse an office due to an essential conflict that exists. Sometimes dealing responsibly with a conflict, even one that is allowed by law, requires sacrifice, whether it be extra income, extra power, or an extra vote for your party.

Officials should not be permitted to get a law passed to require dual office holding as a way to get around the incompatible offices rule. An ethics commission should hold public hearings on any such law to consider all the factors involved, and then determine whether the law is in the public interest.

Some states or local governments have passed more specific exceptions to the incompatible offices prohibition. For example, Michigan expressly allows public officers to serve as a member of a board of tax increment authority, downtown development

authority, local development finance authority or brownfield redevelopment authority. Michigan also provides specific exceptions for municipalities with less than 25,000 residents, including emergency medical services personnel, and a non-full-time firefighter or fire chief.

Sanctions

Common law usually does not provide for enforcement. So what can be done if an official does take a second, incompatible public office and there is no incompatible office provision in the ethics code? The California statute provides a good solution. The public officer is “deemed to have forfeited the first office upon acceding to the second.” Thus, a mayor who successfully runs for or accepts an incompatible office is no longer mayor. If the mayor won't budge, this sanction may be enforced in an action by the attorney general, or by a private party with the AG's consent.

But it would be better if a local ethics commission could enforce this provision. First, it would make it more likely that local officials would seek ethics advice before acting, preventing the need for enforcement. Second, it would keep enforcement out of the hands of individuals who might be under political pressure either to prevent an official taking a second office, or to allow the official to take the office. Third, it would require the local government to clarify this common law doctrine in the form of an ordinance, thereby making it part of ethics training and making it easier for officials to recognize the issue when it arises, and to know what to do. Not many attorney general offices do training on important laws such as this.

A Wise Quote

I want to share with you a wise, old-fashioned quotation about the doctrine of incompatible offices from the treatise *McQuillan on Municipal Corporations*, a standard reference book. It states something that cannot be said often enough, and will never again be stated so elegantly.

[The doctrine of incompatible offices'] applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiring of that kind would be too subtle to be rewarding. The doctrine

applies inexorably, if the offices come within it, no matter how worthy the officer's purpose or extraordinary his talent. . .

Other Kinds of Incompatible Offices

It's worth mentioning here some other offices that may be considered incompatible, although they do not fall within the incompatible offices doctrine. The combination of offices that causes the most controversy is what is known as "double-dipping."

There are two types of double-dipping. One occurs when an official resigns, starts getting a pension, and then takes another government position, presumably, although not necessarily, making use of obligations owed to him by others in government, often former subordinates or colleagues.

The second sort of double-dipping occurs when an official holds two legally compatible offices, gets two government salaries and will, in the future, get two government pensions. Again, there is often a feeling that the official has used his position to get favorable treatment when applying for the second office. In addition, there is the impression that the official, with two full-time positions (even if most legislative positions are not officially considered full-time), does not have time to do both jobs well, even if there are no direct conflicts between the positions.

There may also be a problem with positions that are incompatible according to the definition, but are not both "public offices," such as being an employee and a member on an oversight or policy-making board, commission, or legislative body. In such situations, an employee effectively provides oversight or policy control over his own supervisor(s). Such an employee, even if he withdrew from matters involving his department or agency, could use his bargaining power on the board or council to make it hard for his supervisor(s) to discipline him, fail to promote him and give him raises, etc. (or the supervisor might be concerned about what the employee might do in revenge for his actions).

When the employee does get a promotion or raise, it looks like it's due to his second position. This can create poor morale in his department or agency. On the other hand, the employee might use his position to advocate for the department or agency, getting it a bigger piece of the pie, thus earning his promotion or raise by representing his department or agency instead of his constituents. As with so many conflicts, it doesn't

matter what the employee's goals are. Either way, there is a conflict that can undermine the public's trust in government.

Some ethics codes, including the City Ethics Model Code, contain a special provision dealing with local legislators employed by a local government, including school board members who are teachers or other school employees:

A member of the legislative body has a conflict of interest with respect to any labor contract to which he or she, or a member of his or her household, may be a party, and with respect to an appropriation to any city department or agency through which he or she, or a member of his or her household, is employed.

The conflicts involving local government employees on a local government legislative body and teachers and other school board employees on their school board go beyond labor contracts. Employees are the last people who want to cut programs or allow criticism of their performance. And as members of the school board, they select and oversee their supervisors, making for an uncomfortable relationship. There are also issues regarding confidential information that cannot be disclosed to other employees or to the union. And there are many special relationships involved, lots of obligations to conflict with what should be a focus on constituents. Therefore, except in the smallest communities, such conflicts should not be permitted and, where permitted, citizens should be told the problems that will occur and how they may be harmful to them.

The situation of a school board member on city council is dealt with by a 1990 California Attorney General opinion that applies the state's incompatible offices rule. Here is the attorney general's reasoning in finding that the two offices are incompatible:

1. Under the Education Code, contracts between the district and the city are authorized for purposes including community recreation, library services, the sale, lease, or dedication of real property, and the installation of water, sewerage, or other public utilities
2. In eminent domain proceedings, either public body may condemn property of the other where a superior use can be shown.
3. School districts may dedicate real property to cities for certain public purposes.

4. In the establishment of a city master plan, the city may chart the location of future schools.

5. City officials are charged with the enforcement of health and safety regulations within the schools.

The public, school district, and the city have an interest in the undivided loyalty of their elected officers

When it is believed that such a combination of offices is necessary in a particular instance, and a waiver is therefore provided, it is valuable to also provide clear guidance regarding how to deal responsibly with labor contracts and budget appropriations directly relevant to the legislator and members of his or her household, and with other conflict issues that might arise. One way to do this is to prohibit the employee from participating, as a member of any board, in matters that involve her department or agency, with the sanction for participating being a choice of resignation from one position or the other.

One problematic situation that sometimes arises is multiple local government union members sitting on a council. Even if these members could not individually vote for their own union contract, they might be, and would likely be seen, as biased toward other government unions. Government unions could use this fact as a bargaining chip. But this could be equally true if a council majority favored the unions, even if many or all were not actually union members. Citizens may want to have union members and sympathizers running their local government, just as they may want chamber of commerce members and sympathizers running it (giving the government a bargaining chip, perhaps).

Another legally compatible, but problematic combination is employee and political party officer. A political party officer is supposed to publicly criticize elected officials and help run campaigns against them. There is an appearance of impropriety when an employee is charged with publicly criticizing and supporting campaigns against an elected official who is in a position to make decisions about that employee's department or agency, whether budgetary or oversight. Not only does it seem unseemly, but it also puts elected officials from the opposite party in a tough position when it comes to overseeing the department or agency the employee works in. The situation gives the employee, and her department or agency, the power to effectively extort budget money from, or prevent investigation by, elected officials. It also puts the party in the position where the employee might hold back

public criticism or provide limited support to her party's campaign when officials promise an increased budget for her department or agency. In short, such a situation politicizes a department or agency, jeopardizing the professionalism and independence of administration via political considerations that should be limited to policy.

Greenburgh, New York has a provision, §570-7.B, that prohibits government employees, appointed officials, members of the boards of ethics, zoning appeals, and planning commissions, and paid agency members from holding "office or position in any political organization within the Town." This is a provision worth debating.

Here's an unusual incompatible offices situation. A serious conflict issue arose in Alaska in 2010 when a state senator who was also chair of a regional native corporation (a tribal body) told a city council "that he had influence in the Legislature on items important to the [city], and linked that issue to the city's action on a [state] lands bill important" to the regional native corporation. This shows that even a tribal body office may be incompatible with certain other government offices.

Although I agree that positions on advisory boards should not generally be considered incompatible, and I recognize that it is often good to have officials on such boards, there is one board that, in some jurisdictions, has only an advisory role, but whose seats should be considered incompatible with a public office. That board is an ethics board that has no enforcement power, but instead makes recommendations to the local legislative body, city manager, etc. There is no place for public officers or government employees on ethics boards, even when they are only advisory boards.

There can also be an incompatible offices-related issue when an elected official works for an organization that does government work for only a part of her constituency, or even for people not part of her constituency. For example, in the Unified Government of Wyandotte County and Kansas City, KS ("UG"), a commissioner was the paid executive director of a nonprofit Community Development Corporation and Community Housing Development Organization that had received funds from the UG.

Withdrawal from matters involving this organization could deal responsibly with the principal conflict. But because the organization sought development for a neighborhood that was not co-extensive with the commissioner's district, she was being paid to bring funds into only one area of her district. Therefore, her two roles conflict on an ongoing basis. A district representative is expected to represent all the areas of her district.

This is the sort of conflict that most ethics codes ignore and that it can be difficult for an ethics officer to provide advice on. But it is an important conflict, and an elected official who puts herself in this conflict situation should discuss it openly at a public forum in her district, asking people from various parts of her district what they think. If there is opposition, she should not accept the job.

J. Transactions with Subordinates

Beyond the areas of political activity and the misuse of government personnel, officials can take advantage of their position, and the power their position gives them over subordinates, by entering into transactions with them. They can effectively coerce subordinates into purchasing products or services from the official, investing in or supplying the official's business or others' businesses, making loans to the official or to others, or making contributions to the official's pet charity. As with the political activity of subordinates, coercion has to be assumed. Therefore, it is not a necessary element for the prohibition of transactions with subordinates.

Looked at from the other side, that is, from what a subordinate might have to gain, there is a second reason why these transactions are problematic. A subordinate can, by making a loan or gift to or purchasing goods from a superior, seek preferential treatment with respect to a raise or promotion. This can cause serious morale issues, as well as unseemly competition among employees. And it can place a cloud over personnel issues, causing long-term problems.

Whoever is seeking a personal advantage, superior or subordinate, transactions between them create problems, including a serious appearance of impropriety.

Here is the City Ethics Model Code provision regarding transactions with subordinates:

No official or employee may engage in a financial transaction, including the giving or receiving of loans or monetary contributions, including charitable contributions, with a subordinate or person or business over which, in the official or employee's official duties and responsibilities, he or she exercises supervisory responsibility, unless (a) the financial transaction is in the normal course of a regular commercial

business or occupation, or (b) the financial transaction involves a charitable event or fundraising activity which is the subject of general sponsorship by a state or municipal agency through official action by a governing body or the highest official of state or municipal government.

In determining whether to enter into a transaction with a subordinate or with anyone else over whom one exercises power, an official should consider the relationship between the parties, their relative power, the significance of the transaction, the terms of the transaction, its availability to others on the same or similar terms, its disruption to city business, and who is the primary beneficiary of the transaction. For example, it is most likely okay for a supervisor to fill out an order form for Girl Scout cookies posted on the department bulletin board by an employee; for an employee who legally moonlights as a realtor to show a house to a coworker, but not to a supervisor or subordinate, on a weekend; or for a supervisor to give money to an employee who is collecting for an office holiday party.

The exceptions are intended to be narrow. A subordinate is allowed to shop at a superior's store or eat at a superior's restaurant. But if a subordinate were to hire a superior as his lawyer, that would appear to be something he felt obliged, or was coerced, to do.

Similarly, if an official is the officially designated United Way representative, she may request contributions from subordinates. But other than such officially recognized charitable appeals, any such request for contributions would be inappropriate.

Because requests for contributions to officially recognized charities are acceptable, it would be best if the process for officially recognizing charities were not in the hands of top officials. If they control the process, then a top official may be in the position to force subordinates to give to his pet charity, despite the intent of the rule to prevent this.

Exception should also be made for de minimis transactions, for example, lending a few dollars to someone who will be paying him back the next day.

It might appear that an exception should be made for situations where the subordinate or the subordinate's business initiates the transaction, but this exception could be easily abused, because the supervisor could let it be known that subordinates were expected to make certain contributions or hire the supervisor's company. As with political

contributions, it is very often the case that government employees understand what is required of them without their supervisors saying anything about or otherwise initiating a transaction.

It also might appear that an exception should be made for transactions where a fair market value is paid, even when the transaction does not occur at a regular place of business. But the fact is that the a supervisor and subordinate are not peers with equal bargaining power, and (1) fair market value is both difficult to determine and (2) there might be other issues, such as difficulty of renting a space or the need for babysitting services right now.

Rules should not be too strict. For example, there might be occasions where a low-level employee has a problem which an official can acceptably deal with through special expertise. For example, the employee faints, and the official, a doctor, helps him (or vice versa). The particular situation and the employee's authority are factors in determining whether the free or discounted service or product is acceptable.

Some jurisdictions place the prohibition on both supervisor and subordinate. It is usually good to include in an ethics code both sides of each transaction, but it is hard enough for a subordinate to report a supervisor who has pressured him to enter into a financial transaction. If the subordinate is also in violation, it makes it that much harder. Since, unlike, say, the official-contractor relationship, here one side is more likely to be the instigator, and a supervisor can almost always say No.

The above discussion focuses on subordinate employees. But the provision also applies to situations involving others an official or employee exercises power over, including contractors and those seeking permits, grants, licenses, and the like. In addition to the possibility of coercion, a transaction in such a situation gives rise to the appearance of a relationship and, therefore, a conflict.

In addition, it's best that elected officials not have personal business dealings with each other. It's best that they relate as representatives, and not as business partners, clients, or customers. One problem is that business relations between officials can be used to launder campaign funds, bribes, and kickbacks. If no money is supposed to pass between officials, any money that does creates a paper trail that makes it harder to criminally conspire.

K. Complicity and Knowledge

“Public servants are ... likely to be passively unjust, being by training unwilling to step outside the rules and routines of their offices and peers, afraid to antagonize their superiors were they to make themselves unduly conspicuous. The resulting injustice is [due to] many hands in general, who need to be reminded constantly of the possible consequences of their inaction.”

—Judith N. Shklar, *The Faces of Injustice* (Yale Univ. Press, 1990)

It is commonly recognized that local government officials and employees have fiduciary obligations to the public, which require them to deal responsibly with their potential and apparent conflicts. What is not so commonly recognized is that local government officials and employees have a similar obligation to the public to report and, where possible, prevent or, at the very least, not support the ethical misconduct of their colleagues.

The complicity and silence of officials and employees are, I believe, the bulwark of all unhealthy ethics environments and, therefore, a principal cause of ethical misconduct in local governments. The most common form of ethical misconduct in an unhealthy ethics environment is not what most people think, that is, voting with a conflict or accepting a gift from a developer. When these acts occur, and when they come up in conversation beforehand, many more officials and employees are saying and doing nothing, and thereby enabling the visible misconduct.

Government ethics is like a parking garage (to use an image from the social psychology experiments of Robert Cialdini): people litter in a dirty garage and tend not to litter in a clean garage. In fact, in a clean parking garage, they often pick up other people's litter. In a government where no one reports or tries to actively prevent ethical misconduct, there is misconduct all over the place and most people simply get used to it.

Here is the City Ethics Model Code complicity and knowledge provision:

No one may, directly or indirectly, induce, encourage, or aid anyone to violate any provision of this code. If an official or employee suspects that someone has violated this code, he or she is required to report it to the relevant individual, either the employee's supervisor, the board on which the official sits or before which the

official or employee is appearing or will soon appear, or the Ethics Commission if the violation is past or if it is not immediately relevant to a decision, to discussion, or to actions or transactions. Anyone who reports a violation in good faith will be protected by the provisions of [the whistleblower protection provision].

Some jurisdictions, such as California (§ 83116.5), place their complicity provision in the enforcement section of the ethics code. But since most officials don't read the enforcement section, placing it there can trap unsuspecting individuals. Also, it is too important a provision to be hidden among procedural matters. A complicity provision belongs among the conflict provisions.

1. Aiding or Inducing

The first part of this provision is consistent with criminal laws, and there would seem to be few arguments against it. And yet it rarely exists. One reason is that such a provision is not to be found in most of the ethics codes that are looked to for guidance, such as model codes or the codes of major cities. Another reason is that government ethics enforcement tends to focus on the individual rather than the group. Considering the entirety of each ethics violation and dealing with everyone involved is generally not considered to be the province of ethics enforcement. In fact, it would go against the most common statement made with respect to government ethics: that 99% of public servants are good and honest, and it is only the bad apples who get involved in ethical misconduct. Sadly, this common statement is false. And government ethics is not about being good or honest. Rather, it is about fulfilling one's obligations, which includes obligations not to provide aid to those who may be violating an ethics provision, and to affirmatively try to prevent ethics violations and to report them when they occur.

Ethics codes without an aid or inducement provision send the message that it is acceptable for government officials to both help their colleagues evade the ethics code and help them cover up violations. And as everyone knows, a cover-up is usually worse than the original violation. For one thing, unlike a violation, a cover-up never is a matter of negligence or ignorance of the law. And they usually involve other people.

Ethics codes without an aid or inducement provision allow officials to appoint individuals who have conflicts. For example, in Stratford, Connecticut in 2009, the fire

chief was accused of appointing to a bid-review committee someone who works for one of the bidders, in fact, for the bidder the committee recommended. Without an aid or inducement provision, the fire chief had no incentive not to make such an appointment. No one could find him guilty of anything more than poor judgment, since he would apparently gain nothing from the bid going to his appointee.

The irresponsible handling of conflict situations usually does not occur in isolation. For example, subordinates who have conflicts can use the defense that their boss (who has no apparent conflict) told them to act when, left to his own devices, he might have withdrawn. In such an instance, both subordinate and supervisor get off scot-free. Officials need incentives to help their colleagues deal responsibly with conflict situations that can undermine the public trust.

Most important, an aid or inducement provision sends the message to local government attorneys that, when approached about ethics matters, their loyalty is to the public, not to the official. Without such a provision, an attorney may advise a colleague how to act so that a conflict does not become known, or so that an interest is indirect rather than direct, or presented as indefinite even when it is definite. If the matter becomes the basis for an ethics complaint, the government attorney is not held accountable for his advice. In fact, she will argue that it is confidential and, possibly, not tell anyone how confidentiality can be waived and why it is best for the government to do so.

There are numerous ways to get around the language of any ethics provision. Local government attorneys need to know that advice can lead to a violation, so that it is in their interest not to give an official advice that will allow the official to act unethically. An aid or inducement provision also allows a local government attorney to explain to an official why he has no choice but to give the official advice he would rather not hear.

The other problem with not having an aid or inducement provision is that it sends the message to private citizens, such as contractors, lobbyists, and developers, that it is acceptable to induce a local government official to violate an ethics provision, and that they run no risk of sanction in doing so. For example, hoping to keep a city's business, a local bank might give a personal loan to the city treasurer at a below-market interest rate. If this loan is discovered, the official will be fined, or might even lose her job as a result; however, the bank will lose nothing. Knowing this, it is far more likely to offer the loan than it would

if there was an aid or inducement provision. It is important that an ethics code makes it less likely that officials will be tempted.

A provision prohibiting aid can also protect private citizens from unethical demands made on them by government officials. If, for example, a contractor was asked to hire an official's nephew, it could say No, this would be aiding an ethics violation and, therefore, it could lose its contract. Pay to play in a city or county with an aid or inducement provision is no longer just about making a small investment to ensure continuing work with the city. It requires risking the loss of this work. This makes it much harder for officials to misuse their office in this manner.

All the words in the first sentence of this provision are essential. Inducing usually involves a supervisor or colleague, or citizen seeking something, who pushes an official or employee to act in violation of an ethics provision. Within the government, inducing can be a way to prevent reporting by making the potential whistleblower a violator herself. Co-opting in this manner is one of the worst things an official can do to someone, especially to a subordinate. It is a more serious offense than stealing money from the government till, because it corrupts a person under one's power and, therefore, to whom one has special obligations. As the old proverb says, "Corruptio optimi pessima" (the corruption of the best is worst). And yet inducing a subordinate like this is not considered ethical misconduct in the great majority of jurisdictions.

Co-opting is also one of the best ways to keep ethical misconduct secret. For example, a Greene County, Ohio treasurer reportedly ran a law practice out of his county government office for thirteen years by requiring all his subordinates to violate the ethics code by working for the law practice (while being paid by the county), making it clear that if they didn't, or if they said anything about the law practice, they'd be fired. The co-opting of subordinates also led to several of them quitting because they couldn't bear the situation, losing the county good workers.

It should also be pointed out that vendors are in a subordinate relationship vis à vis officials, and can be similarly co-opted. For example, in 2010 a school custodian admitted to having used school funds from three school vendors for personal purchases, and then getting the vendors to falsify invoices to conceal this personal use of funds. For this act of co-opting vendors, and for other instances of misconduct, he was given the largest penalty ever given by the New York City Conflicts of Interest Board.

It is common to prohibit aiding in criminal laws, but not in ethics laws. And yet aiding ethical misconduct is the same or, in two ways, worse. Ethics violations usually involve irresponsibility rather than intended misconduct. However, in instances when a violator brings in others to help the misconduct occur, this indicates that the violation is not irresponsible, but was intentional. Although intent does not have to be proved, it certainly makes the violation worse in the eyes of most people. And yet those who help an official intentionally violate an ethics provision are usually not held responsible for their actions. And the violator is not held responsible for seeking help.

Second, unlike ordinary citizens, government officials have a fiduciary duty not to engage in ethical misconduct, even if they get nothing personally for it. However, in most cases those who aid ethical misconduct are getting something very important, whether it is being part of the club, protecting their job, or making someone obliged to them, with the expectation of future returns.

2. A Requirement to Report

The second part of this provision seems to turn all local government officials and employees into stool pigeons, tattle-tales, squealers, finks, and snitches. English is rich in expressions that individuals use to negatively characterize their colleagues when they report on other colleagues. The outside world, however, calls these people “whistleblowers.”

It is clear from the fact that most local government ethics codes do not include a requirement to report (and model codes do include such a requirement) that, while the public sees such a requirement as protecting the public, government officials view such a requirement only through those rich negative expressions. That is, while the public believes that officials’ obligations are to the public rather than to each other, local government officials tend to see their principal obligations as being to each other.

And yet a principal reason why ethics programs are often ineffective is that officials and employees feel they can get away with ethical misconduct, because no one will turn them in. Instead of having a culture based on devotion to the public interest, their department, agency, or the entire government organization has a culture based on loyalty to one’s colleagues.

People in such a culture feel no obligation to deal responsibly with their conflicts of interest, because they feel protected. There are three reasons for this: (i) no one wants to

be a tattle-tale; (ii) most people are afraid to be a tattle-tale, because doing so might threaten their jobs, lead to harassment and failure to advance, or undermine their relations with people in power; and (iii) tattling means that they are no longer one of the gang.

Tattling is rarely defended in a rational way. There is just an assumption, or a feeling, that it is wrong, not unethical exactly, not sinful or criminal, simply wrong. It is important to look at where this assumption and this feeling come from.

The assumption, accompanied by strong feelings, comes from our childhood experiences. Not tattling is something very important in childhood. It helps maintain the solidarity of children against adults. It is one of the bases for children's socializing together. As one politician said in 2010, "What is endemic to politics [in Prince George's County, Maryland] is this sort of complicity in the sense of, 'I'm not going to tell on you, so you don't tell on me.'" Effectively, hundreds of individuals in the county government, as well as party officials, lawyers, realtors, and the like, took the position, not in words but in actions, that they preferred to charge taxpayers millions of dollars in investigations, unwanted developments, and overpriced contracts just so that they could be good ten-year-olds and not rat on their buddies. If they had the courage to say this out loud, the whole game would have fallen down around their ears. But saying this out loud would itself be "telling." It is this secretive, complicit schoolyard mentality that keeps the pay-to-play game going.

The closest adult equivalent is the Mafia's *omertà*, which includes a code of silence and an honor system that consists not only of secrecy, but also of not cooperating with authorities or interfering with others' illegal conduct. But *omertà* is intended to protect criminal conduct, not the management of a community.

The question that should be asked of adults who put personal loyalty to their colleagues ahead of their other obligations is, "Who are you maintaining solidarity against?" In childhood, there are adults. In sports, there are other teams. In gangs, there are other gangs and the police. In business, there are competing companies. And in politics, there is the other political party.

In government, there is . . . the public. It's the public that can't know, and it's the public that pays the price, both in an economic sense and in the sense that their representatives are putting their personal interests ahead of the public interest, undermining public trust and participation, as well as democratic values.

This sort of unquestioning loyalty to one's colleagues, which is inappropriate in most adult contexts, is especially inappropriate in a government context, where there are powerful obligations that take precedence over colleague or party solidarity (which are, in any case, hardly equivalent to children solidarity; adults are supposed to have progressed beyond that).

Talk about tattling in government rarely mentions the flip side: the lookout. One of the most important aspects of in-group loyalty is the implied promise that, if anything is up, you will be given the heads-up, that your back is being watched. For example, people who follow unwritten rules in government expect to be told if anyone knows that there is an investigation on. Having a lookout to allow conduct officials don't want the public to know about doesn't look as noble as refusing not to squeal. But they are two sides of the same record that keeps playing over and over again. So when you hear a politician say that he's not going to squeal on anyone, ask him whether he has affirmatively given anyone the heads up so that they won't get caught.

A requirement to report ethical misconduct is necessary because it is government officials and employees who best know what is going on in a government. They are in the best position to help enforce an ethics code and prevent ethical misconduct from happening in the first place. This is done not by reporting every possible violation, but by creating a culture that considers reporting an acceptable, even desirable, responsible, professional form of behavior. In such an ethics environment, it is far less likely that anyone will knowingly violate an ethics provision, because it would have to be done alone, and even an official's colleagues would lose respect for him if his conduct was to become known.

It's worth noting that anyone would assume that, if subordinates are involved in ethical misconduct, and their supervisor knows, the supervisor has a duty to deal with it quickly and formally. The real question is whether colleagues and subordinates have such a duty. Should a council member help a fellow council member keep ethical misconduct hidden (or effectively agree to avert her glance so that she knows as little as possible, something that is done by letting decisions be made at the district level)? Should one department head keep another department head's ethical misconduct a secret? And what of a council staff member, an assistant procurement officer, a zoning board's secretary? The latter group may certainly fear reporting what they know about, but is there really any question about their duty?

In 2011 in Cuyahoga County, Ohio (which includes Cleveland), a Code of Ethics Workgroup consisting of citizens recommended the following provision:

Covered persons, contractors or employees of contractors who believe they have knowledge of criminal or ethical misconduct shall make immediate, lawful and protected disclosure to their supervisors, employers, or to the County Ethics Board. Supervisors or employers receiving such a report shall immediately refer the complaint to the County Ethics Board.

But [the final code language](#) (Sections 17 and 18) made reporting discretionary, complicated the reporting procedure, limited the reporting requirement to criminal offenses, and dispensed with the county ethics board, giving authority instead to a human resources commission and the inspector general. A true ethics reporting requirement, which seems like a no brainer to citizens, seems to be very difficult for elected officials to pass.

San Antonio has a detailed requirement to report provision that is worth reading. The report is essentially a simplified complaint. One major difference is that an official or employee does not have two years, as she would to file a complaint.

Section 2-54 Persons Required to Report; Time to Report; Place to Report

(a) A City official or employee who has knowledge of a violation of any of the provisions of this Ethics Code shall report this violation as provided below within a reasonable time after the person has knowledge of a violation. A City official or employee shall not delegate to, or rely on, another person to make the report. Any City official or employee who has knowledge that a violation of the Ethics Code has been committed and intentionally fails to report such violation is subject to the penalties herein.

(b) A report made under this Section shall be made to:

- (1) the Ethics Compliance Officer or his or her designee; or
- (2) the Ethics Review Board.

(c) A report shall state:

- (1) the name of the City official or employee who believes that a violation of a provision of the Ethics Code has been or may have been committed;

- (2) the identity of the person or persons who allegedly committed the violation;
- (3) a statement of the facts on which the belief is made; and
- (4) any other pertinent information concerning the alleged violation.

The report should also include a statement of the nature of the violation. This seems to have been a negligent omission.

The village of Glen Ellyn, Illinois has an interesting requirement to report preferential treatment provision:

§1-12-9(b). Village staff shall maintain a record of all written or oral communications from all elected officials and department heads in which the requester appears to be directly or indirectly seeking to obtain preferential treatment for himself or herself or any other individual or entity. The communications from department heads should always be reported when they involve requests unrelated to that individual's duties in the Village. All such requests should be reported to the Village President and to the Village Manager, who may choose to inquire from the Ethics Officer or the Prosecutor whether the communication constitutes a violation of this code.

The odd thing about this language is that it requires staff to record communications from elected officials with respect to preferential treatment, but it does not require them to report such communications. However, it requires the recording and reporting of such communications with department heads. A problem with this language is that terms such as “preferential treatment” and “unrelated to duties” leaves a lot of room for subjective determinations of what communications to record and report.

It is important that a requirement to report means reporting to an ethics commission, not to officials or to a different office, even an investigative office. The decision whether to dismiss or investigate a complaint should be made only by an ethics commission or its staff, that is, the office responsible for a local government ethics program. Investigators may consider the allegations in a report to be unworthy of investigation, while an ethics commission may see them as part of a pattern that needs to be

dealt with. Reporting to a legislative body or a city or county manager places one of the most important ethics program decisions in the hands of those under the ethics program's jurisdiction. This procedure can actually make these officials complicit in covering up ethical misconduct, which means a more serious scandal if the matter becomes public.

It would be nice if everyone had the moral courage to report misconduct without being required to. But moral courage is not something that can be expected of people. In his book [*Moral Courage*](#) (William Morrow, 2005), Rushworth Kidder defined moral courage as "a commitment to moral principles, an awareness of the danger involved in supporting those principles, and a willing endurance of that danger." Possible dangers include everything from unpopularity to verbal and media attack, being fired or kept back from promotion, losing party support or not being re-elected, being sued, having your reputation in the community destroyed (along with your business or profession), or even being threatened with, or feeling the possible threat of, physical harm. The most common danger in organizations is being seen as disloyal, being excluded from the power circle, or alienating one's superiors, and all that these can lead to.

Beyond loyalty and fear of all these dangers, moral courage is inhibited by other things, including a refusal to take blame or responsibility, indecisiveness, secretiveness, sensitivity to criticism, the desire to be accepted, indifference, and shamelessness.

The difficulty of showing moral courage is especially important because moral courage is not simply one of many virtues. It is the principal enabler of acting virtuous in difficult situations. A lack of moral courage is the principal reason why people who have virtues do not act on them. It is also the principal reason why being a person of integrity is not sufficient to deal responsibly with conflict situations. Integrity requires moral courage in order to become action, at least in difficult situations, such as a government employee speaking out about a conflict situation or reporting the irresponsible handling of a conflict situation. For more on moral courage, see the following section.

A requirement to report misconduct is central to government ethics, because (along with a whistleblower provision) it allows the people who know most what is going on in their government to prevent action in the public interest (reporting a possible ethics violation) from being against their self-interest (protecting their job). The inclusion of this provision makes it clear to all officials and employees that government ethics is a group

activity, that ethical misconduct is less an individual problem than it is an organizational problem.

It is also important that government ethics is recognized as an area where accountability comes less from the public than from within the government organization. The public only knows what the organization makes public. And since the goal is to increase public trust, it is highly preferable that there be no misconduct which, when it does become public (and even moreso when it is covered up) undermines public trust. This can only be accomplished by officials and employees who see themselves as responsible and professional. No other enforcement mechanism is so effective. Or inexpensive.

Government ethics may be a group activity, but it is common to see enforcement as something done against individuals. This is how we see criminal enforcement, which is the template for ethics enforcement. It is, therefore, difficult for most people to see that ethics enforcement is different, that it should go beyond individuals to deal with the ethics environment. And the ethics environment is about a group, not only about an individual violating a provision, but also about the people who help that individual and the people who know about what that individual is doing.

3. The Process of Reporting

The decision to report what appears to be ethical misconduct is not an easy one. The League of California Cities, in a pamphlet entitled [*Walking the Line: What to Do If You Suspect an Ethics Problem*](#), recommends an eight-stage approach. Here is my version of the process, with seven steps. I've also added in advice from Mary C. Gentile's book [*Giving Voice to Values: How to Speak Your Mind When You Know What's Right*](#) (Yale University Press, 2010), which is an excellent book about ethical empowerment, that is, how to get yourself to the point where you will be more likely to act on your ethical convictions.

The first step is to get up the courage to act. Courage is the great enabler of virtuous conduct. As Rushworth Kidder wrote in his book [*Moral Courage*](#) (William Morrow, 2005), "Without the courage to act, virtuous conviction is pointless and paralytic."

It takes courage to stand up against what appears to be opposition by those who can affect your career, even if you recognize that many of your colleague agree with you but are not saying what they really think.

Whatever enables us to act is what courage is for us. The enabler can be a purpose that is very important to us, for example, government transparency. Or it can be something we despise, such as injustice or intimidation, against ourselves or against someone else. It can be something as simple as someone telling us we don't know what we're talking about.

Fear can be not only a paralyzer, but also an effective enabler. Like values and obligations, fears can be in conflict. We might be afraid of losing our job or our friends, but also afraid of losing our reputation, or afraid we won't be able to live with ourselves if we do nothing, or afraid of being punished and all that that might lead to.

It is important to recognize that even the meekest of us has the values or the need or the fear or the anger necessary to act on our convictions, at least to raise issues for discussion, ask questions, stir things up a bit. It is also important to recognize that, "Just as a culture of silence is contagious, so is one of courage." (Paul Rogat Loeb)

The second step is to question your motivation for reporting. This is a difficult but valuable exercise. Are you motivated by loyalty to the organization and the public it represents? Are you motivated by politics? Are you worried that the individual might soon be reporting you for ethical misconduct or poor work performance, and believe that reporting him might make his report appear to be retaliation? Are you motivated by retribution for the way the individual has treated you or others?

Reporting someone in order to seek retribution, or for other ulterior motives, can start a destructive dynamic that undermines the public's trust. Often, when the motivation is improper, the conduct itself is minor or only technically illegal. Reporting may not be the best way to deal with the problem. Pointing out the technical illegality to the official who engaged in the conduct might do more for the public trust and the ethics program than exposing the conduct and making a public issue out of something minor.

The third step is equally difficult, but in a very different way. It is important to take the right attitude in pursuing an ethics matter. The default attitude is right vs. wrong. But this is an area many people are very uncomfortable with. It's personal, religious, philosophical, not part of the day-to-day work environment. For many people, it makes it more difficult to act responsibly.

But there is another attitude, another approach, which is the same can-do approach we takes toward whatever confronts us at work. A can-do attitude with respect to

government ethics matters takes two forms. One is to view ethics matters as little different than other matters, and to approach the problems they raise in much the same manner. For example, think in terms of risk management. Recognize the risks you take in reporting misconduct, and prepare yourself for them by anticipating and mitigating them. Make scripts of what you want to say (especially in response to the usual rationalizations of ethical misconduct), try them out on people, and form an implementation plan.

The second way to employ a can-do attitude in ethics matters is to approach them with the same set of skills you bring to other issues. As with any issue that arises, there are many available approaches, and you need to choose the ones that best employ your particular skills.

The fourth step is to make sure you have the facts right. Write them down in order to think through them and determine if something is more uncertain than you thought, or if something is missing. Remember that hearsay is not sufficient to report someone. If someone told you something that, along with what you knew yourself, made you think there may be something to report, go back to that person and ask questions about what they said and see if they would be willing to join you in reporting the conduct.

The fifth step is talking with someone else. This is the single most important factor in acting on one's values rather than letting the matter go without acting. Keeping ethics issues inside makes them personal, uncomfortable, fraught with fear. Talk the matter over with someone you can trust, who is neutral with respect to the individual and the politics and, if possible, who knows the individual and is likely to understand the situation and possibly see it in a different light or with different information than you. If you feel your chair or supervisor fits this description, that may be the best person to talk with. In fact, that person might be the one to make the report.

But often a chair or supervisor will have a special relationship with the individual (positive or negative), and may not be in a position to provide a neutral response or to be sympathetic to the idea of reporting the misconduct. A member of the city or county attorney's office may be able to provide excellent advice, but it's important to remember that the attorney may be politically involved, may have represented the individual and therefore feel loyalty to him, or may be overly legalistic in her approach to an ethics issue. If you yourself are a government attorney, it's important to remember that what an official or employee might have told you may be confidential outside the government, but is not

confidential within the government, especially when there is a possibility of illegal conduct having occurred.

The best person may turn out to be someone outside the organization, perhaps someone who used to work there, but not necessarily. The important thing is to get someone who will listen, be sympathetic, and talk honestly to you. More than anything else, you need to get your ideas out in the form of a conversation, and get one or more outside viewpoints.

It's important when talking to others not to assume bad motives. Focus on the individual's conduct itself. Be careful not to exaggerate, which is a common way of making the conduct seem more serious. Be open to alternate explanations, remembering that explanations are not necessarily excuses. And be open to alternate ways of dealing with what you know, including where to take the information and who else to talk with, including the individual himself.

When talking with others in the government, it's important to consider their stake in the matter and in the organization, and to frame your arguments in such a way as to show that you are taking into account the listener's position and reputation.

If the issue is not conduct that has already occurred, but rather conduct that might occur if an official or employee does not deal responsibly with a conflict, then the sixth step is to talk with the individual at this point, either directly or, if you are too junior or have a problematic relationship with the individual, indirectly through someone else. Often people underestimate (1) how others will feel about their conduct, (2) the possibility that they will be caught, and (3) the possibility that, if caught, they or their party or colleagues will be penalized for the conduct. It can be valuable to point this out to the individual, and to make it clear that you will be required to report him if he does not deal responsibly with his conflict.

But recognize that most people think they are not doing anything wrong. They are more likely to see themselves as victims acting in ways they have already justified or will quickly justify when confronted. It's important not to accuse, but to discuss, and to show that you are concerned with their welfare in addition to the city or county's best interests. An ethics matter can be reframed as a professional matter, for example, as a risk to avoid, whether it's a risk to individuals, to the party, or to the local government.

If the individual raises the issue of loyalty, one way to respond to is talk about loyalty as a two-way street, a form of mutual respect in which decisions are discussed and there is no rejection or intimidation of those who disagree with the way things are commonly done. What most people think of as loyalty is a one-way street with one-way obligations that do not include a supervisor's obligation to take seriously a subordinate's concerns.

If the conduct has occurred and you feel that the individual may be open to discussing the matter rather than denying that there is a problem, it might be worth suggesting to him that he report the conduct himself and offer to do whatever is necessary to remedy it. Knowing that one will be reported can change how one views the situation and the best way of dealing with it.

If you are convinced there has been misconduct and the individual either refuses to report it himself or you cannot approach the individual directly or indirectly, then the seventh step is to report the misconduct to the ethics commission or ethics officer, if there is one, or to your chair or supervisor if there is no ethics enforcement body or individual. If you fear retaliation and there is a hotline or other way to report misconduct confidentially or anonymously, then you should take advantage of this. If you do not fear retaliation, then you and whoever else is willing to join you should file a formal complaint.

The Wyandotte County/Kansas City, Kansas ethics code has an interesting prohibition in its whistleblower provision (§2-270) against one official requiring another official to report misconduct to a third official before formally reporting misconduct. It is important that supervisors are not able to control an official or employee's reporting of misconduct in any way.

Some ethics codes, in fact, speak only of reporting to a supervisor or to the city manager. This can (1) prevent many reports from being made, because many employees will feel that nothing will come of their report but trouble, and (2) mean that many reports of misconduct will not be investigated or acted upon. When it comes out that a matter has been reported and ignored, it will look like a cover-up, and the scandal will be much worse than otherwise.

Giving voice to one's values is a skill that requires thought and practice. It also requires the recognition that most people want to do the right thing, but are uncomfortable or afraid to raise issues, and that when they do speak out, there is not usually retaliation,

especially if they do it thoughtfully rather than out of anger or malice. The more you give voice to your values, the easier it becomes for others to do it, too.

Were the above steps part of the typical government official's approach, government ethics would be a topic of daily discussion. Officials would have a much deeper understanding of government ethics, would ask sophisticated questions about it, and would be no more likely to handle conflicts irresponsibly than they would, say, the fixing of a bridge or the planning of a community sports program. The reason is that they would be working together to find the best solution for the community, instead of agonizing over what many people consider to be a personal matter.

4. Whistleblower Protection

A requirement to report is not enough. Fear of retaliation is a strong and reasonable obstacle to reporting the ethics violations of one's superiors. And the great majority of important ethics violations are committed by higher-level officials.

A requirement to report needs to be supplemented by [whistleblower protection](#), as well as by three more things that work together to ensure that reports are not only made, but are also investigated.

The first thing that is needed is [a hotline](#) for people to report possible violations, either in their name or, if they fear retaliation, confidentially or anonymously.

The second thing that is needed is for the ethics commission to have the ability to start an investigation based on hotline reports and, if the commission finds there is reason to believe a violation has occurred, [to file a complaint on its own initiative](#).

The third thing that is needed is for an ethics commission to be able to amend a complaint when it obtains new information during its investigation, whether through the investigation or via the hotline. It is also useful for an ethics commission to be able to consolidate related matters, so that everyone involved in a matter can be dealt with at the same time. For more on this, see [the section on ethics commission complaints](#).

Knowledge of a possible violation does not mean that reporting it is the first step. The best thing to do, before reporting, is to try to ensure that the matter is dealt with responsibly, to directly recommend, for example, that someone withdraw from participation or seek advice from the ethics commission. But it is important that those who

are given such advice know that they cannot expect the silence of fear or misplaced loyalty if they decide to ignore the advice.

5. The Consequences of Non-Reporting

In 2009, it came out that two Pennsylvania judges had been filling two for-profit juvenile detention centers with thousands of youths who would not otherwise have been removed from their families and schools. They did this in order to benefit themselves.

How did this happen? Dozens of professionals – lawyers, social workers, police officers, and various court and juvenile workers – knew that the youths were being unjustly harmed, even though they did not know why. The Juvenile Law Center made an attempt to end this practice, but its protests made no difference to a culture where no official, employee, or lawyer felt a responsibility to report illegal and ethical misconduct.

In New York City, as in many other local governments, the police, at least in the Bronx, followed what is known as “professional courtesy” in fixing tickets at the request of government officials. No one dared blow the whistle.

There is also something known as “district courtesy,” where council members let their colleagues do whatever they want in their own districts, knowing that their colleagues will stay out of their business, too. This sort of courtesy is accompanied by the widespread knowledge that ethical misconduct is occurring. District courtesy leads to serious problems. It allows high-level officials not to feel responsible to their city or county as a whole, and it gives them the benefit of deniability, that is, the ability to honestly say that they didn’t know what was happening (even when they had reason to believe it was happening). It is every official’s responsibility to know what is happening, and to do something about it.

The mayor of Tamarac, Florida was accused of having indirectly taken money from a developer to fund attacks on her campaign opponents, and then, very soon after, voting on a matter involving the developer. The same developer was implicated in the indictment of the three other Tamarac politicians in the year before the mayor’s arrest.

This minor matter involved father-and-son developers, a county commissioner who mentored the mayor, a campaign manager who was hired the previous year by the county commissioner, two lobbyists, one of them a prominent financial figure in national campaigns, another local mayor, a political firm that produced attack mailers, two

development subcontractors who helped hide the source of the funds, a 527 political committee created to do the dirty work, a party “operative” who helped set up the 527 committee, and their attorneys.

Even a minor scheme such as this was not the work of a lone wolf. Any of the people involved, and any of the many others who knew at least part of what was going on, could have stopped the whole thing. But knowing they wouldn’t be found in violation of any law, why bother making a report? It wasn’t their fault or their responsibility.

That deserves repeating in a more general way. In almost every instance of ethical misconduct there are people who know it is occurring, and these people can stop it either privately or, if necessary, by going public. Ethical misconduct occurs because these individuals say and do nothing. This is true of almost every kind of misconduct that occurs in government. One or two people speaking out can stop the whole thing. The worst instances of misconduct depend on them not saying or doing a thing, or at least being quickly intimidated into shutting up, and on there not being confidential ways to report the misconduct and no independent process to enforce the law.

Although a complicity and reporting provision is a hard sell, it’s worth trying. As it says in the comments to the International Municipal Lawyers Association (IMLA) Model Code’s duty to report violations provision (it also has a complicity provision): “Even if a community ultimately decides not to impose any duty, it would be better off for having debated the issue.” I would take this a step further. What are the chances that, if a public hearing were held on a duty to report provision, citizens would not strongly favor it?

How would a duty to report be enforced? Would everyone who knew or had reason to know about ethical misconduct be fined or suspended? I don’t think that would be necessary, at least for first offenses. But they should be reprimanded, individually and publicly and, most important, if they have not already said what they knew during the investigation, say what they knew at a public hearing, publicly admit that they should have said or done something and, hopefully, apologize to the public for their inaction.

L. Appearance of Impropriety

Some ethics codes come right out and say that creating an appearance of impropriety is an ethics violation. It is good advice to tell someone not to participate in conduct that creates an appearance of impropriety. But this language is too vague, I think, to appear in an enforceable ethics provision. And it provides too little guidance. Appearance of impropriety is a consideration to be taken into account in ethical decision-making. If I do this, how will it appear to others? It's important to consider this as part of dealing responsibly with conflicts. And, of course, how it appears is how others will judge one's conduct. But although an important consideration, appearance of impropriety is not a sufficiently clear standard by which someone's conduct can be fairly judged.

This difference is central to the difference between advice and enforcement. An ethics officer will tell an official that certain conduct is likely to create an appearance of impropriety and, therefore, should not be done. But it is very difficult to provide evidence of such an appearance in a case brought against an official. An appearance of impropriety involves points of view. Even having several citizens testify that, when they heard about what an official did, they thought it was improper, does not prove an appearance of impropriety. The reason is that the official has to be able to anticipate how these citizens will think. This sort of anticipation is hard for most people to do, because they believe their judgment to be unaffected by things like conflicted obligations and they have disdain for the opinions of people who don't know them and don't understand the situation. It is unreasonable to expect an official to be able to make this judgment, it is difficult to honestly prove in a particular situation that, in retrospect, he made it poorly, and it is unfair to find a violation on the basis of how conduct appears.

Some people point out that there are many vague standards that are central to our justice system. Standards such as "due process" and "equal protection." But these standards are intended to protect citizens from governments, not to prosecute individuals. And these standards have been the subject of countless court decisions, which have defined them in concrete ways. This has not been done with "appearance of impropriety," and there is no reason to believe that, if this standard was accepted nationwide, there would be anything but a wide range of interpretations that would muddy the waters rather than make the standard more concrete.

In [the section below on Vagueness](#), it is acknowledged that there will be an element of vagueness in ethics provisions, and that this can be dealt with via ethics advice. This is

true. But “appearance of impropriety” is more than vague. It requires officials to go through a process that is difficult and lacks any guidance or standards. It is more fair to have relatively clear standards, and it is more reasonable to expect officials to follow them and, when there is a gray area, when there is any doubt about what to do, seek ethics advice. Better, I think, to fine an official for not seeking advice ([an alternative I discuss below](#)) than to fine an official for not recognize that her conduct will appear improper.

M. Minor Provisions

There are some minor provisions that often appear in local government ethics codes, but which do not require their own sections.

One involves fees and honorariums (honorariums are fees that are paid to officials, usually for speeches). Here is the City Ethics Model Code version:

No official or employee may accept a fee or honorarium for an article, for an appearance or speech, or for participation at an event, in his or her official capacity. However, he or she may receive payment or reimbursement for necessary expenses related to any such activity.

Some jurisdictions add immediate family, as with gifts, so that illegal payments are not made to them instead of to the official. And some jurisdictions allow fees and honorariums up to a certain dollar figure, which is acceptable if that figure is low and includes expenses (the District of Columbia’s, at \$10,000 plus expenses a year for honorariums and another \$10,000 for royalties, is far too high). The D.C. provision allows unlimited honorariums and royalties as long as they are made to nonprofit organizations. This allows for preferential treatment of particular nonprofits, and the pay to play that accompanies high-level officials’ favorite charities (see [the section on this](#)).

This provision should not be used to permit restricted sources to make gifts of travel to an official. This provision is intended for speeches in the local area, not in Vegas or Miami.

The second minor provision involves endorsements. Product or company endorsements are a specific kind of preferential treatment. Here is the City Ethics Model Code version:

No official or employee in his or her official capacity may publicly endorse products or services. However, this does not prohibit an official or employee from answering inquiries by other governmental officials, consumer organizations, or product information services regarding products or services.

Even if there is no such provision, an ordinary conflict provision prohibits officials and employees from endorsing products that benefit themselves, their family members, or their business associates. This would include the products of any company that employs or otherwise benefits oneself, family members, or business associates.

The next two provisions appear in the City Ethics Model Code, but not in most actual codes. But they are worth considering. One involves meeting attendance. It recognizes the failure to attend or prepare for meetings on a regular basis as a form of self-interest that is placed ahead of the public interest.

All members of boards and commissions are expected to attend meetings on a regular basis. It is a violation of this code to miss more than a third of a board or commission's meetings in a twelve-month period.

This might seem rough, but it is rough on a board when its members do not attend meetings. In fact, it can make quorums difficult and, thereby, undermine the functioning of the board.

If a board member has health problems, lives out of town a large part of the year, or has ongoing scheduling problems, the responsible thing to do is resign. If things change in the future, the board member can ask to be appointed when the next position opens up. Reappointment should be easy for someone responsible enough to resign when he had too many scheduling problems.

A non-attendance violation would not force board members to resign, although this would often be the consequence. However, such a violation would be a reminder to all board members that attendance is an obligation that should not be taken lightly.

Indianapolis has this rule. Some other cities and counties have even tougher rules. For example, Chula Vista, California has a provision that creates a presumption that a board or commission member who misses three consecutive regular meetings has “vacated his or her membership.” The provision explains why this is important, and what can be done to change this presumption:

2.25.110 A. The City Council relies on advice of the City’s boards and commissions that grows from discussions among appointed members. The City Council anticipates that members appointed to the City’s boards and commissions will make every reasonable effort to attend all regular meetings of their respective boards or commissions, to attend special meetings, and to be prepared to discuss matters on their respective agendas.

B. The City Charter requires that any board or commission member who is absent from three consecutive, regular meetings will be deemed to have vacated his or her membership on the particular board or commission, unless his or her absence is excused by a majority vote of the other members, as reflected in the official minutes of the board or commission.

The provision also lists the reasons that board and commission members may use for excusing a member’s continuing absences, and sets up a special committee to monitor absences and make recommendations to the council for removal. Board secretaries are required to file annual attendance reports. Semi-annual would be even better.

New Castle County, DE has an even harsher rule:

Four members of the Commission by resolution may declare vacant the position on the Commission of any member who has attended no more than four of the Commission’s preceding twelve meetings.

I don’t think it should be up to a member’s colleagues to enforce such a rule. This puts them in a very uncomfortable position.

Another minor provision involves an official falsely impugning the reputation of a citizen. It is, unfortunately, not uncommon for local government officials, especially elected officials, to falsely impugn each other's reputation. But to do this to citizens is a different story. Citizens lack the ability to respond in such a way as to set the record straight, especially in the same forum or medium, for example, during a council meeting or in an interview with a reporter, or even with a letter to the editor of a newspaper that supports the particular official. In addition, what a citizen says usually does not carry the same weight as what an elected official says, and anything a citizen says will be seen as defensive and not taken too seriously.

What is truly important in government ethics terms is that when an official falsely impugns a citizen's reputation, he is misusing his position for personal reasons. If he did not hold such a position, he would not likely have made the false accusation, nor would anyone know or care.

Falsely impugning a citizen's reputation is a common way for officials to intimidate residents who speak out and, thereby, to prevent others from similarly speaking out. This form of misuse of office is central to undermining free debate as well as citizen participation and oversight of executive and legislative actions. It makes anyone planning to speak out think twice about doing so. And it creates a general sense of disgust with government.

Here is the City Ethics Model Code provision:

An official or employee may not falsely impugn the reputation of a city resident. If an official or employee believes his or her accusation to be true, and then learns that it was false, even in part, he or she should apologize in the same forum the accusations were made. A failure to so apologize within a reasonable period of time after learning of the falseness of the accusations will create the presumption that the conduct was fully intentional.

Note that this is a very unusual provision in that it puts the onus on the official, but allows him to cure his violation by apologizing. It creates a process by which a resident (or someone else) can respond to an official, saying that what he said was false and, possibly, demanding a retraction and apology. Only if the official adds insult to injury by ignoring the citizen's or other's statement of the facts is the official in violation. In short, the goal of this provision is more to correct the misconduct than to penalize it.

I think it is important to mention apology in an ethics code, because a lack of true apologies from members of a government organization is like a dead canary in a mine. An organization without true apologies is one where officials put themselves ahead of the good of the community, where people think in terms of getting away with mistakes and misconduct.

Without such a provision, a citizen must file an expensive defamation suit or, if there has been concrete harm to the citizen due to the official's words or actions, an even more expensive federal suit under U.S.C. §1983 for deprivation of her constitutional rights, such as her right to speak out on an issue (see [Paige v. Coyner](#), 614 F.3d 273 (6th Cir., 2010)).

Most ethics codes have one or two provisions that are minor, but worth considering. I have collected a number of these provisions in [Appendix 1](#).

N. State Ethics Laws That Apply Locally

One of the most serious omissions in most local government ethics codes is an addendum that sets out all the state ethics laws that apply to local government officials and employees, candidates, former officials, contractors and consultants, etc. Including these laws (and not just a list of citations) gives everyone a complete set of all the ethics laws that exist for their guidance and that may be enforced against them. It also makes clear to those drafting and voting on the local ethics code, or amendments to it, any inconsistencies or duplications that exist between the local ethics code and state laws, so that code provisions will fulfil and not contradict or violate state requirements. It is frequently the case that local and state ethics laws are not consistent, and this can cause all sorts of problems down the road. Besides helping with the drafting of a local ethics code, this process can show problems with state laws, which a local state legislator can make an effort to amend, for the benefit of all the state's local ethics programs.

A good example of a publication that includes all relevant state laws is Houston's [Ethics in City Government](#) publication. Over half the publication involves state laws. It is well organized and comprehensive.

When considering such an addendum, it is best not to focus solely on state statutes. There may also be court decisions and decisions of other bodies, such as the attorney general's office, that are important to the local ethics process.

Two areas where this is true involve confidentiality and freedom of information. For example, there is a case in the federal Second Circuit, which includes New York and Connecticut, that effectively makes it unconstitutional for an ethics commission to require a complainant to keep his or her accusations confidential. The only thing that can be required of a complainant is that he or she not say that the complaint was filed, at least until a finding of probable cause. This should either be made clear in the ethics codes of all jurisdictions in this federal circuit, or it should be cited in the addendum with a summary of the opinion. By the way, in other circuits there are other confidentiality rules, or no rule. (See [this book's discussion of confidentiality.](#))

Freedom of information rules and decisions are sometimes specifically relevant to ethics commissions. For example, the Connecticut Freedom of Information Commission has determined in advisory opinions that local ethics commissions do not go into "executive session" to discuss complaints during the investigatory phase, because the state statute on ethics proceeding confidentiality overrides the Freedom of Information Act. Instead, the commission determined that such meetings are a different sort of "closed session" that need not follow the requirements associated with executive sessions. Again, this should either be made clear in the local ethics codes in Connecticut, or cited in the addendum with a summary of the advisory opinions.

O. Federal Laws That Apply Locally

There are also some federal ethics laws and rules that apply locally, and are sometimes ignored. For example, there is a conflict of interest rule for local empowerment zones, for which the Housing and Urban Development (HUD) agency provides loans, that is more inclusive than many local government ethics rules:

Any interested parties, including employees, committee members, and borrowers, may not receive any direct or indirect financial or personal benefits in connection with the approval and awarding of a loan.

Note the phrase “direct or indirect financial or personal benefits.” This is very similar to the City Ethics Model Code language, but not to many local government ethics codes. Here is a situation where this phrase made a difference. A HUD loan, administered by the city of Columbia, South Carolina via an empowerment zone, was used by the mother of a Columbia council member to purchase an office building. Part of the building was rented to the council member’s law firm. The mother asked a state ethics commission staff member for informal ethics advice, but did not point out that the transaction was governed by the empowerment zone policies, in addition to the state’s. The staff member gave the mother the green light. Had the rule been included in an addendum to the state ethics code, the staff member would more likely have known about it.

A lot of things can be learned from this story. Ethics commission staff should always ask if there is state or federal money and, therefore, special state or federal laws relevant to the situation. Empowerment zone personnel should be trained in the federal conflict policy and should put together an information sheet for officials and employees as well as for ethics commission members and staff (there actually are such sheets, which cities and counties can copy or use as the basis for their own; check out those of [Arlington, Texas](#) and [Spokane, Washington](#)). Loan committee members and staff should be required to sign a form verifying that they understand the requirements and will adhere to them. And applicants for loans paid for out of federal funds (or state and local funds, for that matter) should be required to fill out a conflict form and promise to ask the staff or ethics officer if there is any doubt about a possible conflict.

The Hatch Act is another federal law relevant to local government ethics (see [the section on this law](#)).

P. Public Administration Association Codes of Ethics

Two major public administration associations, the American Society for Public Administration (ASPA) and the International City-County Management Association (ICMA) have codes of ethics that apply to their members.

The ASPA includes officials of all kinds and at all levels of government. Its [code of ethics](#) is purely aspirational. But it is an excellent presentation of a public servant's obligations, going far beyond conflicts. It is valuable for all public servants, elected, appointed, or hired, to see what the ASPA feels its members' obligations are.

The ICMA is a more focused association. Its membership consists of city and county managers. Although the language of [its code of ethics](#) is no less aspirational than the ASPA code's, the association does have an enforcement mechanism. However, only one of the code's twelve tenets expressly refers to the responsible handling of conflicts, so there is little overlap with local government ethics enforcement. An ICMA enforcement proceeding should not preclude or interfere with a government ethics proceeding.

Q. Vagueness

Some of the central ethics provisions are necessarily vague, which many feel raises due process problems (although due process is usually limited to criminal and First Amendment matters). I have pointed to ways to make ethics provisions as concrete as possible, for example, by using the language of "benefits" rather than "interests." But there will always be language that needs to be further defined, such as the term "preferential treatment" (I do not, however, recommend that this term be used in an enforceable ethics provision, unless it is followed by a more concrete description of a type of preferential treatment, such as allowing certain individuals to use government equipment).

In [the oral argument in the *Carrigan* case](#) before the U.S. Supreme Court, the issue of vagueness was discussed at length. Justice Scalia said, "The first Congress adopted a rule that, quote, 'No member shall vote on any question in the event of which he is immediately and particularly interested.' I don't consider that very precise. And the rules adopted by Thomas Jefferson for the Senate, 'Where the private interests of a member are concerned in a bill or question, he is to withdraw.' 'The private interests,' what does that mean?"

Later in the oral argument, Justice Scalia said, "judges are subject to ethical rules which prohibit their participating if there would be, quote, 'an appearance of impropriety.' If there's anything vaguer than that I can't imagine what it might be. Can I get out of all that stuff?" the Justice joked.

Justice Scalia took the position that vagueness is acceptable if it is not discriminatory: “[I]f it's vague for Mr. Carrigan in this case, it's vague for everybody else as well. ... And so it's sort of a self-regulating mechanism.” In other words, it's up to the legislature to determine how it operates, as long as its rules are not discriminatory.

Justices Breyer and Kagan ran with Justice Scalia's idea about vague conflict rules, recognizing that the recusal rules for judges have been worked out over the years case by case. Justice Breyer asked, “Why is it impermissible for the Executive Branch or the Legislative Branch also to use a common law, case-by-case method of elucidating through example what a general ... provision means?”

To which Carrigan's counsel responded that an official and those with whom they have special relationships “have to know *ex ante* [that is, before they enter into the relationship] whether to engage in this relationship or not.”

Justice Kagan responded, “But why do they have to know *ex ante*? There was an advisory process that was set up by the Nevada commission here. ... Mr. Carrigan chose not to use it. But he could have gone to the commission, said: What do you think about this relationship? Does it fit or does it not fit?”

In short, the justices recognized that any ethics rules are going to be somewhat vague, and that it is the job of an ethics officer and commission to elucidate the boundaries of a rule by means of advisory opinions and decisions on complaints. This is a mature approach, which recognizes, effectively, how important it is to seek advice and how important advice is in informing others about what is required by ethics provisions.

Although it is important to be as concrete as possible, those drafting ethics codes should realize that there will necessarily be some vagueness in ethics provisions, and that this vagueness can be worked out through advice that is made public and organized in such a way that ethics provisions become increasingly concrete (see [the section on presenting advice online](#)).

V. Transparency: The Three Kinds of Disclosure

I have to admit that [the proposed ethics code and annual disclosure form] made me nervous because I kept seeing instances where I personally could be considered, shall I say, at risk. Because the things I am involved in are funded by the city. Making me nervous was a good thing. This is very clear.

—then Kirkland, Washington deputy mayor Penny Sweet

It is a common belief that conflicts are bad in and of themselves. But the fact is that they occur often, especially in smaller towns and counties. Government ethics seeks not to rid government of conflicts, but to ensure that conflicts are handled responsibly.

Disclosure is the first step in dealing responsibly with possible conflicts. The disclosure of conflicts and of information that suggests possible conflicts keeps the wheels of an ethics program well oiled. That is, by letting the public know about relationships (e.g., employers and clients) and ownership interests (e.g., property ownership) that could lead to possible conflict situations, officials and those seeking contracts, grants, permits, and licenses from a local government do three things, all of which are intended to avoid ethics violations.

First, disclosure focuses the official and those seeking special benefits from the local government to pay attention to relationships and interests that could lead to conflict situations. This often makes people a bit nervous, like the deputy mayor quoted above, but as she says, this is good. It is only those who have something to hide who think reasonable disclosure is a bad thing. This attention and concern about relationships and interests allows officials and those seeking special benefits from the government to be aware of possible conflicts, remember them when particular matters arise, and deal with them responsibly. And the knowledge that information about one's relationships and interests is public makes it more likely that officials, those seeking special benefits from government, and those with

whom they have special relationships will not engage in ethical misconduct. The principal goal of disclosure is prevention, not exposing officials or catching them.

Second, disclosure lets other officials (such as supervisors, colleagues, fellow board members, and those providing oversight) and the public (including the news media) know about possible conflicts that might arise, so that when a conflict situation does occur, there is information available for them to make sure the conflict is dealt with responsibly. Why is this necessary? Because it's often hard for individuals to see their own conflicts, even though it's easy for individuals to see others' conflicts. Therefore, officials often need others to point out their conflicts.

And third, disclosure (theirs and others') means that officials regularly participate in and are aware of the government ethics program, which helps maintain a healthy, active ethics environment in the local government.

There are three essential types, or timings, of conflict-related disclosure in local government ethics (excluding lobbyist and campaign finance reports, which are outside the scope of this book):

- (1) Transactional Disclosure: the disclosure of certain interests and relationships when they relate to a particular matter, such as approval of a contract, the appointment of a board member, or the provision of a permit or grant;
- (2) Annual Disclosure: the annual disclosure of certain financial interests and certain personal and business relationships; and
- (3) Applicant Disclosure: the disclosure of certain interests and relationships by those applying for something from the government (and those representing them), including permits, contracts, jobs, and grants.

Sadly, few jurisdictions require all three kinds of disclosure. Transparency is something good government and other citizens organizations usually have to fight for.

The best approach to getting more conflict-related disclosure is to show officials how much disclosure, like advice, helps and protects them as well as the public. This is not something that appears immediately logical to officials. What they see first is a lot of exposure of their personal affairs and a lot of work.

Disclosure protects the official (1) by regularly reminding him about his possible conflicts, so he is less likely to ignore a conflict situation when it arises, and (2) by allowing the public, his colleagues, and those doing business with government to help officials recognize and deal responsibly with their conflicts, before they get into trouble. It is simply too easy for an official's blind spots (see [the section on them](#)) to prevent him from recognizing his conflict situations on his own. And it is too easy to have the false belief that no one will discover his interests or relationships if they are not made public. It is better to act with the true belief that people know and, therefore, one will not get away with misconduct. This belief prevents a lot of ugly scandals.

In addition, the requirement of annual disclosure makes the ethics process less stressful for the official. At the time a matter comes before a board, there is a lot of pressure to help those who have helped you. At the time of filling out a disclosure form, there usually is no pressure at all. The official discloses her income sources and then, if someone she has done work for comes before her board, the official simply says to that person, "I have already been required to disclose your name. I'm not allowed to participate in any matter that involves someone I have worked for." No choice, no pressure. It's just doing what has to be done. The official can do the responsible thing without going through an agonizing balancing of considerations or explaining it all to family members and business associates. That makes life a lot easier.

Disclosure requirements, like all government ethics requirements, are minimum guidelines. Just because it is not clearly stated that a certain relationship or ownership interest must be disclosed (or that the relationships and interests of a spouse must be disclosed), and even if no disclosure at all is required, this does not mean that disclosing a particular relationship or interest is not the responsible, professional thing to do. It never hurts anyone to disclose more than is required, and to disclose it as soon as possible. If an official has any doubt about whether something must be disclosed, she should disclose it. Disclosure is the default.

And if an official realizes that she overlooked a relationship or interest, she should immediately make a disclosure or amend a disclosure form. This should not be treated as an admission of guilt, but rather as a responsible act. However, if there is a fine for late or incomplete filing, the official should pay it, without requiring an investigation or hearing.

It is important also to recognize that transparency is itself a major component of government ethics. A principal reason for transparency laws is that officials often try to keep information secret for self-serving reasons, including the fact that the less the public knows, the less they can bother officials about what is happening. Managing a community behind closed doors is far easier than doing it in the public eye.

But, on the other hand, anything done behind closed doors looks to the public like officials have something to hide. And what may be bothersome to officials is to citizens considered public participation, an essential element of democracy.

In other words, secrecy is a way to exclude the public from participating (or participating effectively) in what is supposed to be a democratic process. If representation is the heart of democracy, then secrecy is a knife thrust into the lungs of democracy.

A. Transactional Disclosure

The most common, but also the most complex kind of disclosure is transactional disclosure, that is, the disclosure that is made when a conflict situation arises. When the conflict is pre-existing, it is often, but not always, accompanied by withdrawal from participation in a matter or, at least, a discussion about whether withdrawal is warranted under the circumstances. An official who withdraws from a matter makes a transactional disclosure as part of the withdrawal process.

Therefore, transactional disclosure is discussed in [the Withdrawal from Participation section](#) of Chapter 3. But it is worthwhile to look more closely at the ways in which transactional disclosure works, especially when withdrawal is not required (that is, when officials have the discretion whether or not to withdraw), which is the case in many jurisdictions (however, this is not considered a best practice).

One important issue is *whom* to disclose your conflict to and *in what manner*. A council member, whose brother's company has begun to look into bidding on a maintenance contract that will eventually have to be approved by the council, would either, depending on what the relevant ethics code says, tell the chair or president about the conflict situation, tell the secretary so that it can be put in the minutes, and/or announce the possible conflict when the matter is taken up by the council. Even if withdrawal is not

required, one should still choose to withdraw, considering the appearance of impropriety involved. An employee should tell his supervisor. If either an official or an employee is not sure what to do, he should ask the ethics officer or, if there isn't one, the city or county attorney's office.

A second issue is *when* to disclose a conflict, something that ethics codes often omit to tell officials. Disclosure, and withdrawal, should occur as soon as an official has a reason to believe that he has or even might have a conflict. The matter does not have to be on a board's agenda, nor does a procurement employee, for instance, have to wait until bidding begins, because an official or employee can have a great deal of influence on a matter long before either of these events occur. For example, a development can be discussed for a long time, informally or before other boards, prior to when it actually gets on a board's agenda. And before a contract is bid, the specifications have to be written and there is often consultation with possible bidders as well as with various officials and employees. An official with a conflict should not be involved in any of these informal or formal discussions, at any stage in a matter.

It is a serious problem that disclosure-only conflict policies generally require disclosure only at the time a matter comes before a board officially (usually at the moment the matter is first voted on), even though the matter may have been discussed for months before that. A disclosure-only policy sends the message that conflicts do not have to be dealt with responsibly, that it is okay simply to acknowledge the conflict at the end of the process, and then act as if it did not exist.

To responsibly deal with a conflict, disclosure should occur at the first moment an official or employee has reason to believe that his company might be involved in a development or her brother might be interested in bidding on a contract. And withdrawal, if required or if the official believes it is appropriate, should occur at the same time as the disclosure.

There are many occasions, however, when a matter comes to an official's attention only when it appears on the agenda of a meeting. In such a situation, the official can at best disclose her conflict when she first sees the agenda or, if she didn't read it closely, at the start of the meeting or when the agenda item comes up. But what if the official is absent for that meeting, or when the agenda item comes up? Atlanta has a provision that deals with this situation:

Should an official or employee be absent from that meeting or a portion of that meeting, the official or employee is required to verbally disclose the nature of the conflict at the next attended meeting and said disclosure shall be placed on the official records of the agency.

In other words, absence is not an excuse for a failure to disclose or withdraw from a matter.

Transactional disclosure is not necessarily over when a matter is no longer before an official. Although transactional disclosure usually involves pre-existing conflicts, there is also the possibility of the creation of a relationship after a matter has been completed. A transaction after the fact causes an even greater appearance of impropriety as one that already existed. When the relationship involves the offer of a gift, it should not only be disclosed, but also be refused (however, in some jurisdictions, the only requirement is to disclose; see [the section on gift disclosure](#)). When the relationship involves a business transaction — for example, a job offer, a contract, partnership, the offer of professional work, or the sale of an interest in an business — this too should be disclosed and dealt with responsibly. However, the creation of this sort of conflict is too often ignored, except when it applies to an official after leaving service. There is no reason not to treat the offer of a business transaction just like a gift, disclosing the offer and either rejecting it or asking the ethics officer whether it may be accepted. Here is disclosure language derived from the Orange County, Florida ethics code. The language is good, except that it does not go on to require that the conflict be dealt with responsibly.

If an official votes favorably on a matter and, within one year from the date of that vote, that official enters into a Business Relationship with a person who brought the matter, the Business Relationship shall be disclosed orally at the next meeting following the official's knowledge that the Business Relationship exists. A written memorandum disclosing the nature of the Business Relationship shall be filed with the person responsible for recording the minutes of the meeting within fifteen days of the oral disclosure and shall be incorporated into the minutes of the meeting at which the oral disclosure was made.

A third issue is *what* to disclose. It is often not clear from an ethics code's language whether it is sufficient to say that there is a possible conflict or whether it is necessary to actually describe the conflict. Nor is it often clear how detailed the description must be.

For example, if a council member's wife is the owner of a company whose contract is about to come before the council, is it enough for the council member to simply say he has a conflict and withdraw from the matter? Or should he say that his wife owns the company whose contract is about to come before the council for approval? If the wife is one of three owners of the company, should he give her percentage ownership? This might be especially important if he decided he did not need to withdraw because his wife only owned 10% of the company and neither worked for it nor participated in its management. In such a case, it is important to provide all the details so that it is clear to the public, and one's colleagues, that there is only a *de minimis* conflict that does not merit withdrawal.

But no matter what the situation, it is best to give a detailed description of a conflict, because otherwise it looks like the official is hiding something. Disclosure is not the minimal act of someone ashamed of or trying to hide a special relationship. It is the maximal act of someone dealing responsibly with a conflict. In this instance, for example, the wife of a council member would likely know the other council members. If the council member simply withdrew with a limited explanation, the other council members may not realize that, when the wife talked to them about the matter, she was pushing her own cause. The wife might have done business with one of them, putting them in a conflict situation. All relevant information should be disclosed by the official or by the individual or company with whom he has a special relationship, if they have a better command of the facts. It is, however, not necessary to provide details, such as the ownership percentage or the value of ownership in instances where the official is going to withdraw.

The worse thing that could happen, for the image of the council as a whole (and it is important to keep in mind that it is the reputation of the government, not the individual, that matters most) is for the council to vote for the contract while the husband remains silent about the nature of his conflict, and then it comes out that the council was secretly giving their colleague's wife a contract, and that two of them had themselves done business with her in recent years. This makes it look like a conspiracy. No one will believe that the other council members knew nothing about the wife's involvement.

It is valuable for boards, agencies, and departments to facilitate the disclosure process, in order to make it easier for officials and employees, as well as the public, to recognize the existence of possible conflicts and deal with them openly and responsibly. Board members should be told the names of every principal of every business that comes before their board, and be asked to state any relationship they have with any of the people involved, anything from living down the street to being employed by them. This is done with juries across the country. If ordinary citizens can answer these questions, there's no reason why officials can't. Then, if the official chooses not to withdraw from the matter, the board is free to discuss whether it feels withdrawal is appropriate or that the official should seek ethics advice, and the public can request such a discussion.

It is also very helpful to officials and employees for the local government to make a frequently-updated list of contractors and their principals available, and to provide regularly updated lists of those currently seeking contracts, permits, and grants.

Here is the City Ethics Model Code transactional disclosure provision, which provides detailed guidelines on this most complex form of disclosure:

1. Whenever an official or employee has reason to believe that he or she should withdraw from participation under §100.3 of this code, he or she must:
 - a. immediately refrain from participating further in the matter, formally or informally;
 - b. promptly inform the appropriate individual or body, pursuant to subsection 3 below, that he or she has a conflict, and the nature of the conflict; and
 - c. promptly file with the ethics commission [or city clerk, if there is no commission] a signed statement disclosing the reasons for withdrawal or, if a member of a board or commission, state this information on the public record of that board or commission.
2. Whenever someone suggests or requests (privately or publicly) that an official or employee withdraw from participation under §100.3 of this code, and he or she chooses not to do so, he or she must promptly file with the ethics commission [or city clerk, if there is no commission] a signed statement disclosing the reasons for refusing to withdraw or, if a member of a board or commission and if the

suggestion was made publicly at a meeting of that board of commission, state this information upon the public record of that board or commission.

3. An official or employee is required to inform the appropriate individual or body pursuant to subsection 1b, as follows:

- a. If a member of a board, commission, committee, or authority, inform the chair or the entire body at a public or executive session (if at an executive session, the disclosure should also be made after going back into regular session); if the chair, inform the secretary;
- b. If not on such a body and appointed by the city manager/director of administration/mayor, inform the city manager/director of administration/mayor;
- c. If an employee of the Board of Education, inform the Superintendent of Schools;
- d. If the Superintendent of Schools, inform the chair of the Board of Education;
- e. If an elected official, inform the mayor;
- f. If a consultant, inform the chair or head of the board, department, or agency that hired the consultant.

4. An official or employee with an interest in a contract must disclose this interest prior to the first of any of the following event of which the official has knowledge:

- a. The preparation of the contract specifications.
- b. The solicitation of the contract.
- c. The bidding of a contract.
- d. The negotiation of a contract.
- e. The approval of the contract.

5. An official or employee need not make a disclosure pursuant to this section if he or she, with respect to the same matter, has already made such a disclosure.

B. Annual Disclosure

“There's no better training for politics than adultery. Little secrets, little secrets.”
—Carlos Fuentes, *The Eagle's Throne*, translated by Kristina Cordero (2006)

When most people think of ethics disclosure, they think of (and dread) the extensive annual disclosure reports required of U.S. senators. The annual disclosure reports required of local officials are far less extensive. They generally include only the name of employers and other income sources, and the ownership of non-public companies and real estate in the city or county or that are outside but do business with the local government.

It is important that real estate owned by an official's company or partnership, or by a close relative, also be disclosed, or there is an incentive to hide property through indirect ownership. If an official is turning over so many properties in town that reporting the transactions is too great a burden, then it is likely that, if that official's authority has anything to do with property, there are too many conflicts for that person to hold that position. The information disclosed in an annual disclosure form is usually that of both the official and his or her spouse or domestic partner.

Also recommended is disclosure of the following:

Substantial creditors

Any direct or indirect interest in a contract with the local government

Relatives employed by the government, by contractors or as consultants to the government, or by a lobbying firm

Clients that do or seek business with, or are regulated by, the government

Financial transactions or joint enterprises with other local government officials or employees (if these are permitted)

Officer positions in local nonprofits, and

Positions on a party committee, a political committee, or a local board of directors

Arguably, an official should provide the names of anyone who, if they were benefited by an official's actions, would give rise to a conflict, especially if they or an entity they own or work for has sought or obtained a benefit from the local government, or is

regulated by the local government or, if the official is not a high-level official, by the official's agency or department.

Finally, it is important to know not only what firms an official has an interest in, but also the names of the firms' other principals, that is, other owners or partners. Knowing just the name of the firm won't alert the public when a fellow owner or partner comes before the official with a matter.

Although annual disclosure is often referred to as "financial disclosure," what is most important is not the financial aspects, but the relationships and the possibility of benefiting from government action or inaction. Calling it "financial disclosure" makes people think it's mostly about stock holdings and property ownership, resulting in overly limited disclosure requirements.

The Yonkers annual disclosure form also asks officials to say whether they have had a job offer and, if so, by whom. Of course, job offers would require an update.

It is important that officials are clearly told that they have to file updates whenever they have new interests or relationships or when certain sorts of events occur.

Some annual disclosure provisions require officials to certify certain things, some of them outside of the realm of government ethics. Certification can be a back-door way of adding non-ethics requirements, which is inappropriate to a government ethics program. For example, the ethics provisions passed by the District of Columbia at the end of 2011 require officials to certify that they have done or not done the following:

- (A) Filed and paid his or her income and property taxes;
- (B) Filed the required financial and other disclosure statements with the Office of Campaign Finance and the Ethics Board;
- (C) Diligently engaged in safe-guarding the assets of the taxpayers and the District;
- (D) Reported known illegal activity, including attempted bribes, to the appropriate authorities;
- (E) Not been offered or accepted any bribes;
- (F) Not directly or indirectly received government funds through illegal or improper means;
- (G) Not raised or received funds in violation of federal or District law; and

(H) Not received or been given anything of value, including a gift, favor, service, loan gratuity, discount, hospitality, political contribution, or promise of future employment, based on any understanding that such public official's official actions or judgment or vote would be influenced thereby, and no such official shall bias, favor, or benefit through any legislative action or an administrative decision the contributor of the thing of value.

There is a lot of language here, but most of it is symbolic, a way of saying “I haven’t done anything wrong, and I’ve done what I’m supposed to do.” The only added requirement directly relevant to government ethics is to disclose known illegal activity, but the example of illegal activity is a crime, not ethical misconduct. This could better be dealt with in a regular ethics provision. It’s also worth noting that only “known illegal activity,” need be reported, not “suspected activity.” This is an important distinction, because we are often unsure about the facts or whether an act or omission is illegal.

The assumption behind disclosure statements, whether U.S. senator or council member, is that a public official’s basic personal financial interests and relationships are public information, even if the value of the interests is not (this distinction is sometimes ignored). It is important to the public to know which of their officials with the power to affect contracts, developments, licenses, and/or grants owns, works for, or represents a company that seeks special benefits from the government, owns property that might be affected by a development, or has a spouse who runs a nonprofit seeking a grant.

When annual disclosure requirements are limited by a council majority concerned more with their privacy rights than with their obligation to maintain the public’s trust in the government, high-level officials can take a leadership role by going beyond the law to set out all relationships and interests that might give rise to an appearance of impropriety in the coming year. Nothing better sends the message that high-level officials take their fiduciary duties, and transparency, very seriously. This puts the pressure on those who voted against more disclosure requirements to vote for them to be added in.

When there are no annual disclosure requirements at all, one high-level official or candidate can take the initiative of adapting (even improving) a state disclosure form for local use and filing it with the ethics commission, the city or county clerk, and/or online.

This can be used as a challenge to get other officials to make a *de facto* disclosure and, hopefully, formalize the requirements in the ethics code.

In short, there is no excuse for not disclosing one's interests and relationships. Disclosure requirements are only minimum guidelines, just like everything in an ethics code. Not disclosing, whatever the law says, is putting private interests ahead of the public interest.

1. Who Should File

Not every official or employee need file an annual disclosure form. This requirement is made only of high-level officials and others in a position to affect contracts, permits, grants, licenses, property purchases and sales, and other matters that specially benefit individuals and entities. Limiting who discloses not only saves the time of employees who have no need to file, but it also allows an ethics commission to focus its oversight of the disclosure process rather than merely doing lots of paperwork.

In determining who must file annual disclosure forms, Detroit uses the term "exercises significant authority," which it defines as "having the ability to influence the outcome of a decision on behalf of the City of Detroit government in the course of the performance of a public servant's duties and responsibilities." With respect to the highest officials, especially the mayor and council members, this should include their staff members, who do much of these officials' work.

But definitions can never be clear enough for every individual to know whether or not she should file an annual disclosure statement. Of course, officials can ask for advice on this, but no one wants to hear that he has to fill out a disclosure form he would not have to fill out had he not asked.

If it's not clear, however, it is best to act as if one's position was included. It may take time, but it's both the right thing to do and it can save a lot of grief down the road. School superintendents in Nevada failed to file annual disclosure forms for years. The state ethics commission was not permitted to deal with the issue unless it was asked (a damaging limitation which goes against best practices), so it had to wait until a new superintendent asked what to do. The commission asked the legislature to clarify the language so that superintendents were included. But this should not have been necessary. That is, one would think that school superintendents, of all people, would have seen this situation as a teaching

opportunity: that just because you're not required by a poorly written law to file a statement you know you should file, this doesn't absolve you of the ethical obligation to file it. You can always do more than required, and if not in an ethics program, where? Instead, by doing nothing, the superintendents were sending the opposite message: only do what you are absolutely certain you have to do, and don't even ask if you're not sure.

What many local governments do is draft a list of everyone who is required to file. This is a best practice. The lists can be job titles, or they can be descriptions of positions. These descriptions are often based on compensation, since this is more clear than one's ability to influence.

But this approach can miss some important officials, especially staff members. That is why it is important to expressly allow the mayor, council president, and city or county manager to designate additional positions whose holders are required to file an annual disclosure statement, without having to take the matter before the council for a vote.

Here are the lists from a few selected cities, starting with three lists of job titles (although Atlanta's list contains descriptions, too), followed by a list of descriptions of positions (with employees described based on compensation).

Atlanta

Mayor

President of council

Members of council

Municipal and traffic court judges

Chief operating officer and deputy chief operating officers

Chief of staff and deputy chiefs of staff

All employees of the office of the mayor who report directly to the mayor

Commissioners, deputy commissioners, department heads and their equivalents

Bureau directors, assistant bureau directors and managers

Division heads

Executive directors of city boards, commissions, authorities or other similar bodies

Zoning administrator and any assistant zoning administrators

Inspectors of all departments and bureaus

City attorney and deputy, assistant, and associate city attorneys

Director of the office of contract compliance and employees of the office of contract compliance with discretionary or supervisory authority over certification, compliance, monitoring, or auditing
Assistant directors, contracting officers, and buyers in the purchasing bureau
Within the department of finance, assistant directors and all employees who have discretionary or supervisory authority over the investment of city funds or the auditing of city finances or city contracts
City Internal auditor and employees of the office of internal auditor with investigative and supervisory authority over audits, the audit process, and audit reports
City ethics officer
Hearing officers
Members, whether paid or unpaid, of all city boards, committees, councils, commissions, authorities and other similar bodies created by state law, Charter ordinance or resolution
Members appointed by the mayor and/or council or council president to other public boards, committees, councils, commissions and authorities of the city, county, or state
Officers of neighborhood planning units.

Philadelphia

Mayor
City Representative
City Councilmembers
Director of Commerce
Managing Director
Fire Commissioner
Director of Finance
Personnel Director
City Solicitor
Procurement Commissioner
Water Commissioner
City Treasurer
Streets Commissioner
Commissioner of Records
Human Services Commissioner

City Controller
Health Commissioner
Sheriff
Police Commissioner
Clerk of Quarter Sessions
Revenue Commissioner
Register of Wills
Commissioner of Licenses & Inspections
District Attorney
Recreation Commissioner
City Commissioners
Commissioner of Public Property
Board and Commission Members, whether or not compensated.

El Paso County

Candidates for elected office
Elected officials
Appointed officials
Board and committee members,
Department heads and the purchasing agent

Chicago

Every City elected official.
Every appointed official, except a member of an agency that is solely advisory in nature and has not authority to make binding decisions, enter into contracts, or make expenditures.
Each employee compensated for services or occupying a budgeted position at an annual rate that equals or exceeds the rate set by the Board of Ethics each year. The rate is based on the percentage changes in the Consumer Price Index for Urban Wage Earners.
Each employee whose total income per year exceeds the rate set by the Board of Ethics because he or she receives additional City compensation for professional services, or as an independent contractor for the City.
Any person that meets the above salary criteria because he or she is newly hired, receives a pay increase, or a job title change.

Every person who qualifies as a candidate for elected office of City government.

None of these local governments requires consultants to file annual disclosure statements, even ones that may be closely involved with procurement and development matters, where conflicts are most often problematic. Consultants should file disclosure statements when hired, and every year thereafter.

Candidates are also omitted from some of these lists, even though information about their possible conflicts could be very important in their elections, and it may be some time after they are elected that they file their first annual disclosure statement and confront their possible conflicts. Candidates should be required to file annual disclosure statements, and to update them when they take office.

It is also important to require outgoing officials to file a final disclosure update. It is a useful exercise for outgoing officials to consider their possible conflicts and post-employment problems at this important stage in their career. It is also useful for the public to know what new investments and business relationships they have made in anticipation of their leaving public service, in case they show the misuse of public office or come up in future representation or business dealings. Outgoing officials might also be asked to make a list of the matters they have worked on in the past couple of years, so that this information is available to the public and to the official's agency if the official chooses to get involved with any of his agency's matters. High-level officials, such as legislators, CEOs, and their aides may be excepted, to the extent they are deemed to have been involved in all city or county matters.

Officials and employees should be allowed to request exemptions from filing if they believe their position lacks the authority to make the sort of decisions, or to have the sort of influence, contemplated by the filing requirement (or, better, delineated in the ethics code or regulations). In effect, such a request is saying that one's position does not belong on the list. This would apply to positions that have no authority to make decisions, enter in contracts, or make expenditures.

But this does not mean that members of every advisory board, for instance, should be exempted from filing requirements. Some advisory boards are very influential. Although they do not make final decisions, their recommended policies or contractor, grant, or personnel selections are usually accepted. Annual disclosure is not only intended to show

the relationships of those with authority. It is also intended to show the relationships of those with influence. This includes paid and unpaid officials, full-time and part-time employees, as well as consultants and other contractors. In fact, it arguably includes informal officials, such as advisers who have no position at all, but can be highly influential both in determining policy and in making personnel selections. Advisers are too often ignored by government ethics programs, simply because they are not paid and do not have an official position. But people know who they are, and they can be involved in some pretty big scandals.

It is best to cast the net of annual disclosure relatively widely at first and, as with waivers, require those who want an exemption to explain why someone in their position should not let the public know about their family and business relationships and ownership of property in the community.

Partial exemptions should also be allowed. It may, for example, be unnecessary for a member of a contract selection board to list property in town. But transparency should be the default, and local governments need to accept that those who want to keep their outside business and family connections secret may not make the best public servants, no matter what their knowledge and skills.

2. When to File

It is important to create a detailed calendar for the annual disclosure process. Everyone involved in the process should know in advance what is expected of them, and by when. This includes department heads and board chairs and agency ethics officers, anyone who has an obligation to determine who must file, to send around notices and reminders, to provide help with filling out forms, and to follow up with the forgetful and confused. Below is a sample calendar, based on Chicago's.

NO LATER THAN

February 15 - Mayor\Manager sends to the ethics commission, all department and agency heads, and all board and commission chairs a list of all officials and employees who, as of January 1, are required to file the Annual Disclosure Statement ("reporting individuals").

March 1 - Ethics commission sends notice of filing requirement to all reporting individuals.

March 15 - Department and agency heads, and board and commission chairs, ask whether their employees and members who are reporting individuals have received a notice of filing requirement from the ethics commission.

April 1 - Deadline for reporting individuals to file a request for exemption from the filing requirements.

April 1 - Department and agency heads, and board and commission chairs, send to the ethics commission the names of reporting individuals who have not received a notice of filing requirement from the ethics commission. Upon receipt of this list, the ethics commission promptly sends a notice of filing requirement to the persons on the lists.

April 1 - Mayor\Manager sends to the ethics commission, all department and agency heads, and all board and commission chairs, a supplemental list of persons who have become reporting individuals since January 1. Upon receipt of this list, the ethics commission promptly sends a notice of requirement to the persons on the list.

April 15 - Agency ethics officer or chair sends a notice to reporting individuals who have failed to file a Statement that if they do not file one by May 1, they must pay a late filing fee of \$50, and that the final deadline for filing is May 31.

May 1 - Deadline for filing Statement with the ethics commission without payment of a late filing fee.

May 15 - Agency ethics officer or chair sends a second notice to reporting individuals who have failed to file a Statement, that they must file, and pay the late filing fee, by May 31.

May 31 - Final deadline for filing Statement with the ethics commission. The ethics commission will hear and take action against those who did not file by the deadline or request an extension, for cause.

Not all “reporting individuals” follow such a calendar, however. It is important for candidates to file as soon as possible, and for new officials and consultants to file within a month after having taken office or started work. Usually, the rule is that candidates need

file an annual disclosure statement only after they have qualified to be on the ballot, but candidates should be sent disclosure statements as soon after they declare as possible (the ethics officer or an ethics commission member should arrange with elections personnel to send the commission notice that a candidate has created a candidate committee, so that the ethics commission can send a notice of filing requirement to each candidate), and they should be encouraged to file sooner rather than later.

However, the regulations should set a number of days after qualification by which a candidate must file a disclosure statement, with a date by which the ethics commission sends a reminder, a fine for failure to file by a certain date, and a final deadline, as in the above calendar.

For the sake of clarity, the ethics commission should e-mail a receipt of filing to each individual who files a disclosure statement, providing the date of receipt.

3. Updating Disclosure Forms

Annual disclosure forms should be required to be updated within thirty days after a substantial change, such as a purchase or sale of property or a business. It would be helpful to remind officials of this in every newsletter and other communication made by an ethics commission or agency ethics officer. In fact, this is a good excuse to keep in regular touch with high-level officials.

4. Facilitating Filing

Often, one or more aspects of the annual disclosure process are confusing enough to cause decision paralysis in many officials. It also may turn out that the form needs tweaking. Often the problem is the clarity of the language. Sometimes it's the directions. And sometimes it's simply that the sheet gets lost among an official's piles of paper.

Therefore, it is important to get feedback on a disclosure form's language and its directions. The ethics officer should go through the process of filling out a form with a few officials, to see what problems were not anticipated. As for forms getting lost, a good way to prevent this is to make it easy to fill out the form online, via a fillable PDF. If a reminder e-mail contains a link to the form, officials don't have to go searching through the piles on their desk. They can even fill the form out at home, which is where most of the necessary information is, or forward it to their accountant.

Motivation is another consideration that is often ignored. It's valuable for an ethics officer to ask himself, "How does someone who files late feel?" The answer is that officials probably don't feel anything, except, possibly, harassment if they keep getting late filing notices and threats of fines, especially if they are publicized. What needs to be done is to find a way to make officials feel something positive when they file on time, for example, making sure a colleague does not look bad, just as they would want that person to do for them.

To create this positive feeling of obligation to an individual, every department, agency, and board should have one person who is responsible for turning all disclosure statements in on time. Each individual's success and failure should be shown on the ethics commission's website. This way, someone other than each official is directly responsible for their filing, and each official's timely filing makes someone else, and the board or agency, look good. This is a good use of the loyalty that can, in other ways, be ethically problematic.

5. Access to Disclosure Statements

Disclosure statements are public information (1) because they contain information about public servants and (2) because the disclosure of this information is intended to create a check on officials so that they are more likely to deal responsibly with their conflict situations. If this information is not easily available to the public, there is no check.

Until recently, the only access to disclosure statements was a visit to the ethics commission or clerk's office during work hours. With the Web, access to these statements can be had from anywhere at any time. In addition, the ability to create databases or, at least, fillable PDFs makes it much easier for officials to fill in and file their disclosure statements and updates, and also easier for citizens, colleagues, and the ethics officer or commission members to search through the disclosure statements for anyone who has a relationship with, say, a certain contractor or a principal or high-level employee of the contractor (and, for that matter, if applicant disclosure statements are also placed on-line, to search for contractors who have a relationship with a certain official, member of the official's family, or a business associate of the official). In short, making disclosure statements searchable provides a much stronger check, making the disclosure process far more valuable than it used to be.

This is why it is important not to accept officials' argument that their disclosure statements should be kept private. Their family and business relationships are not private, only the details of their business relationships, such as the percentage of their ownership or the value of their properties. It says nothing about a person that he is an individual's partner in a company, or owns property in town. Owning property is public for everyone, and public servants should not be involved in secret enterprises. Even the names of a lawyer's clients are not confidential information. If there is an unusual situation that truly requires confidentiality, an official may seek an exemption from disclosing the facts of the situation. For more on this topic, see [the section below on Disclosure and Confidentiality](#).

6. State Disclosure Requirements

Problems can occur when state laws require certain local officials to file annual disclosure statements. Sometimes it's not clear whether local officials should file two statements, one statement in two places (and which one), or one statement in one place (again, which one). It is often assumed that state law takes precedence over local law, but often the local requirements are more extensive than the state requirements, and the intent of the local ethics code was to make it applicable to more officials than the state requires.

Therefore, when state law requires annual disclosure by certain local officials, it is important that a local code expressly require all filers to file the local disclosure statement with the local ethics commission, whatever their state requirements. If state law says that state law takes precedence, then the state should be asked to accept the local disclosure statement, which can be drafted so as to include all state-required information. If it refuses to accept this, local officials should be required to file the local disclosure statement with the local ethics commission in addition to filing the state disclosure statement with the state ethics commission.

If this is not worked out in advance, there may be a scandal down the road where a major official does not disclose her spouse's business connections because the state doesn't require this (and the official argues that the state laws take precedence) and the public learns about the spouse's connections from an investigative reporter.

This is another case where it is important to recognize that ethics laws contain minimum requirements. A state disclosure requirement is only the minimum required. A local official can offer to file a more extensive disclosure statement than the state requires,

even if the local government does not require it. A local official can also put a searchable form online, even if the state government does not require it. No state law can stop this from happening. It is always the official's choice to act responsibly rather than do only what is required by law.

7. The Controversy Surrounding Annual Disclosure

Annual disclosure can be a very controversial requirement, especially for volunteer board and commission members. Across the nation, there have been occasions when local government officials oppose disclosure requirements, sometimes even the most minimal ones (for example, the name of an elected official's employer). Arguments are sometimes made about privacy, identity theft, and overweening government. But the argument that is always made is that if you require annual disclosure, no one will volunteer for local boards and commissions.

This argument was put to a test in 2008 in eastern Oregon, whose towns had been able to obtain exemptions from state disclosure requirements (in Oregon, local government ethics is handled at the state level). Dozens of officials, including council members, resigned en masse when their towns lost their exemptions. Officials were quoted as saying, "Now they want to know what my dog is worth," "They're calling you basically dishonest to begin with," and "Big Brother is watching."

Of course, the state ethics commission didn't want to know what anyone's dog was worth, no one was accusing anyone of dishonesty, and "Big Brother" is better known as the citizens these officials were supposed to be representing.

Oregon's requirements are so onerous that, the year before the exemptions were ended, it was ranked 21st in the country in annual disclosure.

Were these disclosure requirements disastrous for eastern Oregon governments? Did the governments ground to a halt? No. Before six weeks went by, many of the same officials had been reappointed, and others were appointed to take their places. But the next year, the state ethics code was weakened, including disclosure requirements. The usual "arguments," none of which was supported by any evidence, were accepted.

One requirement that was removed was giving the names of relatives. Why would anyone care about an official's relatives? Because it is a violation for an official to use his position to benefit a relative. If no one knows who an official's relatives are (in Oregon, this

does not include cousins, aunts and uncles, or more distant relations), then how will anyone know there has been a violation?

Here are the words of a local citizen in a letter to the editor:

If I were a public official, I would rather have relevant information disclosed to the public, certified as true by me, rather than have people who think they know me through gossip judge me through gossip with the truth having to wait for the results of a lengthy ethics investigation (not to mention the additional expense to the taxpayers) if it were to be reported by a concerned citizen. ... I believe the gossip mill will be reduced significantly if relevant and true information were disclosed by public officials.

And yet a state legislator said of removing the exemptions and then reforming the ethics code, "Last year's well-intentioned ethics reforms unfairly subjected these local elected and volunteer officials to invasive reporting requirements and unnecessary limitations. This bill sets those wrongs right. This bill continues to protect the tradition of honor and respect that accompanies those who are willing to serve their state and community."

I have gone into detail about this issue because it is raised all over the country, especially when annual disclosure is proposed. There is a lot of loose talk about things that mean a great deal to most Americans, such as privacy, honesty, respect, and freedom from government interference. Too rarely is it mentioned that the people we are talking about are public servants who have *obligations* to the public. The discussion is instead about the *rights* of these public servants. Too rarely is it mentioned that the public has the right to be able to anticipate and protect themselves from the irresponsible handling of conflict situations by the people who spend their tax dollars and decide how their community is to be managed and developed. It's important to ask whether individuals who are not willing to consider balancing their rights against their obligations are the kind of people who should be public officials.

The bottom line here, however, is that reasonable annual disclosure requirements for local officials do not destroy local government by causing people not to seek public office. This "fact" is not a fact at all, nor is it an argument. It is a smokescreen for those who want to hide their possible conflicts or who are simply hostile to government.

What actually causes problems getting people to serve on government boards and commissions is an unhealthy ethics environment. Washington, D.C. is a good example of this. In March 2012, more than 700 board seats were vacant. In fact, 27 city boards had no members at all or were made up of people whose terms had expired.

8. Disclosure Extensions

There are times when it is reasonable to give an official an extension on the filing of an annual disclosure statement. If a request for an extension is made before the filing date, it is very similar to a waiver, and the same rules should apply. But sometimes the request will be made after the fact, but not with respect to a complaint. The reason for the official's failure to file may be the same reason for the official's failure to seek an extension before the filing date. Therefore, a request for extension, even after the filing date, should be considered.

The criteria for an extension may be open-ended, as in Milwaukee: "if the board determines that the literal application of the filing requirements would work an unreasonable hardship on that individual or that the extension of the time for filing is in the public interest." Or the criteria might be stated more concretely, for example, due to extended illness.

Too open-ended criteria can be abused to allow extensions in most instances. However, even a choice to provide concrete criteria should also include an open-ended phrase (I prefer "unreasonable hardship" to "public interest," because it requires a showing of personal need, not a clumsy argument that an individual's personal problem is somehow in the public interest). After all, it is impossible to anticipate every possible good reason, for example, an official might have been newly elected or appointed and not received information or training on disclosure requirements.

Some excuses should not be allowed. Forgetting is not a sufficient excuse, nor is the fact that an aide dropped the ball. If the aide is fully responsible, then the aide should pay the fine. That, however, is a problem between official and aide, not one that should be considered by an ethics commission.

9. Avoidance of Disclosure

The 2011 District of Columbia ethics bill has a clever provision that requires those filing an annual disclosure statement to file an affidavit stating that he or she “has not caused title to property to be placed in another person or entity for purposes of avoiding the disclosure requirements of this subsection.” This language is too intention-based, but it’s a good idea to at least remind officials that they could get into trouble by trying to hide property by putting it in the name of someone other than their spouse (whose property should be included in the disclosure in the first place). Better language might require an affidavit stating that the filer “has not caused title to property to be placed in another person or entity in such a way that the disclosure requirements of this subsection would be avoided.”

C. Applicant Disclosure

The third kind of disclosure, applicant disclosure, involves the disclosure of possible conflicts, that is, of relationships with and possible benefits to an official, employee, their families or their businesses, by those who apply for something significant from the local government, such as a contract, a land use permit, a license, a job, or a grant.

Just as annual disclosure provides a check on transactional disclosure, alerting the public to possible conflicts before they become a problem, applicant disclosure provides a check on both annual and transactional disclosure. It does this by requiring the individual or entity that has a special relationship with an official to disclose this relationship, or to disclose the name of any official or employee (or their immediate family members or business associates) they know may benefit directly or indirectly from the transaction. Applicant disclosure informs or reminds officials that they may have a conflict and, because others can check applicant disclosure statements (it is a best practice to ask that they be presented whenever a matter comes before a board or agency), applicant disclosure prevents officials from saying they didn’t realize they had a conflict without inquiring more about who is involved in a matter.

Disclosure also makes applicants think twice about becoming involved with officials. If they are required to publicly disclose their relationships with officials, including any gifts they have made, and to risk losing their contract, grant, job, license, or zoning permit if

they do not, they will be more likely not to tempt officials, but instead deal with them on an arm's-length basis.

Since the individual or entity is seeking a special benefit from the local government, it is reasonable to request such disclosure. And yet, applicant disclosure is not usually required. As with so much in government ethics, the obligations and responsible conduct of officials are the only ones usually considered. It is best when both sides of a relationship or transaction are equally required to disclose possible conflicts and deal with them responsibly.

Applicant disclosure does not normally require that the applicant research which officials, if any, have an interest in or may benefit from the matter. It only requires that the applicant disclose the names of interested or related officials to the extent the applicant knows of the interest, relationship, or possible benefit. If there is a special family, business, or friendship relationship with an official in a position to affect the application, the applicant should have this knowledge. If the applicant is an entity, it has an obligation to ask its major owners and officers, or employees involved in the matter, if they know of any possible interests or relationships.

In addition, no burden is normally placed on the applicant to update a disclosure statement if the applicant later learns that an official has an interest in the application, although such an update would be welcome and should be required. Even if failures to update are not enforced, updates should at least be recommended, and forms for updating should be accessible from the ethics website and websites in the procurement, land use, personnel, and grant-related areas of a city or county's website, as well.

In 2013, the mayor of San Antonio recommended a broadening of applicant disclosure to include the identity of executive committee members, officers, and directors of entities seeking to contract with the city, including not only contractors, but also subcontractors, parent entities, and subsidiary entities. This valuable expansion of disclosure would make it much easier for officials to identify and deal responsibly with indirect conflicts. There is no reason not to include subcontractors and related companies. Government ethics needs to deal with indirect relationships and to see through corporate fictions.

Applicant disclosure can be very beneficial to both officials and the government, because it prevents ugly situations where an official insists he has no relationship with a

company or did not know his brother did. Since the public cannot know what an official actually knows, it is best that the official know as much as possible, in order to deal responsibly with a situation before it becomes a scandal. Applicant disclosure does this.

Here, for example, is a situation that arose in Atlanta in 2012. Allegations were made that a council member had sponsored and voted on a no-bid contract despite having some sort of employment relationship with the contractor. The allegations were based on an internal e-mail by one of the contractor's executives, sent the day after he had met with the council member. The council member said that he had no relationship with the contractor, and that he had never seen the e-mail. One could not prove that there was such a relationship (the contractor had not paid the council member) or that the council member had seen the e-mail. However, there was evidence that the contractor at least believed such a relationship had been created, and it certainly knew about the e-mail. Had it been required to disclose such a relationship, the council member would have had to withdraw from the contract matter, and there would have been no allegations and no scandal. In fact, had the contractor been required to disclose its relationship with the council member, it is likely that the executive would never have met with the council member in the first place, and there would have been no question of a special relationship.

Another case of how applicant disclosure could help an official arose in 2013 in Mississauga, Ontario. The city's mayor said that she did not know her son had invested in a huge hotel and convention center deal. She had to plead ignorance in order to keep her position as mayor. Had the hotel and convention center contractor been required to disclose that it was working with the mayor's son, she would have been alerted and she could have withdrawn from the matter and not had to tell the public something it was unlikely to believe, even if it was true.

Sometimes, applicants are required to disclose any campaign contributions they, their owners, or their officers have made to officials during the past one to three years. Disclosing such contributions can be helpful to officials, who may not otherwise realize the contribution came from an applicant before their board. For example, an elected board member of the Los Angeles City Employees' Retirement System was asked by the mayor to resign after it came out that he had accepted, he said unknowingly, a campaign contribution from someone who pitches investments to pension boards on behalf of investment companies. Had the investment company been required to disclose the contributions of its

owners, officers, and agents, it is unlikely that the contribution would have been made or, if made, that it would have been accepted.

Requiring applicants to disclose in general, and to disclose contributions and gifts especially, also helps prevent pay to play, where applicants feel they are required to give officials something in order to get business with the local government. When applicants are required to disclose their relationship with officials and what they give them, it's harder for officials to ask for, or expect, anything. It also means that an applicant who gives a large contribution (or a bundle of contributions) to an official seeking to influence him will know that, when its application comes before a body or agency, there might be pressure on the official to withdraw from the matter, thereby undermining the contribution's goal.

With respect to developers especially, but also other applicants, it should be recognized that they often hide behind opaque or shell corporations, preventing local governments from identifying conflicts. Developers and contractors also sometimes hide individuals with criminal backgrounds, whom the government might choose not to work with. Disclosure of all principal investors and personnel is important to provide full transparency and to protect the government from scandals officials might truly not have the information to prevent.

Company ownership disclosure rules may be placed in zoning laws or regulations, grant-related laws or regulations, and procurement laws or regulations. But this would mean numerous reforms, which might easily be stopped or watered down along the way. Therefore, the best way to require such disclosure is to place it in an ethics code, and have the rule require action by each of these areas to make disclosure requirements clear to companies seeking benefits, for example, by including the disclosure requirement in every RFP and other procurement document, in every grant request, and in every permit request. The disclosure requirement should include a requirement to disclose the names of immediate family members and business associates of both individuals and company owners (say, where there is at least 10% ownership by an individual or immediate family). And there should be a requirement to update such information quarterly, even after the contract, grant, or permit has been obtained, for at least the contract, grant, or permit period.

What are the arguments against applicant disclosure? Some officials argue that it will have a negative impact on local businesses. But disclosure doesn't prevent anyone from

doing business with the local government. It has absolutely no effect on conflict situations other than to bring them out in the open so that they can be dealt with responsibly. In fact, applicant disclosure is likely to prevent misconduct that leads to the voiding of contracts and permits, and the return or ending of grants.

Some officials argue that companies would rather not bid for government business than fill out a disclosure form. The same thing is said about people sitting on boards and commissions. But they're wrong. Only people with something to hide refuse to fill out disclosure forms, such as big landowners and business owners who want to keep their land and business ownership secret, and businesses that get benefits from the local government due to family and business relationships.

Some officials argue that big companies won't file disclosure statements because it's too hard to keep track of all their employees. But applicant disclosure should not apply to regular employees, only to owners, officers, and those directly involved in doing business with a particular government. And it should not apply to all information, only information relevant to the particular city or county. If the company is so huge that it cannot honestly disclose relationships of these people with high-level officials and, say, procurement officials, then the company could ask for a partial waiver on this basis.

Some officials say that applicant disclosure is unfair to small local companies because they don't have legal departments. But there is no need for a lawyer to fill out a disclosure form. Disclosure forms ask only for facts about ownership and relationships.

Applicant disclosure provisions are sometimes accompanied by two other provisions that affect local government contractors: one that makes contracts void if there is an ethics violation and another that bars ethics violators from entering into a contract for three years or so ("debarment"). Other contractor-related provisions sometimes appear in an ethics code, but more often in procurement rules, provisions, and contracts. In fact, it is good practice to include all rules and laws that affect applicants in all forms and documents that are used with respect to contracts, grants, and job and land use applications. Procurement misconduct can be best prevented when contractors have an interest in preventing it. (For more, see [the Procurement chapter](#).)

Here is the City Ethics Model Code applicant disclosure provision, which is the minimum that should be required of applicants:

1. When a person requests that the city, or a city official or employee, take or refrain from taking any action (other than a ministerial act) that may result in a financial benefit to either any official or employee or to one of the other persons listed in §100.1 of this code, the person requesting must disclose the name of any such person or persons, to the extent of his or her knowledge at the time of the request.
2. If the request is made in writing, the disclosure must accompany the request. If the request is oral and made at the meeting of a public body, the disclosure must be set forth in the public record of the body. If the request is oral and not made at the meeting of a public body, the disclosure must be set forth in writing and filed with the city clerk, who will send a copy to the Ethics Commission.

Such “requests” should be facilitated by the drafting of forms that apply to the different kinds of request. They should either be drafted with the ethics commission’s involvement or approved by the ethics commission, so that there is consistency of both language and coverage.

Here is alternate language from San Antonio (a “discretionary contract” is one that is not competitively bid). I don’t like the “reasonably understood to raise a question” language (although at least the code tries to define it), but this is another good way to make sure that applicants of all sorts participate responsibly in the ethics program.

Section 2-60 Disclosure of Association with City Official or Employee

- (a) Disclosures During Appearances. A person appearing before a city board or other city body shall disclose to it any known facts which, reasonably understood, raise a question as to whether any member of the board or body would violate Section 2-43 of Division 2 (Conflicts of Interest) by participating in official action relating to a matter pending before the board or body.
- (b) Disclosures in Proposals. Any individual or business entity seeking a discretionary contract with the city shall disclose, on a form provided by the city, any known facts which, reasonably understood, raise a question as to whether any city official would violate 2-43 of Division 2 (Conflicts of Interest) by participating in official action relating to the discretionary contract.

(c) Disclosure of Benefit. If a person who requests official action on a matter knows that the requested action will confer an economic benefit on any city official or employee that is distinguishable from the effect that the action will have on members of the public in general or a substantial segment thereof, he or she shall disclose that fact in a signed writing to the city official, employee, or body that has been requested to act in the matter, unless the interest of the city official or employee in the matter is apparent. The disclosure shall also be made in a signed writing filed with the City Clerk.

(d) Definition. For purposes of this rule, facts are “reasonably understood” to “raise a question” about the appropriateness of official action if a disinterested person would conclude that the facts, if true, require recusal or require careful consideration of whether or not recusal is required.

Disclosure and Confidentiality

There are instances where an official may have a confidential or secret (e.g., illicit) relationship with the individual or entity that gave rise to the conflict. There are ways of providing basic information about a conflict without revealing a confidence, for example, by saying that a special relationship exists, without identifying the relationship, or saying that a party to the matter is a client, without identifying which party. But such ways should be employed only when it is absolutely necessary.

An official who is seeking to deal responsibly with a conflict situation may ask the person or entity with whom he has a relationship to waive confidentiality, at the very least with respect to identification of the relationship. This is a more difficult problem if the official is a psychotherapist, for example, than if the official is an accountant or attorney. With psychotherapy, there is confidentiality of person, due to the social onus that is still tied to having mental health issues. But this is not true of accounting or law.

It is important to remember that professional confidentiality is intended to protect the client or patient, not the lawyer or doctor. In other words, an official should not use confidentiality to protect himself at the expense of transparency, because being transparent lets people know that officials are not hiding things from the public.

Many states, however, except lawyers from annual disclosure requirements that would apply to their clients. California is one exception. Not only are lawyers not excepted, but the state has a process, which applies to local officials, where a lawyer-official

is required to provide the executive director of the California Fair Political Practices Commission with an explanation for his nondisclosure of a client. If the executive director agrees that nondisclosure is justified, the matter goes before the commission.

Disclosure should only be required if a client stands to benefit from government action. There is no need to know the names of the many clients whose relationship will not lead to a conflict. In fact, having too many names can place a serious burden on regulators, citizen groups, and the news media.

In other words, there should be a presumption of disclosure and an exemption procedure before an independent ethics commission when this presumption arguably does not apply, that is, where there is a compelling reason why information must be kept secret. In 2010, the New York City Bar Association recommended the same procedure for New York State.

Why would a major bar association recommend something that goes against a lawyer's instincts? Because, as it says in its report, "Courts have routinely held that the identity of a client does not come within the purview of the attorney-client privilege, because the disclosure of representation does not reveal the substance of any such communications between the attorney and client." It is very important to recognize, as difficult as it may be for lawyers to do.

If a local government does accept that an official cannot disclose her clients, and the clients refuse to allow the disclosure, this puts a great burden on the official. That is, since the relationships cannot be known to the public, there can be no public check on the official with respect to potential conflicts. If a matter involving a confidential or secret relationship arises, the official should withdraw whenever there would be any appearance of impropriety if the relationship were to come out. And if the client chooses to seek benefits from the local government and the official fails to withdraw or drop the client, it would be incumbent on the official to resign.

This sort of secrecy is not limited to attorneys. Many consultants and employees sign a non-disclosure clause when they take on work. For example, in High Point, North Carolina, a council member contracted with Ralph Lauren to do a market survey relating to expansion in the area, and the town gave Ralph Lauren incentives to do this. The council member said he could say nothing about his relationship with Ralph Lauren or what he did, not even who was his contact at the company. Government officials should not sign non-

disclosure clauses relating to work that may come before their body or agency. It makes it appear to the public that they are secretly participating in work that affects their community, and that they and their client have something to hide.

An official who has multiple clients who refuse to have their relationship with the official disclosed, and yet do or seek business with or other benefits from the government, should not run for office or take a government position in the first place. Thus, a professional who is considering running for office should ask her clients who do business with or are regulated by the government whether they would allow them to disclose their professional relationship. If clients are unwilling to allow this for anything short of a very compelling reason, the professional needs to choose between running for office or dropping those clients.

It is important not only for a lawyer-official to disclose her clients, but also relationships with other law firms and lawyers. For example, in Pennsylvania officials do not have to reveal retainer relationships with other law firms. It turned out, in 2010, that a senator's firm received \$192,000 in retainer fees from a law firm that, according to a federal indictment, was effectively laundering money from its clients in return for the senator's support of certain development projects. Officials should be required to disclose such relationships with law firms.

There are instances in which, when a conflict arises, an official chooses to resign rather than withdraw from a matter in order to keep the underlying relationship secret. However, such relationships are public information, whether they are part of annual disclosure or whether they are required to be disclosed as part of transactional or applicant disclosure. The goal of annual disclosure is to let the public know about an official's basic interests, so that if the official does participate in a matter where he has an interest, the public can stop him from doing so. Annual disclosure also allows the public to know whether an official may have too many possible conflicts to responsibly fill his position. Resignation should not make a difference to an official's obligations. What should have been public should still be public, and even after resignation there may still be a question whether the official participated in the matter before resigning. It will appear to the public that the official is keeping the relationship secret to protect himself from ethics enforcement. An official needs to deal with the relationship before taking office, not when it becomes an issue and threatens to undermine the public trust.

D. Other Kinds of Disclosure

1. Gift Disclosure

A fourth common kind of disclosure is gift disclosure. This topic is discussed in [the section on gift provisions](#), and a bit in [the section above on applicant disclosure](#). Gift disclosure is a transactional disclosure when a gift has been offered. Where the gift giver is required to disclose gifts, it is a form of applicant disclosure.

The problem is that, when gift disclosure is required, this usually means that the gift may be accepted, as long as it is disclosed. This is not a good way to maintain the public's trust that officials are acting in the public interest rather than in their personal interest and in the interest of those with whom they have special relationships, such as companies that give them gifts.

The one thing I want to emphasize here is that requiring *only* disclosure of gifts from restricted sources is tantamount to saying that such gifts are both legal and ethical. Although disclosure sounds at first blush like a good compromise between no gift provision and the prohibition of gifts, it does not provide guidance to officials and employees about accepting gifts from restricted sources, nor does it provide protection to restricted sources from officials and employees who want to make them pay in order to play.

2. Charitable Contribution Disclosure

As discussed in [the section on gifts to officials' pet charities](#), many problems arise from high-level officials selecting pet charities and soliciting contributions to them, including holding events such as a mayoral golf tournament. This is a favored way for officials to require those doing and seeking business with the local government to give something legally that will benefit an official's reputation and favored cause. That is, it is a popular form of pay to play. It is also not appropriate for an official to favor any charity over others in this way.

Considering how hard it is for an ethics program to prohibit this sort of conduct, some local governments choose instead to require officials to disclose any charitable contributions that they solicit, including at what event the contributions were solicited.

The most serious problem with this approach is that officials don't actually have to solicit the contributions. They can associate themselves with a charity or charitable event, and let others solicit the contributions.

Here is the Broward County, Florida provision:

To promote the full and complete transparency of any such solicitation, a County Commissioner shall disclose, on a form provided by the County Attorney's Office, the name of the charitable organization, the event for which the funds were solicited, and the name of any individual or entity that may have promoted the solicitation. The form shall be completed legibly and shall be filed for public inspection in a database designated by the County Administrator, which database shall be searchable both in hard copy and by internet.

The requirements and prohibitions of this subpart shall not apply to Broward County sponsored charities or fundraising events.

Besides being limited only to county commissioners, the biggest problem with this particular provision is that it excepts charities and events that are sponsored by the county. Since it is the commissioners who decide what charities and events are sponsored by the county, this allows a powerful official to make his pet charity and event officially sponsored. This effectively makes pay to play an official policy of the county. This is not a good thing.

Better that the exception go only to one or more organizations that fund a wide variety of local charities, such as United Way. This is the closest thing to being inclusive rather than favoring particular charitable organizations.

3. Prospective Employment Disclosure

San Jose requires the disclosure of prospective employment when an official is "entertaining offers, discussion or negotiations, or who has an agreement" and where the employer thereby might have influence on a decision made by the official (§12.15.040-050). Clearly, such a discussion would give rise to a serious conflict, but there is no way of knowing about it unless disclosure is required. Disclosure is not sufficient (in fact, San Jose's code also requires withdrawal from matters involving a prospective employer), but requiring it

certainly makes it clear to officials and the public that a serious conflict exists and that it must be handled responsibly.

4. Gifts to a Local Government

Most local governments allow restricted sources to give them gifts, even if they are clearly intended to influence the actions of their officials (see [the section on gifts to local governments](#)). However, there are some jurisdictions, such as Arkansas, that require local governments to make disclosure of such gifts. Arkansas requires quarterly disclosure to the state ethics commission.

This is a best practice that should be done by local governments themselves, where local officials are not under the jurisdiction of the state ethics commission, or where the state does not require such disclosure. If local governments are going to accept gifts from restricted sources, they should be as transparent as possible about the restricted sources' relationship with the government. Otherwise, people will think the worst.

In addition to the amount and nature of the gift and the name of the restricted source, a local government also disclose all the contracts, permits, licenses, and grants it has given the restricted source, as well as its principals (even via other companies), in the past three years, and any pending bids or requests.

5. Earmarks

Some cities have had serious problems involving the use of council discretionary funds (often called "slush funds") and other forms of earmark. Often these funds are given to organizations run or controlled by individuals who have special relationships with council members (often family members). When this comes out, it creates a big scandal.

Public disclosure of information about the grant applicants and their officers make it far less likely that such misconduct will occur. If the council is not willing to require full disclosure, an ethics commission or other office can at least formally ask for disclosure, thereby putting pressure on council members to either formally require it or make sure it is provided. This is what New York City's Public Advocate did in 2010, creating a database on his website. He said that "the momentum this will create will be irresistible. We're going to try to get public officials to cooperate. But if they don't, I won't hesitate to point

that out.” This is the power an ethics officer or body has, even when there is no formal law or jurisdiction.

If no one asks you to disclose, then not disclosing is okay. If an ethics commission asks you to disclose, then not disclosing is admitting that you have something to hide. This does, after all, relate to public funds. Each council member is put in the position of having to weigh the value of hiding information about organizations that apply for earmarks against the value of showing constituents that you have nothing to hide. The trick is to monitor the information carefully enough to know which council members are hiding information, and this can be mean a lot of work.

The best thing is to get rid of slush funds altogether. This is what the South Carolina ethics commission recommended after investigating Greenwood County’s discretionary funds:

A simple remedy to this dilemma would be to make the funds available to council as a whole, allow interested groups to apply for funds and make presentations to council to justify their request in a public forum, and then council as a whole could vote on which groups qualify and how much they should receive. This would remove any speculation of conflict or special interest on the part of any individual council member.

But since this is politically difficult, disclosure and oversight are the next best thing. It is best to formalize this oversight in an independent body.

Another approach is to limit the use of discretionary funds, so that none of the money goes to anyone with whom the council member has a special relationship, directly or indirectly, including family members, business associates, and companies or nonprofits they work for or lead. In 2012, impetus for a decision by the Prince William County, Virginia Board of Supervisors to eliminate their discretionary spending on nonprofits came from a supervisor who wanted to spend \$100,000 of his discretionary funds on his wife’s nonprofit. After coming to the conclusion that this was wrong to do, he proposed that no supervisor be allowed to do this.

E. Enforcement

There are three aspects of disclosure that are enforced: late filing, insufficient filing, and false information. The first two aspects are usually enforced by an ethics commission imposing a civil fine on violators. The third aspect can be enforced civilly by an ethics commission, or criminally by a district attorney charging the violator with perjury.

Perjury is not something that is normally dealt with in an ethics code, but it is a process that is available, as long as the disclosure statement requires a signature and contains a statement that it is made under penalty of perjury. But it can be harmful to an ethics program to have a district attorney criminally enforce ethics requirements. It is better for the ethics commission to enforce the ethics code's requirements through finding late filing and insufficient filing violations.

See the Enforcement chapter for more on [enforcement of disclosure violations](#), including a discussion about [the place of criminal enforcement in local government ethics](#).

VI. Procurement

Procurement is an area rife with conflict and preferential treatment issues, some of which need to be handled, at least in part, outside of an ethics program. The laws and rules most relevant to procurement situations include some government ethics provisions (applicant disclosure, withdrawal, gifts, revolving door, ex parte communication, avoidance and debarment sanctions), as well as campaign finance and lobbying laws (limiting or prohibiting contributions from, and bundling by, contractors and their lobbyists, and rules requiring withdrawal by those who receive large contributions from or bundled by contractors and their lobbyists), procurement rules (related to the bidding process, specifications, oversight, and no-bid exceptions), auditor and inspector general investigatory rules (related to fraud and waste), and criminal provisions (related to kickbacks, pay to play, and bribery).

Procurement is the area where the greatest temptations exist and where there can be the greatest savings for residents by ensuring a lack of preferential treatment. An ethics commission should be aware of all procurement-related issues, even those areas where it lacks jurisdiction. When there is inaction outside the ethics program, it is appropriate for an ethics commission to try to work with other officials responsible for procurement decisions and oversight and, if there is resistance or no response, speak out. After all, there is no other part of a local government that is focused on conflicts and preferential treatment. Any aspect of local government that undermines, or can further, the public trust is a concern of the ethics commission and its staff.

Here's an example from Jacksonville, where City Ethics president Carla Miller was the ethics officer. Although the ethics commission had no authority over the bidding of contracts, others were not objecting to the way the city's largest contract ever, a \$750 million contract to manage the city's landfill, was being handled: the mayor wanted to waive the purchasing code and extend the contract for thirty-five years without competitive bidding. Miller expressed her view that the bill to provide this waiver was purposely vague and lacked clear cost information. And she wisely argued that whenever the formal bidding process is set aside, the reason for doing this must be made completely clear to the public.

Miller encountered resistance, especially when she requested information about how often waivers had been obtained, and for what reasons. She was told to stick to the ethics code, that she was overstepping her duties. She continued asking questions, and the waiver request ended up being opposed by the council. The ethics commission formed a procurement subcommittee to provide ongoing oversight.

One of the most important issues in procurement is one [discussed in the preferential treatment section](#) of the chapter on conflicts, even though it is not usually part of an ethics code: the failure to follow formal processes (also see [the section on this](#) in the Administration chapter). An important sign of preferential treatment is not going through the required formal process, whether it involves a contract, an approval, or hiring personnel. If there is not a formal process at all, especially where no-bid contracts are allowed for anything more than very small contracts (and even here, very small contracts should not be given to one contractor, or contracts will be broken down into small ones), this is a sign that officials want to be able to do as they please, that is, help those they please, often including themselves. Loopholes in processes, especially those that remain even after they have been pointed out, are another way officials leave open the possibility of helping others without doing anything illegal or threatening anyone.

Procurement laws should prohibit no-bid contracts and require officials to seek waivers by going to the ethics commission or another independent body, before which, in a public hearing, they must provide a detailed explanation of the extraordinary circumstances that require a no-bid contract, fully answering all questions directed to them by the ethics commission and by citizens. All alternatives to a no-bid contract should be considered. The body may deny the waiver, allow the waiver, or allow the waiver with requirements such as regular reports and annual requests to renew the contract.

A lack of transparency with respect to formal processes is an indication that there is something about the bidding process that officials do not want the public to know. It also shows that officials do not feel required to provide reasons when they depart from the formal process. Providing reasons in public and responding to questions and criticisms are essential to prevent officials from dispensing with formal processes in order to provide preferential treatment to their large campaign supporters and to others with whom they have special relationships.

Ethics commissions should also give special attention to land use and grant-making, where the same temptations exist, similar formal processes are often ignored, ex parte communications should be prohibited, and misconduct is frequent in unhealthy ethics environments.

Just because procurement rules and practices do not generally appear in an ethics code, this does not mean that the ethics commission cannot make recommendations to the local government's governing body, or a charter review commission, to institute procurement rules and practices that will create serious obstacles to favoritism that costs the public not only its trust, but also millions of dollars a year.

One recommendation worth making is to bring the procurement rules into the ethics code as, for example, Stamford, Connecticut does by simply saying that it is an ethics violation to violate certain procurement rules (§19-10(A)).

There is an ABA Model Procurement Code for State and Local Governments, which has been adapted by about sixteen states and numerous local governments and agencies. The code itself is not available online (it costs \$40), but you can view [an adaptation of it in Kentucky](#). The ethics provisions (sections 450-460) are focused on gratuities and kickbacks.

When there appears to be abuse of the procurement system, or the rules do not seem to be sufficient to prevent it, it can be valuable to seek outside advice. For example, the [National Institute of Governmental Purchasing](#) will perform a procurement management review, examining and reporting on (1) procurement policies and procedures, (2) business processes, (3) operations improvement and efficiency, (4) external customer service, (5) staff assessment, (6) information technology, and (7) ethics policies. The institute interviews government officials and employees as well as contractors, and it also does a survey of contractors. Click [here](#) to see the one done for Sarasota County, Florida in 2011.

An alternative is to wait until something serious has happened and then bring someone in to do a forensic audit, which often includes recommendations for changes to prevent whatever happened from occurring again.

An ethics commission can itself call for an audit, even when it is not responsible for procurement matters. The reason this is appropriate is that an ethics commission is charged with limiting preferential treatment and providing advice on improvements to laws and procedures which will help prevent ethical misconduct.

A. Procurement and Government Ethics

Procurement can be dealt with by an ethics code in several ways. The archetypal conflict situation involves a council member whose sibling owns or works for a company whose no-bid contract must be approved by the council. Such contract-related conflict situations may involve not only an official's family members, but also the official himself, a business associate, or a client or customer. It can also become an issue when, for example, the contractor is a competitor of an official's company, or the official's landlord or tenant, friend, campaign contractor (who provided the campaign a discount), or large contributor.

What is important is that every contract with a local government appears to be a contract entered into after following all the rules of the competitive bidding process and without the participation in any way, directly or indirectly, of any official and employee who might benefit, or be harmed, directly or indirectly. That is, without the participation of anyone who might have a reason to help someone get, or block him from getting, the contract.

Full withdrawal from participation is especially important with respect to procurement matters, because preferential treatment can be provided at any stage in the process, from the decision to contract out (rather than do the job in-house or renew the current contract), to determining the extent of the work and specifications of the contract, to setting up the bidding process, to deciding whether any part of the bidding process should be waived or changed, to comparing and deciding on bids, to approving the final bidder, to considering later amendments to the contract, including common requests for price increases, to oversight of the job, which might go on for years, and to requests for extensions and renewals. The final vote to approve a contract is usually the least important step, unless there is already a controversy about actions taken in one or more of the earlier steps. And yet, too often it is only at the final approval that the issue of withdrawal is publicly, or even privately, discussed.

Here is how the [Atlanta ethics code](#) describes participation in a procurement context (it is all this participation from which an official with a conflict must withdraw):

§2-812. ... participate directly or indirectly through decision making, approval, disapproval, recommendation, the preparation of any part of specifications or requests for proposal, influencing the content of any specification or contract standard, rendering advice, investigating, auditing or reviewing of any proceeding or application, request for ruling or other determination, claim or other matter pertaining to any contract or subcontract and any solicitation or proposal therefore or seek to influence the votes or decisions of others with respect thereto

Not even the full withdrawal of conflicted officials and employees is sufficient to protect the public. All prospective contractors must also be excluded from the procurement process, except to the extent that a procurement employee has questions that require bidding contractors' input, when a prospective contractor has a question about the process, or when parts of the process are dealt with or debated at public meetings. When prospective contractors are allowed, for example, to be involved in the writing of specifications, they can give themselves preferential treatment. Since procurement employees know this, the involvement of prospective contractors indicates either incompetence or an undisclosed relationship between a procurement employee or an official with one or more prospective contractors.

Prospective contractors — a term that includes not only those bidding to get a contract, but also current contractors seeking an extension, renewal, or a contract with different terms — often have no prior relationship with an official, but act in order to create the sort of obligation that accompanies special relationships. The gift provision of an ethics code prohibits the creation of such an obligation through the giving of a gift. A contractor is one of the principal “restricted sources” from whom officials and employees cannot accept gifts.

A prospective contractor cannot, for example, invite a council member to play golf with him at her country club, give business to the law firm of a procurement officer's spouse, or hire the mayor's nephew (both an indirect gift and an indirect form of nepotism). In many jurisdictions, a prospective contractor cannot even give a sizeable campaign contribution to an official within a certain period before or after the bidding process, to ensure that it does not appear that the contribution is effectively an attempt to bribe the official to help the company get the contract. Since the entire procurement process relating to any contract can extend for years, or even indefinitely when extensions

and renewal are permitted, it is better not to limit contributions or have other rules only apply to the bidding period.

A post-employment provision prevents a council aide or procurement officer from leaving government employment and going to work for a local government contractor whose contract the aide or officer worked on. And a mayor or council member should not be permitted to work for any local government contractor, at least for the first year or two after leaving office.

It's important to recognize that the owners of large contractors are likely to own or have close relationships with other companies. It's just as damaging for an official to get a job (or professional work) with an owner's other company as with the contractor itself.

It's also important to recognize that the revolving door goes both ways. People who work for or own government contractors sometimes become public servants, and will be seen as favoring their company or former employer. They should not be involved in any way with matters pertaining to that contractor or to contracts in the area in which his employer specialized. This can be seen as a basic conflict or, to make sure, special language can be added to the conflict provision, such as:

It is a violation of this code for an official or employee to, within one year of entering local government employment or service, participate in the awarding of a contract or any other matter that directly or indirectly benefits a person or entity that, within the two years prior to being hired or elected, employed him or her, full-time or as a contractor.

It is most important to bring contractors into a government ethics program in every way possible, not just due to certain conflict provisions. Contractors should receive ethics training, be encouraged to request advice, be required to disclose interests and relationships, business and familial, when they bid or request a change or extension of a contract, and be required to report possible ethical misconduct that they know about. All ethics provisions that relate to contractors, including the aiding or inducing provision, should be included in bid materials and in contracts.

And the ethics commission should have full jurisdiction over contractors, with sanctions such as avoidance and disbarment (see [the sanctions section of this chapter](#)) that

apply specifically to contractors. If contractors have a lot to lose by misusing or creating special relationships with officials and employees, they will be much less likely to do so. They will also be less likely to give in to pay-for-play requests when it could mean losing the contract and/or paying damages.

1. Officials Who Own or Work for Contractors

Some ethics codes prohibit any high-level official, or all officials and employees, from having an interest in, that is, owning or being an officer of a company that has a contract with the local government. This seems reasonable. A government should not be doing business with a high-level official.

Others, such as Houston, also prohibit any company owned, even in small part, by an official or employee from bidding on a contract. Here is the Massachusetts provision:

268A:20. Municipal employees; financial interest in contracts; holding one or more elected positions.

(a) A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished . . .

This section shall not apply if such financial interest consists of the ownership of less than one percent of the stock of a corporation.

This section shall not apply:

(a) to a municipal employee who in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or disposes of the interest, or

(b) to a municipal employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family ... [and numerous other, less important exceptions]

But is it necessary to require a firm to give up its contract if one of its owners or officers successfully runs for office? Or, from the other point of view, is it in the public interest to have such owners and officers not run for office in order either (1) to preserve their income or (2) to not bring harm to their company?

For example, in 2011 a San Bernardino, California city council member who owned a towing company, whose major source of income was a contract with the city, resigned when the contract became an issue. The reason was that he discovered that California law does not allow a council member to have a contract that was approved by the council, even if he was not then on the council.

There is no doubt that it looks inappropriate for a council member to have a contract with the city, but if the contract predated his joining the council, there is no actual conflict and there is not even an apparent conflict relating to the process by which the contract was approved.

The conflict would, however, become an issue in three possible situations, only one of which apparently occurred. If a problem arose with the towing company that was serious enough to merit the council's attention, it would be hard for the council to discuss its colleague's problems, even if the council member were to fully withdraw from the matter. In other words, a body should not have oversight over one of its members. If the procurement office or another office could deal with the problem, and the council made it clear that the council member could not have direct or indirect communication with the procurement office, then there would not be a conflict.

But when an official sits on a board or holds a position that does provide oversight with respect to a contract, there is a conflict that cannot be responsibly handled by withdrawal from participation. In such an instance, the official should be required to choose between the public office and ownership of or employment with the contractor.

Oversight can be more problematic than procurement, because while a contract can be competitively bid and overseen by officials over whom an official has no influence, a procurement office cannot provide oversight, especially when there are serious problems. A consultant can be brought in to handle the problem, but this means an unnecessary expense to the government. And there can be a question of the consultant's bias if her hiring is not handled responsibly.

If, as happened, the council wanted to consider having the city do the towing rather than a contractor (something that could not reasonably be anticipated), the council member could easily not participate. The question is, would the council's decision to stay with the current situation be seen by the public as helping out its colleague?

This is an relatively unusual situation, but increasingly common. Usually it's a choice between competitively bidding or not, and the problem involves possible, or apparent, interference with the bidding or approval process. If a council member is involved, the contract should be competitively bid and should be left to the procurement office to deal with, with no participation by the council at all and with an independent office providing careful oversight and drafting a report that is immediately made available to the public, with an explanation of the entire process and the safeguards involved.

In short, through consideration of the possibilities of different sorts of conflict arising, responsible withdrawal, and creative handling of problems that arise, I do think the council member could have kept his seat, his towing business, and his contract.

It is a more difficult question when a council member's business wants to bid on or renew a contract. A no-bid contract or renewal without a bid should not be allowed, but there are certainly instances where, with a relatively small contract, a waiver should be given to the council member in return for complete transparency, no ex parte communication directly or indirectly, the careful following of every formal process, and a clear public explanation of the situation to the public. What would otherwise create an appearance of impropriety could be used as a way to educate the public about government ethics.

Many local governments allow officials to bid on contracts. The assumption is that the competitive bidding process will prevent the appearance of any impropriety. This is simply not true. As will be set out [in this chapter](#), there are many ways to game the bidding system if you have inside information and influence. And even without knowing about these ways, the public finds it hard to believe that officials fairly won a contract.

Here's an example from Louisville in 2010. The contract for the concrete for a new arena was won by a company solely owned by a member of the state task force that chose the site, the chair of the board that manages the arena, a close friend of the coach of the arena's primary tenant, and a nonvoting member of the arena authority, whose executive

director reports directly to the board that this individual chairs. Would anyone trust the fairness of the concrete contract bidding process?

Here's another interesting contract situation. A council member in Helmet, California was the executive director of a nonprofit with a contract from the city. The contract was not approved separately by the council, but was part of the budget. A grand jury found that there was a conflict, but it would be ridiculous for the council member to withdraw from the entire budget. What is required here is a bit of non-legalistic ingenuity. The council should consider a budget amendment to cancel the contract. The executive director could withdraw from participation in discussion of or voting on the amendment. The council could then openly and responsibly discuss the matter, considering the appearance of impropriety, the possibility and practicality of competitive bidding, the role of the executive director in proposing the program in the first place, and a more general council policy on contracts that involve its members.

Whether an official's company should be permitted to bid on a contract depends on several factors, including (1) the official's level – a high-level elected official should not be bidding on contracts; (2) the official's role in the company – if she is a regular employee not involved in the bidding process, or a small minority owner with no involvement with the company's management, the company should more likely be allowed to bid; and (3) whether the procurement process has been vetted by an outside auditor, so that there is reason for the public to trust that the formal processes will prevent interference by the official, and even communications with the company itself.

It is best to prohibit bidding and then require an official to seek a waiver and make his case publicly. It won't take too long before it will become clear which situations are acceptable, and which are not, and this will provide concrete guidance to officials.

Sometimes agencies with revenue streams other than tax dollars, such as parking authorities or police departments that sell assets like stolen cars, will argue that, when they are not spending tax dollars, they do not have to follow procurement rules. It is important to make it clear to all agencies that procurement rules apply across the board, that any money spent comes from the community and that the community does not make this sort of distinction. This distinction exists only to allow ethical misconduct.

In addition, dollars are fungible. Who is to say which dollars are being given to fellow police officers through contracts rather than to the businesses of others in the community? Revenue streams and expenditures have no direct relationship.

2. Utility Inspectors

Utility inspectors are electricians and plumbers who, often on a part-time basis, inspect the installment of electrical, plumbing, and gas work in a town or county. Many jurisdictions prohibit these inspectors from bidding on the government's electrical and plumbing work. But many do not.

In 2010, the issue arose in Lakeville, Massachusetts. The board of selectmen discussed the possible hiring of an electrical inspector who did electrical work for the town of 10,000 people. One side argued that it is unfair to have electricians competing for town work against the electrical inspector. One of the selectmen said, "It's not a good feeling when you know you have to come into town and bid against somebody that's going to inspect your work." The inspector, even if barred from bidding on Lakeville's electrical work, would be able to bid for work in all the other towns around.

The other side argued that it is unfair to make an electrician give up a lot of work to get "a little, teeny, part-time, few hours a month" position. The selectmen chair said that there are state laws allowing plumbing and gas inspectors to do work for their town, and it would be easy for the town to pass a law providing the same opportunity for electrical inspectors.

Ironically, the two other people who had applied for the position were inspectors in neighboring towns that did not allow them to work for the town. They had already made the sacrifice that the chair believed should not be made in her town.

Even a part-time official has to make sacrifices so that his government acts fairly and is seen as acting fairly, not only by citizens, but also by contractors who might do better work or the same work for less. It is better that a government be unfair to its official than unfair to citizens and contractors. This is often hard for individuals to understand, because fairness is fairness, and no one likes it when the unfairness is directed at him. But it is far better for a local government to direct its unfairness at itself and its officials than at the community and its citizens. Also, scaring away possible bidders usually means paying more for services.

3. Cooperation

The ethics commission, procurement officials, members of procurement selection committees and evaluation teams, the auditor and inspector general offices, campaign finance officials, government attorneys, and prosecutors need to work together to make sure that, with respect to procurement, their rules, advice, oversight, and enforcement and reform efforts are supporting each other rather than getting in each other's way. This is difficult.

Relations should be formed outside of enforcement matters, where there can be turf wars. The worst time to form cooperative relationships is when there is active conflict between different laws and offices, and issues of power, precedence, and credit. For example, the ethics officer might work with procurement professionals to develop an ethics training program for contractors and consultants, as well as procurement selection committee and evaluation team members. Ethics commission members and staff might suggest a discussion group on procurement ethics with procurement professionals, prosecutors, the city or county attorney's office, and local or state campaign finance officials. A joint advisory opinion program or webpage might be established, so that all procurement-related advice can be found in one place, be as consistent with each other as possible, and be understood and taken into account by those focused on enforcement. A joint hotline might be created. Disclosure rules might be coordinated, so that they neither conflict nor require disclosure in more than one place. And offices might cooperate in putting together and updating a list of all contractors and subcontractors, including prospective contractors and subcontractors, to help officials better disclose conflicts, and a list of all officials, employees, and their family members to help contractors better disclose conflicts. Finally, rules could be established for cooperation and precedence in procurement-related investigations and proceedings.

It is also important that all local independent agencies, including public-private partnerships, coordinate their procurement rules and processes with the rest of the local government. For the sake both of contractors and of the training, advice, disclosure, and enforcement aspects of each program, as well as ongoing cooperation on procurement, it is best that the rules and processes be either centralized or as much the same as possible.

4. Ex Parte Communications

Information regarding government contracts is one type of confidential information that, when disclosed to the wrong people, can provide great benefits for them (winning bids) and for officials who disclose the information (usually in the form of kickbacks). Such information can give contractors that are preferred due to family, business, or political relationships a big advantage in competitive bidding. A confidential information provision can only provide so much protection. This prohibition does not provide guidance specific to the situation, and it is very difficult to prove that confidential information has been disclosed.

In addition, one of the biggest problems with respect to contracts is bidders getting involved in the bidding process, including in the drafting of specifications for the job, either directly or through advice. The easiest way to win a contract is to have its specifications drafted with one's own advantages or equipment in mind, and it is very difficult for people outside the procurement office to detect what is going on.

Some years ago, Miami-Dade County came up with a now renowned ethics provision that deals well with both of these problems. It is known as [the Cone of Silence provision](#) (p. 21), after [the glass cone](#) that Maxwell Smart and his boss, Chief, used to use in the TV series *Get Smart* for top-secret conversations. The goal of the provision is to limit communication about contracts, to make it clear to everyone which kinds of communication are acceptable, and to have all acceptable communication be public, equal, and above board. Here's how the Miami-Dade County Ethics Commission describes the cone of silence provision:

The Cone of Silence prohibits oral communication between vendors, bidders, lobbyists and the county or municipality's ... staff between the time that the bid, RFP or RFQ is being drafted ... and the written recommendation of the city or county manager to the county or city commission or council.

The Cone of Silence also prohibits oral communication regarding the bid, RFP or RFQ between the Mayor, County or City Commissioners and their respective staff and any member of the county or city's professional staff between advertisement of the bid, RFP and RFQ and the manager's written recommendation.

The Cone of Silence does not apply to communications with the county or city attorney and his or her staff, communications with the technical assistance unit of the Department of Business Development regarding CSBE or minority business programs, duly noticed site visits and emergency procurement of goods or services. The Cone of Silence also does not apply to pre-bid conferences, selection committee presentations, contract negotiations or presentations before the Board of County Commissioners or a municipal commission or council.

The Cone of Silence does not prohibit communications between a vendor, service provider, bidder lobbyist or consultant and the Vendor Information Center staff, the procurement agent or the contracting officer as long as the communication is limited to matters of process or procedure.

The Cone of Silence does not prohibit the communications between the procurement officer or the contracting officer and a member of the selection committee as long as the communication is limited to matters of process or procedure.

According to the former ethics commission executive director, the purpose of the provision is to “insulate county officials and employees from pressure that bidders and their lobbyists try to exert on decision-makers to win lucrative county contracts. ... This assures the public that the county’s purchasing and procurement decisions are not compromised by backroom dealings and secret negotiations. [All communication has to be in writing and, therefore, accessible to the news media, to all government officials, to all bidders, and to the public] ... it creates a level playing field — all competitors have access to the same information.”

There are arguments against the Cone of Silence provisions. It can cause unnecessary delays and hinder decision-makers from learning key details of some contracts. Another criticism is that the provision increases the possibility of undue influence from the county administrators who appoint contract selection committees and write bid proposals, which, I suppose, is a way for contractors to affect the process without illegal communications. There is no doubt that, as some have argued, the people who write bid proposals can, especially via specifications, limit the number of contractors that can bid. But that can happen with or without a cone of silence provision.

In 2008, the Cone of Silence provision was amended to allow staff to speak with the county manager after the selection process, but before the manager issues his recommendation; and to talk with each other during the process, and require the county manager to forward recommendations to the county commission within 90 days.

The characters in *Get Smart* knew that the cone of silence wasn't really soundproof, but they used it anyway. The irony is not lost on government ethics professionals, who know that no ethics provision is foolproof, but realize that good provisions such as this provide excellent guidance and help good officials and employees act professionally and in the public interest.

Ex parte communication provisions are also valuable in other areas, such as land use, hiring, and grants.

5. Subcontractors

Too often, subcontractors are overlooked both in ethics provisions and in procurement rules. Subcontractors are sometimes considered to have little or no involvement in the bidding process, but they can be an important part both of the bidding itself and of any improprieties related to it. Officials can have an interest in or relationship with a subcontractor just as much as with a contractor, and the same issues involving gifts, campaign contributions, ex parte communications, and post-employment relations apply to subcontractors.

It is often the subcontractors, after all, that do most of the work on a contract. The contractor can be little more than a front, especially when there are advantages to having a particular sort of ownership. Even when the contractor does most of the work, subcontractors are similar to employees, in that they can be pressured to give to local candidates and their pet charities. And they can also be pressured into providing jobs for officials' relatives, friends, and political colleagues. Such indirect gifts can often be made under the radar, since people, including the press, are often unaware of subcontractors.

Subcontractors should be required to disclose just as much as contractors. They should also receive the same oversight, training, and access to advice, and be under the ethics commission's jurisdiction.

After Baltimore's mayor was forced to resign after a criminal conviction (along with ethics allegations), one of the most important ethics reforms accomplished in 2010 was

adding subcontractors to the definition of those doing business with the city (restricted sources). There is no reason to leave them out.

Chicago has a gift provision that applies only to subcontractors:

§2-156-120. Contract Inducements. No payment, gratuity or offer of employment shall be made in connection with any City contract, by or on behalf of a subcontractor to the prime contractor or higher-tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.

This prohibition shall be set forth in every City contract and solicitation...

6. Contract Decisions

It can be very touchy for an ethics commission to get involved with the prerogatives of high-level officials, but no other group of public servants can so powerfully undermine the public trust when they do something that appears to be improper. Too often, council members and mayors are involved in the contract process in ways they consider important, but others feel are unnecessary, and even damaging. The more involvement they have, the more they can use the contract process to obtain gifts and large campaign contributions, and bundling, from contractors who feel they have no other choice.

High-level officials are also more open to influence since, while procurement officials can easily limit their interactions with contractors to written, professional interactions, and have no interaction at all with lobbyists, council members and mayors (and their party committees) are dependent on contributions for their political campaigns. And they have constant social and professional interactions with companies in the community and with their lobbyists. On such occasions, contractors and lobbyists can put personal pressure on officials. After all, lobbyists can make or break a candidacy due to their representation of multiple contractors and developers, which are the principal money source at the local level, unless there is a public campaign financing program.

Since high-level officials cannot be prohibited from talking to lobbyists and companies in the community, one solution to this problem is to limit their influence by limiting what they can do. If they can have only very limited communications with procurement officials, do not approve contracts, and have a very limited ability to waive bidding requirements, there is little reason to influence them. In addition, this leaves them

with little leverage with which to require contractors to pay up in order to do business with the local government.

When council members represent districts, it is important that they have no role with respect to contracts that involve their district, for example, roadwork, particular schools, or a waste treatment plant. They should be able to do no more than try to push for the work itself, staying completely out of the procurement process.

Although in the short run it can appear acceptable for elected officials to develop relationships with contractors, in the long run the preferential treatment they are seen to provide and the view that they are either under the contractors' influence or are effectively extorting money and other benefits from the contractors can seriously undermine both their personal reputations and the reputation of the government in the community and in the outside world. By making the procurement process look fixed, it can also scare off low bids and, thereby, cost taxpayers millions of dollars a year.

7. Applicable Ethics Sanctions

There are two ethics sanctions that apply especially to procurement situations: avoidance and debarment.

a. Avoidance. One of the most important sanctions available to an ethics commission is the ability to void contracts resulting from an ethics violation. Avoidance is an important way to ensure that government contractors have an interest in protecting the public from officials irresponsibly handling their conflicts. No one will better police government ethics than those who have a lot to lose from others' ethical misconduct. If those who have or seek contracts have nothing to lose, there is no incentive for them not to tempt officials, give in to play to play demands, or police or even cooperate with the government with respect to conflicts.

There are two approaches to avoidance. The ethics code may either make the avoidance automatic or allow the ethics commission to impose avoidance as a sanction. Where avoidance is automatic, the ethics commission or the local legislative body may be given the authority to waive the avoidance, in whole or in part. It is important to provide for waivers, because voiding a contract can sometimes cause damage to the local government or the community, or undue damage to the contractor. Avoidance is a strong sanction, and should be carefully used. The waiver, like any waiver, should be discussed

and voted on fully in public, with clearly stated reasons provided. This is the approach taken by the City Ethics Model Code, which allows the legislative body to make the determination:

Any contract, permit, or other transaction entered into by or with the local government which results in or from a violation of any provision of sections 100 or 101 of this code is void, without further action taken, unless ratified by the city's legislative body in an open session held after applicable public notice. Such ratification does not affect the imposition of any sanctions pursuant to this code or any other provision of law.

Whichever avoidance process is chosen, it must be followed carefully, evidence of an ethics violation must be collected and discussed publicly, and all parties, including other bidders, must be permitted to ask questions and present their opinions. Since a contract or other legal arrangement will be voided, there will be financial harm. Therefore, it is important to do everything possible to show good faith and create a procedural paper trail to prevent a suit from parties that are harmed. It is also important, when a waiver is allowed, to be able to show the public that the waiver process was as open and fair as possible.

In San Diego in 2008, a harmed developer sued in a situation where there was not a waiver process. In that case, the Center City Development Corp. (CCDC) had had the ethics matter investigated by an independent attorney, who said there was undoubtedly a conflict that "tainted the transaction to the level that the transaction should not continue." And the CCDC believed in good faith that the former CCDC president had misrepresented her lack of involvement in the negotiations with the developer.

And yet the developer also may have been acting in good faith, because it may have had no knowledge of the former CCDC president's past dealings with its Florida affiliate. This mess is one of those unintended consequences of doing the right thing, but not doing it correctly. The CCDC may have acted based on a faulty reading of state law and it may have acted without consulting with the developer about its actual relationship with other developers that shared its name. Had there been hearings, and had the developer been allowed to ask for a waiver, there would most likely have been no suit.

b. Debarment. A contractor or prospective contractor should be prohibited from doing business with the local government for a period of years after having been found to have violated an ethics provision in more than a de minimis manner. This should apply to an entity, to individuals who own that entity, and to any entity owned by any of these individuals. This extension to other entities is important, because it is easy for a contractor's owners to simply set up another company to get around a debarment order.

To prevent debarment occurring where the violation was the result of negligence, a showing of intent or knowledge is often required. The City Ethics Model Code provision also protects entities against the conduct of employees who violate an ethics provision on their own, acting beyond company policy, custom, and knowledge.

1. Any person or entity that intentionally or knowingly violates any provision of this code, in more than a de minimis manner, as well as any entity owned by such person or entity or by an owner of the entity in violation, is prohibited from entering into any contract, other than an employment contract, with the local government for a period not to exceed three years.
2. Nothing in this section may be construed to prohibit any person or entity from receiving a service or benefit, or from using a facility, which is generally available to the public.
3. Under this section, a corporation, partnership, or other entity is not vicariously liable for the actions of an employee. A corporation, partnership, or other entity is not debarred because of the actions of an employee unless the employee acted in the execution of company policy or custom, or with knowledge of one or more company officers. A store, region, division, or other unit of an entity is not debarred because of the actions of an employee of that unit unless the employee acted at the direction, or with the actual knowledge or approval, of the manager of the unit.

Debarment provisions are strengthened by the creation of, and online access to, debarment lists, so that local governments know about the violations of contractors outside their jurisdiction, and can take this into account in the bidding process and in proposals to give a no-bid or single-source contract to a particular contractor (see [the section below on questionable contractors](#)).

Some debarment provisions apply only if there is a criminal conviction or a finding of a civil offense related to criminal accusations. The problem with this is that, not only are ethics violations not sufficient for debarment, but also, contractors can work with a prosecutor to ensure themselves protection (prosecutors tend to focus on catching officials rather than contractors). Government ethics, on the other hand, stresses prevention over enforcement. To prevent misconduct, there need to be disincentives on both sides of each illegal transaction.

In 2013, after Miami Beach's debarment provision proved useless with respect to a contractor who worked with the local prosecutor, the city attorney proposed language that would allow debarment for ethics violations. The language he used was the commission of "any offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a City contractor or subcontractor." Additional language would allow debarment for any offense the contractor admitted to (thereby foregoing prosecution) or for "knowingly failing to disclose criminal or fraudulent conduct relating to public procurement, public officials, or the public trust." In other words, he sought to add a requirement to report.

This sort of language, which seems particularly vague, is relatively common. The reason such vague language is allowed is that debarment is considered remedial, not punitive, and therefore due process rules are not so strict.

One might think that a debarment provision is unnecessary. After all, who is going to approve a contract with someone who has recently been found to have violated the local ethics code? The answer is, a lot of people. For example, in 2010, after a North Providence, Rhode Island zoning official was found to have committed multiple violations related to no-bid contracts, the mayor was quoted as saying that he felt the official's pain. "Now he can feel free to do whatever he wants to. Hopefully, he will continue to bid work that the town has in the future."

With sanctions such as avoidance and debarment in an ethics code, contractors are not going to play around with conflict situations. They will disclose whatever conflicts they're aware of, ask questions when they suspect a conflict exists, refuse to talk with officials who have a possible conflict, and not create conflicts by offering gifts. The responsible handling of conflicts will be ensured in a wide range of situations. Honest officials will be better off, as there will be fewer attempts to tempt them into ethical

misconduct, and fewer ethics problems will arise to undermine the public's trust in the officials who manage their community.

B. The Procurement Process

1. Procurement Selection

The best solution to both the appearance and fact of ethical misconduct with respect to procurement is the creation of a procurement selection committee that excludes members of the local legislative body, as well as anyone who might be seen as doing the bidding of legislators, including legislative staff and members of the city or county attorney's office. Local legislators should not become involved in any way until after the bidding process has been completed, and even then there are important limits with respect to oversight, amendments, extensions, and renewals. Members of the committee should include a representative of the finance department and procurement department, as well as citizens who are not involved in the principal contracting industries. Here's a provision from the Broward County, Florida ethics code:

It shall be a conflict of interest for a member of the Board of County Commissioners to serve as a voting member of a County procurement Selection/Evaluation Committee. County Commissioners shall not be included as members on any Selection/Evaluation Committee and shall not participate or interfere in any manner at Committee meetings or in the selection of Committee members, which members shall be appointed by the County Administrator. Upon the completion of the selection process by the Committee, County Commissioners may inquire into any and all aspects of the selection process and express any concerns they may have to the Purchasing Director.

Here is what the Broward County inspector general said in defense of this provision when the county mayor proposed to remove it only a year after it had been passed:

[P]rocurement selection committees are vulnerable to the appearance of impropriety and potential abuse because they are empowered to designate a

particular contractor or vendor as the favorite, and recommend specific contracts or vendors to the governing body. Thus, selection committees are the focus of significant attention from interested businesses, competing bidders, [and] elected officials ... The Ethics Commission [that drafted the ethics code] observed that few staff members are in a position to openly disagree with a commissioner serving on a selection committee, and concluded that a commissioner's mere presence on the selection committee presented an obstacle to a transparent and unbiased procurement.

And here's what two county commissioners said about the situation before they were prohibited from sitting on a procurement selection committee:

Lobbyists made phone calls or approached commissioners and said, "Would you get on that committee?" We did that, and people on this dais did that. And that's what muddied it up.

There were times when you could tell people made decisions based on friendships rather than value. I saw how the system could be manipulated and was. There isn't one of us that didn't notice it.

It is understandable to want people on a selection committee who have a great deal of expertise. But it can be hard to find local people with such expertise who do not have something to gain or lose, or are not involved (or recently involved) in transactions with some of the bidders. If one can attract out-of-town experts without such ties, or retired experts who no longer have anything to gain or lose (and no relationships with those still seeking contracts), that is good. But it is important to recognize that there is a good compromise: have experts available as non-voting advisers. Have them explain the technical points to those who will vote on them. This is the best of all worlds for procurement selection.

Procurement selection committees can be ongoing (a standing committee) or, with respect to major contracts, especially new ones such as a school building project, specific to the contract or series of contracts.

A selection committee should be transparent as possible, willing to publicly explain its considerations and decisions, and respond to questions and criticism from the community as well as from actual and potential bidders.

One thing to be wary of, and to have rules to prevent, is getting around procurement rules by having the selection process done by an independent agency or public-private partnership that has its own rules and no outside oversight, except sometimes final approval by the legislative body. This sort of end-run around good procurement ethics rules cannot be permitted. The call of “independence” is usually a way of preventing independent oversight.

Many ethics codes have provisions that prohibit involvement in procurement matters by officials with a financial interest in a prospective contractor. But there are many situations in which an official has a personal rather than financial interest that creates just as strong an appearance of impropriety. Therefore, Winston-Salem, North Carolina has a provision in its ethics code that prohibits participation where there is a personal relationship, as well:

No city representative will influence the city’s selection of or the conduct of business with, a corporation, person, or firm having or proposing to do business with the city if the representative has a personal relationship and/or any financial interest in the company.

2. Specifications

The most popular way to game the procurement system is to get specifications drafted so that they either exclude one or more possible bidders or so that it is far more likely that a particular bidder can make the lowest bid, because only it has certain equipment, personnel, or experience. One phrase can be enough to do this, and for those who don’t understand the complexities of specifications, it is very difficult to recognize these phrases.

Sometimes language in specifications is clearly preferential to a particular bidder. For example, in 2011 in Essex County, New Jersey (home of Newark), a bid was put out for an immigrant detention center. The specifications said that visitors to the detention center will greet detainees “in the gymnasium” —and an existing facility, Delaney Hall in Newark, just happened to have such a gymnasium.

Other specifications can be preferential against a particular bidder, which tends to win bids in many area cities and counties. For example, a town in Connecticut used to bid out its non-health insurance contract with a specification that excluded a particular type of plan, which happened to be the cheapest alternative: the plan provided by a municipal association, on whose board the first selectman (effectively the mayor) sat. Although one may think that the first selectman might have preferred an organization in which he held a position of power, in fact there is nothing to be gained by this, and much to be gained by excluding the organization in favor of insurance companies and brokers that make campaign contributions and, possibly, give kickbacks. Officials can count on the fact that a municipal association won't go public about being excluded from bidding by a member municipality. It is losing bidders that most often raise possible conflict issues and other procurement problems.

There are two problems with making changes to specifications in order to provide preferential treatment. One, they can give preferential treatment to officials, their companies, their family members, their business associates, and their political allies. And two, when they favor others, officials can charge a price for making these changes, either in the form of bribes (including jobs for family members or business for the official's firm or company) or, more often in contract cases, kickbacks. Kickbacks exist because, by excluding certain bidders or preferring one over the others, the cost of the contract to the local government is higher than it would otherwise be. This means additional profit for the winning bidder, which is shared with those who helped create that additional profit. Kickbacks are simply a percentage of the additional profit or, from the other point of view, of the additional taxes paid by the community.

Even if the preferred bidder is a friend, family member, or political ally or supporter, few individuals like someone so much that they will give them an overpriced contract as a gift. Some percentage of the additional profit/cost goes to paying off whoever was involved in drafting the specifications, helped arrange the change, or sometimes even knows about what happened. Kickbacks are difficult to prove, unless a recipient suddenly changes his lifestyle by buying a new mansion or yacht, or taking fancy vacations.

If caught, there is always an explanation: The excluded bidder was liable to go bankrupt, so something had to be done to protect the city. People just don't understand how essential the particular specification is; these things are pretty technical. Joe may be on

the local party committee and a big supporter of its candidates, but he won the contract fair and square, without lobbying for it or in any way using his contacts.

But, of course, Joe didn't have to lobby. He had tailored the contract specifications to his company years ago.

Another way specifications can be tailored to help the contractor rather than the taxpayer is to add costs that don't add value, such as fancy design features or extra lanes to a road or bridge that is not projected to need them.

On the other hand, specifications can be less than what will be needed, so that a contractor in the know can bid low for the contract, knowing that she can make the big money on the add-ons. Add-ons should be treated just like the original contract. They should be very carefully explained in public, any official that has any relationship with the contractor should totally withdraw from the matter, and the same ex parte communication limitations should apply. The independent selection committee should play a role in the add-on process, as well. Add-ons need to be rejected, or contractors will bid low knowing that they will make their profit on the add-ons, which are not competitively bid.

Oversight, transparency, limits on ex parte communications, and following formal processes to the letter are extremely important in order to keep the procurement process from giving preferential treatment that can be extremely costly to taxpayers and the public trust.

3. Legislative Approval

Some local legislative bodies, such as the District of Columbia council, are involved in the procurement process due to a requirement that the council approve certain contracts. In the District of Columbia, approval is required of multiyear contracts and any contract in excess of one million dollars.

This sort of law cries out for legislative interference in the procurement process. Even when a contract is properly bid, the local legislative body can change the terms or even the winner of the bid by threatening to reject the contract, or actually rejecting it and requiring another bid.

A legislative body should be involved in determining whether a project is desirable, but once the policy aspects of the contract have been determined, the procurement office, and an independent procurement committee, should be allowed to act independently. If

there are concerns about the legality of the process, the inspector general, auditor, or special independent counsel should investigate.

4. Professional Contractors and Consultants

Most no-bid contracts are given to professionals, including lawyers, accountants, insurance agents, and a great variety of consultants in fields such as land use, construction, planning, development, housing, pension investments, and tourism. Professionals, or specified types of professional, are usually excepted from bidding provisions, because people do not choose professionals solely on the basis of price. This is true. However, contracts are rarely bid out solely on the basis of price. Other considerations include quality, capacity, qualifications, experience, past experience with the local government, and the use of union employees and subcontractors.

One should be wary of ways to prevent price from being a factor, such as a contingency fee arrangement with an attorney. In addition, such an arrangement gives up a large percentage of any damages as well as some control over the litigation, a serious problem when the public interest should be paramount.

It is often said that one chooses a professional one is comfortable working with and has confidence in. But these are personal considerations. There are two kinds of trust: personal trust and professional trust. An official should be focused on professional trust, that is, trust in an individual's abilities and his personal independence from (that is, lack of special relationships with) officials and others with whom the professional will likely be dealing.

A contractor or consultant should be selected not because officials have worked with her in the past, but because she is the best choice for the city, in terms of cost, qualifications, etc. In fact, it raises conflict issues if the officials who choose the contractor or consultant have worked with or used the services of one or more applicants (or the only one considered, which is often the case) in the private sector or as a candidate or political party member. Professional contracts are a principal area where cronyism takes place.

Giving professional contracts to party members, large campaign contributors and bundlers, clients, partners, and friends can be easily defended as picking the best individual for the job, or "someone I can work with and trust." But it's not about who an *official* can trust, but about who the *public* can trust. And the public doesn't trust cronyism. People

assume that party members and contributors are getting the job not because they're best, but because officials feel obligated to give it to them or because they will do what is best for the officials rather than what is best for the community.

Another problem with the public's view of professional contracts is that these professionals tend to be among incumbents' biggest campaign contributors. This makes it look like professional contracts are not only about friendship, but also about retaining power. It is reasonable to believe that professionals who win through an independent competitive bidding process are less likely to make large campaign contributions.

How much of a part do no-bid professional contracts play in a local government's procurement program? In one year in Philadelphia, the city awarded 586 procurement contracts based on competitive bidding, and 1,530 professional service contracts, most of which were not competitively bid, although there were usually requests for proposals (RFPs). In other words, professional contracts play a large role in terms of numbers, although most likely they represent a smaller proportion of dollars spent. Most important, they represent a large proportion of contracts that appear to the public as preferential. And the professionals hired under these contracts have an effect on government far greater than other contractors. One clever attorney can do a great deal to undermine a local government's ethics environment and/or cost the community millions of dollars a year.

One problem with enforcing ethics and procurement rules with respect to professional contracts is that professionals are less likely than ordinary contractors to protest when someone else gets the job. Professionals who don't get government work are generally not looking for it. They know the rules, and either support the minority party or faction or are not interested in playing the game. In other words, where professionals are picked for their loyalty rather than their skills, the most skilled professionals don't bother to bid for a professional or consulting position. What the public doesn't see is what the public doesn't get.

Construction, waste, maintenance, and other companies are far more likely to go public with declarations of preferential treatment, in the form of formal and informal protests and, sometimes, ethics complaints, criminal complaints, or civil suits.

Winston-Salem's ethics code expressly requires consultants to follow its provisions and to disclose any interest or relationship with any city official. The provision goes on to

say that, “No payment shall be made to the consultants until a signed acknowledgment, and if appropriate, any of the aforementioned disclosures have been received.”

A special problem with consultants is that they not only do work for a local government, but they often take roles that are essentially those of an official. This can raise serious conflict issues. For example, [a study done in 2010](#) of the Los Angeles Unified School District found that although the school district had a requirement that consultants selected to participate in hiring panels (an official role) should not be from the same firm as a consultant seeking to be hired, in more than 225 instances a consultant sat on a panel that selected a person employed by his employer. The study showed that even limited oversight prevented much abuse of the contracting process.

The resemblance of these contractors to local government employees led to this provision in the San Antonio ethics code (§2-53(c)):

All contracts for administrative services between a member of the City Council and independent contractors shall contain a provision requiring the independent contractor to comply with all requirements imposed by this code on city employees.

Consultants should be given ethics training, they should have access to ethics advice, and they should be subject to oversight and enforcement. If consultants knew that their firm could be debarred from doing work for the city if they did not withdraw from any matter involving a colleague, they would withdraw a lot more often or they would choose not to sit on a hiring panel for jobs their firm was seeking.

The Los Angeles report also recommended that consultants file a statement of economic interests not only once a year, but every time they are hired and when their contract period ends.

As it happens, the Los Angeles Unified School District has a good [contractor code of conduct](#), but enforcement is not by a single body or office, but by the following: the Ethics Office, the Office of the General Counsel, the Office of the Inspector General, and the Procurement Services Group or Facilities Contracts Branch in consultation with the Contract Sponsor. A lot can fall through the cracks of all these bodies and offices.

The school district ethics website even has [an ethics “quiz”](#) (not really a quiz, but a learning experience) specially for contractors.

Because most professional contracts are not competitively bid, professional contractors provide a fertile field for pay to play. Look at the contributions to mayoral and council candidates, and you will find the names of many lawyers and other professionals who have or seek work with the city or county. Some local governments deal with this problem with pay-to-play laws specific to professional contracts. Here is the most important language from [such a law in Trenton, New Jersey](#) (this is based on [a model pay-to-pay ordinance](#) drafted by Citizens’ Campaign, a good government organization):

Section 1. (a) ... the City of Trenton and any of its departments, instrumentalities or purchasing agents shall not enter into any agreement or otherwise contract to procure “professional services” ... and/or banking, insurance or other consulting service (hereinafter “professional services”) from any professional business entity if such professional business entity has solicited or made any contribution ... to (i) a candidate or joint candidates committee of any candidate for elective municipal office in Trenton or a holder of public office having ultimate responsibility for the award of a contract, or (ii) to any Trenton or Mercer County political party committee, or (iii) to any political action committee that regularly engages in the support of Trenton municipal or Mercer county elections and/or Trenton municipal or Mercer county political parties or Trenton municipal or Mercer County political party committees, (hereinafter “PAC”), in excess of the thresholds specified in subsection (d) within one calendar year immediately preceding the date of the contract or agreement.

(b) No professional business entity who submits a proposal ... shall knowingly solicit or make any contribution, to ... [as above] ... between the time of first communication between that professional business entity and the municipality regarding a specific agreement for professional services and the later of the termination of negotiations or rejection of any proposal, or the completion of the performance of that contract or agreement. ...

Section 3. Prior to awarding any contract ... the City of Trenton ... shall receive a sworn statement from the intended recipient of said contract that he/she/it has not made a contribution in violation of Section 1 of this Ordinance. The recipient of said contract shall have a continuing duty to report any violations of this Ordinance

that may occur during the negotiation, proposal process or duration of a contract's performance.

Section 4. A recipient of a contract for professional services may cure a violation of Section 1 of this Ordinance, if, within 30 days after the general election which follows the date of the contribution, the contract recipient notifies the municipality in writing and seeks and received reimbursement of the contribution from the recipient of such excess contribution.

Section 5. The contribution limitations ... do not apply to contracts which (i) are awarded to the lowest responsible bidder after public advertising for bids and bidding therefore ... or (ii) are awarded in the case of emergency ...

Section 6. (a) It shall be a material breach of the terms of a City of Trenton agreement or contract for professional services when a recipient of such agreement or contract has: (i) made or solicited a contribution in violation of this Ordinance; (ii) knowingly concealed or misrepresented a contribution given or received; (iii) made or solicited contributions through intermediaries for the purpose of concealing or misrepresenting the source of the contribution; (iv) made or solicited any contribution on the condition or with the agreement that it will be re-contributed to a candidate or joint candidates committee of any candidate ... or any ... political party committee, or any PAC; (v) engaged or employed a lobbyist or consultant with the intent of understanding that such lobbyist or consultant would make or solicit any contribution, which if made or solicited by the professional business entity itself, would subject that entity to the restrictions of this Ordinance; (iv) funded contributions made by third parties, including consultants, attorneys, family members . and employees; (vii) engages in any exchange or contributions to circumvent the intent of this Ordinance; or (viii) directly or indirectly, through or by any other person or means, done any act which if done directly would subject that entity to the restrictions of this Ordinance.

(b) Furthermore, any professional business entity that violates Section 6 (a) ii-viii shall be disqualified from eligibility for future City of Trenton contracts for a period of four calendar years from the date of the violation.

5. Insurance Contractors

Too often, insurance contracts are given too little special oversight, even though insurance is a big area for abuse in local government. It usually constitutes a sizeable dollar percentage of a local government's contracts. Insurance is easy to abuse because it is an area few people understand, and an area that no department, office, or board may be responsible for overseeing.

In addition to the usual government procurement issues, an insurance broker who works in government or has party or business connections with high-level officials often uses his position or connections to get the insurance business of companies that do or want to do business with the town.

It was an insurance scheme that combined both types of insurance misconduct which, in early 2011, brought down the president of Jefferson Parish (2010 pop. 400,000), part of New Orleans, and his top administrator (the parish attorney later resigned, as well). The center of the scheme was reportedly an agreement between a community hospital and an insurance company owned by the administrator and his wife. The administrator's insurance company also did business with several parish contractors as well as with several insurance companies that did business with the parish. The former owner of one of these contractors (the president of another local parish) was convicted on federal bribery charges.

Not only was the insurance broker a parish administrator. He was also a member of the parish Insurance Advisory Committee, which had jurisdiction over the hospital's insurance matters.

Insurance schemes, unlike matters involving attorneys or consultants, are often very complex, with many players and relationships involved. When others want to be involved, it's hard to say no. According to the charges, the administrator's company entered into “cooperative endeavor agreements with two other insurance agencies managed by politically connected associates,” one a former parish president. There was also sharing of commissions with an insurance agency that has contracts with several public entities in the area.

Because of the complexity of insurance, it is best to have knowledgeable but independent oversight over all insurance dealings that involve either the government itself or those who do business with the government. There also needs to be full disclosure, with serious sanctions for any company that does not disclose, so that you don't get this sort of web of players. Insurance dealings should be included in the transactional disclosure

required of those bidding for or being given contracts or seeking permits. It would also be valuable to add relationships involving insurance to annual disclosure forms for high-level officials. A pattern of insuring officials' companies is a strong sign that something is going on.

6. Nonprofit Contractors

Because nonprofits are not seen as focused on money, and money tends to be what most people think conflicts are all about, nonprofits are often left out of conversations about procurement rules, and sometimes excepted from the rules themselves. But nonprofits often have large social service contracts with local governments (or are subcontractors), and they also get government grants or do quasi-government work that is paid for or regulated by government, even if there is no contractual connection.

Nonprofits also have paid officers and employees who, as in any other entity, are just as concerned about survival, have jobs to hand out, and have funds to raise and hand out, all of which involve money. Some may also be favored charities of high-level officials, dependent on their support and, therefore, conflicted in a way that commercial contractors are not. They often have personal relationships with high-level officials, as well.

Therefore, it is important to make sure that nonprofits are not in any way excluded from ethics provisions or from procurement oversight.

Sometimes, those with ties to nonprofits doing business with government, even officers of the nonprofits, are on boards involved with determining who gets government grants or contracts. When their organization gets a grant or contract, other organizations quickly shout about preferential treatment. Even when board members do not vote on grants or contracts involving their organization, they have input with respect to the criteria or specifications for getting a grant or contract, which often limit who can apply. And they can make deals, or be seen as making deals, with other board members to vote for each other's applications or bids. No matter what the rules are, the appearance is of a club of nonprofits helping themselves and their friends to public funds.

With respect to a 2005 Philadelphia procurement reform bill [discussed below](#), the director of policy for an association of social service agencies called for an amendment exempting social service agencies from reporting standards, as well as from requirements that contracts be rebid on an annual basis. She argued that opening up contracts annually

would become very expensive for nonprofits and overburden the system with administrative processes. But it is these processes that protect the public from ethical misconduct. Ethical misconduct can lead to the preferential treatment of nonprofits every bit as much as with profit-making companies.

To its prohibition of conflicted officials and their businesses entering into no-bid contracts with the government, Miami-Dade County added a prohibition of organizations in which an official, or her spouse, “is associated” (§9.05(2)(g)) in order to deal with the apparent impropriety involved when an official’s nonprofit gets a no-bid contract.

7. Questionable Contractors

Many states and some local governments have lists of contractors that, due to criminal or ethical misconduct of one sort or another, have been debarred from doing business with that government (for example, [Los Angeles County’s](#)). States should bring these lists together in one place, as is done by the federal government in its [Excluded Parties List System](#) (EPLS; requires registration) and as was recommended by a Florida grand jury in [its December 2010 report](#). Also see a [GSA Inspector General page](#) with links to state lists.

If a government or agency receives any federal funding for projects, it is required to verify that a contractor has not been debarred or suspended by the federal government. This requirement applies for any contract exceeding \$25,000. This verification is done by checking the EPLS database mentioned above, or by getting a debarment and suspension certification from vendors. States should make the same requirement.

Why is this done? Because a contractor with a history of misconduct can create serious problems with respect to a particular job or project. It is a matter of protecting the government from risks, both in terms of performance and in terms of possible ethical misconduct. It is also a way to prevent misconduct by raising a contractor’s risk from engaging in misconduct.

When a debarred contractor seeks a no-bid contract from a different government, and it is known that the contractor is on such a list, the answer should be to refuse the request. In fact, every contractor considered for a no-bid contract should be asked if it is on such a list (or currently involved in criminal or ethics proceedings) and, if it says it is not, this should be checked, at least within the state and surrounding states. If such a contractor bids on a contract, the bid process should be carefully watched.

Sometimes a contractor has not been debarred, but has engaged in ethical or criminal misconduct, such as bribery. Often in bribery cases, only the official is prosecuted. But there is a record of the contractor's involvement. And often this is easily detectable by doing an online search. Such a contractor should be treated just like a debarred contractor.

If contractors are permitted to make campaign contributions in a particular jurisdiction, candidates should refuse to accept contributions from contractors, and their officers, employees, and agents, with a recent history of ethical or criminal misconduct. It's not worth the risk to the candidate's reputation, nor what the acceptance of such contributions does to the public trust in the local government. It might appear to the candidate that no one will find out who the contributor is or what he or his company have done, but these facts often come out through the informal oversight of good government groups and bloggers.

According to a 2011 report from Deloitte on corporate risk management, 63% of companies surveyed said that they had aborted or renegotiated a deal after learning of corruption issues involving another company. 80% did not wait passively to hear about problems; they looked closely at the compliance programs and controls of companies they do business with.

Local governments and their officials have a stronger obligation than companies do to actively manage risks to their reputation by keeping track of the conduct of the companies and individuals they do business with or take sizeable contributions from, and by acting on what they learn. Local governments should put online lists of companies and individuals they will not do business with, based on successful prosecutions and other judicial or quasi-judicial processes, including ethics proceedings. This cannot be done based on hearsay, but hearsay itself can be acted on. Procurement professionals, ethics commissions, and inspectors general need to take the initiative in determining whether reports and rumors about contractors are true or not, and reviewing reports of proceedings that involve those who seek to do business with their government.

As [Mike Purdy's Public Contracting Blog](#) has said, "Failure of public agencies to check state and/or federal debarment lists is a frequent audit finding against public agencies. After checking whether a contractor is debarred, a public agency must maintain documentation in the contract file."

8. Representation of Contractors

Ethics codes prohibit government officials and employees from representing contractors seeking business with the city or county. But some ethics codes also prohibit contractors, and other seeking business or funds from the government, from hiring anyone to represent them on a contingency basis. That is, a representative of a contractor can be paid for her time, but cannot get a percentage of what the contract or other sort of benefit is worth, which would give the representative an interest in the contract, giving rise to a conflict of interest. Here is the language from the Wyandotte County/Kansas City, KS ethics code:

Sec. 2-263. Prohibition against contingent fees.

(a) *Contingent fees.* In addition to violating any other ordinance or any state or federal criminal statutes, it shall be a violation of this division and a breach of ethical standards for any person to be retained, or to retain a person, to solicit or secure a unified government contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

(b) *Representation of contractor.* Every person, before being awarded a unified government contract, shall represent, in writing, that such person has not retained anyone in violation of subsection (a) of this section. Failure to do so constitutes a breach of ethical standards and of this division.

(c) *Contract clause.* The representation prescribed in subsection (b) of this section shall be conspicuously set forth in every contract and solicitation therefore.

9. Vendor Codes of Conduct

Vendor codes of conduct are not popular with local governments in the United States, but there are states, state agencies, and Canadian provinces that have them, and occasionally the issue of having one is raised by local officials, for example, in Cuyahoga County, Ohio in 2011.

Most vendor codes of conduct do not involve government ethics issues. When they do, they usually provide insufficient guidance, as in the following provisions from West

Virginia's vendor code of conduct:

4. Refuses to cause or influence, or attempt to cause or influence, agency procurement officers in their official capacity to impair the objectivity or independence of judgment of a purchasing transaction;
5. Avoids any appearance of unethical or compromising practices in relationship, actions and communications;
6. Identifies and eliminates participation of any individual in procurement situations where a conflict of interest may be involved;
7. Understands that agency purchasers of the state shall at no time or under any circumstances, accept directly or indirectly, gifts, favor, service, gratuities or other items of value from your organization;

And, of course, there is no training, no advice, no disclosure, and no enforcement related to vendor codes of conduct. It is better that vendors be brought fully into a local government ethics program. Not only does it protect the public and their officials, it also protects vendors and others from being forced into a pay-to-play situation. Ethics provisions should apply to vendors and other contractors, and the local (or state) ethics commission should have jurisdiction over these individuals and companies. Any ethics-related rules for contractors should be included in the ethics code either directly or in an appendix, so that all rules can be found in one place (relevant state rules should also be included in the appendix, for this reason).

For a good contractor code of conduct (except for enforcement; [see above](#)), see the [Los Angeles Unified School District code](#).

New Jersey has a [Business Ethics Guide](#), which is not actually a code of conduct, but reads like one. In fact, it is based on, and cites, numerous state laws. Such an ethics guide would be useful for those doing business with local governments.

10. Forms of Preferential Treatment and Gaming the System

Preferential treatment with respect to procurement can take many form. One way, which has been discussed, is through job specifications. In addition, local companies can be favored either through connections and access to personnel and confidential information, or

expressly through ordinances that allow local companies to bid as much as 10% higher and still win the bid. Such ordinances increase bids not only by the 5% or 10% preference, but often by even more, because potential bidders realize they have no chance to win the bid and don't waste the time it takes to make a bid.

Another way to favor small local companies is to break up jobs so that each "job" is below the minimum competitive bidding limit and can be given, without bidding, to a local firm. This is a popular way to favor friends, family, and large contributors. It should be prohibited.

When instead of favoring small local firms, a local government makes a contract larger, sometimes bundling a variety of small jobs, in order to get lower bids from larger firms, local companies tend to file protests. This can make it hard on procurement employees as well as elected officials to get the best deal for taxpayers.

Another way to favor firms is to rebid a job after a favored firm loses the bid, making minor changes that exclude the winning firm, or simply annoying the winning firm or effectively letting it know that it won't get the contract, so that it will not bid again.

Another way to favor firms is to intimidate their competitors into either not bidding or not protesting when they lose. This can be very difficult to prove. However, when no one protests, it is a good sign that there was intimidation, because losing contractors do tend to protest when there is a possibility of favoritism.

Another way to favor firms is the sole source contract. The government argues that it can get what it wants only from one firm or individual. No one else can supply the product or do the job. This is essentially a special waiver that allows anyone, including an official or employee, family member, or business associate to get a no-bid contract. Sole source contracts should be handled like waivers, following a written formal process, with at least one oversight agency reviewing and reporting on the proposal well before it is discussed and voted on in public, with the contractor, and any official with whom that contractor or its officers has a special relationship, available for questioning. The central question with respect to sole source contracts is, Are the specifications unnecessarily specific, thereby limiting the contract to a single source? Could they be broadened so that the contract could be competitively bid?

Another way to favor firms is to improperly disqualify one or more firms from bidding. The effect is similar to specification changes, and can turn a competitive bid into a

sole source contract. It should be shown, in public, that the considerations for disqualifying each potential bidder are legitimate and in the best interest of the local government. When there are only two bidders, and one has been involved in ethical or criminal misconduct, it is important to ask whether the problems were substantial rather than simply technical. Sometimes the existence of past ethical misconduct can be used unethically and against the public interest.

Another way to favor firms is to arrange it so that a bidder can bid low to win the contract, but with the understanding that it will be granted changes to the specifications, called “change orders,” or to the amount paid after the bidding process has ended (usually in the form of cost overruns). In such a case, the bidding process is effectively meaningless. It is worse than a no-bid contract, because it *appears* to have been competitively bid. There is a serious transparency problem, because the attention paid to the bid process will not be paid to the apparently obscure changes in specifications or the provision of additional funds outside the bid process. And there is a serious oversight problem, because the government gives up its oversight responsibilities in order to favor the contractor. Every change order and cost overrun must be shown, in public, to be necessary and unexpected. Oversight after the bid is just as important as during the bid process.

These ways of providing preferential treatment are only those that necessarily involve local government officials and employees. There are several other ways that contractors can game the system on their own, although sometimes officials are aware of or involved in what is going on. As a group, these ways are known as “bid rigging” or “bid tampering.” Here’s a list of types from the Wikipedia bid rigging page:

Bid suppression occurs where some of the conspirators agree not to submit a bid so that another conspirator can successfully win the contract.

Complementary bidding, also known as cover bidding or courtesy bidding, occurs where some of the bidders bid an amount knowing that it is too high or contains conditions that they know to be unacceptable to the agency calling for the bids.

Bid rotation occurs where the bidders take turns being the designated successful bidder, for example, each conspirator is designated to be the successful bidder on certain contracts, with other conspirators designated to win other contracts. This is a form of market allocation, where the conspirators allocate or apportion markets, products, customers or geographic territories among themselves, so that each will

get a “fair share” of the total business, without having to truly compete with the others for that business.

Subcontract bid rigging occurs where some of the conspirators agree not to submit bids, or to submit cover bids that are intended not to be successful, on the condition that some parts of the successful bidder's contract will be subcontracted to them. In this way, they “share the spoils” among themselves.

If anyone believes this doesn't really happen, here are two recent examples of big-time bid-rigging schemes. In 2010, Banc of America Securities agreed to pay the SEC and others \$137 million to settle charges related to a municipal bond bid-rigging scheme. Reportedly, bidding agents, hired to help municipalities raise money, steered business to Banc of America by giving them inside information on competing bids and by getting others to submit fake bids to make it appear as if there were an actual market. In return, Banc of America Securities steered business to the bidding agents, giving them kickbacks or submitting bids they knew would not be successful. The same scheme appears to have been done by other banks, but no charges have yet been filed, to my knowledge.

And in Montreal, according to the 2012 Charbonneau Commission report, “multiple fields of the construction industry in Montreal and surrounding regions were controlled by a small group of contractors who took turns ‘winning’ bids, and paid a percentage on the value of every public contract to the Mafia. ... Any contractor who tried to break into the system quickly learned that the Montreal market was ‘hermetically sealed,’ and that it was best to go elsewhere.”

11. Procurement Reform

Procurement reform is usually a response to contract-related misconduct, including no-bid contracts, kickbacks, pay to play, cronyism, and contracts given to family members and business associates. Such reform differs from the usual ethics reform, because procurement reform usually pours over from government ethics (applicant disclosure, withdrawal, gifts, revolving door, ex parte communication, avoidance and debarment sanctions) into campaign finance and lobbying laws (limiting or prohibiting contributions from and bundling by contractors and their lobbyists or requiring withdrawal by those who receive large contributions from or bundled by them), procurement rules (on the bidding and

selection process, specifications, oversight and limiting, and creating formal processes for, no-bid exceptions), and criminal laws (kickbacks, pay to play, bribery, conspiracy).

This mixture of areas can make procurement reform confusing and difficult. It requires numerous laws and, in some cases, either state approval or reforms to state laws. It requires the involvement of criminal authorities as well as procurement officials, the ethics commission, the city or county attorney's office, the auditor and/or inspector general, and the local legislative body. It's hard to get all these people on the same page. Often what is passed is what is most easily passed, in a piecemeal manner, either because no one cares much about the details or because the politics of the moment make it essential for everyone to agree to pass something quickly. If there has been cooperation between those involved in procurement, it is much easier to get together to draft valuable procurement reforms (see [recommendations for cooperation above](#)).

As with all reform, there are arguments against aspects of procurement reform. For example, in response to a procurement reform bill proposed in Philadelphia in 2005, a mayoral aide wrote in a memo criticizing the bill's limit on contributions from prospective contractors, "The traditional way for [minority-owned] firms to be taken seriously and to get the attention of public officials is by means of political contributions." Take out the consideration for minority-owned firms and this is an argument that pay to play (effectively extortion by government officials) is a legitimate price for getting business from a local government.

A Philadelphia council member argued that procurement rules would "tie up services to our constituents." Yes, formal processes can create delays, but if procurement is handled professionally, the process should prevent significant delays down the road.

There are all sorts of arguments in favor of not bidding and automatically renewing contracts, but none of them respond to the costs that accompany preferential treatment in terms of the public trust or the monetary cost to taxpayers. Corruption is often defended as a lubricant that makes government work more efficiently, but it is important to recall that efficiency is not the principal goal of democracy. Efficiency is a positive value, but sometimes friction is better. Efficiency is only one value to be balanced against other, equally or more important values, including transparency, the public trust, the quality of work done, and the waste of taxpayer money.

C. Procurement and Campaign Finance

Campaign finance and pay-to-play laws are central to making a procurement program be and appear to be fair. When contractors, including those who competitively bid for contracts, give large contributions to local candidates, it looks like an attempt to get themselves preferential treatment (influence) or to let themselves be considered for a contract (pay to play). Why else would contractors make such large contributions? Many of their owners don't even live in the city or county. No one believes that government contractors have the strongest feelings about the principal issues in every election, or believe more strongly than others that political parties and PACs are important parts of our democratic system. They reasonably believe that the contributions are related to their contracts and the prospect of future contracts.

It is instructive to look at the campaign finance reports of local candidates (especially incumbents), local party committees, and PACs that make contributions to local candidates. If your state requires contributors to give the name of their employer and you have a list of local contractors, or recognize the names of some of them, you will find that government contractors, current and prospective, including contractors' lobbyists and those who provide professional services, constitute a sizeable portion of the funds that are contributed to local candidates. When a candidate has trouble raising funds, it is generally because she could not get contributions from contractors or local government officials and employees. In other words, she is not an incumbent.

There are three approaches to preventing this sort of influence and pay to play, which costs citizens a great deal in both money and trust. One approach is to prohibit or set a low limit on contributions from anyone who has or is seeking a contract, or works for such a firm, something that several states do, but few local governments, sometimes because they do not have the authority to do so.

Over seventy New Jersey local governments have passed [a model pay-to-pay ordinance](#) drafted by Citizens' Campaign, a good government organization. It prohibits any campaign contributions from prospective contractors (directly or indirectly), and prohibits entering into a contract with anyone who has made campaign contributions. A violation means no contracts for four years. (See above for [the Trenton version](#) of this model

ordinance.)

Another approach is to institute public campaign financing, which limits the size of contributions from anyone, including contractors, to participating candidates. When one candidate is strongly supported by contractors and chooses not to participate, the public financing program allows participating candidates to have the funds necessary to get their message out.

The third approach is to require disclosure. There are two types of disclosure. One is disclosure by the contributor. There is usually an amount, say \$300, below which disclosure is not required. This disclosure can consist simply of giving the name of one's employer, but most people won't know if this is a prospective or current contractor. Better that there be a box to check saying whether the contributor's employer is a prospective or current contractor or subcontractor, or whether the contributor is a contractor or subcontractor itself or a lobbyist or other agent (e.g., attorney or accountant) for a contractor or subcontractor. If there is to be such disclosure, it is important that the information is easily available to the public and the news media. For example, the New Jersey Election Law Enforcement Commission has an [online state and local database](#) of campaign contributions from government contractors.

The other type of disclosure is by the elected official. When a matter arises involving a contractor that made a contribution to the official, the official is required to disclose this fact publicly as soon as she is aware of the matter, if at some point in the process she might be involved in it. In addition, if the contribution or aggregate of contributions from the contractor, officers, employees, lobbyists, and agents is over a certain amount, the official might be required to withdraw from the matter (see [the above discussion of the Westminster approach](#)).

In order to be fair to officials, an up-to-date list of prospective and current contractors should be made easily available online and at meetings. One way to do this is to require current and prospective contractors to file a form with the ethics commission or procurement office. If campaign finance reports are also put online, as they should be, then it is a relatively easy task for officials and their staffs to check and see if there are any relationships based on contributions that must be disclosed. Searchable databases make life easier not only for citizens and the news media, but also for officials.

There are state pay-to-play laws that cover local governments, but these laws are

often weak and are, therefore, supplemented by local pay-to-pay laws or, better, ethics provisions. For example, New Jersey's Local Unit Pay-to-Play Law deals only with no-bid contracts, and it lets each local government or agency determine what is a "fair and open process" that allows contractors to make contributions to involved officials. That is why so many local governments in New Jersey have passed their own, stronger laws.

D. Criminal Enforcement

Kickbacks and bribery are the only two forms of conduct that, according to the U.S. Supreme Court in *Skilling v. U.S.*, 561 U.S. ___, 130 S.Ct. 2896 (2010), the federal honest services fraud statute may be applied to. The honest services fraud statute had, prior to this decision, allowed the federal government to get involved in enforcement against local government officials irresponsibly dealing with conflicts, when the local government itself had no ethics program or where local prosecutors took no action.

Both kickbacks and bribery are very difficult to prove in a criminal proceeding, both in terms of the burden of proof (beyond a reasonable doubt) and what needs to be proven (a quid pro quo, that is, an exchange of money for specific conduct; sometimes it can also be hard to show that the conduct, a few words in the specifications or confidential information, constitutes preferential treatment, or to show who actually engaged in, as opposed to benefited from, the conduct).

Of the two, kickbacks are more common with respect to procurement. Kickbacks are, in fact, a principal reason why contracts are either not competitively bid or are insufficiently bid, due primarily to specifications that limit who can bid or that make one bidder more likely to make the lowest bid. Unlike bribes, kickbacks often directly consist of taxpayer money. They represent part of the difference between the amount bid and the fair market value of the contracted work.

In 2012, for example, the mayor of bankrupt Central Falls, Rhode Island pled guilty to federal charges involved with a kickback (in the form of home renovations) from a \$1.7 million "emergency" (that is, no-bid) contract to board up foreclosed homes in the city.

Kickbacks sometimes involve benefits to contractors that do not do business with the government, but which are based on a misuse of office. For example, in 2010 the mayor of

Niles, Illinois was sentenced to prison for taking kickbacks in return for forcing local businesses to use a friend's insurance company.

Bribery in the procurement context is, in effect, a kickback before the contract is won. A bribe is either a way to ensure that one wins the bid or gets a no-bid contract, or a required payment by anyone who wants a chance to win a bid (pay to play). The motivation for the bribe may be different, but the transaction looks just the same, and the benefits and harm are similarly the same.

The government ethics way to prevent kickbacks and bribes is to prohibit gifts from restricted sources. No need to show a quid pro quo, intent, or motive, and no proof beyond a reasonable doubt is required. But ethics commissions rarely have the investigatory capability to find evidence of kickbacks or bribes. Therefore, these are usually the province of criminal authorities. It would be nice if criminal authorities would cooperate with an ethics commission, handing over their evidence of bribes and kickbacks when they felt that criminal prosecution would be too difficult and expensive, or too slow, leaving a cloud over a city or county while the indicted official remained in office.

Another thing that makes criminal enforcement so difficult is that those who know about procurement-related kickbacks and bribes are hesitant to report what they know, and what they know is often more speculation than actual knowledge based on direct evidence. Even honest contractors who refuse to pay to play rarely go to the authorities. They believe that blowing the whistle on one group of officials could hurt their chances to do business with any local government or with state agencies. Losing contractors will file protests, but rarely will the protests include the explicit mention of kickbacks or bribes. Therefore, criminal enforcement agencies must depend on procurement employees, sting operations, and an official or contractor who is caught and then turns state's evidence. Ethics commissions can only hope to depend on procurement employees and those who employ a hotline to make anonymous tips.

When, as often happens, criminal authorities choose to focus solely on public servants, an ethics commission should enforce the ethics code against contractors and their officers, employees, and agents. The decisions of prosecutors should not limit ethics commissions. Letting contractors go allows them to cause trouble elsewhere.

E. Federal Grants Management Common Rule

If a local government takes money from the federal government, its procurement process is subject to the Grants Management Common Rule, which includes bid protest procedures, without much in the way of guidelines, and codes of conduct for the award and administration of contracts. The required code of conduct even includes disciplinary actions. In many cases, some of the provisions appear in local or state law, but these must be supplemented.

All of this is rather complicated and not so easy to find. Luckily, Eileen Youens has [a You Tube video](#) that tells you how to find the rules. She also has written a couple of North Carolina Local Government Blog posts on the rule, one [focused on bid protest procedures](#), the other [focused on codes of conduct](#).

VII. Guidance: Advice, Training, and Discussion

Advice, training, and discussion are the three most important parts of any ethics program, because they best fulfill the principal goal of preventing ethical misconduct. Ethics provisions provide guidelines for local officials and employees. Training and advice provide a better understanding of the rules and their application to particular situations. They should also go beyond the rules, recognizing them as minimum guidelines.

Discussion of ethics issues at administrative and board meetings makes government ethics an organizational priority, provides a continuing education in government ethics, and brings the public into the ethics program, both allowing their participation and increasing their trust in their government. With good advice, training, and discussion, there should be little need for enforcement.

These guidance part of an ethics program, which is all but ignored by the typical ethics code, depends on good leadership. Without good leadership, ethics training consists of a poorly attended lecture once a year or less. Without good leadership, independent ethics advice is not readily available, or it is not regularly used, especially by high-level officials, who need it most. Without good leadership, there will be little discussion of ethics issues at government meetings, private or public. This especially is something that requires the ongoing encouragement and the setting of an example by high-level officials.

With good leadership, ethics training is as ongoing a process as any other kind of professional training. It occurs regularly in the form of classes, memos, newsletters, and departmental and board discussions. Government ethics becomes not something only considered too late, in the midst of a scandal or as part of political squabbling. Government ethics becomes a part of how matters are handled from the start, with a base of good training, easily available guidance, open and unemotional conversation, and pride in handling conflicts well.

Injury prevention experts have a framework to think systematically about prevention, called [the Haddon Matrix](#). The matrix focuses on three times: pre-event, event, and post-event. Consider injuries from car accidents. Pre-event interventions include things that will prevent accidents, such as highway lighting, antilock brakes, and

campaigns against drunk driving. Event interventions assume accidents will still occur, but that injuries from them can be reduced by seat belts, air bags, and the like. Post-event interventions assume that injuries will still occur and, therefore, but that emergency medical teams will limit the effect of the injuries.

Government ethics programs often focus on none of these kinds of prevention. The principal form of prevention in these programs is enforcement, that is, preventing through fear of punishment. This is true even though it doesn't work very well, and does nothing for those who feel they are doing the right thing, but either don't understand government ethics or are affected by their blind spots. These programs may have some training, but it is rarely very good. There is advice, but it is usually neither timely, nor professional, nor independent, and few take advantage of it. There is little discussion of ethics issues in professional terms, or ways to raise ethics issues at meetings or make information about conflicts more easily accessible.

A good government ethics program focuses on pre-event prevention, including good, ongoing ethics training and timely, professional, independent ethics advice. Ethics issues are discussed just like legal and financial issues, and disclosure is both frequent and easily accessible online. This is how to apply the Haddon Matrix paradigm to government ethics.

It would be nice to market a government ethics program to government officials and employees as conflict enlightening, with antiscandal brakes. Another campaign could focus on learning to take one's emotional blinders off and get professional ethics advice before making a decision. It should be all about guidance and prevention.

A. Government Ethics Advice

If an ethics trainer could instill just one idea in her students, it would be the importance of asking a designated ethics adviser whenever one finds oneself in a situation where one either (1) has a special relationship, direct or indirect, with someone involved in a matter that is about to come before him, or has already come before him, (2) might directly or indirectly benefit from or be harmed by such a matter; or (3) is faced with a possible new relationship, often through the offer of a gift, with someone who is or might be involved in

or benefit from such a matter.

Seeking ethics advice should be a habit, just like seeking legal advice. If officials were to predecide that, whenever faced with a conflict situation, they would seek ethics advice from the ethics officer (just the way they seek legal advice from an attorney or engineering advice from an engineer), this would ensure the professional handling of conflict situations. By doing this, temptations, competing goals, blind spots, and bad habits would no longer be impediments. This is why this predecision to seek ethics advice is an individual's central act relating to government ethics (this is the only underlined sentence in this huge book).

Establish this as a habit (by means of leadership, training, the hiring of an ethics officer, reminders, and visible ethics advice) and you've gone most of the way toward the goal of an effective government ethics program. But to become a habit, seeking ethics advice needs to be the social norm. In most government organizations today, the social norm is to believe that each of us can make his or her own ethical decisions.

Professional, independent, quickly available advice is the single most important part of any government ethics program. It is the principal way for officials to prevent ethical misconduct from occurring. And to the extent the advice is formal or is shared with other officials in training sessions, newsletters, and other forms of ongoing education, ethics advice creates a series of precedents to better, more concretely guide officials and employees.

In their book [Switch](#) (Crown, 2010), Chip and Dan Heath note that self-control or, more accurately, self-supervision is an exhaustible resource. What looks like laziness or selfishness is often simply exhaustion. Self-supervision gets burned up by managing the impression we make on others, by coping with fears, and by trying to focus on complex instructions.

With respect to government ethics, officials have trouble following ethics rules, especially those with numerous exceptions. The best way to change the way officials deal with conflict situations is to keep the rules simple. This is consistent with another of the Heaths' "surprises" about change: What looks like resistance is often a lack of clarity. If you want people to change, the directions have to be crystal clear.

Providing clarity means simplifying the rules. But this does not mean that ethics provisions should be cut down to five clear prohibitions. What it means is letting officials focus on doing one simple thing that they're comfortable with: asking for professional

advice. This limits ethical self-supervision to two things: recognizing a conflict situation and then seeking advice from the ethics officer. That's not too taxing.

I would rather see a professional, independent ethics adviser without an ethics code (but with [a requirement to ask for ethics advice](#)) than an ethics code without a professional, independent ethics adviser. That is how important ethics advice is. And yet the current ratio of ethics codes to independent ethics advisers is somewhere in the vicinity of 10,000 to 1.

1. Independent Ethics Advice

One reason professional, independent, timely ethics advice is rarely made available at the local level is that the city or county attorneys who write ethics codes are the people who provide ethics advice, and they are neither independent nor do they have professional training in government ethics. In addition, these attorneys, thinking in terms of the criminal enforcement paradigm, are focused on ethics provisions and procedures for enforcement. Advice, like training, is not something they think about. They may mention advisory opinions in an ethics code, but often there is no procedure for obtaining advice, and where there is, it is only for obtaining formal opinions, not informal, timely advice.

Formal opinions by ethics commissions usually take a long time. This is why, for example, Louisville's ethics commission requires that an official request advice at least three weeks before the official needs to act on the advice. It is rare that an official's attention is focused on dealing with a conflict situation three weeks before he must make a decision about it. Much more common is focusing on it when a meeting agenda arrives in one's e-mail inbox.

Timely advice can only be provided by an ethics adviser, not by an ethics commission. In addition, ethics commissions without staff (and usually without the proper training) find it difficult to provide quality opinions. The opinions end up getting written by the city or county attorney's office.

Most lawyers and officials believe that the city or county attorney's office should provide ethics advice just like it provides legal advice. The problem is that ethics advice differs in many ways from legal advice. One, it is not simply about laws, because ethics laws are only minimum requirements. Therefore, ethics advice does not end with the usual legal conclusion, "It would not be illegal for you to do that." An ethics adviser might say this, but

then go on to say, “Although this situation was not contemplated by the ethics code, there would be an appearance of impropriety if you did that, so I would advise you not to do it.” The adviser would then explain more specifically the reasons for withdrawal or returning a gift, and the problems that might arise if the official participates or keeps the gift. In other words, ethics advice recognizes that, when it comes to conflict situations, more is expected of public servants than simply acting legally.

Here’s another way of putting this. Ethics enforcement is legal. You cannot enforce rules that are not in the law. But when it comes to ethics practice, dealing responsibly with one’s conflicts, the law represents only the minimum requirement. The law is what you have to do, but an official should be more responsible, more open, more cognizant of how conduct appears to the public, than what is required by law. The reason is that government officials have a fiduciary duty to the public that goes far beyond the provisions of ethics codes and includes consideration of whether conduct would appear improper. Ethics advice speaks to ethics practice, not just to ethics laws.

A 2004 report by the U.S. Interior Department’s Inspector General clearly states how harmful and selfish legal advice about an ethics matter can be:

By answering ethics questions from a purely legal perspective, the provider of such advice builds in an inherent defense, should such advice subsequently fail to protect. The resulting disservice to a political appointee is profound. After all, it is not the career of the ... attorney that is on the line.

Lawyers are trained to give advice that serves their clients, that is, advice that allows a client to find the legal way to do something he wants to do, to find clever solutions that allow the client to participate in conduct that would otherwise be illegal. This is often done by interpreting statutory language liberally or finding loopholes in provisions. Neither of these approaches is consistent with government ethics advising, which focuses not on finding legal ways to act, but rather on finding ways to act that do not create an appearance of impropriety and that are consistent with the spirit of ethics laws. Ethics advice can be every bit as creative as legal advice, but the purpose is completely different. The purpose is to find a way to act so as not to create an appearance of impropriety (and not, of course, by doing something secretly so that there will be no appearance at all).

In other words, a government attorney has an interest (or, at least, a perceived interest), personal or political, in helping his “client,” the official, in a legal (representing the official) rather than ethical (representing the public) way.

Here’s a different way of looking at this difference. An ethics adviser is clear about who her client is: the public. Government ethics is intended to protect the public from an official using his office for personal purposes. A government attorney, on the other hand, is used to treating officials as the client. Since in a conflict situation, an official is or might be conflicted, the government attorney is effectively conflicted, too.

According to the [Public Law Ethics Primer For Government Lawyers](#) prepared by the Washington State Municipal Attorneys Association (2010), it is “necessary for a governmental attorney (ethically) to advise a public employee or official that he/she should secure private counsel ... any time the attorney believes that the individual interests of the official will conflict with those of the public agency.” However, an official need not get private counsel if there is an independent ethics officer to consult. If the government does not provide someone other than an ordinary government attorney to provide ethics advice, then the official should seek private counsel, and the government attorney should tell this to officials. But [as I explain below](#), having officials seek private counsel is itself not an appropriate course of action. It is only a fallback when the government fails to provide even a part-time ethics officer.

A second problem with government attorneys providing ethics advice is that they have little or no training or expertise in government ethics. Reading an ethics code is no more sufficient for giving ethics advice than reading the tax code is sufficient for giving tax advice. And unlike tax law, ethics laws do not have explanations or a history of precedents.

A third problem is that city and county attorneys are political animals, and they spend their days looking out for the interests of the very individuals whose interests an ethics professional is supposed to subordinate to the public interest. A city attorney has the sort of special relationship with officials that leads to a conflict requiring withdrawal from participation, including the giving of ethics advice. Just as an official’s private attorney appearing before the official’s board should lead to the official’s withdrawal from the matter, an official’s government attorney should withdraw from participation in anything that involves the official’s personal interests. A government attorney’s relationship with officials also creates an appearance of impropriety that taints any advice that appears to be in

an official's personal interest, even when the advice is excellent.

More than any other laws, ethics laws need to be interpreted by individuals who are independent from local politics, and who have no interest, personal, professional, or political, in the matters upon which they provide ethics advice. As a close political ally and often a friend of the mayor or council members who appointed her, a city attorney is conflicted with respect to ethics advice to the mayor/council, to their appointees, to their political allies, and to their political opponents. This will usually include most high-level officials in the city or county.

It is just as important that ethics *advice* be independent as it is that [ethics enforcement be independent](#). It is very damaging for an ethics adviser to appear to be favoring or disfavoring an official. Opponents of those in power will not bother to seek ethics advice from someone they feel will disfavor them. If only those who feel they have an ethics adviser's favor seek ethics advice, this undermines the purpose for providing this advice. Ethics advice will be seen as just another kind of favoritism, undermining rather than increasing the public's trust in its government's fairness.

Here's what it looks like. When a government attorney tells an official that it's okay to engage in certain conduct, the conduct turns out to cause a scandal, and the official says, "But I was told it was okay," it looks like the advice was intended to protect the official, not to protect the public interest (this is true if the attorney was merely wrong or even when the attorney gave excellent advice!). And yet the ethics code cannot be enforced against either the official or the attorney. This situation, which undermines the public's trust in an ethics program and gives it the appearance of being politicized, is unfortunately all too common. The only way to prevent this situation is to have advice provided solely by an independent ethics officer working for an independent ethics commission.

There doesn't even have to be a scandal for ethics advice from an appointee or political ally such as a city or county attorney to be problematic. Take, for instance, a post-employment matter. A retiring mayor asks the city attorney whether he can take a job as president of a university in town. The city attorney says he may, even though the university is a major player, permittee, and lobbyist with respect to legislative and land use decisions. Not only does this seem to favor the mayor, who is the city attorney's appointing authority and political ally, but it also creates a precedent that makes it difficult for future city attorneys to advise against other post-employment positions that will cause the public to

believe that high-level officials are favoring local institutions in order to get a nice job with them when they leave office.

There is another conflict involved when government attorneys provide ethics advice. In most jurisdictions, the city or county attorney's office represents the ethics commission, so that if there is an enforcement proceeding involving an official the attorney advised, the attorney ends up being a principal witness as well as an adviser to both sides of the matter. The alternative is for the government attorney to withdraw, and the ethics commission to hire someone specially to represent it. If, that is, the commission has the budget to do so, which is not usually the case. Then the commission has to go to the legislative body for funds, even if the complaint was filed against a local legislator. A legislative body's refusal to provide the funds makes it look like it is protecting its colleague.

The fact is, officials hate going to an ethics adviser they don't know. They would much rather go to the city or county attorney, or the attorney who advises their board or works in their agency. The above arguments need to be made to convince them why this is problematic. And officials need to see that having an independent ethics officer, no matter how much they may not like the idea, does prevent ethical misconduct.

A case study in Chip and Dan Heath's book [*Switch*](#) (Crown, 2010) involves drug-related errors in a hospital. Errors in medication occur because doctors keep interrupting nurses on their way to administer medication. The chosen solution was having nurses don a vest when they are carrying medication, in order to let doctors know not to bother them. The nurses and doctors both hated the solution, but it worked. "You know you've got a smart solution," the Heaths wrote, "when everyone hates it and it still works."

If officials are not permitted to seek advice from anyone but the ethics officer, they may hate it, but they will find that it works, not just for them (they may never believe that), but for their colleagues. A hateful solution may be hard to sell, but when it works, it will be accepted.

For more on local government attorney advice, see [the section on local government attorney ethics advice](#) in the final chapter.

Why can't officials and employees be required to get their ethics advice from a private attorney, on their own dime? Because ethics advice is not a personal issue. It is not intended to protect an official's personal reputation, nor is it intended to protect an

official's business. In fact, its principal goal has little to do with the official. The official may want advice to help herself, but due to her position, she should be seeking ethics advice to help the government and the community (the entire community, not just her district). Ethics advice is intended to protect the reputation of the local government, and the public's trust in it. That is why ethics advice is something a local government should provide, and why officials should be encouraged, or even required, to seek advice whenever they encounter a conflict situation. In any event, few private attorneys have expertise in local government ethics.

Another common problem regarding ethics advice is limiting it to formal advisory opinions, which prevents officials from getting quick informal advice. A formal advisory opinion requires at least one monthly ethics commission meeting, and sometimes two, after which the final opinion is drafted. This may be necessary for new or complex issues that require deliberation and official approval, and will provide a new, useful precedent for other officials. But it is unnecessary for the great majority of conflict situations.

Sometimes an ethics code limits formal advisory opinions to a determination of whether conduct would constitute a violation of an ethics provision, as if advice was simply part of enforcement. Whether or not conduct is in violation of the law is the only consideration in enforcement, but not in advice. Just as ethics advice is different from legal advice, ethics advice is different from ethics enforcement, because it is not limited to the law. It is not limited to determining violations. An ethics adviser must be allowed to tell an official that certain conduct would create an appearance of impropriety or goes against the spirit of the law, and should not be done, even if the conduct might be legal, that is, not anticipated by the drafters of the ethics code. And an ethics adviser must be allowed to suggest ways for the official to act so that he will deal responsibly with his conflict and his action will be appear appropriate. This can require creative thinking as well as a good deal of back and forth between adviser and official. Limiting the adviser to the law ties the adviser's hands and prevents her from doing her job.

2. Obstacles to Asking for Ethics Advice

The biggest obstacle to asking for ethics advice is recognizing that there is an ethics issue involved in a matter before oneself, that is, that one is faced with a conflict situation. Good ethics training should teach officials and employees how to identify conflict situations. It

should focus on relationships and benefits. If an official or anyone with whom she has a special relationship – family, business, professional, or personal – is involved in a matter, and might benefit or be harmed by action taken in the matter, then as soon as the official knows that the matter might, or has, come before her or her body or agency, she should either seek ethics advice about how to deal with the possible conflict situation, or withdraw completely from participation in the matter. If the conflict situation involves the creation of a relationship or benefit, such as by the offer of a gift, then the official should refuse or return the benefit, prevent the relationship from occurring, or seek ethics advice.

But even those who have had ethics training sometimes exclude important, relevant information from their decision-making by placing bounds around their definition of a problem. In effect, we put on blinders, like a race horse. We narrow our concept of responsibility (e.g., to our boss rather than to the public), we focus on instructions that are given to us, or we see our action as supporting a decision our supervisor or local legislators have taken (it is, therefore, not really *our* decision). When we do not feel there is an ethics issue, we do not ask for neutral external input, and we reject those who criticize us as partisan or self-interested. We focus on meeting a deadline rather than seeking out more information and opinions. We limit ourselves to our functional boundaries, such as engineering, law, or finance. We give in to groupthink, that is, seek or accept unanimity rather than considering alternatives. We act out of fear, the fear of rejection, of being seen as goody-goody, of the consequences of whistle-blowing, of threats to our job. We focus on the law rather than the ethics. There are so many ways we can act, and justifications we can make to ourselves, that get in the way of dealing responsibly with a conflict situation.

The blinders of what Max H. Bazerman and Ann E. Tenbrunsel, in their book [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) (Princeton University Press, 2011), call “bounded awareness” form a serious obstacle to asking for ethics advice. The first steps in dealing with these blinders are to recognize that *we* (not only *they*) wear them and to talk about them openly.

We also have to get beyond the belief in the prophylactic powers of our integrity. We need to recognize that, without realizing it, we sometimes act in ways others will consider unethical, that one’s best intentions are not all that matters (in fact, they’re pretty much irrelevant), and that we are sometimes the worst judge of whether our conduct is appropriate and of how the public will see it. We see in others’ conduct what we cannot

see in our own. The famous question from Matthew 7:3 is apt: “Why do you see the speck in your neighbor's eye, but do not notice the log in your own eye?” This question should be asked whenever an official insists he doesn’t have a conflict.

An official has not only an obligation to respect people’s reasonable reactions to her conduct, but equally to recognize how hard it is for her and her colleagues to know how people will react to what they feel is good, necessary or, at least, legal conduct. That is why it is so important, whenever an official has a special relationship with anyone involved in a matter, to talk with an ethics officer who can present the situation to her from the public’s point of view. And it is why it is equally important for an ethics officer to do this, rather than to be limited by the language of an ethics provision.

It is also important for officials to remind themselves that dealing responsibly with a conflict situation, even though it involves their personal interests, is a matter of their professionalism, not a matter of their integrity. A professional official recognizes when he needs advice on legal issues, engineering issues, personnel issues, and the like, and they seek out the appropriate specialist. Conflict situations are no different. They are often difficult and require someone who has dealt with many of these situations in the past. Just as with a legal or personnel issue, it is an official’s responsibility to do the best job he can for the community, and that means getting professional ethics advice.

The more easily available ethics advice is, and the more people – especially supervisors and elected officials – talk about how valuable it is and not only encourage its use, but use it themselves and talk about the advice they were given, the easier it is for everyone to ask for it when they’re not sure how to proceed, even when they’re not sure there is a conflict situation. Think how hard it would be to seek personnel advice if the mayor and council members said publicly that they learned all they needed to know about difficult personnel situations from their families and houses of worship?

3. Who May Seek an Advisory Opinion

Here is the first section of the City Ethics Model Code advisory opinion provision:

Upon the written request of any official or employee, including former officials and employees who served or were employed within the prior three years, and also including those who intend to soon become an official or employee, as well as any

candidate, consultant, or person or entity doing business with or seeking a special benefit from the city, or intending to soon do so, the Ethics Commission must render, within fifteen days after the date of its next regular meeting, a written advisory opinion with respect to the interpretation or application of this Code. If an earlier response is desired, or if the Ethics Officer determines that the situation does not require a formal advisory opinion, an informal verbal or e-mail opinion will be provided by the Ethics Officer.

Any person or entity may request informal advice from the Ethics Officer about any situation, including hypothetical situations, but such advice is not binding and there are no time requirements.

It is important to make clear who can request a formal advisory opinion from an ethics officer or commission. It is unusual to allow just anyone to request a formal opinion, since it requires the involvement of the entire ethics commission, as well as staff or counsel. Many jurisdictions allow only current officials and employees to request a formal opinion, but there are situations where former and soon-to-be officials (including candidates) will have a need for an opinion. It's useful for officials-to-be to deal with their conflicts as early as possible. Former officials have important questions involving post-employment provisions.

Consultants and those doing or seeking business with a local government, or seeking permits, contracts, grants, licenses, or other special benefits, should also be permitted to seek a formal opinion, because they are often a party to a conflict situation and ethics laws can be enforced against them. They should be brought into an ethics program as much as possible.

Although usually the situation presented to the ethics commission or officer will involve the individual or entity requesting the opinion, opinions can be requested for situations involving others, including subordinates, supervisors, colleagues, fellow board and commission members, and officials involved with contracts, permits, and grants.

If, for example, a board member chooses not to seek advice, a board chair may want to seek advice about the member's possible conflict, on behalf of the board, so that the board can have the information necessary to determine whether the official should withdraw or not, if the official chooses to ignore advice to withdraw or take other action.

Whereas it might seem more appropriate for a supervisor to request advice

regarding a subordinate's possible conflict situation, it is equally useful to allow a subordinate to request ethics advice regarding a supervisor's conduct, so that the subordinate can prevent her agency from getting into trouble due to the supervisor's blind spots regarding a conflict situation. In fact, a subordinate needs the confirmation of independent ethics advice more than a supervisor does. A supervisor might act without such advice (even if not most responsibly), but a subordinate can only act, or support an opinion, when her opinion has received formal confirmation. This goes equally for colleagues of someone with a situation a supervisor is not willing to deal with himself.

And yet some jurisdictions, such as California, limit advice to the duties of the official seeking it. This sort of limit makes no sense, except to lessen the load of the ethics commission and its staff.

Some jurisdictions expressly allow attorneys to request advice on their client's behalf, but this isn't really necessary. In fact, it is best if officials and employees seek advice themselves, rather than trying to turn the provision of advice into a legal matter. I would not go so far as to prohibit attorneys from helping officials put their requests into appropriate language, but I certainly would do nothing to encourage their participation. It is best if the advice process is a direct conversation between official and ethics officer. Even if a matter is deemed appropriate for an ethics commission to consider, the ethics officer can better help the official use the most appropriate language.

It is a difficult question whether to allow ordinary citizens to request advisory opinions. Most ethics codes exclude them from the list of possible requesters, even though "citizens" includes officials' family members and business associates, vendors, contractors, permit and grant seekers, candidates, good government organization directors, and others who have an obligation to make sure conflicts are dealt with responsibly.

There are four arguments for disallowing citizens from seeking advisory opinions. None of them is totally convincing, and applying them to the groups listed just above is throwing out the baby with the bath water

One argument is that a citizen cannot request advice about her own conduct, and that is the principal purpose of ethics advice. However, officials and employees are rarely limited to seeking advice only about their own conduct. Why should officials have a greater right to ethics advice, which is intended to serve the public, than the public itself? An ethics program exists for the sake of citizens first, and only secondarily for the sake of officials.

The ethical conduct of officials and employees is a matter of concern for all citizens.

In many cases, members of the public *are* involved in conflict situations, as relatives, business associates, and those seeking benefits in the matters where officials are faced with a conflict situation. It may be just as important to a contractor or developer to do the right thing or, at least, not get embroiled in a scandal, as it is to a government official.

The second argument for disallowing citizens to seek advisory opinions is that it may overburden the ethics commission. One solution to this problem (the one that appears in the City Ethics Model Code) is to allow citizens to request only informal advice, not formal opinions. If the ethics officer believes the matter deserves a formal opinion, then the ethics officer can present the request to the ethics commission. This is a good solution to the problem of overburdening the ethics commission, if there is an ethics officer or someone else providing informal advice. And even if there is no staff member, it is much less work (and more timely for those who request advice) for an ethics commission to designate one of its members to get special training and provide informal advice.

The third argument is that citizens may use the advice process to effectively file a complaint and yet make it public, since the advice process does not usually have the protections that surround enforcement proceedings. Usually, the only protection for ethics advice is confidentiality, but the individual citizen requesting the advice can waive confidentiality (in an enforcement proceeding, only the respondent official can waive confidentiality). The reason this is not as serious a problem as it appears is that, when advice is sought, no misconduct has yet occurred (if it has occurred, an ethics officer would suggest that the individual seeking advice consider filing a complaint instead). Therefore, unlike in a complaint, in a request for ethics advice there is no potential ethical misconduct to point to and to become controversial. If the ethics commission staff says that an official should withdraw, then all the official has to do is withdraw. Advice and enforcement may be relevant to the same situation, but at different times. And it is better and less expensive for the public to have a possible conflict situation dealt with as advice than as an enforcement matter.

The fourth argument is that citizens may abuse the advice process for political purposes. This is true. But it is equally true of officials, employees, candidates, and others. Potential abuse is not an argument for anything but dealing with requests for advice (1) as quickly as possible, so that frivolous requests, especially those that are made public, are

dealt with responsibly before they cause damage; and (2) by an independent ethics adviser, whose decisions will not be seen as politically motivated, one way or the other.

Since the principal goal of an ethics program is to prevent misconduct, not penalize it, citizens should be encouraged to act as early as possible. The alternative is for the citizen to wait until the conduct occurs, when it's too late to prevent it, and then file a complaint, potentially leading to a scandal. Allowing requests for advice elevates guidance over enforcement, leading to the responsible handling of conflict situations, and this is preferable. If government officials are not dealing with their own and their colleagues' conflicts in a responsible manner, that is, by requesting ethics advice, then there is no reason why informed citizens, or citizen groups, should not be able to do it for them. There will be abuses, but they can be treated as abuses. The possibility of abuse should not itself be abused in order to limit ethics advice.

One abuse that may be worth dealing with is requests for advice about hypothetical situations. This could be used simply to cause trouble. But it is very legitimate for vendors, contractors, permit and grant seekers, and candidates to seek advice re hypothetical situations, so they can make decisions that prevent them from occurring. This also goes for family members and business associates who want to be prepared if a restricted source offers them a gift or work. An online information sheet on this and other topics will reduce the requests for such advice.

It's worth noting that when the issue of citizen requests for ethics advice arose in Sioux Falls, North Dakota in 2009, it was the council that sought to prevent citizens from seeking advisory opinions, while the ethics board wanted to preserve citizens' right to do this, despite what would arguably mean a greater burden of work.

The most serious problem involving citizen requests for advice is that the citizen may not have the facts right. This is a problem with all requests for advice, which is why advice is binding on an ethics commission only to the extent that the facts given to it were accurate and complete. Usually, officials and citizens do not know all the facts, don't have them straight, or do not know which are important. But sometimes they provide incomplete facts in order to get the answer they want. Therefore, it is important to make it clear to the citizen requesting advice that the advice is only good to the extent the fact situation, as she presents it, is accurate and complete. If they go public with the advice rather than take the advice to the relevant official, they might be in for some serious

embarrassment.

If there appears to be any uncertainty on the part of the citizen, or if it is an important matter and the citizen might raise the issue in the middle of, say, a council meeting debate, and seriously affect the debate, the ethics adviser should contact the official and ask if the facts are accurate and complete. In fact, an ethics commission could make it a policy to contact the official and check the facts whenever relevant. If there remains a disagreement about facts, the ethics adviser can reflect this by providing different advice for the different factual situations.

Checking with the official turns a citizen request for advice into an ethics officer's initiation of advice to an official who did not request it. This is, in any situation, often a valuable thing to do. In other words, a citizen's request for advice is something like a tip that leads an ethics commission to investigate a possible conflict situation. The citizen need not be involved in the matter beyond effectively giving the tip, but this will have to be explained to the citizen. It will be more clear if the citizen realizes that the same initiation of advice may arise from a newspaper article or blog post. In that situation, no advice would be given to the reporter or blogger, but only to the official.

It is important here to recognize that advising citizens is not a goal of ethics advice. The goal is ensuring that an official deals responsibly with a conflict situation, for the good of the government. If this can occur due to a citizen's request for advice, there is no reason to prohibit it.

The need to contact an official in this and other circumstances should lead an ethics officer to obtain a list of full contact information for all city or county officials. This is an essential reference, and an ethics officer should not take No for an answer. Officials should be told that if they do not want an ethics officer to have their contact information, the ethics officer will have to deal with matters without consulting them.

Should the news media be permitted to seek ethics advice about officials? Should journalists and bloggers be permitted to call an ethics officer and ask her whether an official with a certain relationship with someone in a matter before him should participate?

Journalists are special citizens who not only care about government matters, because it is part of their job, but who also have many occasions to deal with government ethics issues and, thereby, learn more about them and teach the public as well as government officials about the subject. The question is, will they teach the public the right things about

government ethics, or the wrong things? As it is, they often have a limited understanding of conflict situations and, therefore, mis-educate the public, especially by reporting on ethics matters in the usual he said-she said manner, where none of the speakers has a good grasp of conflict situations. They also tend to assume that there is something wrong with *having* a conflict, rather than with not dealing responsibly with it. And they are often looking for a scandal.

However, calling an ethics officers and getting the story right before it becomes a scandal not only educates journalists, but can also prevent ethical misconduct, either because it alerts the ethics officer and allows him to intervene before any misconduct occurs or because reporting on the advice will quickly grab the attention of the official involved as well as his colleagues. This may not be the way the ethics officer would like the matter to be dealt with, but once it is in the hands of the press, it's most likely going to go public anyway, unless the ethics officer can explain to the journalist why it is best to give the official the advice first and allow her to deal responsibly with the conflict situation before raking her over the coals in public. It's a better story for everyone that a conflict situation was handled responsibly, that the government ethics program (with the help of the press) worked to protect the community. It should be given a chance to work, and responsible journalists will recognize this.

A journalist also needs to recognize that, like a citizen, she may not have the right or the complete information, thereby creating a problem where one does not, in fact, exist. For this reason, an ethics officer should ask to speak off the record, providing background information only, at least until the facts have been confirmed and it is clear that there even is a conflict situation to deal with, and the advice given will be appropriate to the actual situation.

Since journalists are essentially investigators, an ethics officer can ask a journalist whether she has confirmed her facts with the official and, if not, how certain she is of the facts. The journalist may be willing to do more investigating, to get a more certain set of facts. Or the ethics officer can say that he will contact the official and get back to the journalist. This contact may both elucidate the facts and provide the official with the opportunity to get the advice necessary to deal responsibly with the conflict situation.

If the official's presentation of the situation is different, and there does not appear to be a conflict situation, the ethics officer can tell the journalist, who may want to do more

research and then contact the ethics officer again if she feels the official is not providing the correct information.

If the ethics officer decides to give a journalist ethics advice, and there is a question about the facts, she should put her answer in writing, setting forth the facts provided and giving advice based solely on those facts. The ethics officer should insist to the journalist that the advice be tied only to these facts, and that it be made clear that these may not be the facts, or all the facts, of the actual situation. In short, the advice is effectively based on a hypothetical situation.

Many bloggers are not investigators. They should be treated more like a citizen than a journalist, unless the ethics officer has worked with the blogger before and knows her to be a trusted investigator. The only question is whether or not, after speaking with the official, the ethics officer should share his advice with the blogger, where he would not share his advice with an ordinary citizen.

It is important for an ethics officer to consider the alternative to providing advice to a journalist or blogger, if they are not agreeable to giving the official a chance to follow the ethics officer's advice before writing about the situation. Most journalists like to quote an "expert." For example, I get many calls from journalists about ethics matters. But so do people with much less expertise, mostly local political science or public administration professors, or good government organization staff. It is better that what journalists and bloggers are told is both accurate and sensitive to the situation. This is what they are likely to get from an ethics officer. It is best if this information can be given off the record, and if the journalist or blogger is willing to let the ethics officer talk with the official and try to get him to deal responsibly with the situation before it is written about, because otherwise there might be a scandal where the story will soon be just the opposite.

An ethics officer should not let pass an opportunity to have a conflict situation dealt with responsibly both by the official and by the press. Saying "No comment" is more likely to undermine both the educational opportunity and trust in the local government.

What if the official has already sought advice from the ethics officer? This is where it is good for an ethics officer to be able to say to a journalist, "I have given the official advice. You should give him the opportunity to act on the advice before making the advice public. If he does not act before the next meeting, you should contact him about the advice. If he cannot give you a clear statement about the advice, you may call me at that time." This

cannot be done if ethics advice, including whether an official has sought advice, is kept confidential. For more on this topic, [see the section below](#).

Honolulu's rules expressly refer to "the public, including the news media" with respect to requesting advice. If the public is permitted to request informal advice, as it should be, it's worth acknowledging that this will include the news media, and that although this could mean more advice and more transparency with respect to advice, it will also mean more prevention of ethical misconduct.

4. What an Advisory Opinion May Deal With

Some ethics codes limit advice to real situations, while others expressly allow opinions regarding hypothetical situations (most say nothing either way). It is certainly valuable to know how to deal with a possible situation when someone has been discussing it. For example, if an official is a part owner of a construction business and the business is contemplating making a bid at some point, the official and the company might want advice on what would happen if it did bid. The answer might save the company money preparing a bid, or it even might lead the official to sell her interest in the company, so that she does not stand in the way of the company's success.

It is reasonable to prohibit requests for formal advisory opinions based on hypothetical situations. However, an ethics officer might feel that a formal opinion on a complex hypothetical situation would provide useful guidance to others. Therefore, there is no reason to restrict an ethics officer or ethics commission's discretion to provide a formal opinion on a hypothetical situation.

Another content-oriented limitation that ethics codes or regulations sometimes make regards the timing of the request for advice. There are three possible timing situations. A request for advice may deal with conduct (1) that has already occurred; (2) that has occurred, but is continuing (for example, the matter has been considered by a board and the official has participated in the discussion, but the matter has not yet been resolved); and (3) has not yet occurred.

Ethics advice is solely intended for future actions, and this should be made clear in the relevant section of an ethics code (the language in the City Ethics Model Code is, "a written advisory opinion with respect to the interpretation or application of this Code with respect to future actions only." Yet it is common for an official not to recognize a conflict

situation, or deal with it responsibly, until a matter has already come before him and he has begun to participate in it. It is appropriate for the official to seek advice on the matter before he is required to act in it again.

It is also common for an official to accept a gift and then, wondering if he should have, seek advice about what to do. Although the gift has been accepted, in many cases this acceptance can be rectified by returning the gift. It is the returning of the gift that is the future action that the official is seeking advice about. Of course, if the official waits to ask for advice until her acceptance of the gift becomes a public scandal, it is too late to ask for advice.

It is valuable to encourage officials to seek advice when they are still in a position to deal responsibly with a possible conflict situation. Therefore, there should be no restriction on seeking advice in this sort of timing situation.

There is, however, a problem when the conduct is all in the past, when an official, for example, has discussed an issue and voted on it for the last time. The problem is that the official cannot deal responsibly with the situation anymore, except to apologize and make amends for it. The way to do this is not to seek advice, but to file a complaint against oneself (or have a colleague file it) and seek to settle the matter as soon as the ethics commission has sufficiently investigated it so that it knows the necessary facts.

Here is useful language from the Philadelphia ethics board's regulations dealing with the issue of timing:

A requestor may only seek an Advisory Opinion for proposed future conduct or action, not for conduct or action that has already occurred. The Board, however, may address past conduct in order to provide guidance in an Advisory Opinion as to corrective action or future action that represents part of a continuing course of conduct that began prior to the request.

Another issue here is what laws an ethics officer or commission may provide advice with respect to. Should their advice be limited to the local ethics code, ethics regulations, and the relevant provisions of the charter? Or should it extend to state ethics statutes that apply to local officials and employees, when there is no state ethics commission with jurisdiction over local officials? And what about federal ethics statutes that apply to local

officials and employees, such as the Hatch Act?

Just as I recommend that all state ethics provisions be included as appendices to a local ethics code, so that all the relevant rules are in one place, it would be useful to officials for an ethics officer or local ethics commission to provide advice with respect to state ethics laws, as well. The question is, should this advice be binding on officials and protect them, as well ([see the section below](#) on the binding nature of ethics advice)? Philadelphia's ethics board, which does provide advice on state ethics laws, expressly makes this advice nonbinding. But why should officials be prevented from getting advice that protects them from a suit? And why shouldn't they be bound by this advice?

One problem is that, since there is no one at the state level providing such advice, there is also no agency or body that creates a consistent body of interpretation and precedent. There are only courts, which are rarely asked to interpret ethics laws and which have no expertise in doing so (in fact, I think that they generally do a poor job of it).

If each local government was permitted to interpret state ethics laws, at least if such advice was not made available online (and in most cases it is not), local ethics advisers would be working practically in a vacuum, without precedents, resulting in a wide range of interpretations of the same language.

To solve this problem, local ethics programs could meet and cooperate, and create a website where they would make their advice on state ethics laws (as well as local ethics laws, whose provisions are relatively similar to each other) available in an attempt to create a body of interpretation that might lead to precedents or, at least, two or three schools of thought on how to interpret particular language. This is better than preventing local officials from getting advice that would let them follow the state laws without the need for expensive and long court proceedings or decisions that treat ethics laws like any other laws and, therefore, do not really provide ethics advice.

Another way to deal with the interpretation of state ethics laws would be for ethics programs in a state to together select an ethics officer (or a board with staff) strictly to provide advice on state ethics laws. If the state legislature was to recognize the authority of this ethics officer or board, then the advice could be fully binding on officials, and protect them from complaints or suits based on conduct consistent with the advice.

In the alternative, a state ethics commission could be given the authority to provide such advice.

5. Time Limits

Since opinions are generally needed as soon as possible, it is important to set a time limit on the provision of opinions. However, especially where an ethics commission has no staff, occasions may arise where an ethics commission's agenda is too full to allow the addition of a request for advice made shortly before a meeting. But it is important to provide a guideline so that ethics commissions cannot, on an ordinary basis, make officials wait too long for an answer.

However, if the ethics commission is late in giving its opinion, this does not mean that the requesting official may simply do as he pleases. If an immediate response is required, the official should be able to request quick, informal advice from the ethics officer.

If there is no ethics officer to ask, inaction by an ethics commission cannot be used as an excuse to deal irresponsibly with a conflict. The default rule is, If in doubt, withdraw from participation in the matter, do not accept the gift, do not take the job.

6. Preparing Advisory Opinions

When preparing an advisory opinion, it is important to remember that, unlike an ethics proceeding, advice is a shared activity, a conversation between official and ethics officer. It is not expected that the official will provide all the necessary information, or cite the right provisions, or have much understanding of what is important and what is not. Advice requires that an ethics officer ask questions as well as answer them. The final question may look very different from the original question the official asked. In many cases, no answer will be necessary, because the official will understand why there is no question what she should do. Advice is guidance, and the best guidance is getting the official to answer questions for herself, to gain a greater understanding of government ethics that she can share with her colleagues.

In 2009, several ethics commission staff members, state and local, shared some practical advice on written advisory opinions. Here are some of the most valuable things they said:

Honolulu: Use the KISS approach [“keep it simple, stupid”]. An opinion isn’t a law review article. If your commission members don't understand it, public servants certainly won't. [This is the most common problem I’ve seen. *I can’t understand a lot of the formal advisory opinions I’ve read!*]

However, you’ve still got to dot the i’s. New Jersey said: When you’re writing an advisory opinion, always keep in mind that this could be the one that goes up on appeal. [Putting the two together, keep an advisory opinion simple, but also make it clear and complete.]

Canada: Always indicate that your opinion is based on and only applicable to the information given. [However, see [the following subsection on general advisory opinions.](#)]

Texas: Brainstorm with colleagues about unintended consequences, especially with respect to opinions that have broad applicability. People will dissect the opinion in search of potential loopholes.

Alberta: Check the database of opinions to find precedents. This ensures easy access to the ethics program's “corporate memory.” [I would add that it doesn’t hurt to look at other ethics commissions’ opinions to see how they have dealt with an issue. [Click here](#) to find a page of advisory opinion links.]

Rhode Island: When the answer to a request for advice is clearly going to be “no,” offer the person asking for advice the chance to withdraw the request for a formal opinion, conform to an informal opinion, and withdraw. This eliminates about a quarter of requests for formal advisory opinions.

Florida: Always restate the facts in the opinion, so that it's very clear what facts were relied on in giving the advice. Also, when the official is asking the wrong question, go beyond what is requested.

Virginia: Keep log sheets of all telephone requests and opinions, and keep records of all e-mail requests and opinions. Enter them into a database to keep opinions consistent. [Just because opinions are given informally, doesn't mean they should not be consistent and available to staff, commission members, and officials for guidance.]

Ohio and Pennsylvania [this advice is more valuable than you'd think]: Develop a style manual and boilerplate language on each issue to make sure opinions are stylistically uniform.

Don't try to do everything yourself. Connecticut puts draft written opinions online for comment before the ethics commission meets to discuss them. If the facts don't seem right, or you need more facts, go back to the requester with questions. If the request came by phone, and it's not something simple and easily answered right away, e-mail the statement of facts to the requester and ask that the facts be confirmed before providing an opinion.

When providing informal advice, it's important to remember that the individual seeking advice takes the situation personally, that he is emotional about the situation, and that it is because of the emotions that the individual's inner lawyer is hard at work coming up with arguments to prove that his emotional response was correct. Many government attorneys accede to these arguments or even provide officials' inner lawyer with better arguments. An ethics officer is more likely to explain why and how the inner lawyer is wrong.

But ethics officers should do more than make counter-arguments. They should display respect, warmth, and openness to what the official has to say before stating their own case. As Jonathan Haidt says in his book [*The Righteous Mind: Why Good People Are Divided by Politics and Religion*](#) (Pantheon, 2012), "Empathy is an antidote to righteousness."

But this isn't always easy to do. For example, it may be difficult to empathize with an official who insists on his integrity and attacks the individual who has made allegations against him, when the ethics officer knows that these allegations are reasonable and feels that the official is unfairly turning the situation into a personal attack on a political opponent. But it certainly makes it more likely that the official will be open to a different point of view if the ethics officer listens well and shows respect and understanding for his

plight, before providing his advice.

[Click here](#) to find a page of advisory opinion links from a variety of cities, counties, and states.

7. Ethics Etiquette

When an ethics issue arises, what should officials do? The best way to determine what to do is to look at mistakes that are made, why they are wrong, and how the situation could be handled better.

Here's an example from Baltimore. In 2012, the city comptroller accepted the pro bono services of a law firm whose most prominent member was the owner of the Baltimore Orioles baseball team, in other words, a major player in city politics. The legal services were for a suit against the mayor, alleging that a large telephone contract was not competitively bid.

The mayor came back with the allegation that the comptroller's acceptance of the gift of legal services was a violation of the ethics code. The comptroller insisted that the legal services were not for her benefit, but for the benefit of the city's residents. She also insisted that the Orioles owner does no business with the comptroller's office.

In other words, a gift to an agency turned into a public battle between two high-level officials. The public was confirmed in thinking that its local government was a place where irresponsible egomaniacs duke it out at the public's expense.

The biggest problem with the handling of this situation was, of course, not mentioned by either side. That problem was not seeking ethics advice. Before seeking a gift from someone doing business with the city, especially in a complex situation involving someone so prominent, an official should ask the city's government ethics adviser what to do. If she does not make use of him, an official only has herself to blame for accusations made against her.

The mayor also should have sought ethics advice or filed an ethics complaint rather than making public ethics allegations against the comptroller. It is not the mayor who should determine, or act as if she has the authority to determine, when ethics violations occur. It's understandable that she was angry about the suit against her, but if she felt she was in the right, she should have acted responsibly by going through the proper channels in dealing with ethics issues.

In addition, the comptroller's pro bono attorney should have kept his mouth shut. Instead, he wrongly stated that future withdrawal from matters involving the law firm's principal is sufficient to deal with a possibly illegal gift. Gifts can only be cured by rejecting or returning them. The attorney should have left it to the ethics board to say whether or not the comptroller could cure the gift via withdrawal.

In short, the proper way to deal with an ethics issue in a city or county that has an ethics program is to let the ethics program handle it. Turning an ethics issue into a public row can only undermine the goals of an ethics program.

8. General Advisory Opinions

Sometimes, it is important to ensure that advisory opinions are limited to the facts of the case, so that an interpretation cannot be applied in different circumstances without at least a request for informal advice. When this is the case, it can be useful to limit the opinion with language such as, "This advisory opinion is based solely on the facts as stated here."

However, there are other times when it is valuable to use a particular situation to provide more general guidance, whether or not anyone has sought advice with respect to the situation. This is especially true either if the situation shows a particular weakness in ethics code language, or deals with a gray area that has caused problems for multiple officials in similar but not necessarily the same circumstances. In such circumstances, an advisory opinion can be more general than is necessary to deal with the particular situation.

Or the ethics commission may, in addition to an advisory opinion on the particular situation, draft a separate general advisory opinion that applies the ideas or approach to a broader range of situations (see [an excellent example](#) of one of these opinions, from the New York City Conflicts of Interest Board).

Some ethics commission call them General Advisory Opinions. Others call them Advisory Alerts or Guidelines. These opinions should be given their own page on an ethics commission's website (see such a page on the [Rhode Island Ethics Commission website](#)), but also be included in the contents and index of advisory opinions.

When drafting a general advisory opinion, it is important to think about unintended consequences and to make sure that it's as clear as possible how various situations will be handled under the opinion's approach. It is best to include a description of multiple situations where the opinion applies, as well as situations where it does not apply.

It is also useful to bring together multiple advisory opinions on a particular topic in the form of special information sheets. This provides better guidance, and both cuts down the number of questions that are asked and makes requests for advice more focused.

Another approach that is useful in situations where there have been multiple instances of misconduct or of conduct in a gray area, that is, situations where there is an appearance of impropriety, is the Risk Alert, an approach taken by, for example, the Securities and Exchange Commission. The idea of a risk alert is to share with those under one's jurisdiction observations of misconduct and ways to prevent it. It has two goals in one: to guide and to warn. The guidance is most important. By showing how situations can be dealt with responsibly (with examples of how it actually has been done), a risk alert can go beyond advisory opinions and general training to provide useful guidance to officials with respect to particular kinds of situations.

A risk alert also lets officials know that there is a serious risk in engaging in the sort of conduct the ethics commission has seen or heard about, whether or not it is legal and whether or not there has been enforcement. After disseminating a risk alert and providing some time, an ethics commission faced with the sort of misconduct it has written about can enforce against it without any question whether the misconduct arose from ignorance or negligence rather than intent. Officials have been forewarned, and they will have no defense and, hopefully, will admit to the misconduct and settle without an extensive investigation and without a hearing.

Here is an instance where the least expensive and most effective approach is something outside the box, which will save the cost of investigations and hearings as well as the cost to the public trust of future scandals.

9. The Ethics Officer

“Ethics officer” is the most common name given to an individual who is designated to give ethics advice. In some large cities and counties, departments and agencies sometimes have their own ethics officers, who are trained and supervised by the government-wide ethics officer. Ethics commission directors and other staff members sometimes act as ethics officers, without the title.

In smaller jurisdictions, ethics advice can be contracted out, on a per-hour or per-matter basis, to an independent government ethics professional (who does not have to live

in town), or local governments can get together and hire a part-time or full-time ethics officer (however, this officer should not be involved with a local government association, because such associations tend to represent the interests of local government CEOs, not the public). An alternative in small towns is to train one or more ethics commission members, or a former member, to provide ethics advice on a volunteer basis.

These are the best practices. But the most common practice is for the city or county attorney, or a member of the office, to either be named ethics officer or, without any special title, provide ethics advice anyway. [The problems with this approach are discussed at length below.](#)

It is important that an ethics officer, or the ethics commission staff, have a monopoly on giving ethics advice, either alone or in conjunction with the ethics commission. Otherwise, officials and employees will do what is known as “forum shopping,” going to the individual they feel is most likely to give them the answer they want, whether it is a supervisor, department or agency head, or local government attorney. An ethics program’s monopoly on giving ethics advice should also mean that officials cannot go to a state ethics officer either, unless the relevant law is only a state law, that is, only when there is no relevant city or county law.

It is also important that the ethics officer not be selected by or responsible to any official or employee other than an ethics commission or, if there is no ethics commission, a selection board consisting of representatives of a local community organization representatives, or an inspector general, auditor, ombudsman, or other independent official charged, at least partially, with ethics enforcement.

Usually, an ethics officer gives quick, informal advice, and the ethics commission gives slower, formal advice that takes the form of a formal, written advisory opinion and is usually made available to the public.

It is important, especially if multiple staff members provide advice, to put advice in writing. A follow up e-mail or letter should be sent to an official or employee who has been given advice in person or over the phone. This creates a record and allows the official or employee to correct the facts as stated and say whether she has any issues involving the advice as presented. In other words, putting advice in writing minimizes error, both the ethics officer’s and the official’s. And if the advice becomes an issue, there will be evidence of the advice given as well as the facts supplied, which can be very important, because

advice based on partial or erroneous facts cannot be depended on. At the least, notes should be taken on each advice session so that there is a record of the ethics officer's view of the exchange.

When providing ethics advice, it is important to remember that often an official will not ask the right questions or provide the right facts. Sometimes, this will happen because the official wants to be given a "Yes" answer. Many people have an excellent instinct for presenting a situation in order to get the answer they want. Other times, the official simply does not understand the situation, but feels there might be some problem with it. The official doesn't know what about the situation is important in a government ethics sense. Either way, an ethics officer needs to ask questions in order to nudge the official toward providing the necessary facts and seeking the advice that is appropriate to the situation.

If the facts are especially complicated or the official is inconsistent in his presentation of the facts, it is best for an ethics officer to put the facts in writing and get the official to confirm them before providing advice.

It's equally important to remember how hard it is for many people to seek advice on what they take to be their being good or bad. Even those who seek out advice are apt to be defensive. They should be reminded at the start, and as often as necessary, that it is only a matter of acting responsibly and professionally, not a matter of being good or bad. In fact, they have already done the responsible thing by seeking ethics advice. The only issue now is getting and acting on advice appropriate to the situation.

As I have said above, there is a gap between advice and enforcement. The gap comes primarily from the fact that certain concepts – especially appearance of impropriety – can be used in providing advice but, because they are vague, cannot be used in enforcement proceedings. An ethics officer can say to an official that, although her conduct would be legal, it would create a serious appearance of impropriety, undermine the public trust and, therefore, it would be best if she withdrew from participation or did not accept the gift.

Some ethics officers worry that if you say 'No' too often, officials won't ask for ethics advice. This is not just because they want to do what they want to do. It is also because they do not understand that the rules that govern ethics enforcement are minimum requirements, unlike other laws. The reason they are minimum requirements is that government officials and employees have a special obligation, a fiduciary duty, that requires them to consider the effects of their conduct on the public's trust that its government is

acting in the interest of the community rather than in the personal interest of its officials.

Limiting advice to the law forces an ethics officer to give advice based on minimum legal requirements rather than on what is best for preserving the public trust. Doing this turns minimum requirements into maximum requirements, and the difference between law and ethics is lost.

There are two gaps involved: between advice and enforcement, and between ethics and law. Enforcement has to be limited to law. This leaves ethics to the domains of training and advice. Closing the advice-enforcement gap limits ethics to training. After the training class is over, there is no more ethics program, just a legal program. In this legal program, many of the innovative ideas I discuss in this book would be out of place.

In fact, a great of ethics training is limited to teaching the law. In these jurisdictions, there is no gap at all, and laws are maximum requirements. Officials should only do what they have to do. Only a lawyer would make this argument.

There is an opposite approach, that emphasizes ethics over law. This is a requirement to seek advice whenever an official has a special relationship, direct or indirect, with anyone involved directly or indirectly in a matter. This is the best way to prevent ethical misconduct. See [the section on this approach](#) below.

Giving purely legal advice on ethics matters, while leaving it up to officials to deal with appearance and other gray-area issues, is, according to a 2004 U.S. Interior Department Inspector General report, “cowardly and disingenuous.” The report emphasizes the fact that officials cannot see beyond their subjective perspective and need neutral advice from someone who can show them how a “reasonable person” would view the conduct they are contemplating. The report noted all the trouble officials get in “when solid, courageous, thorough advice at the outset might well have prevented these appearance problems altogether.”

What does it mean to give solid, courageous, thorough advice on appearance issues? Here is an example from a report by the Atlanta ethics officer:

However well intentioned, the [municipal airport] planning committee’s decision to hold a hybrid [retirement party] – part private and part public – created appearance problems. By asking for financial support from companies that do business at the airport, city employees placed themselves and the donors in an untenable position; what was intended to be a celebration honoring a public servant

for his 12 years of service instead became a subject of controversy in which motives were questioned. In the future, the better practice would be to host a more modest affair funded entirely by the City and persons in attendance.

One of the Interior Department Inspector General's recommendations is that ethics advice be "proactive," that is, "ethics advisers should ask all questions necessary to answer both the 'can I' as well as the 'should I' questions. Ethics advisers must be willing to say the word 'NO!' — even to high-level political appointees."

Not only should an ethics officer be proactive in an ethics consultation, but there are occasions where ethics advice may be provided when it is not sought by the official or employee involved. The District of Columbia council's attorney recommended this to the city's new ethics board in 2013. He told the ethics board that it "should keep its finger on the pulse of emerging issues within the District's ethics ecosystem by listening to employees and the public, anticipating common or emergent situations, and tackling difficult but predictable ethical dilemmas."

Proactive ethics advice can be provided in several ways. One is that the ethics advice can be sought by the chair or other members of an official's board or commission, and shared with the body as part of a discussion of a possible conflict affecting that official. This can be done within agencies, as well.

Another way this can happen is that the ethics officer can read about a situation in a newspaper article or blog post and take the initiative by contacting the official to offer advice.

A third way is providing [general advisory opinions](#) or advisory alerts when multiple officials have sought advice regarding similar situations or there have been tips regarding the same sort of alleged misconduct.

A fourth way is providing specific guidance (in the form of information sheets or FAQs) regarding situations that have arisen elsewhere in certain areas such as procurement, grants, development, transportation, and council slush funds. This guidance can be provided before such situations become problematic in the city or county.

A fifth way is that a supervisor might take the initiative to either raise an ethics matter with a subordinate or to ask the ethics officer to intervene.

A sixth way is that another official or employee, or even a citizen, might ask the

ethics officer to talk with an official or employee.

A seventh way is that a government attorney might provide ethics advice as part of a consultation not intended to involve conflicts (if there is no ethics officer), or strongly suggest that the official request advice from the ethics officer, if there is one.

An eighth way occurs when an ethics complaint is filed, and the allegations are either de minimis or clearly legal, but ethics advice to the respondent would be useful. This advice usually is placed in a letter letting the respondent know that the complaint is being dismissed.

Another valuable proactive way to prevent ethical misconduct is for an ethics officer to make an overall assessment of ethical risk, to look at where the greatest risks of ethical misconduct are. Over time, an ethics commission learns where the greatest risks are. There is no reason to wait until misconduct occurs. An ethics program can save itself a lot of time and resources by learning which are the areas where the problems are the greatest (e.g., procurement, grants, and council slush funds), and then providing focused training and advice in these areas, making recommendations for processes that will prevent misconduct in these areas, and enforcing the laws in these areas on its own initiative, if need be.

Sometimes an official won't like an informal opinion he is given (especially if she didn't ask for it or is told "No."). She should be allowed to ask for a formal opinion from the ethics commission. But if it is a fairly straightforward issue and it becomes clear after a discussion by the ethics commission that the informal advice will be affirmed, the official should be told, so that she may withdraw her request for a formal opinion, follow the informal advice, and save the ethics commission and its staff a lot of work.

10. Informal Advice

Informal advice from a member of an ethics commission's staff is not a casual affair. Executive directors, ethics officers, and other staff members should keep a record of each request for informal advice and the response given. The record should include the name, position, and contact information of the requester, the name of the person providing the advice and anyone contacted regarding the advice, the facts (real or hypothetical), the final version of the question (if more than "What should I do?"), and the advice given (including references to ethics provisions and regulations, formal advisory opinions, and other laws). Any documents presented by the requester should be attached, physically or digitally, as

exhibits. What should be included in records of informal advice should be described in detail in the ethics commission's regulations.

The reason such records are necessary include (1) having a record to show the ethics commission how its staff has been handling requests for informal advice; (2) having a record of the facts provided and the advice given to compare to the official's conduct and the facts determined by an investigation or a stipulation of facts, should an ethics complaint be filed against the official or should the official insist publicly that she has followed the advice she was given; and (3) having a record of advice that staff can together flip through to determine what advice would be valuable to others and, therefore, worth putting online.

With respect to the first reason, it is important to require that advice records, and statistical summaries of advice given (broken down by type of conflict, by level of official or employee, etc.) be provided regularly (at least twice a year) to the ethics commission, so that it can determine how frequently and by what sorts of officials and employees ethics advice is being sought, and how often staff is telling them to withdraw or participate, accept or reject a gift, accept or not accept post-employment positions, etc. It is also valuable for the ethics commission to know how many times its staff provided advice on their own initiative, and whether on the basis of news reports or citizen contacts, and how many times its staff took requests for advice to the ethics commission for a formal opinion.

The most valuable statistic, however, is the hardest to provide: how many times officials and employees followed the advice they were given, and what happened when they did not. Officials could be requested to provide this information; there could even be an online form to fill out. But it is not likely that this would be enforceable.

The only part of this information that is easily available is how many times the failure to follow advice led to an ethics complaint (and how many times complaints were filed even though officials followed advice given). Any information along these lines is valuable to put together and provide to the ethics commission, at least once a year in [an annual report](#).

Atlanta has a way of dealing with informal advice that is worth considering. Its ethics board has a three-member committee on advisory opinions, created pursuant to the board's rules (such a committee may be formed elsewhere, even if the rules do not require it). The ethics officer may consult with the committee, and the committee is supposed to periodically review the ethics officer's informal advice "to determine whether any question

should be referred to the board for its review.” Such a committee, or even a designated ethics commission member, could provide a valuable sounding board for an ethics officer who is uncertain whether an issue is important enough to bring before the board, or feels it is important to run possibly controversial advice past the board, but an answer needs to be given to the official before the board’s next meeting.

11. The Binding Nature of Ethics Advice

Seeking ethics advice is good for the public and for an official or employee who wants to handle a conflict situation responsibly. A formal advisory opinion is always binding on an ethics commission and will usually protect an official or employee in a suit. However, this is true only to the extent the facts presented to the ethics commission were accurate and complete, and to the extent the facts do not change. If, for example, a council member told the ethics commission that she was a volunteer or employee of a nonprofit seeking a grant from his city, but it turns out that she was also secretary of the nonprofit’s board, then the advice may not be binding. Similarly, if when she asked for the advice she was a volunteer, but then became secretary of the board, the advice may no longer be binding; the official should ask for advice regarding the changed circumstance.

By saying that formal ethics advice is binding on an ethics commission, it means that a complaint based on the conflict situation will be dismissed if the requester followed the advice and the facts depended on were correct and complete.

It is important to recognize that part of the binding nature of ethics advice is the requirement that the official follow the advice. In other words, the advice is binding on the official as well as on the ethics commission. An official who ignores ethics advice can be found in violation of the relevant ethics provisions.

Binding ethics advice from an ethics commission is not only good for the official with the immediate problem, but for other officials as well, because the advice is made public and adds to the quality of the guidance provided by the ethics program. This is the principal reason why advisory opinions should be readable as possible or, at least, contain a summary at the top that is intended to provide guidance to officials and employees who are not lawyers. Many formal ethics opinions read too much like court decisions. As with ethics provisions and training materials, ethics opinions should be written for readers with no legal background. Non-lawyer ethics commission members should analyze the readability of

each formal opinion, and not be afraid to admit when they don't fully understand something that is said in the opinion, because this means editing is required. Since ethics commission members' understanding of ethics matters is greater than that of most officials and employees, if they don't understand something, most officials and employees will not, as well.

While a formal advisory opinion is binding both on the ethics commission that gave it and on the official, this is not always true of informal advice. The City Ethics Model Code provides, "The Ethics Officer's informal opinions may be relied upon, in good faith, but will not be binding upon the Commission or upon the person making the request." But if a local government has an independent professional available to provide informal advice, and the advice is written down and the facts are confirmed by the official requesting the advice, there is no reason why it should not be binding on both the official and the ethics commission, as long as the facts were accurately and completely provided. If the question is especially complicated, the ethics officer could acknowledge this and say either that the requester will have to wait for a written response, or that immediate advice will not be binding.

The extent to which ethics advice is binding or not, on the ethics commission or on the official, should be said expressly in an ethics code or regulation, and it should also be said expressly when the advice is given. It should, for example, be said that the advice will not be binding on a court in a criminal trial (because other, criminal laws are being applied), and that it will not be binding even on the ethics commission if any important facts were left out or inaccurate.

One reason that an official's ability to depend on ethics advice should be stated expressly is that there is a 2007 California Supreme Court decision, [*State v. Chacon*](#) (click and search for "Chacon" and "council"), that does not allow local officials to depend on a city attorney's ethics advice, at least on the basis of common law (however, the California Fair Political Practices Commission, the state's ethics commission with jurisdiction over local officials, considers following a local government attorney's ethics advice to be a mitigating circumstance in an enforcement proceeding). This court decision would not seem to apply to advice given by an ethics officer on the basis of an ordinance that expressly says the official may depend on it, but it is always best to be careful.

In 2008, the Florida ethics commission, which has jurisdiction over local officials,

proposed that it be made clear via state statute that officials cannot depend on the ethics advice of a local government attorney.

Here is the subsection from the City Ethics Model Code that deals with the binding nature of an advisory opinion:

An advisory opinion rendered by the Ethics Commission, until and unless amended or revoked, is binding upon the Ethics Commission in any subsequent proceeding concerning the person or entity that requested the opinion and acted in good faith, unless he, she, or it omitted or misstated a material fact in requesting the advisory opinion. The advisory opinion may also be relied upon by the person or entity, and may be introduced and used as a defense in any civil action brought by the Ethics Commission or the city.

12. Ignoring Ethics Advice

A serious problem occurs when an official ignores ethics advice that he is given. Here is the City Ethics Model Code provision that deals with this situation:

If the Ethics Commission has reason to believe that an advisory opinion has not been complied with, it will take appropriate action to ensure compliance, including but not limited to the filing of a complaint pursuant to §213.3.

There are officials so stubborn and sure of themselves, they will insist that, despite what they are told by an ethics officer, they can do what they want. This is especially true if they are told that no law would necessarily be violated, even if there would be a serious appearance of impropriety.

For example, Louisville council members were strongly discouraged by the ethics commission chair and the council president not to accept an offer of luxury suite tickets to a basketball game from a company seeking renewal of a cable TV contract. One council member accepted the tickets and gave them to friends and family members, as if that made a difference. Another said he didn't feel he had a conflict and "Whatever I do, that's my business." and "Do you really think we're going to vote against the [cable contractor]? I don't think that's even a question."

One problem here is that the advice of an ethics commission chair or of a council president is not binding on an official. This allows the official to be bullheaded. But what if the advice had come from the ethics commission or an ethics officer in the form of an advisory opinion? Then the ethics commission should treat the advice as binding, whether or not an ethics provision was actually violated.

This is a highly controversial issue. Most people take the lawyerly view that violations of the law are all that matters in ethics, and that, therefore, no one can tell an official to do something unless it would prevent a legal violation from occurring. In fact, some ethics codes do not allow ethics advice to consider anything but violations of ethics provisions. In this way, they tie the hands of ethics officers and ethics commissions, turning ethics advice into legal advice, minimum requirements into maximum requirements. In this way, an ethics code can, with a single phrase, undermine the foundational idea that ethics provisions are minimum requirements, and that officials are not supposed to take advantage of loopholes in those provisions, but should instead seek advice about gray areas, and follow that advice.

13. Advice on the Ethics Commission Website

Since ethics advice is important not only to the official requesting it, but also to other officials, it is valuable to make this advice easily available on an ethics commission's website (see [the Advice part of the section on websites](#) for information and examples of how to do this). The goal is to use advice to provide continuing ethics education and to make the ethics program's guidelines increasingly clear, so that it is easy as possible for officials to deal responsibly with their conflict situations.

What if you are in a small city or county, or you have a new ethics program, so that you don't have any advisory opinions to clarify your ethics code? The fact is that you *do* have advisory opinions, you just haven't made them yours. It's likely that your most important ethics provisions use language similar to that in numerous other ethics codes, local and state. An ethics commission, or its staff, can look for useful and applicable advisory opinions made in other jurisdictions, and make them yours ([click here](#) to find a page of advisory opinion links).

Like all ethics materials, advisory opinions are not copyrighted. It is both legal and ethical to use them, word for word or in an adapted form. In this way, an ethics

commission can create instant precedents that can provide a great deal more guidance than an ethics code alone. One advantage of borrowing from other jurisdictions' advisory opinions is that you don't have to worry about the confidentiality problems discussed in the next subsection.

Since confidentiality is the default position of most lawyers and politicians, it is important to spell out the requirements in the ethics code or in regulations relating to placing ethics advice online. Do not assume that advisory opinions, informal advice, or anything else will remain online or that they will be made, or kept, as accessible as possible. If transparency and accessibility are not required, you can bet that someone down the line will insist on confidentiality or access only through the clerk's office.

14. Ethics Advice and Transparency

A serious limitation on the usefulness of ethics advice, including its omission from ethics commission websites, is that it is sometimes considered confidential. It is common to talk in terms of the "confidentiality" of ethics advice, especially since confidentiality is very important to lawyers and lawyers generally determine the language used. But since transparency is an important part of government ethics, the talk should be about "transparency," and the exceptions to transparency.

The Arguments in Favor of Confidentiality

There are three principal arguments that are made in favor of the confidentiality of ethics advice. The strongest one is that many officials and employees will not seek such advice if they know it will be public information. There are three reasons for this. Officials often do not understand that it reflects well on them when they seek ethics advice. Officials should be proud to be seen seeking advice about their public duties. It shows that they want to deal responsibly with their conflict situations, that they are behaving professionally and with consideration for preserving the public's confidence in the integrity of their local government. People who believe that their seeking of ethics advice should be kept confidential wrongly feel that there is something wrong with having a conflict. A policy should not be based on a misunderstanding of government ethics.

Officials are also concerned about how any revelations about them might look. And they view their private affairs as personal information, not for public consumption, even

when their private affairs may conflict with their obligations to the public and even when their private affairs involve government contracts, permits, grants, and the like. These reasonable concerns need to be dealt with in ethics training, through the example of government leaders, and through redaction of a transaction's details (although not of the transaction itself). Since the most important message that comes out of a training program is to seek advice, if the advice is not to be fully confidential, it is extremely important to explain why this is the case, to listen to and respond to officials' concerns.

Although there is no doubt that officials tend to prefer that ethics advice be kept confidential, there is no evidence that, when it is made public in a responsible manner, officials seek advice less often.

The second argument in favor of confidentiality over transparency is that the facts given may include personal information not only about the official, but about others, such as relatives and business associates. This concern can usually be handled by redacting, that is, carefully striking out personal information before an opinion, whether formal or informal, is made public. There is usually no reason even to include names. It is enough to say that a contract was sought by a business associate, or a grant sought by a family member. Amounts and names are far less important than relationships and the fact that someone with a special relationship might benefit from government action.

The third argument in favor of confidentiality is based on the fact that most lawyers consider ethics advice the same as legal advice, and consider legal advice to government officials the same as legal advice to ordinary citizens. Since private legal advice is protected by attorney-client confidentiality, they believe that public ethics advice is also protected by attorney-client confidentiality. The only part of this argument that is right is that private legal advice is protected by attorney-client confidentiality.

First, ethics advice is not the same as legal advice. A government ethics program's principal goal is to teach government officials to deal responsibly and professionally with their conflict situations. In this, ethics advice is less like legal advice than like an employee asking a supervisor or specialist for guidance about a particular problem, whether it be about a city plan or fixing a truck, that the employee doesn't fully understand. If others need the same guidance, it would be useful to share this advice with everyone.

Legal advice, on the other hand, is not educational, nor are officials and employees expected to know or learn about most legal matters. And legal matters often involve

litigation, where tactics are kept secret in the interest of protecting the local government's, and hence the community's, interests. Ethics advice does not involve litigation, and it is in the community's interest to have ethics advice given to one official be available to other officials.

Second, legal advice given to a government official or employee is not the same as legal advice given by a private attorney to a private citizen. Lawyer-client confidentiality assumes that the subject matter of the advice is private. The legal or ethics issues in which a government official is involved *as a government official* are public issues. As public issues, they are confidential only to the extent that they fit one of the exceptions in a state or local government's transparency laws, such as having to do with ongoing litigation or with employment issues.

Why should ethics advice be made an exception to transparency laws when the only part of it that is private is the part of it that is potentially harmful to the community? A public official's private matters are private only to the extent they do not conflict with her public obligations. As soon as a conflict situation arises, the private matter is no longer simply private. It may seem private, it may feel private to the official, but it is important that the official recognize (1) that it is not private, and (2) that she has a special obligation to deal responsibly with the conflict as a public official in a public manner. If the whole thing is kept private, it has no educational value, to other officials or to the public, and it will appear to the public that something is being hidden from it.

In any event, lawyer-client confidentiality exists only to the extent the client chooses to keep the advice confidential. Even a private client can make private legal advice public by waiving confidentiality. A government official, by accepting a position in a jurisdiction that has transparency laws, effectively waives the right to keep government information, including legal or ethics advice, confidential to the extent it does not fit one of the transparency law's exceptions. The waiver is not something the public official chooses; it is something that goes with the position she currently holds. However, since many government attorneys and officials do not seem to believe that such an effective waiver exists, it is valuable to state this effective waiver in an ethics code or regulation.

Government attorneys sometimes argue that ethics advice might be litigated and, therefore, it fits a transparency law exception. Therefore, they argue, there is no effective waiver. But there is no exception for advice that *might* be litigated, only for advice that is

part of litigation. *Everything* in government *might* be litigated. If there was an exception for what might be litigated, there would be no transparency in government at all. This is so important, it bears repeating. When a government attorney says that something must be kept secret because it *might* be litigated, he is arguing that *all* government business should be kept under lock and key. It is a radical and irresponsible anti-transparency argument, and it should be treated as such.

Although it is not openly argued, there is another reason for seeking confidentiality of ethics advice. As Dennis Thompson wrote in his book [Ethics in Congress](#) (Brookings Inst. Press, 1995), “the advising function would be more valuable if [legislators] used it more often for ethical enlightenment than for political cover.” In other words, ethics advice, especially when it is not given by an independent individual or commission, is often too permissive, that is, it is intended to let (or even help) officials do what they want to do even if it creates an appearance of impropriety, so long as it is legal. It is reasonable to want such advice to be kept confidential, because the advice itself would create an appearance of impropriety. However, when ethics advice is kept confidential, it is reasonable for the public to think that the advice was intended not to further the public trust, but to further the personal interests of government officials. In this case, confidentiality is just another way of operating behind closed doors. Confidentiality, in effect, makes a mockery of an ethics program, which is supposed to get officials to act in the public interest, not in their personal interests.

Of course, if someone criticizes an official’s conduct or files a complaint against him, then the official waives confidentiality (for his personal benefit) and makes the advice public, in order to defend his conduct. This makes it appear that ethics advice is solely for the official, when it is actually given for the good of the government and the community. It is not there simply as a defense, even though it can be used for that purpose, as well.

For more on attorney-client confidentiality and ethics advice, see [the discussion](#) in the section on local government attorneys in the final chapter of this book.

Advice and Guidance

Note that ethics advice is in the Guidance chapter of this book. Its principal goal, with respect to officials, is guidance. This guidance should not be wasted on one official at a time. The educational value of ethics advice should be a primary consideration in

determining the level of transparency provided to it.

In 2012, Stephen Colbert of Comedy Central's *Colbert Report* decided to educate the public about the absurdities of certain federal campaign finance laws, as limited by the U.S. Supreme Court. To do this, he created his own Super PAC and [invited his lawyer, Trevor Potter, to provide ethics advice](#) to him right on his television show. He did this several times. Potter gave serious campaign finance advice (campaign finance is part of government ethics), and that serious advice made a mockery of the law. It was the most effective government ethics educational effort ever, and it consisted solely of ethics advice from someone who was once chair of the Federal Election Commission.

Ethics advice need not be given on community television, but it's worth considering the effect this would have on the community. The community would recognize that the advice they were paying for is valuable and for the public's benefit. They would see that ethics advice is given (and taken) so that their government officials would act as much as possible in the public interest rather than in their personal interest. It would increase their trust in their government and in its ethics program. Everyone would be a winner, and yet I've never heard of it being done.

Confidentiality and Lying

One problem with making ethics advice confidential is that, when it is kept secret, officials can lie about it. For example, a New York state senate majority leader told people who paid him for his services that their involvement with him had been cleared by the state ethics commission when, in fact, the commission had done no such thing. But since ethics advice was confidential in New York state, there was no way to check on the majority leader's representations. You couldn't even find out if he had asked for advice, not to mention what it was.

Waivers of Confidentiality

If a local legislature insists on ethics advice being confidential, or state law requires this, it can at least allow the ethics commission to create an easy process for citizens to request a waiver of confidentiality. A written statement should not be the only means of waiving confidentiality. Waiver should also occur if the requesting party makes any aspect of the advice request public.

But the best approach is for the ethics officer to be required to ask requesters to waive their confidentiality. In addition, an official's refusal to waive confidentiality might be made public.

After all, a request for ethics advice is made by an official not as an individual, but solely in his public role. And although the advice helps him deal professionally with a problem, the primary goal of ethics advice is to maintain the public's trust in its local government. People too often lose sight of this primary goal.

As stated above, when an official who requests ethics advice publicizes this advice, this is considered a waiver. The more difficult question is whether another person's publicity of the advice request also constitutes a waiver, at least when it is clear that the information about the request did not come from the ethics commission or its staff. Otherwise, if someone seeking advice was to make the request indirectly public, the ethics commission would be limited to responding to misunderstandings or false information only by saying, "No comment." This allows false information about its ethics advice to be accepted without response, undermines the ethics commission's important educational function, and makes it look like the ethics process is unnecessarily secretive.

Ethics Advice Transparency and Redaction Rules

The level of transparency of ethics advice should be clearly set out in an ethics commission's rules and regulations. The rules should state which of the following will or will not be made public: the identity of the person requesting advice, the identity of others involved in the circumstances described in the request (an individual or entity's relationship to the official is more important than their name), the substance of the request, the level of details of transactions and ownership, and the advice that is given (and whether the rules differ between oral or written, informal or formal advice).

The rules should state whether the advice given will be redacted to keep names, identifying information, or financial details confidential (and the balancing of considerations employed in redacting). And the rules should state the procedures by which exceptions may be made to the transparency of advice when there are special circumstances.

Usually, the focus of arguments in favor of confidentiality is on the requester's identity. I think the focus should be on the details, for example, the value of property, the percentage of ownership, and the like. Personal information about people other than an

official and the official's immediate family should be redacted from the advice, to the extent possible. For example, if an official's brother owns part of a company bidding on a local government contract, it is important that the public know this, and that the official is dealing responsibly with this situation. The exact percentage interest of the brother in the company is not important, but if it is important that the brother is a majority owner, or owns only a small percentage, then this information should not be redacted either. After all, someone who bids on a government contract is involved in a public action, and should not expect confidentiality of information relevant to the transaction. Procurement should be done in public, and it is being done that way in more and more jurisdictions across the country.

Good transparency and redaction rules can only be accepted when high-level officials understand that seeking ethics advice is a good thing. Recognizing that seeking advice is a good thing for officials and the public, and that having a conflict is not a bad thing, means that the single most important part of a government ethics program – seeking advice – becomes normal and even desirable, and most ethical misconduct can be prevented, at very little cost to the community.

Here is language for a rule to deal with all these aspects of transparency and confidentiality. First, here is language for local governments that recognize transparency as the default and ethics advice as part of ethics training. In other words, this is for local governments whose top officials recognize that conflict situations are public and that when officials deal responsibly with their conflict situations, the public should know and their colleagues should have access to the advice so that they can better understand government ethics.

Advice and Transparency. Conflict situations are public, since they involve either (1) situations that place an official or employee's personal interests and obligations in apparent conflict with their public obligations, and (2) their participation in public matters when they have a conflict situation. It is presumed that ethics advice is public information, to be made available online for the educational use of colleagues and for recognition by the public that the official or employee is dealing responsibly with his or her conflict situation.

Details of transactions and ownership interests, and any information that is covered by an express exception in the state Freedom of Information Act, will be redacted

by the Ethics Officer. The requester of advice may identify and ask the Ethics Officer to redact information about others involved in the request for advice (other than their relationship to the requester) and about private business dealings and interests that do not involve the seeking of special benefits from the local government, and the Ethics Officer will redact this information to the extent he or she finds that they truly constitute private information.

If the requester of advice would like his or her name redacted from the advice, he or she must put in writing the reasons for this, and the Ethics Commission will consider the request in executive session. But this information should be redacted only under exceptional circumstances, and the reason for this redaction should be made public to the extent possible consistent with the Ethics Commission's approval of the request.

Here is language for a rule to deal with advice transparency for local governments that recognize confidentiality as the default, but also recognize the educational value of ethics advice.

Confidentiality. The Ethics Officer must ask each official and employee who seeks ethics advice whether or not he or she is willing to waive confidentiality and allow the request and advice to be made public, on the Ethics Commission website, with the redaction by the Ethics Officer of the details of transactions and ownership interests, and any information that is covered by an express exception in the state Freedom of Information Act. The requester of advice may identify and ask the Ethics Officer to redact information about others involved in the request for advice and private business dealings and interests that do not involve the seeking of special benefits from the local government. The Ethics Officer will redact this information to the extent he or she finds that they are truly private information. If the requester of advice does not waive confidentiality, the advice will be placed on the Ethics Commission website with all identifying information redacted, in addition to the redactions described above. If the Ethics Officer finds it impossible to publish the advice without identifying the requester, he or she must ask the requester again to waive confidentiality to the extent of the requester's identification. If the requester chooses not to waive confidentiality, the advice will not be published.

If the ethics request or advice becomes public, this will be considered a waiver of confidentiality, and the Ethics Officer will add back to the online advice

information that identifies the requester of advice, or publish unpublished advice.

A simple alternative can be found in Boise's regulations: "The Commission may publish Advisory Opinions with such deletions as may be lawful and necessary to prevent disclosure of records exempt pursuant to the Idaho Public Records Act." Or in New Castle County, Delaware's regulations: "the Commission shall not disclose the identity of the requesting party, unless disclosure is necessary to the import of the Opinion."

15. Reconsidering and Appealing Ethics Advice

An official who is not happy with an ethics officer's informal advice should be allowed to effectively appeal that advice by requesting a formal advisory opinion from the ethics commission. But there should be requirements for such an appeal, so that appealing ethics advice does not become a common way for an official to delay his withdrawal from matters pending an ethics commission decision.

Philadelphia requires that an official appealing ethics advice demonstrate that (1) a material error of law has been made; (2) a material error of fact has been made; or (3) a change in materially relevant facts or law has occurred since the requestor made his or her request for ethics advice. In other words, appeals can occur only (1) when, arguably, the ethics officer made a significant mistake, or (2) when circumstances have significantly changed. The latter is not really an appeal but, as Philadelphia refers to it, a "request for reconsideration."

Philadelphia requires that the ethics board's general counsel, who provides formal ethics advice, handle the first level of appeal or reconsideration. It is reasonable for the ethics adviser to deal with a reconsideration, because it only means that the facts have change. When it is the ethic's adviser mistake that is in question, should he be given another shot at it? Fortunately, the Philadelphia procedure requires that the general counsel consult with the ethics board chair. And since the requester of ethics advice can appeal the general counsel's reconsidered advice, there is sufficient pressure on the general counsel to reconsider the advice and correct any mistake he made. Giving the ethics adviser another shot is a reasonable way to make the reconsideration process work quickly (not waiting for the ethics board to meet) at little or no cost to the official requesting advice.

Philadelphia's regulations also allow an official to request a reconsideration by the ethics board of its formal advisory opinion. Again, this allows a requester of advice to correct a mistake without court intervention, and all the delay and costs that entails. But it should not be used as a way to delay following advice.

There is a fine line between a request for reconsideration and a request for [a waiver](#). When an official is told she cannot participate or accept a gift, for example, she can request a waiver, arguing that due to exceptional circumstances or a compelling need, her situation should be excepted from the rule. An official who files a request for reconsideration is not saying that her circumstances are exceptional, but that the ethics adviser or commission made a mistake in its statement of facts or its application or interpretation of the law. Because in many situations it may not be clear which to request, an official should consult with the ethics officer before filing a request. If an official files the wrong request, the ethics officer may ask the official either to resubmit the request or allow the ethics officer to amend it.

Philadelphia's regulations also allow the general counsel or the ethics board to revisit an opinion on their own initiative, after giving notice to the requester of advice. However, advice amended on the general counsel or board's initiative applies only to future conduct. It is important to say this expressly.

It is also important to make it clear, as the Philadelphia regulations do, that a request for reconsideration or an appeal does not "suspend" an advisory opinion. That is, the advisory opinion stands, and should be followed, until it has been amended. The alternative is to allow an official to do whatever she wants until she gets a final opinion, after the ethics officer reconsiders, and the ethics commission decides on appeal and then reconsiders itself. By preventing officials from employing the appeal or reconsideration process for the purpose of delay (an attorney's default approach) and by requiring the showing of material error or a material change in circumstances, procedures make it less likely that frivolous appeals will occur.

As long as it is clear that ethics advice is binding even while being reconsidered or on appeal, time limits for appeal are not necessary.

A few ethics codes allow for the appeal of ethics advice to a court. This is understandable (since ethics commission decisions are usually appealable to courts), but problematic. The problem involves the most important difference between advice and

enforcement: enforcement is limited to the minimum requirements of ethics provisions; advice goes beyond these minimum requirements to consider relationships and other circumstances that cannot be defined or foreseen by local legislators. Advice is focused on preserving the public trust and other goals of ethics laws. The result of allowing appeals of advice to a court is to make advice simply part of enforcement. This effectively negates the most important part of a government ethics program. Thus, what seems like a reasonable provision of appeal undermines the entire program.

If ethics advice may be appealed to a court, then advice, like enforcement, would have to be limited to whether conduct would be a violation. The reason for this is that a court deals with law, not with ethics. It will review advice in terms of the law. If the advice does not match the law, even if it is good ethics advice that any ethics officer or ethics commission would give, a court would have to say that it is not a permissible interpretation of the law, because the provision in question says nothing about appearance of impropriety or what can be done to preserve the public's trust.

Therefore, if a local government truly believes that appealing ethics advice to a court is necessary, it should include in the code a provision that says expressly that ethics advice should take into account the appearance of impropriety, the preservation of the public trust, and the spirit of the law, and need not be limited solely to interpretation of the law. Then, possibly, the court will take this considerations into account in its consideration of an appeal. But this cannot be counted on.

16. A Requirement to Seek Advice

What should be done about government officials and employees who do not seek ethics advice? The only way ethics programs today can deal with a failure to seek ethics advice is as an aggravating factor in determining a sanction for an ethics violation. Since seeking ethics advice is the most important part of an ethics program, and the most basic way to deal responsibly with a possible conflict situation, there should be some other way of ensuring that seeking advice becomes the default act of every local official and employee.

The most powerful way to ensure this is to consider a failure to seek advice as a failure to deal responsibly with a conflict situation, in other words as an ethics violation itself. This may seem extreme, but in a good ethics environment, where the ethics aspects of each situation are openly discussed, it would be no more extreme than requiring officials

to seek legal or engineering advice when faced with a legal or engineering situation.

The norm today could also be portrayed as extreme. There is a lack of training in and discussion of the ethics aspects of common conflict situations or the value of ethics advice in dealing responsibly with conflict situations. Because of this lack, most officials do not have an understanding of the government ethics issues involved in a situation sufficient for them to recognize when they should seek ethics advice. Therefore, doing the most important thing in a government ethics program cannot be expected of any official. Because of this, a failure to seek ethics advice is generally not even considered to create a presumption that the official was irresponsible in handling a conflict situation. Expectations are extraordinarily low.

Here's how this translates into other areas of public administration. An official receives a subpoena. Since there is no expectation that he will seek legal advice, the fact that he tosses the subpoena in the wastebasket is not held against him. Or part of a bridge collapses, and an official simply closes the road down, without seeking advice from an engineer about whether it can be fixed sufficiently to keep at least one lane open. This isn't held against the official, because there is no expectation that he would seek professional advice.

It is only a lack of understanding about government ethics, that is, the false idea that dealing with conflict situations is personal rather than professional, private rather than public, something one learns as a child rather than something that requires continuing education as an adult, that causes ethics advice to be treated differently than any other form of professional decision-making. Everywhere else, officials and employees are expected to seek professional advice when they are faced with a situation requiring it. It is, therefore, the current way ethics advice is viewed that is radical.

In addition to this lack of understanding, most people have [blind spots](#) that lead them to believe that they are acting only in the best interests of the local government, not to further their own interests or the interests of those with whom they have special relationships or to whom they owe special obligations. In fact, they do not believe that they have bad motives or obligations, or that their relationships matter much. Without recognizing or believing in the importance of one's relationships and obligations, one cannot know that one is in a conflict situation, and, therefore, that there is anything to ask for advice about.

One important way to deal with this gulf in perception is by training officials in the “blind spots” all of us have (see [the section on training about blind spots](#)). Another is to focus on relationships. However they perceive a situation and their own motives, individuals usually do know that someone or some entity involved in a matter has a special relationship with them, either as a family member, business associate, close friend, major campaign contributor, gift giver, or whatever. These are facts that no one can deny, even if they do not know how the relationships may lead to conflict situations. And these (along with the public’s perception of these relationships) are what is most important to government ethics. Government ethics is not about motives or integrity, but about facts and perceptions about relationships, and about acts, such as gifts or job offers, that create relationships.

Because people so often believe they are doing nothing wrong, they need a rule that is so simple and factually based that their integrity is not an issue. What they need is a bureaucratic requirement, like filling out a form or getting a supervisor’s approval. The rule I propose is a requirement that any official or employee who has a special relationship with anyone involved in a matter that is or might come before them, or which they may influence, be required to seek ethics advice from an independent ethics officer. Ditto for anything that would create a special relationship, such as a gift, business, or job offer to oneself or to someone with whom one has a special relationship.

How radical is this idea? In the [U.S. Supreme Court oral argument](#) in the case of *Carrigan v. Commission on Ethics of the State of Nevada* (April 2011; Carrigan was a city council member found to have voted with a conflict), Justice Kagan noted, “There was an advisory process that was set up by the Nevada commission here. ... Mr. Carrigan chose not to use it. But he could have gone to the commission, said: What do you think about this relationship? Does it fit or does it not fit?”

Kagan’s point here is that an official who does not seek advice should not later argue that an ethics provision was too vague. If the official wasn’t sure whether it applied, all he had to do was ask. Effectively, Justice Kagan argued that officials have an obligation to ask for advice, even if it is not written in the ethics code. I believe such an obligation should be written in an ethics code.

The Problems a Requirement to Seek Ethics Advice Solves

However, I don't know of a single jurisdiction that has such a requirement. The Glen Ellyn, Illinois ethics code comes closest to creating such an obligation:

§1-12-5(f). . . Civil servants have the continual and ongoing obligation . . . to identify any issues that may have the potential for a conflict of interest, and if they are in doubt to seek the opinion of the Ethics Officer.

Miami requires that officials and employees “seek a conflict of interest opinion . . . prior to the submittal of a bid, response or application of any type to contract with the County by the person or his or her immediate family.” (§2-11.1(c)(4))

A requirement to seek ethics advice would solve many problems. First, such a requirement would override the natural reluctance of an individual to seek advice from a stranger about matters, such as special relationships, that seem personal. The reluctance is increased in a context where the official might be called “unethical” and where the official may be told he has to declare a conflict and withdraw from a matter, giving up what he sees as a right or obligation to represent his constituents or do his job. When the matter involves a personal relationship and, from the official's point of view, one's character, this can feel very embarrassing, or worse.

Other reasons for reluctance to seek ethics advice include the belief that seeking advice itself puts one's integrity in question (or is even an admission of guilt), and the concern that one will be told not to do something one wants or feels obliged to do. After all, conflict situations involve conflicting obligations.

The way that a requirement to seek ethics advice would overcome an individual's natural reluctance to go to an ethics adviser is by making it a bureaucratic act rather than a personal act. It would be about fulfilling a statutory duty rather than about one's character or personal integrity. And as withdrawal became more common, that too would not seem like giving up one's rights or undermining one's obligations, but instead just following the law. As for being told not to do something you want to do, there would be no other choice. The alternative would be a sanction at least for not seeking advice, if not for a more serious ethics violation.

Second, a requirement to seek advice would mean many more requests for advice and, therefore, a growing body of informal and formal advisory opinions that would clarify

the language of ethics provisions by showing how the language apply to concrete situations. If the advice was made public in an easy-to-use fashion, such as general advisory opinions on various topics or comments to ethics provisions included in the online edition of the ethics code, a requirement to seek advice would make an ethics code so clear that advice would become quick and easy, not the agonizing confessional some might picture it as.

Third, a requirement to seek advice would lead to a huge change in a local government's ethics environment, because it would be in every official's interest to openly discuss the ethics aspects of every matter, just as they consider its legal, financial, and policy aspects. Ideally, a requirement to seek advice would lead to an ethics environment where this requirement was no longer necessary. For now it's an ideal, because it hasn't been tried.

Fourth, requiring officials to seek advice would place advice above enforcement and make unjustified accusations, which are usually political attacks, far more rare. When the ethics officer says that certain conduct is either acceptable or outside the commission's jurisdiction, this would put to rest ethics accusations. This would de-politicize government ethics, a very worthy goal.

Fifth, a requirement to seek advice would effectively remove the line between advice and enforcement that causes the many gray areas of government ethics to exist in a sort of limbo, where confusion and accusations undermine the public trust. By this I mean that the media, blogs, and complainants are constantly accusing officials of ethical misconduct that falls in a gray area, where there is an appearance of impropriety, but not a clear ethics violation.

As it is now, where the law is not clear, officials are seen as being rewarded for not seeking advice. The public sees apparently improper conduct treated as if it were ethical. This undermines the public's trust in government. When enforced, ethics provisions are generally interpreted narrowly, but when advice is given, they are generally interpreted broadly, that is, as minimum requirements.

More concretely, if a situation is in a gray area, an ethics officer will tell an official that certain conduct may or not be in violation of the ethics code, but that it would create an appearance of impropriety and, therefore, should not be done. But when an official engages in such conduct without asking for advice, and a complaint is filed, the ethics commission may simply dismiss the complaint. Requiring ethics advice does away with such

damaging dismissals.

Sixth, requiring officials to seek advice would make it clear, in a way nothing else could, that government ethics is nothing like the criminal justice system. It would show that government ethics is really about training and advice, not enforcement. Only when officials fail to get training and fail to fulfill their obligation to seek advice regarding particular situations could they be in violation of an ethics code.

Seventh, requiring officials to seek advice would both clarify ethics code language to the individual and to other officials, and clarify an official's obligation to the public. It would effectively replace a number of rules, which can be either vague or, in an attempt not to be vague, extensive and complex, with one clear rule: if you aren't sure, ask. If you have a relationship with someone, or a relationship is about to be created, ask. Since this is already the first rule of government ethics, this requirement is neither something new nor a great burden. It's only putting into action what is already there.

Eighth, requiring officials to seek advice would also greatly lessen the number of enforcement proceedings, which are the principal (and the most unpredictable) cost of an ethics program. And since it is easy to show that an official failed to seek ethics advice, this violation would cost very little to enforce. This savings would leave more than enough money to pay an ethics officer either full-time in larger jurisdictions, or on contract in smaller jurisdictions, so that she could run a good training program and provide independent advice immediately or within a few days. It is the lack of such a position in the majority of local governments that prevents them from having an effective, independent ethics program that is trusted by officials, employees, and citizens alike.

Ninth, and most important to officials, a requirement to seek advice takes a great deal of pressure off an official who has conflicting obligations. The official who has a person she is obligated to (a boss, a family member, a partner) pulling him one way about a contract or a grant, and yet who knows that it is her obligation not to show favoritism to this person can be taken off the hook by a requirement to seek advice and do what the ethics officer tells her. It's out of her hands every bit as much as a legal decision. This especially comes in handy when the official would rather not give her sister-in-law a contract or push for her boss's property to be re-zoned.

In short, a requirement to seek ethics advice is not the radical solution it appears to be, at first. Along with a good training program, it solves most of the problems of a

government ethics programs, while protecting officials (and the community) from the agony of scandals, enforcement proceedings, and annoying in-laws.

Of course, I don't expect every local government to start requiring its officials to seek ethics advice. But the arguments for doing this should convince anyone how essential seeking ethics advice is to a government ethics program. Without an independent ethics officer to provide advice, or when there is no encouragement to do so, there effectively is no ethics program, just some guidelines and, possibly, an enforcement process that deals with problems that could better have been dealt with by providing advice.

17. Warning Letters

A warning letter, given when a complaint has been filed or a tip made regarding what would be a de minimis violation that is not worth investigating, is effectively unrequested ethics advice after the fact. Such advice is useful, because if someone thinks conduct is okay, she will continue to do it. Also, some recipients of warning letters will share what they have learned with their colleagues, allowing the warning letter to provide an occasion for ethics training and discussion. (See [the section on warning letters](#) in the Enforcement chapter for more information.)

18. Waivers

Waivers are essentially a form of advisory opinion. However, a waiver usually begins with a determination, either by the official or in an advisory opinion, that certain conduct is not allowed. What the official seeks is a further determination that, due to extraordinary circumstances or a compelling need, a special exception to a rule should be made. In both instances, the requester wants to be able to do something that may be inappropriate or illegal.

A request for a waiver following ethics advice is similar to [a request for reconsideration](#). When an official is told she cannot participate or accept a gift, for example, instead of requesting a waiver arguing that due to exceptional circumstances or a compelling need, she may file a request for reconsideration, arguing not that her circumstances are exceptional, but that the ethics adviser or commission made a mistake in its statement of facts or its application or interpretation of the law. Because in many situations it may not be clear which to request, an official should consult with the ethics

officer before filing a request. If an official files the wrong request, the ethics officer may ask the official either to resubmit the request or allow the ethics officer to amend it.

Waivers are a good way to deal with the unforeseen consequences of ethics rules. Every law has them, and it's irresponsible to act otherwise. The responsible thing is to recognize that they will arise and create a process to prevent them. It certainly beats amending the law every few months. Consider what happened in Alaska in 2008. An Alaskan state representative needed a new kidney. The state ethics law did not allow gifts over \$250. So the state legislature rushed through a bill to create a compassionate gift exemption that would require disclosure. A good waiver process would have allowed the kidney to be accepted and would have created a clear precedent for similar cases in the future. (Note that the only reason the gift of a kidney was a problem is that the law did not follow the best practice of limiting gift prohibitions to direct and indirect gifts from those seeking benefits from the government.)

An official who believes she will be told she cannot engage in certain conduct, but feels that her situation is truly special, may request a waiver rather than an advisory opinion. This allows the ethics officer or ethics commission to consider both the situation and the extraordinary circumstances or compelling need. When one is sure of the answer and does not want it to apply to the particular situation, it can be a waste of time to seek advice and then, only when one is told to withdraw or reject a gift or job offer, to seek a waiver. But a waiver, since it has to go before the ethics commission, can itself take some time. Therefore, if an official is not sure which kind of request to make, the best thing is to seek informal advice about the proper request to make under the circumstances. This request itself will likely turn into the correct sort of request, although a request of a waiver may be required to be in writing.

Some ethics codes are full of specific exclusions and exceptions. Where an exclusion or exception appears to cover certain conduct, an advisory opinion should be requested, rather than a waiver. But having a general waiver provision, along with a good ethics advice program, can allow an ethics code to be more simple, without the numerous exclusions and exceptions that characterize many ethics codes, making them unreadable and making people think they are intentionally full of loopholes and, therefore, that high-level officials are not serious about creating a healthy ethics environment.

Some ethics codes expressly refer to waivers in particular provisions. The City

Ethics Model Code refers to waivers in the following ethics provisions:

Appearances before one's agency or board

Post-employment provisions

Nepotism

Rule of Necessity, where an official is the only one authorized to act

The City Ethics Model Code waiver provision also lists other provisions that may be waived. It is possible for someone to request a waiver relating to another provision, although this might require an even stronger showing of a compelling need. Here is the Model Code provision:

1. Upon written application, at an open session after public notice, the Ethics Commission may in exceptional circumstances grant the applicant a waiver of subsections 1-10, 13-19, and 22 of §100, §101.1(a), §106, or §108 of this code. To allow a waiver, the Ethics Commission must determine either that the applicant has a compelling need or that overall, when considering the possible damage to the community, the conduct would clearly be beneficial to the community. The Ethics Commission must also determine the extent to which the waiver might create a potential for undue influence, unfair advantage, or a serious appearance of impropriety.
2. Waivers must be in writing and must state the grounds upon which they are granted. Within ten days after granting a waiver, the Ethics Commission must publish the waiver on its website in a clearly designated area.

It is important to grant waivers only with public notice and input, and a clear explanation of the grounds for granting the waiver, because allowing waivers opens the door to the wholesale gutting of an ethics code, encourages political pressure on ethics commissions, and can lead to charges of partiality. If not handled properly, these problems can undercut the perception of the ethics commission as an impartial body. This is why many local governments choose to forego a provision for waivers.

It can be valuable to list reasons for waivers as a guide for both officials and the ethics

commission. This works best if the reasons are limited to specific sorts of instances, as with Denver's sample waivers for nepotism (see the following page).

A waiver process will be more respected if ethics commission members are selected by community organizations rather than by elected officials. Recall what happened at the start of the first Obama administration, in 2009. Ethics reforms were among the administration's first acts, including a waiver process. And waivers were quickly given to some high-level officials, such as a deputy secretary of defense who had lobbied for a major defense contractor. This caused a lot of questioning of the administration's commitment to ethics, but nothing was said about the alternative of having the waiver process handled by a truly independent body or individual.

Waivers can be a hard sell if they aren't going to come from an independent office or agency. Making the waiver process independent of officials, extra-transparent, and with required determinations makes waivers acceptable to the public and allows ethics commissions to be fair, compassionate, and able to weight ethics concerns against the needs of the community where this is appropriate. When waivers are allowed, an ethics commission should be very clear about why it allows a waiver and should take into account the politics, both partisan and personal, of each situation. That is, even where there appears to be a compelling need or an overall benefit to the community, the appearance of impropriety that accompanies a situation may require an ethics commission to reject a request for a waiver.

Baltimore requires that an agency rather than an employee make the request for a waiver, and that the mayor approve the request. It also expressly states, "The Ethics Board must apply this section as consistently as possible under similar facts and circumstances."

Most waivers that are given involve nepotism. Reasons that would allow such a waiver should be carefully thought through before including them in a waiver provision or a waiver proceeding. For example, here are three such reasons from Denver, which were not, I believe, carefully thought through:

- (1) The relative who was proposed to be hired was certified through a competitive process conducted pursuant to law, and the officer, official, or employee who would make the appointment did not influence or affect the certification.
- (2) The officer, official, or employee who would officially make the appointment is

acting ministerially and did not select the relative or attempt to influence the person who did.

(3) The relative who would be in the line of supervision was already working in the agency before the officer, official, or employee came into the line of supervision, and the officer, official, or employee can and will abstain from participating in any personnel actions involving the relative.

These reasons sound good and fair, but they do not take into account the appearance of impropriety. Nor are they very realistic. Certification is only one factor in hiring, something required in order to apply for a position in the first place. Rarely is hiring a ministerial act, and there is no way to know whether an official has attempted to influence a colleague or subordinate who hires her relative. And it is impossible for an ethics commission to monitor an official's participation, directly or indirectly, in personnel actions involving a relative.

Additional exceptions for nepotism appear not to be fair or reasonable. They exist because nepotism is considered acceptable, even laudable, in many local governments, and especially in the uniformed departments. Additional exceptions are intended to allow nepotism to continue, not to be fair or reasonable (for more on this, see [the section on nepotism](#)).

Waivers for nepotism are more common in smaller jurisdictions, where there are fewer people available to hire and to serve on boards and commissions. But even there, where possible, relatives should try to get jobs in the governments of neighboring local governments. There is nothing wrong with a police officer's child working in the same profession. But there is something wrong with a police officer's child working under his parent. Working in the next town over preserves the tradition without creating appearance and management problems.

The more power an official or employee has, the more important it is not to allow a waiver, because however the situation is dealt with, it will appear to the public and to other government employees that the hired relative would be given special treatment, and this appearance undermines both public trust and morale.

One situation where a waiver of a nepotism provision might be appropriate is where two members of a department or agency marry. If both are valuable members of the

department or agency, they are respected and already have separate relationships with their colleagues, and they would not be a team effectively running the department or agency together, then it is likely that keeping their skills would be more valuable than requiring one of them to resign. But even here, alternatives should be considered, such as a transfer, to keep the couple's skills, but have one of them work in a different department or agency. This might be not only the best thing for the agency, but also the best thing for their marriage.

Another area where waivers will sometimes be appropriate is with appearances before a board or agency. If, as in the City Ethics Model Code, officials and employees are restricted from appearing before boards or agencies other than their own, this could cause hardship. Why is this restriction necessary in the first place? Because restricting only appearances before your own board or agency would, for example, allow a code-enforcement official or the city attorney to represent private clients before the city planning board, because those officials are not members of that board. It would be very difficult to list every possible instance where an appearance before other boards and agencies would be inappropriate. When there is no actual or apparent conflict, an official or employee may obtain a waiver.

San Antonio has an interesting provision that shows how close a waiver is to an advisory opinion. This provision sets up a procedure for the city's ethics review board to determine whether an official has a prohibited interest in a city contract or city sale of land, materials, supplies, or service. Here is the way the procedure is described (§2-52(c)):

The Ethics Review Board will make this assessment using a standard of "clear and convincing" evidence at a hearing. A request for such a determination cannot be made confidentially. The hearing must be posted two weeks in advance clearly stating [the name of] the officer or employee with the presumed prohibited financial interest, the contract or transaction at issue, and the individual or business entity that is the party to the contract or transaction at issue.

Although it would appear that the board is giving its advisory opinion, the procedure looks more like that for waivers. The fact that much ethics advice has the same effect as a waiver adds to the necessity of making such advice public.

Waivers are not always simple yes or no answers to requests. They can involve detailed instructions about what must and what must not occur. For example, take a school principal in New York City who wanted to act as executive director of a nonprofit that did business with the city, but not with the education department (DOE). The waiver given to the principal said that the principal could work for the nonprofit only at times when not required to work for the DOE, could not use his DOE position or title to obtain any private advantage for himself or the nonprofit, and could not use DOE equipment, letterhead, personnel, or other city resources in connection with the nonprofit.

A violation of waiver instructions is equivalent to a violation of an ethics provision.

Waivers should never be provided by government officials. In 2012, the Portland, Oregon council provided a waiver in the form of a special ordinance, which allowed a police officer's company to bid on equipment contracts. This is not the right way to provide ethics waivers. But Portland doesn't have an ethics commission. Louisiana does (and it has jurisdiction over local officials), but in 2012 the state legislature provided local officials with a number of waivers, including general waivers to allow public hospital board members' relatives to be hired for health care jobs, and more specific waivers such as one to allow the wife of a parish council member to work at one of the public service district hospitals.

As a state senator said during the debate on these waiver bills, "If you want to destroy ethics in this state, you do it one local bill at a time."

B. Government Ethics Training

Without a good ethics training program, local government officials and employees cannot be expected to recognize conflict situations, not to mention deal with them responsibly. And yet most local governments provide no ethics training, or only an amateurish hour or so, where a government attorney lectures on the ethics code and the need for integrity, or even less time, when it is part of human resources training. A government ethics program cannot get off the ground without a good ethics training program.

There are two principal obstacles to creating such programs. One is that it costs money. Most ethics commission members are volunteers, and few local governments

provide their commission with a full-time, or even part-time, director or ethics officer. Therefore, the great majority of ethics commissions are given little or no budget.

So ethics training must come out of an agency or department's budget. The likelihood of an agency or department hiring a government ethics expert to do training is very slim. Instead, a government attorney or human resources trainer does the training himself, without any expenditure of money.

When states require ethics training, local governments tend to complain about an unfunded mandate. But without a mandate, they generally choose not to pay for it.

Why such reluctance to pay for something so valuable? That brings us to the second obstacle to government ethics training: most officials do not believe that they need it. They do not believe you can teach ethics to them or to anyone. They believe that they learned everything they need to know about ethics at home and in their house of worship (no one ever seems to admit to having had a poor or non-religious home environment except in the context of overcoming obstacles to get where they are).

This problem arises because so many government officials hear only the word "ethics" in "government ethics." They somehow block out the word "government" and fail to acknowledge that it involves dealing responsibly, professionally with conflicts of interest, not right or wrong. Does anyone learn at home or in a house of worship what they need to know about public servants responsibly handling their conflict situations? I certainly didn't, and I even took an Ethics course at my house of worship.

A more cynical version of the same view can be seen in the following, typical words of a California council member on the subject of ethics training: "It's not going to change behavior. [It] creates a job for someone."

Bring these two problems together, add a practical, public administration viewpoint, and you get the position that government ethics training should not be funded because it is not productive. Add in the emotional argument that it would take money from the hands of needy citizens, and you are unlikely to get a budget allocation for ethics training.

Missing from the above computation, however, is the fact that getting officials to follow government ethics rules can save a local government millions of dollars a year both in money and in productivity, because contracts, grants, and jobs will not be given on the basis of personal relationships, but rather on the basis of what is best for the community. In addition, both nepotism and intimidation destroy morale, patronage brings down the

quality of administration, scandals undermine a community's ability to attract businesses, and competent people do not want to work for corrupt governments. And the creation of a healthy ethics environment can also prevent criminal behavior and ethical misconduct at the state and federal levels by those who move there from local government. Unfortunately, these arguments in favor of ethics training are too rarely made.

But the most important fact that is rarely mentioned with respect to government ethics training is that every local government already has an ethics training program, and citizens pays dearly for it. Government ethics norms are communicated through the words and actions of elected officials and administrators. Unfortunately, all too often these norms are different from the written rules, and even more different from government ethics best practices. These norms usually include loyalty to department and agency heads, and to political parties, rather than to the public, which is often considered a pain in the neck. These norms often include the use of one's position to benefit oneself, one's family, and one's business associates. These norms usually involve generally accepted unwritten rules that give discretion to officials without any oversight. And these norms usually include keeping quiet about what you see, that is, they validate an atmosphere of secrecy and personal loyalty, and sometimes of intimidation. When officials oppose government ethics training, they often mean, consciously or unconsciously, that they do not want their training in their government's norms to be disturbed. The way it's always been done is the best practice. Ethics training threatens the status quo, and all the personal benefits that go with it.

Law students are required to study legal ethics. Business ethics is taught at business schools across the country, and corporate officers are required to take corporate ethics classes. Ethics is central to the studies of certified public accountants, medical professionals, psychotherapsts, etc. Why is it that these professionals need to learn about ethics, and yet many government officials feel they do not? Are their home environments and houses of worship that much better?

It would be hard for anyone who flips through this book to say that government ethics is too simple to merit training. Government ethics, like legal ethics, medical ethics, and accounting ethics, is a complex field of knowledge that is relevant to a large part of what government officials do and encounter every day.

U.S. Supreme Court Justice Ruth Bader Ginsburg took a strong position on

government ethics training in her March 2011 dissent in the case of [Connick v. Thompson](#), 563 U.S. ____ (2011). The particular training involved the *Brady* duty, which places an affirmative constitutional duty on prosecutors and police officers to disclose exculpatory evidence to a defendant. As with most government ethics duties, this one goes well beyond what is required of ordinary citizens, including private lawyers.

Justice Ginsburg wrote:

The prosecutorial concealment Thompson encountered ... is bound to be repeated unless municipal agencies bear responsibility—made tangible by §1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under §1983 “where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” *Canton v. Harris*, 489 U. S. 378, 388 (1989).

In other words, Justice Ginsburg felt that the lack of this particular kind of government ethics training makes a municipality liable for the failure of its officials and employees to follow the *Brady* rule. This lack of training is, in this case, “deliberate indifference to the rights” of specific individuals.

It is valuable to view a failure to provide adequate ethics training not as a way of saving money, but as indifference to the public interest. This argument should be made whenever the topic of ethics training is being discussed.

Government ethics training does not cure all ills. But it is an essential element of a government ethics program, and a government ethics program is an essential way to gain and keep the public’s trust in the government that manages their community. It is, in fact, part of the single most important part of a government ethics program: guidance. Guidance is provided not just by an ethics code, but also by training and advice that includes and goes beyond the ethics code. And training, along with practice of what is learned, is what makes someone a responsible professional.

It is important to provide ethics training to all officials, employees, and candidates, as well as everyone who deals regularly with government, including contractors, vendors, developers, grantees, lobbyists, consultants, outside counsel, public-private partnerships, independent agencies, journalists, and organizations such as chambers of commerce and

civic associations (individuals external to government may be asked to pay a fee for this training; or, in the alternative, a small tax could be placed on permits, licenses, and contracts in order to pay for the entire training program, or for the government ethics program itself). It is also important that political and administrative leaders place their imprimatur on training, appearing in videos, adding a preface to training materials, and showing up at larger lectures.

Finally, it is important to do everything possible to “sell” ethics training by the way it is named (for example, “conflicts” rather than “ethics”; it can even be called something like “career survival training” to emphasize how useful it is to officials), by making it as entertaining and participatory as possible, and by making it clear that it is professional training, not about character or religion.

1. Timing of Ethics Training

The most important time to do ethics training is when employees start their job (or move into a management position) and when officials take office. This is the best, and possibly the only, opportunity to teach them the written rules and responsibilities before they learn any unwritten rules there may be and develop loyalties and feel pressures that make it harder for them to deal with conflicting obligations. It is also the time when officials and employees are most likely to engage in ethical misconduct simply out of ignorance of the rules. It is unfair to them not to let them know and understand the rules as soon as possible. A serious ethics training session should be part of every government’s orientation program. It can help new officials and employees fill out their first annual disclosure statement, and give them an opportunity to discuss some of the possible conflicts they bring to their government positions.

Another important time to do ethics training is when officials and employees leave the government. This is the time to do a session on post-employment issues, answering their questions about what they can and cannot do in their specific jobs. In August 2012, Chicago added a requirement for leaving officials to receive ethics training.

Most training will occur between these two dates, including on-line training, e-mail newsletters and updates, continuing education classes (at least once every two years), and the like. But there is nothing like forming a good foundation from the start, and providing important guidance at the end of an official’s term.

2. Kinds of Government Ethics Training

Most government ethics training involves a minimal class for new officials, a short annual class only for elected officials and department and agency heads, or a simple online class or online materials, none of them more than inexpensive attempts to make it look like there is a training program. Ethics training is rarely tailored to individual needs, which means that board members are often given examples applicable to department heads or council members, and vice versa. And ordinary employees with no decision-making powers are either ignored or are not given training focused on the few ethics violations they are capable of and the important role they can play in reporting officials' ethics violations.

Worst of all, ethics commission members often receive no or only rudimentary training. They are expected to provide advice and enforce the laws, but they usually get no more than a short generic class. This forces them to depend on staff, if they have staff. Far more frequently, it forces them to depend on the city or county attorney's office, an office usually led by a highly political official, whose interests often conflict with the needs and interests of the ethics commission and undermine its appearance of independence, and whose members themselves often have no expertise or training in government ethics. Because of the dependence there is on these attorneys and their lack of training, city and county attorney offices have been enablers in a substantial percentage of ethics scandals across the country.

In-Person Training

In-person training, which is the most effective kind of training, is also the most expensive kind of training. It requires not only more time from trainers, but also more time from officials and employees. And with expertise in local government ethics very limited, it is hard to find good trainers or good training programs (of course, more demand would quickly produce more supply). This limitation is not cause for giving up on ethics training. Rather, it is a good argument for having a part-time, full-time, or shared (with nearby local governments) ethics officer who can train in addition to providing ethics advice and counsel to the ethics commission.

An alternative, in large cities and counties, is to train departmental and agency ethics liaisons (not full-time, but an additional responsibility accompanied possibly by an addition

to salary), who can train employees, while ethics commission staff, a devoted ethics commission member, or a consultant trains officials. Requiring a certain kind of ethics training, but making it internal, can solve the problem that heads of departments and agencies do not like to part with their employees for long enough to allow any more than a lecture. This way, ethics training can become part of the internal continuing education program.

It is beyond lectures that the most important in-person ethics training is done: in small-group discussions of concrete ethics situations, including current ethics issues, whether pay to play, nepotism, or whatever. Not ducking current and recent problems, in the particular local government and others in the area, brings home how serious and relevant the training, and the ethics program, are. The discussions can be done without professional training personnel, if there are well-written case studies and experienced facilitators available. Small groups can also do role-playing exercises, so that they can better feel what it is like to see issues from the viewpoints of people in other positions, including journalists/citizens, lobbyists, and those who do business with government.

But it is hard to do this unless the individuals participating in these group discussions have a good basic understanding of government ethics and someone to keep the discussions on point. Otherwise, what was intended to be a government ethics discussion can turn into a discussion of morality, civility, or the evils of politics, none of which is truly relevant to government ethics.

The typical government ethics training session of from one to two hours can do little more than provide the most basic introduction to government ethics and a short summary of the most essential relevant laws. If the trainer tries to include participants by getting their views of what government ethics is, which is important to understanding what it is and is not, then it can be difficult in an hour to even get to the ethics code. All there might be time for are the basic requirements, such as annual filings, disclosure of conflicts, and withdrawal from participation. And, most important of all, drumming into officials the need to ask for advice whenever there is any question what to do.

In small jurisdictions with a small budget and no ethics officer, it might be best to limit in-person training to an introduction to government ethics, supplemented by an online video and/or quiz to train on the laws, followed by small group discussions of cases a bit more complex than the ones in the video or quiz. This would be the best use of limited

resources.

But larger jurisdictions should employ at least a part-time ethics officer or use professional government ethics trainers. They should put together a quality in-person ethics training program at least for elected officials, high-level administrators, and board and commission members, as well as consultants and contractors. Here's how the Atlanta Ethics Office describes its in-person training program:

Using real-life case studies, the Ethics Officer presents the relevant law, describes a scenario that raises an ethical question, leads a discussion in which participants discuss appropriate ways to resolve the question, and then explains how the issue was decided. The goal is to enable officials and employees to identify potential conflicts of interest, determine appropriate ways to avoid or resolve the conflict, and encourage them to seek advice in difficult situations.

Online Ethics Training

Since the cost of providing government ethics training online is relatively low, and online classes and quizzes can be taken and online materials read as breaks from an official's routine, online training gets around two of the principal objections to ethics training. And yet online training is seriously inadequate and, in the great majority of local governments, nonexistent.

[A list I did of online ethics training materials](#) (complete with links to them) shows that, outside of a few of the largest cities, there are limited training materials, and none at all in most jurisdictions. Videos and powerpoints with audio are now very inexpensive and useful, but these technologies are rarely being employed. Also very useful are plain English guides, manuals and handbooks, quizzes, specific area guidelines (e.g., on gifts or nepotism), answers to frequently asked questions, newsletters (which can provide ongoing guidance based on real-life ethics situations, and an ongoing reminder of the importance of dealing responsibly with conflicts), and links to useful local government ethics information elsewhere (such as this book). However, these can be found only here and there, even though, for the most part, they can be easily adapted from some excellent examples available free online (check out the links on the list).

The materials available online show both good and bad ways to approach educating

employees, officials, candidates, contractors, lobbyists, and the public. There's no reason to recreate the wheel each time a local government ethics commission, with a small or non-existent budget, needs to put together training materials. Even a volunteer with limited knowledge and experience can check out what is available online, pick out valuable training materials, and make the minor changes needed to adapt to local ethics provisions. In fact, doing this would itself be a great education for ethics commission members and staff!

Ethics Quizzes

[New York City's ethics quiz](#) is a great example of how to guide officials and employees through a series of common situations where ethics violations may occur. Ethics quizzes aren't like the ones you had in school. These quizzes do not expect officials to know the answers, but rather they guide them by explaining why a chosen answer is right or wrong. With some tweaking, this quiz would work for any city or county. One of the things that is especially good about this quiz is that it not only gives the law, but also notes what would create an appearance of impropriety even though it is legal. In other words, it recognizes and teaches the important difference between law and government ethics.

One improvement would be to have different quizzes for different sorts of official or employee, for example, one for council members and staff, another for procurement professionals, another for department and agency heads and their staff, another for land use employees and board members, another for contractors, etc. Some situations may appear in all the quizzes, but many would apply to only one or two of these groups (for example, the situations used for procurement professionals and contractors would be the same, but the point of view would change, that is, the questions in one would be what an official would do, in the other what a contractor would do).

Quizzes are good training methods because they're interactive (they keep people involved and interested – let's be frank, awake) and they depend on concrete examples of the sorts of situations officials and employees often face.

But not everyone agrees. A Massachusetts mayor's response to a requirement to do government ethics training in the form of this kind of quiz was, "This is a complete waste of time, a complete waste of resources. ... The computer will not let them answer questions wrong. Taking online training or signing a piece of paper does not make someone more

ethical. If they are going to steal \$10,000 from the government, they will.” This statement combines a lack of understanding of government ethics with a lack of appreciation of the value of a quiz format for teaching purposes.

More damaging, a Massachusetts municipal government association opposed the state’s mandatory ethics training due to its expense, that is, the time officials and employees have to spend taking the quiz. A state-developed online quiz is, however, an extremely inexpensive and effective use of resources.

It is important to make it clear how valuable government ethics is, both in terms of monetary savings and in terms of the benefits of a good ethics environment to productivity, morale, and public participation.

Ethics Handbooks

Ethics handbooks, also referred to as “manuals” or “plain English guides,” are a way to make government ethics concepts and overly legal ethics provision language understandable to government officials and employees. Handbooks are most understandable if each section contains concrete situations. The problem with most ethics handbooks is that they provide few such situations, and are almost never focused on particular types of officials or employees.

[New York City’s plain language guide](#) is a good example of a general handbook. [San Antonio has separate handbooks](#) for officials and former officials, each of which includes many concrete situations. [Massachusetts has separate webpages](#) (with special case studies) for different local government positions, such as manager, clerk, treasurer, and planning board member. Other jurisdictions have separate handbooks for lobbyists, candidates, those doing business with the government, and those required to file financial statements. The more focused the training materials, the more they will be of interest to readers and the more room there will be for situational examples, without creating an overwhelming document.

It appears that most jurisdictions that go to the trouble to create general handbooks feel they have to keep them short or no one will read them. But unless they are used as texts for training courses, they will primarily be consulted on a piecemeal basis. That is, someone who has a question about gifts will only look at the gifts section. Therefore, there is no reason to limit gift situations to one or two. Several situations will make it more likely

that a reader will find one that is relevant to her own situation. Since the handbooks do not need to be printed out (or can be printed out in a shortened form), there is little extra cost to using more examples to make the handbook more concrete. Similarly, there is no reason not to have separate handbooks for different sorts of official and employee, even though they will in many ways be the same. The extra cost of having several handbooks is minimal, while the value is great. People are more interested in something designed for them and focused on their work and concerns.

It is important that handbooks include all relevant state laws, executive orders, and administrative policies. A good example of a publication that does this is Houston's [Ethics in City Government](#) publication; however, this publication is only a list of rules, not a handbook.

Another sort of handbook to make available, and use as required reading before a training course, is City Ethics' free 27-page introduction, [Local Government Ethics Programs in a Nutshell](#).

Ethics Videos and Powerpoints

Ethics videos are the most expensive sort of online training, but they can be worth the money in large cities and counties that choose not to train ethics officers in each department and agency. Even though they do not allow interaction by participants, at least they ensure a professional presentation. And the video can be supplemented by quizzes, handbooks, and group discussions.

[New York City](#) has a 9-part "It's All About Ethics" video, as well as two filmed seminars, a game show (with three city employees competing to show what they know about government ethics), and a rap on calling the conflicts of interest board for help with your conflicts.

Powerpoints with audio can, if they are done well, be as involving as videos for a much lower price.

Training Ethics Commission Members

Training ethics commission members is something that is often overlooked. They are usually volunteers with little or no government ethics training or experience. Even those with ethics training in their profession will have a great deal to learn. An introduction to government ethics that might be enough for employees, and a good start for officials, will

certainly not be enough to allow individuals to provide ethics advice, interpret ethics laws, know how to critique ethics disclosures and complaints, ask good questions during meetings and hearings, and recommend ethics reforms to the local legislative body.

Where do ethics commission members get this training? Is it sufficient for them to learn the way other board and commission members do, by attending meetings for a while and trying to read relevant materials on their own? It is a good idea for ethics commission members to be alternates for at least a year before they become full members. Many local boards and commissions provide for alternates in the event a member has a conflict or cannot attend meetings for a while. But having alternate members can also be used for the purpose of educating members. However, even this is not usually enough to develop a sufficiently deep understanding of government ethics.

Ethics commission members need a great deal of specialized training. They can start out with the ordinary training program, and then this basic training can be supplemented with classes and materials prepared specifically for them, as well as individual meetings to consider a wide range of concrete situations as well as focus on commission procedures, something of no interest to other officials and employees. Concrete examples can be taken from the commission's past proceedings as well as those of ethics commissions in other jurisdictions.

This book should also provide a good general government ethics education for local ethics commission members, especially if it is part of a course in which members read and discuss (with a staff member or other discussion leader) one section at a time. Otherwise, the book is too daunting. It's better to start with City Ethics' free 27-page introduction, [*Local Government Ethics Programs in a Nutshell*](#).

Ethics commission members also need continuing education, either through a directed program, attendance at a Council on Governmental Ethics Laws (COGEL) conference, or keeping up with the decisions and opinions of local ethics commissions across the country, and discussing them either at regular meetings or at special training sessions. The latter can be done most easily by reading the City Ethics blog and by getting on the e-mailing lists of those ethics commissions that send out or make available online their press releases, newsletters, and reports.

It would be useful if local ethics commissions were to join together to produce training materials, so that local staff or resourceful ethics commission members would only have to

make changes necessary to adapt the materials to local laws and local situations. There is no reason for each commission to start from scratch with respect to ethics training.

3. Ongoing Ethics Training

Ethics training needs a destination. A destination causes people not just to think when they are learning, but to think how to get to the destination. And it makes the whole process make sense. It's not just ethics training, it's something more. Few people are motivated to learn about conflicts of interest. A destination helps motivate them.

Thinking about a destination also motivates ethics trainers to think about how to structure training, and how much time to devote to it. An ethics trainer with an hour to lecture is not going to be able to promise anything. But an ethics trainer who has a vision for ongoing ethics training can. Ongoing ethics training consists of a semi-monthly newsletter, occasional quizzes, general advisory opinions, FAQs, and other sorts of info, and news in the form of summaries of ethics decisions, settlements, and advisory opinions. It should also consist of discussion groups.

With a stream of information carefully designed to be interesting and not too annoying, an ethics trainer can say to a class of new government ethics students, "By the end of one year, you're going to truly understand conflicts of interest. By the end of two years, you'll be professionally handling your conflict situations and engaging in discussions of others'. And by the end of three years, you may be leading a seminar on how government ethics applies to your department." In other words, you will be knowledgeable, professional, and maybe even cool.

4. Going Beyond the Expected

The principal goals of government ethics training are getting officials and employees to understand what government ethics is (and that its principal purpose is to further the belief that government officials are acting for the public, not for themselves, that is, to further public trust in government), to ask for advice, and to understand the jurisdiction's ethics provisions as well as important concepts such as fiduciary duty and the appearance of impropriety.

But all the information one can provide is of no value if officials are not also taught about the underlying values of government ethics, as well as the pressures and blind spots

that get in the way of dealing responsibly with one's conflict situations. These lessons may not be expected, and may not be part of many ethics curriculums, but they are just as important as laws and procedures.

a. Regime Values. It is valuable to understand government ethics in terms of what are referred to as "regime values." These are the values that underlie our system of government: fairness, justice, openness, constitutional freedoms, political equality, civic responsibility, and citizen participation. Understanding and discussing regime values make it far more clear to local officials that government ethics is not an idea that is being imposed on government officials, but something essential to their government's essential values.

The importance of regime values can be seen by comparing government ethics training to a popular form of ethics training in and out of government known as "character training," such as the Character Counts curriculum. Character training is based on values such as Character Counts' six pillars of character: trustworthiness, respect, responsibility, fairness, caring, and citizenship. These are good values, but most of them apply only tangentially to government ethics.

It is better for government ethics training to focus on regime values than on these other values, because government ethics is less about being a good, trustworthy, respectful, caring person, than it is about being a good government official. Government ethics is limited to the role an individual plays in government, a role that can conflict with that individual's other roles in life. Understanding government ethics in terms of regime values focuses an official's attention on the particular role he plays in government which, in the case of board and commission members, may be a relatively minor role in his life, one that, therefore, requires more attention.

For full-time public servants, regime values define their mission, and government ethics is an essential means to fulfill that mission. This is true in the narrow sense of conflicts, as well as in the broader aspirations exemplified by the [American Society for Public Administration's code of ethics](#).

b. Approaching Ethics Issues. Another important goal of government ethics training is to show officials how to approach ethics issues. For example, it is valuable to understand that silence and inaction are principal causes of ethical misconduct, and that the causes of silence and inaction include shame, personal and partisan loyalty, fear, self-justification, a lack of moral courage, and a lack of a feeling of professional obligation. It is hard to learn

how to deal responsibly with conflicts; it is even harder to develop the courage to speak up with respect to ethics issues. But there are ways to do this.

It is important to recognize that the same can-do attitude with which we approach any issue or problem can be applied to government ethics issues. And dealing with these issues involves the same set of analytical and problem-solving skills we use every day. Normalizing ethics for officials, that is, helping them recognize that ethics issues are part of everyday decision-making can take a lot of the stress out of handling these issues responsibly. Once they are normalized, these issues require far less courage to raise and, therefore, can more easily be the topic of open, honest discussion. And officials can more readily seek help from ethics advisers and report misconduct.

It is not enough to show what specific sorts of conduct are prohibited. It is also necessary to try to change officials' perspective on the values that hinder ethical conduct. Take loyalty. We always assume that loyalty is a one-way street. We're disloyal to our party colleagues if we criticize the way they do things, but our party colleagues are not disloyal to us if they make it very hard for us to share our opinions with them about ethics issues. Loyalty can be reframed as a two-way street, a form of mutual respect in which ethics matters are openly discussed and there is no intimidation of those who disagree with the leaders' views or with what is often simply assumed, because people are afraid to even bring the topic up. When officials demand loyalty from their subordinates, there is neither mutual loyalty nor mutual respect. This is intimidation and abuse of power, not loyalty.

c. Blind Spots. Dealing responsibly with conflict situations depends on the ability to recognize them when they arise. Trainers cannot assume that government officials are able to recognize when they have to apply ethics standards and concepts. They need to help officials understand what conflict situations are, which is difficult enough. But they then need to get officials to recognize the blind spots all of us have that prevent us from recognizing and dealing responsibly with a situation's ethical aspects. If officials are not trained to do this, they cannot be expected to ask for advice.

What follows is a quick overview of the blind spots we all have. For a more detailed look at them, including how to deal with them, see [the Blind Spots section](#) in this book's last chapter.

We have a bias blind spot that prevents us from believing that there are selfish reasons for our doing what we do. Kathryn Schulz wrote about this blind spot in [Being](#)

[*Wrong: Adventures in the Margin of Error*](#) (Ecco, 2010). For example, we do not believe that we vote for a grant because our brother is the director of the charity it is going to. We believe we vote for the grant because it's going to a cause that is good for the community. And yet most neutral people will believe that we voted for the grant because of our brother.

In fact, we believe the same thing about others. Without further information, we believe that others act in their own interest, that they're basically selfish people taking care of themselves, their families, and their business associates. And we're even nasty about it. Showing officials how they do this all the time can be shocking. It's hard to accept how blind, and unfair, we can be. But that's part of being human, for all but the most saintly individuals.

This asymmetry in our thinking is produced by the fact that we can look into our own minds, but not into the minds of strangers, so that we “draw conclusions about other people's biases based on external appearances — on whether their beliefs seem to serve their interests — whereas we draw conclusions about our own biases based on introspection. . . . Our conclusions about our own biases are almost always exculpatory. At most, we might acknowledge the existence of factors that could have prejudiced us, while determining that, in the end, they did not. Unsurprisingly, this method of assessing bias is singularly unconvincing to anyone but ourselves.”

According to Max H. Bazerman and Ann E. Tenbrunsel, the authors of [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) (Princeton University Press, 2011), a second blind spot, which they call “bounded awareness,” prevents us from seeing what we need to see to make ethical decisions. We tend to exclude important, relevant information from our decision-making by placing bounds around our definition of a problem. We narrow our concept of responsibility (e.g., to our boss rather than to the public), we focus on instructions that are given to us or support a decision our supervisor or local legislators support. We do not ask for neutral external input, and we reject those who differ with us as partisan or self-interested. We focus on meeting a deadline rather than seeking out more information and opinions. We limit ourselves to our functional boundaries, such as engineering, law, finance. We give in to groupthink, that is, seek or accept unanimity rather than consider alternatives. We act out of fear, that is, fear of rejection, of being seen as goody-goody, of the consequences of whistle-blowing, of threatening our job. We focus

on the law rather than the ethics.

A third blind spot, “ethical fading,” involves the elimination of the ethical dimension of a decision. According to Bazerman and Tenbrunsel, “Most of us dramatically underestimate the degree to which our behavior is affected by incentives and other situational factors.” Goals, rewards, informal pressures, even compliance systems effectively blind us to the ethical implications of what we do. The result is that we do not see our behavior as ethical, but as something else: acting for our agency, acting strategically, considering the financial costs and benefits, pushing our party’s platform, doing what we are required to do by law, doing what it takes to look good.

Ethical fading is an important obstacle to acting ethically. If we do not recognize a situation’s ethical aspects, how can we apply ethics laws, not to mention go beyond ethics laws to consider the appearance of impropriety, the possible loss of public trust, etc?

Another blind spot is our inability to put ourselves in others’ shoes and see ourselves through their eyes. The ability to do this is called “moral imagination.” It is a mirroring process, and mirroring is central to education, especially our social education. This is why applying our moral imagination to government ethics decisions is such an appropriate subject for ethics training. It is important to recognize that it takes a lot of thought to overcome the strong emotions we attach to our decisions and to the loyalties on which we often base those decisions – to colleagues, agency, party, family – not to mention one’s own career and reputation. Once we “frame” a situation as something we have to do for our family or our party, or for the good of our city, it is hard to get out of that frame to see one’s decisions and actions from other points of view. Most of the worst misconduct is done for someone or some thing, rather than for oneself. Or so people tell themselves.

Another blind spot is our tendency “to overlook the unethical behavior of others when it is not in [our] best interest to notice the infraction.” Bazerman and Tenbrunsel call this “motivated blindness.”

Motivated blindness comes into play when our supervisors and high-level officials are involved in ethical misconduct, and others say and do nothing, or actively support their decisions. This is especially important when local government attorneys are advising their “clients” on ethics matters. Too often, they give an official advice that is in the official’s personal interest (that is, what will allow them to do what they want without hurting their personal reputation or getting them into trouble) rather than advice that is in the public

interest (that is, what will not create an appearance of impropriety). It is generally assumed that the government attorney's bias is intentional. But often it is not conscious at all. It is a result of the fact that the government attorney identifies with the situation the official is in, and that he is unconsciously motivated by the fact that it is in his interest to have the official be happy with his advice. We want those we work for to be happy with our performance. And we want to help them. This is a fact of life we need to recognize when we are faced with others' possible misconduct.

The final blind spot is our tendency to focus on character and ignore the situations people are in and the situational forces that often contribute greatly to ethical misconduct. As Chip and Dan Heath wrote in their book [Switch](#) (Crown, 2010), "What looks like a person problem is often a situation problem."

The Heaths use Lee Ross's term for our tendency to ignore situational forces: "the Fundamental Attribution Error." They wrote, "The error lies in our inclination to attribute people's behavior to the way they are rather than to the situation they are in."

When you recognize that people look to their environment for cues about how to act, and you think in terms of changing the cues from the environment, the choices open up. You can train officials, because they're not simply good or bad, but individuals who aren't getting the right cues about handling conflict situations.

To deal with their blind spots, officials need first to recognize that we all wear blinders, which is a truly difficult, painful thing to do. There is no better place to do this than in an ethics training class, where officials can laugh at each other, and then, hopefully, at themselves. Learning about one's blind spots may even be the thing an ethics training class needs to make it feel like an exciting, perhaps even life-changing discovery.

Officials also need to get beyond the belief in the prophylactic powers of an individual's integrity. They need to recognize that they, and their colleagues, sometimes act unethically without realizing it, and that their intentions don't really matter when it comes to dealing responsibly with conflicts. Government ethics trainers can make officials conscious of the processes they use to unconsciously put ethical considerations aside not only in their self-interest and in the interest of their families and friends, but even when they are thinking of their agency, their party, efficiency, strategy, or law.

After recognizing they have blind spots, officials need to learn that even if they recognize them at this moment, when an ethics matter arises, they will likely be blind to

their blind spots, just like before. Exercises need to be developed to help remind officials that they have blind spots and to help them see around them or, at least, recognize that they're hard to see and, therefore, talk to someone who can provide a better perspective on the situation. In other words, an ethics trainer needs to remind officials, again and again, that the best way to deal with blind spots, whenever there is any question of a possible conflict, is to run situations and possible decisions about them by the ethics officer, if there is one, or otherwise by someone they trust to give them an honest response that is not biased toward them and their colleagues. It's important not to ask an aide who is likely to tell you what she thinks you want to hear, or a party colleague who might have the same motivated blindness. What one needs is someone who is independent, thoughtful, and ethical, and has no personal interest of their own in the matter.

Ethical reasoning, that is, taking a logical, analytical approach to ethics issues, can also be a good way to deal with our blind spots. It is valuable to teach officials how to reason their way through sample situations. But officials also need to be made aware that our usual approach is not to use reasoning to make ethical decisions, but rather to make decisions and then justify them as ethical using our reasoning.

When one first hears this, it sounds like a terrible accusation. However, it is simply a description of how we tend to deal with ethical decisions. Once an individual recognizes that this happens, he is more likely to be able to question rather than justify his reactions to an ethics-related issue. Without this recognition, it is hard to deal professionally with such issues, because we often let our reason undermine rather than enhance our ethical decision-making. With this recognition, we can also better understand what is going on when other officials become so defensive of their decisions not to deal responsibly with a conflict.

Similarly, it is important to show officials that they can gain a lot by becoming actively ethical individuals who, instead of turning away from even knowing what is going on (which is a common response, due to the feeling that one is helpless to do anything about our ethics environment), seek to be aware of what is going on and inject ethics into discussions about all sorts of matters. Rather than being passive, not-unethical individuals, they can become active, ethical individuals. Being ethical means being active. This is one reason it is so important for ethics training to include small discussion groups. Listening just isn't enough to get through our blind spots and our powerful self-defenses.

d. Confusion of Person and Office. The distinction between person and office is one

of the more difficult things to understand in government ethics. Therefore, this distinction should be part of ethics training. It is important for officials to recognize that, when they enter into high office especially, they have responsibilities that have nothing to do with who they are or what they believe. When they speak, they are representing their community. When they act, they are representing their community. They preserve a personal life, but it should be kept as separate as possible from their government work.

Confusion of person and office is the basis for nepotism, cronyism, and patronage. Those who participate in such ethical misconduct believe that government jobs are something that should help the person, not the public. Handing out government jobs is treated as a reward for electoral success, not an obligation to the public like any other.

Confusion of person and office is also the basis for problems that occur when government attorneys represent government officials.

Personal loyalty also arises out of the confusion of person and office. For more, see [the section on this confusion](#) in the final chapter.

e. Unwritten Rules and Situational Forces. It is also valuable for ethics training programs to discuss the unwritten rules, patterns of conduct, and situational forces, such as expectations of loyalty and intimidation, that do so much to create an unhealthy ethics environment. Unwritten rules, which undermine the rule of law, usually to allow for preferential treatment of certain individuals and companies, should be discussed, both those of the particular local government and the unwritten rules public servants should be on the lookout for. Patterns of unethical but legal conduct that should be discussed in a training class include procurement abuses (see [the chapter on procurement](#)), legislators' control of the land use and grant-making processes, and abuses of constituent service. This is one area where the participants know far more than the trainer about the specifics. Discussions of unwritten rules, which are usually picked up bit by bit by new officials and never discussed as a whole (or at all), can be extremely eye-opening.

Equally difficult to discuss are the situational forces that make it hard for officials and employees to act ethically. It is not easy for people to acknowledge how important it is for them to feel like they belong, and how hard it is for them to risk becoming an outcast by raising ethics issues. An ethics trainer should point out the pressures placed on individuals to get them to go along, be loyal to individuals and factions rather than to the public, and not say that they are uncomfortable doing something (or doing nothing). Where there are

strong situational forces, reporting ethical misconduct feels extremely risky and takes a great deal of moral courage (see [the section on the process of reporting ethical misconduct](#)). The first steps in countering these forces are to point them out and to get officials and employees openly discussing them, talking about how they feel about loyalty and the fear that accompanies intimidation and retribution (even when it is others who are the direct victims).

f. The Positive Side. An important goal of ethics training is to show the positive side of government ethics. For example, trainers can show officials the ways in which an ethics program can help them and their political parties or other allies. Trainers can explain that the alternative to the use of ethics advice and the enforcement process is being pilloried in the news media, online, and in campaigns. Clear guidelines and an independent ethics commission make it far less likely that scandals will occur and, when they do, that their resolution will be unfair or questioned by the public as political whitewash. In other words, it is better for officials to have allegations dismissed by a truly independent ethics commission than by the council, the city or county attorney, or an ethics commission whose members were selected by the official under investigation.

Ethics rules protect both officials and those doing business with government from coercive influence and pay to play, as well as from difficult dilemmas, such as being expected to help one's brother-in-law get a contract when you truly think he'd do a terrible job, but your sister wants you to give him a chance.

Positive training, rather than punishment, is what works best with dogs. So why not with government officials? Officials don't respond to feelings of guilt any better than dogs. That it's why it's important to get the emotions out of government ethics by showing officials that it's not about being a good or bad person, but about being a responsible, professional person or an irresponsible, unprofessional person.

Similarly, it is important to present government ethics as a central aspect of democracy, where government officials, elected or appointed, are intended to represent the public interest, not their own interests or the interests of other individuals who specially matter to them. This is where officials' fiduciary duties are discussed, as well as their management of the community and their stewardship of community funds.

High-level officials and supervisors can even give their colleagues and employees treats and say "Good girl!" (in bureaucratic ways, of course) when they handle ethics

situations responsibly (see [the awards section](#)).

g. Transparency. Ethics training should also emphasize how important transparency is, even though most local governments do not have their own sunshine or open meeting laws. Transparency is not limited to documents and meetings. It is an attitude toward the public that government business is the public's business. Including ethics. It's important that officials recognize that their interest in keeping the ethics process secret (what they refer to as "confidential") is itself not in the public interest.

Some ethics training programs include teaching about state transparency laws. I think this is trying to cover too much. Transparency should get its own training program. The best way to combine the two, if necessary, is do one in the morning, serve lunch, and do the other in the afternoon. This makes a day of it, without cramming the information and discussions into too short a period of time.

h. Settlement. Similarly, it is important for officials to be made aware that, if they do violate an ethics provision, the best solution, for everyone, is admission, apology, and a quick settlement. No one benefits from most of the defenses that are made by officials' attorneys, not even the officials themselves. And everyone loses when a cover-up is attempted. The public trust is benefited most by officials dealing responsibly not only with their conflicts, but also with any poor ethics decisions they make.

i. Dealing with Constraints. Ethics training should openly deal with the tendency people have to rebel against constraints on their freedom. Rules naturally set off in many people's minds thoughts of the costs and benefits of compliance versus noncompliance. Not only lawyers think about getting around rules, and not only teenagers think about getting away with prohibited conduct. There is an excitement to doing this, the excitement of freeing oneself from what emotionally appear to us to be parental constraints. This sense of freeing ourselves in ethics situations is ironically made stronger by the obligations to others that underlie our conflicts. In other words, we have a greater need to make ourselves feel free when in fact we feel tied down by our loyalties and obligations to family, agency, party, and career.

Ethics training should also frankly deal with the feelings high-level officials have about being lorded over by a group of unelected officials and their staff. A member of the Atlanta council expressed this feeling well at a council meeting in March 2012:

I think a lot of us have felt as though ... we've been kind of looked down upon, ... that the [Ethics] Board has treated us this way, that "we're over you, that we're your overseer," ... and that's very disturbing to me. ... I haven't been able to shake it no matter who's on the Board. ... I don't get that with other Boards. ... And it's almost as though [they're saying], "I've got my thumb on all of you."

Ethics training should point out that these feelings are natural, but they're wrong. It's not about being free or getting out from under anyone's thumb. Enforcement is a minor part of an ethics program in which officials take a professional approach to dealing responsibly with their conflicts.

Ethics training can also point out that ethical conduct can itself be a freeing process, a way of rising above one's personal ties and doing what is best for the public. It is also a way of rising above our emotions and acting like responsible professionals. Nothing is more mature than recognizing the obstacles we place in the way of acting professional, and then trying to overcome them. The problem isn't an ethics commission's power over officials, but rather officials' power over their own emotions.

One way of showing this in ethics training is by pointing out that people who have trouble doing this are moral klutzes, people who trip over their own or others' feet, who drop the ethical ball, who run into scandals because they weren't looking where they were going. It's worth pointing out that klutzes (the usual kind) aren't just people who are naturally clumsy. They're people who didn't take the drills seriously, who ignored the coaches, who didn't give their all. There are people who are naturally good at dealing with ethics situations, like there are natural athletes, but most of us need to work hard at it. Those who don't do the hard work can't expect to be good at something, to reach the point where they can take pride in their skills.

And there is something about ethical conduct that everyone can appreciate, even children: it feels good. It may be work to recognize the ethical aspects of a situation, get out of ourselves in order to analyze it, consult with others, and deal with emotions that get in the way of dealing responsibly with our conflicts. But the result is pleasurable. Experiments have shown that there is more reward-related brain activity during acts of altruism than during the receipt of cash rewards.

j. Educating the Public. Ethics training need not be limited to local government

officials and employees, and those seeking benefits from the government. It is also important to educate the public. One way is through community outreach (see [the subsection on that](#)).

There are also many occasions that can be turned into opportunities for educating the public and the press. For example, in Knox County, Tennessee in 2009, the county law director confessed to taking thousands of dollars from his then law firm to pay off a tax lien on his home. This provided an opportunity for the ethics commission to educate the public about its limited but important role in the community: dealing with conflicts between private and public interest. When instead it said nothing, while trying to figure out what it could do rather than say (it could, of course, do nothing), it was attacked for not acting quickly to rid the county of an unethical official. It is important to educate the public not only about an ethics commission's successes and role in making the government more ethical, but also about its limitations, and the complementary roles of leadership and the criminal justice system. No program should be embarrassed by its limitations.

k. Opportunities for Teaching. Whenever an ethics issue arises, it should be treated as an opportunity for teaching officials, employees, and the public about government ethics. This is not only true of scandals. There is no better education than watching a colleague handle a conflict situation well and explain what he is doing and why (or allow the ethics officer to explain). Talking to the ethics officer before a meeting can help an official think through both the decision and the proper explanations.

5. Enforcement of Ethics Training Requirements

How do you make sure officials and employees take whatever ethics course is required of them, in person or online? Some local governments fine people who don't take the course within an allotted time. Chicago has a \$500 fine for failure to attend. That's high. Long Beach, CA decided to up the ante and make failure to take an ethics course by the end of the year (a course is required every two years under California law) a cause for automatic removal. This sanction, combined with two reminders, led only 226 of 284 board members to watch the two-hour video (online or at city hall). Those who did not watch the video were forced to resign, to the consternation of all.

The focus, especially for board members whose government service is only a small part of their lives, should not be on sanctions, but on leadership. Board chairs and chief

administrators should be responsible for getting everyone trained. They are regularly in touch with their board members and employees. Just as government ethics is a professional responsibility, ensuring the training of officials and employees should be a management responsibility.

To enforce ethics training requirements, they need to be made clear. Once a program is established, the requirements should be included in the ethics code or in ethics commission regulations, and made prominent on the ethics commission's website. Open-ended requirements, even when a number of hours is stated, allow, say, lawyers to fulfill the requirements simply by going to a legal ethics class, killing two birds with one stone, but getting no training in government ethics. It is best that an ethics commission either create its own course or work with a municipal association or local university to create a course that will train not only those under its jurisdiction, but also the officials and employees in nearby cities and counties. Most of government ethics can be taught without focusing on the language of particular provisions. As shown in this section, the most important aspects of ethics training are the concepts (what government ethics is and is not), the underlying values, the concrete examples, and the psychological obstacles to dealing responsibly with one's conflict situations.

Mandatory ethics training is only mandatory to the extent attendance is enforced. And enforcement is only fair if officials and employees are given a choice of dates and times, and are given at least one reminder. Enforcement works best if department and agency heads and board chairs make attendance a priority and take responsibility for making the reminders. E-mail reminders from an unknown ethics officer carry little weight.

If a local government decides not to hold chairs and department and agency heads accountable, what is the right fine to ensure attendance while not putting employees out a week's pay? A sliding scale would probably be best, both in terms of what officials and employees can afford, and in terms of the fact that ethics training is most important for those with more authority. The sliding scale should treat volunteer board members, and part-time elected officials, like assistant department heads, perhaps. Employees might be told that they don't get a raise if they don't take the course, but unions would most likely reject this. Perhaps unions could be given the responsibility for making sure their members show up. It's better to bring unions into the program, as well, than to create another area for friction.

C. Government Ethics Discussion

Discussions of ethics issues should be every bit as common, professional, and impersonal as discussions of engineering, fiscal, and legal issues. And they should be regular, that is, institutionalized. For example, whenever any matter is discussed at a board, department, or agency meeting, the question should be raised whether there are any ethics issues involved. At a board meeting, whenever the board moves on to a new agenda item, the chair should ask not only if anyone has a motion, but also if anyone has or knows of a potential conflict situation, his own or someone else's.

At a meeting of procurement officers, when they start to discuss a contract matter, the question should be raised if anyone has or knows of a potential conflict situation involving not only the procurement officers themselves, but also any official or employee who might have been or might become involved in any way with the contract preparation, bidding, approval, or oversight process. In addition, the question should be raised whether there have been any irregularities, such as ex parte communications with elected officials, possible contractors, or their representatives, or unusual specifications, change requests, etc. If a contract has been presented as a no-bid contract, this decision should be questioned, including the relationships of anyone who suggested that the contract not be bid, and adequate explanation given. And when an official or contractor contacts a procurement officer regarding a contract, she should ask whether the person has a relationship or involvement with any potential contractor or subcontractor, or with a government official or employee. When there is uncertainty about a possible conflict situation, someone should be assigned to ask those who might know.

As with engineering issues, one goal should be to get all the facts out on the table and then make use of different points of view and various kinds of expertise, in this case managerial, ethical, legal, and media-oriented expertise. The role of a manager or board chair is to provide information about how such matters have been handled in the past in the agency, department, or board as well as in other agencies, departments, and boards, and the good and bad results both for individuals and for the agency, department, board, or government as a whole. The manager should seek to put on the table for discussion not only

the written rules, but also unwritten rules, and look into how the rules contrast, and why. The manager should also make it clear that there will be no retaliation for the presentation of unpopular views or the provision of information. The manager should play devil's advocate when necessary, forcing meeting participants to confront uncomfortable facts and concepts, and talk about all aspects of the situation under discussion. Both acts and failures to act should be discussed.

If a lawyer is at the meeting, she should recognize that ethics laws are minimum requirements, and that it is not appropriate to encourage officials and employees to take advantage of loopholes or gray areas. If loopholes and gray areas are pointed out, they should be discussed not in tactical terms, but in terms of the appearance of impropriety and the responsible handling of conflicts. This is especially important if there is no one present with expertise in government ethics. When no one can present the ethics point of view, it is incumbent on lawyers to present it as well as they can, even if it is not their common way of thinking. If a lawyer has had no experience with government ethics, she should not act as if she did, just because she thinks it is expected of her.

A member of the press office (or, if not available, a journalist, off the record) can provide expertise on how the press might deal with a situation. Such a presentation makes the concept of appearance of impropriety concrete. Presenting the media viewpoint is a professional way of doing the front-page test, that is, considering how an official's conduct would look on the front page of the next day's newspaper. It is important that a member of the government press office not try to spin the situation or present tactics on how to prevent the press from getting wind of the situation. Her job should be limited to focusing on appearances of impropriety in a way that provides a point of view officials and employees need to help determine how best to handle a conflict situation. It might seem strange to ask journalists questions, rather than the other way around, but they are usually happy to cooperate, and their expertise and viewpoint can be very useful.

Formal discussions of ethics issues lead to more open informal discussions of such issues outside of meetings, a better understanding of government ethics and, therefore, a better recognition of ethics issues when they arise. The normality of such discussions make ethics issues less personal and more professional, and they show that everyone has a role in dealing responsibly with ethics issues just as they have a role in other issues that arise, whether political, professional, administrative, or policy-oriented. Discussion helps form

both values and processes for dealing responsibly with conflict situations.

Discussion also provides a reality test to our feelings about ourselves. Most of us do not believe we are capable of ethical misconduct. We are expert at formulating justifications of our actions and inaction that are consistent with our images of ourselves. Here are a few typical justifications and self-justifications:

I deserve some benefit for all the volunteer work I do (or the lousy pay I get).

I'm not putting money in my pocket like the others are.

It's just a technical conflict, not something bad.

They knew I was involved in this business when they appointed (or elected) me.

I did it because it was the best thing for the community.

I can accept gifts like that, because I know I can't be bought.

It wasn't for me, but for my family (business, friends).

We need the input of others to make us recognize not that we are bad if we mishandle a conflict situation, but that what we are considering doing is unprofessional, inconsistent with best practices, and will be damaging to us, to our colleagues, to our government, and to our community.

As Mary C. Gentile points out in her book, [*Giving Voice to Values: How to Speak Your Mind When You Know What's Right*](#) (Yale University Press, 2010), it's normal to think that, if you raise an ethics issue, others will find you naive, that *they* have no desire to act on *their* values, or that they don't even see the issue as ethical. But when you discuss the issue with people, you often find that people *do* want to act on their values, that they share your concerns and fears. Knowing this makes one less afraid and more determined to at least continue talking about the issue with others.

It is important to recognize, respect, and appeal to others' capacity for choice, not to sell them short. Gentile suggests that people approach their superiors as if they're on the same side, as if they share your commitment to handling conflict situations responsibly, and to the importance of values and reputation to success. It's also important to approach ethics issues not in an accusatory fashion, but with questions intended to get a discussion going.

It is the rare official who does not have mixed feelings about ethics rules. These feelings need to be recognized and talked out. Emotions, including feelings of loyalty, entitlement, and obligations to family, friends, business associates, and political supporters, in addition to a belief in one's integrity, should be discussed openly, without embarrassment. These feelings and obligations are not wrong. What is wrong is not recognizing these feelings and, thereby, allowing them to prevent our dealing responsibly with conflicting obligations.

One emotion that is especially hard to live with is the feeling of helplessness in the face of others' misconduct and intimidation toward oneself and others. It is hard to live with fear and the feeling that you may jeopardize your career, and your family, if you act on your values. It is also hard to live with the fear that you will be personally ostracized if you speak out. Employees especially, but also officials, including board and commission members, need a secure forum in which to speak their minds. They need to be asked for their opinion by someone in charge, and to know that they will be rewarded for speaking their minds, instead of penalized. Providing an alternative to the silence and tacit acceptance that enables most ethical misconduct can be a liberating experience personally, and can do more to create a good ethics environment, and good morale, than anything else.

When discussions do not lead to a clear and agreed resolution of the situation, or when people would like to confirm that this is the best resolution, the manager or chair should seek professional ethics advice. This should be seen not as a sign of weakness, but as the responsible way to bring a more knowledgeable, experienced individual into the discussion to help resolve differences of opinion or bring more light to a gray area. If a matter has to be postponed till the next meeting, that is far better than acting when there is disagreement or a quandary about what is the best thing to do. Government ethics is a complex field that is often not intuitive. That's why independent ethics advice is the most important part of an ethics program. No one, and no group of individuals, should be embarrassed because they are not sure how best to apply government ethics laws and concepts to a particular situation.

It is important to place the idea of openly discussing ethics matters in the proper context of our democratic system, which can only function correctly through open deliberation on all issues and matters. The open discussion of ethics issues is not some kind of new-age treatment that is good for officials (although it will make them more

professional administrators). It is an age-old way of protecting citizens from the misuse of the power they give to those who manage their community.

If formal and open discussions are not held, there will still be ethics discussions, but they will be held privately, behind closed doors, and they will be about unwritten rules, clever ways around the written rules, the evils of tattling, and the like. Norms and a community are formed through conversation and story-telling. The open discussion of ethics issues and situations, formally and informally, led by high officials or entered into spontaneously at the water cooler, creates the right sort of norms and a community of openness and comfort, rather than secrecy and fear.

Ethics discussion also provides officials with experience honestly providing reasons for their conduct. This is a good thing to practice in private so that it can be done well in public. Explanation is essential to transparency and to trust and, ultimately, to democracy. Insisting one is a good person – the norm – satisfies no one but oneself. All it does is make it difficult for conduct to be discussed.

When a topic is not discussed openly, or when a discussion consists of accusations, denials, and self-defense, we tend to be uncomfortable with it, not to mention the feelings we have about our own conflicts as well as those of our colleagues. Ethics can seem like one of those topics you didn't bring up at the dinner table when you were young, because of the emotions it stirred up or the vague sense that it was wrong or harmful.

When there is not open, critical discussion, we tend to accept others' definitions of the situation we are in, rather than considering alternative views and options. Here's an example of how this works. For years the public comments portion of the meetings of my town's major boards were not televised on the local public access television channel. For a long time, there was no discussion of this lack of transparency. Then, when the issue was raised, some officials placed the blame on the public access channel. Other officials accepted this explanation and did not discuss ways to get around the problem. Therefore, since few members of the public attended the meetings, and newspaper coverage was uncritical, the board members, and other officials, could say anything to citizens during the public comments section of meetings, and no one would know.

The situation existed only because officials did not insist on a public discussion of the ways in which the public comments portion of meetings could be put on television. When this was actually accomplished in a roundabout way – citizens filming and putting the public

comment portion of meetings on You Tube – a quick end was brought to the lack of transparency and the abuse of citizens: a way was suddenly found to put public comments on the public access channel, but again without a public discussion.

Leadership is important to the discussion of ethics issues. High-level officials need to send a clear message, both through what they say and through how they act, that discussing ethics issues is an important part of being a professional administrator and a responsible board or legislative body member. When there are complaints that conflict and transparency issues are not being discussed, high-level officials must insist on discussion. And facilitate the discussion, when necessary. Department heads and chairs should also facilitate such discussions.

Ethics discussions can be required by formal or informal rules. For example, it can be required that whenever a board or legislative body moves on to a new agenda item, the names of the individuals and entities involved are read out and the question is asked, “Does anyone here have a special relationship with anyone involved in this matter? If you are not sure, ask for more information. The matter can be tabled if your questions cannot be answered.”

This is what is done in the *voir dire* of jury members. They are expected not to have conflicts when they deliberate and make decisions. Why shouldn't the same question be asked of individuals who have a fiduciary duty to withdraw from participation when they have a conflict?

By asking this question again and again, it will be natural that conflict issues will be discussed. A board member will say that he has done business with one of the companies involved in a matter, but that was ten years ago and he has not been in contact with anyone there in at least five years. Other board members can give their opinions about whether this relationship should require the board member to withdraw from this matter. A call could be made to the ethics officer and, if she cannot be reached, the board may decide to go on to the next agenda item and deal with this one after the board member has obtained ethics advice. At the next meeting, the board member can share the advice with the rest of the board, and the public, and the discussion may continue, if necessary, so that all the board members, and the public, understand the ethics issues involved.

In this way, discussion builds on advice and provides training. All the elements of guidance come together. Too often, what happens is that training stops at the end of a class,

and advice remains confidential. All one's colleagues and the public know is that a board member has decided to withdraw. If he does not withdraw, they will know nothing.

What is harder is doing the same thing with respect to conversations. Withdrawal from participation includes not only public meetings and other formal discussions, but also informal conversations, buttonholing in the hall, etc. People need to be encouraged not to shy away from questioning whether someone should participate in such conversations when they appear to have a conflict. When this is seen not as rude or being too much of a stickler, but rather as a way of protecting the organization, it is much easier to do, even if the person in question is a superior. But it helps a lot if high-level officials encourage this behavior, and engage in it, and when everyone is aware that it is considered to be in the interests of the organization and consistent with its values and its leaders' values.

All ethics discussion is not good. In his book [*The Righteous Mind*](#) (Pantheon, 2012), Jonathan Haidt points out that moral judgment is social in nature. This means that when people talk about it, outside of the context of an ethics program, they do it for the same reasons they talk about anything else. "Moral talk serves a variety of strategic purposes such as managing your reputation, building alliances, and recruiting bystanders to support your side."

This is why moral judgment is so different in healthy and unhealthy ethics environments. In a healthy ethics environment, one manages one's reputation by being open, responsibly handling one's conflicts, seeking professional advice, and acknowledging one's mistakes. In an unhealthy ethics environment, one manages one's reputation through denial, accusation, cover-ups, and the insistence that one is a person of integrity.

The social nature of moral judgment can work for or against good conduct. People can come to an official's defense, insisting that she followed the law and is a woman of integrity. Or, more beneficially for the community, people can share their outside viewpoint with an official whose blind spots prevent her from seeing the situation clearly. They can provide her with viewpoints she couldn't see for herself, thereby triggering new reactions and intuitions that will allow her to change her mind. We need others, especially those we trust, not to support our misunderstandings and misperceptions, but to challenge and correct them. Ethics discussion is important for this.

However, this isn't always easy, because these others tend to employ rational arguments, while the official is being guided by emotions. Haidt uses the metaphor of an

elephant (emotions, intuition) and its rider (reason). You usually have to appeal to the elephant, who quickly leans one way or the other, not the rider, who has little control once the elephant has leaned. This is why many government ethics professionals try to get officials past their immediate emotions by asking them to consider what their mother would think if they were to engage in a certain kind of conduct. This is an emotional rather than a rational approach, and therefore often has a better chance to steer the elephant in the right direction.

VIII. Definitions

The definitions section of an ethics code should be a neutral place to clarify what ethics-related terms mean. But often it is not. Often it is used to greatly limit the reach of ethics provisions and the authority of the ethics commission. A draft definitions section should be examined carefully to determine if this is being done.

This chapter on definitions is placed in the middle of this book for the same reason that the definitions section of an ethics code should be placed after all the conflict provisions (and before the administration and enforcement sections): definitions should not be very important. That is, they should not be used to expand or limit the scope of ethics provisions, only to clarify them and, in some cases, provide exceptions. When definitions are used to expand the scope of ethics provisions, they may catch officials unawares and, thereby, be unfair to them. When definitions are used to limit the reach of an ethics commission, this usually reflects on the craftiness of the attorneys who drafted it, doing high-level officials' bidding in secret. There should be no rules in a definition. The goal of a definition should be guidance.

Placing exceptions in definitions makes ethics provisions shorter and more simple. It is the rules that are important. If an official does not look to see if an exception applies, he will be acting more responsibly than the minimum that is expected of him. But there should not be too many exceptions in any case. Hiding them in the definitions section does not remove the problem that exceptions open up loopholes and lead to unexpected consequences, including some pretty ugly scandals.

Looking for exceptions is easier if, in the online ethics code, each word that is defined is internally hyperlinked to its definition, as is done in the [City Ethics Model Code](#). This is a process that takes only a couple of hours and can be done by an intern. This is highly recommended, and it is essential for ethics codes that have multiple definitions sections, as many unfortunately do, sometimes providing multiple definitions for the same term as it is used in different parts of the ethics code.

It is best to have one definition of a term. If it is essential to define a term differently in a particular provision, the alternate definition should be part of the provision, and the provision should make it clear that this definition differs from the one in the Definitions section of the code.

Terms that require definition should appear over-inclusive rather than under-inclusive, so that the definition of the term clarifies rather than adds to a term people, conduct, or activities that the term itself appears to exclude. For example, the Massachusetts ethics program, which has jurisdiction over local officials, uses the term “employee” for all government officials and employees. Since board and commission members are volunteers and, therefore, do not in any way think of themselves as “employees,” this term makes them think that the ethics code does not apply to them. Even though the definition makes it clear that the term includes them, one cannot expect everyone to read the definitions. They are there primarily for clarification.

This chapter focuses solely on the definitions that should be included in an ethics code. For definitions of the terms used in this book, see [the Glossary](#).

The below list of definitions is inclusive. Different codes require different definitions. Some definitions that are peculiar to one or only a few ethics codes are left out. But a particular local ethics code might well require one or two definitions that are not included here. It is not necessary to include all these definitions; the City Ethics Model Code doesn't. But it is worth looking at them and considering whether they are valuable.

Agency - a city/county office, position, administration, department, division, bureau, body, authority, corporation, advisory committee or other agency of government, not including any court, the expenses of which are paid in whole or in part by the city/county, or where some or all of its board and/or administrators may be appointed by a city/county elected or appointed official.

[This is more than a definition. It effectively states the jurisdiction of an ethics program, at least in terms of the agencies it covers (agencies not covered should be clearly listed as exceptions, as the courts in this above version of this definition). Another place to do this is in the definition of “officials and employees,” as in the City Ethics Model Code. For more on jurisdiction over agencies, see [the Jurisdiction section](#) below.]

Appear - to “appear” or “appear before” means to communicate in any form, including, without limitation, personally, through another person, by letter, electronic communication, or by telephone. This definition also applies to the noun form, “appearance.” Ministerial acts are not considered appearances.

[Sometimes this definition appears under “communication.” San Diego has exceptions for responding to questions from an official and for responding to an enforcement proceeding with the city.]

Associated - A person or firm “associated” with a public servant includes a spouse, domestic partner, child, parent, or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.

At the Behest of - under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express prior consent of.

Attempting to Influence - promoting, supporting, opposing, or seeking to modify or delay any action by any means, including but not limited to providing or using persuasion, information, statistics, or analyses.

Blind Trust - a trust in which a public servant, or the public servant’s spouse, domestic partner, or unemancipated child, has a beneficial interest, the holdings and sources of income of which the public servant, the public servant's spouse, domestic partner, and unemancipated child have no knowledge, and which is directed by a trustee.

Business - any corporation, partnership, proprietorship, organization, self-employed individual and any other entity operated for economic gain, whether professional, industrial or commercial, and entities which for purposes of federal income taxation are treated as nonprofit organizations.

[The most important part of this definition is the last part, that is, the treatment of nonprofits as businesses. This is important because many nonprofits do business with local governments, and should be treated no differently than anyone else who does business with a government, makes gifts to officials, or hires officials and their family members or business partners. Someone who works for a nonprofit has the same incentives as someone who works for a profit-seeking company. Founders and other nonprofit executives often

act no differently than ordinary business owners.

The biggest difference occurs with respect to lobbying. Some nonprofits lobby in order to get more business. But others, especially associations, lobby only to affect policies, with no direct or even indirect benefits accruing to those who work for or belong to the association.]

Client - any specialized and highly personalized professional business relationship, not including an ordinary business or vendor relationship. If the official or employee does not personally represent the client, but conducts business as a member of a primary partnership or professional corporation or conducts business through another entity, a client of the partnership, professional corporation, or entity is deemed to be a client of the official or employee.

Confidential Information - information obtained in the course of holding public office, employment, a contract with an agency, or otherwise acting as, in support of, or as a replacement for an official or employee, which is not available to members of the public.

[Often, “confidential information” is defined in terms of whether information must be made available to the public pursuant to state or local transparency or sunshine laws, as well as under criminal laws or personnel rules, to the extent those laws or rules do not contradict transparency laws. This is wrong, because the legality of confidential information is far less important than its availability. A confidential information provision prohibits only the misuse of the information to someone’s special benefit. It does not involve making confidential information public, which can often be in the public interest. Government ethics is only interested in the misuse of office for private, not public reasons.

Another way of saying this is that, for the purposes of government ethics, what is most important about confidential information is not its confidentiality, but rather the favoritism with which it is disclosed. That is, confidential information matters only to the extent it can be used by certain people to benefit themselves.

Therefore, it is better to define “confidential” in terms of the information’s availability rather than in terms of the legality of its distribution. If the information has appeared in the newspaper or on a blog, it doesn’t matter whether it was meant to be kept within the confines of the council or even whether it was illegally leaked. It is no longer

confidential.]

Consultant - an independent contractor or professional person or entity engaged by the city/county or advising an official, and in a position to influence a city/county decision or action, or have access to confidential information.

Customer or Client - (a) any person or entity to which a person or entity has supplied goods or services during the previous twenty-four months, or (b) any person or entity to which an official or employee's outside employer or business has supplied goods or services during the previous twenty-four months, but only if the official or employee knows or has reason to know that the outside employer or business supplied the goods or services.

Doing Business With - engaging or seeking to engage in any transaction with the city/county involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, not including a transaction involving an official or employee's residence.

[This is an important definition for gift prohibitions. It is important that the prohibition apply only to those doing business with the local government, and that this definition include not only contractors, but anyone seeking special benefits from the local government, including permittees, grantees, and licensees. Some jurisdictions instead define "restricted source"; see the useful and more inclusive [definition of that term](#) below.

Some jurisdictions except those who do only a small amount of business with the local government. Chicago has a bottom limit of \$10,000 over twelve consecutive months. For smaller cities and counties, this figure should be lower. However, I prefer that an ethics commission determine what is de minimis in each instance, and that those who are offered a gift by someone doing a small amount of business seek advice, so that they can deal responsibly with the situation, even if the ethics officer might consider it minimal. When other factors are present, a de minimis amount of business may require withdrawal or other remedies after all.

Chicago also defines "seeking to do business." Here is a variation on that definition: (1) taking any action to obtain a benefit from the city/county when, if such action was

successful, it would result in the person's doing business with the city/county; and (2) the benefit sought has not yet been given to any person.]

Domestic Partner - an adult, unrelated by blood, with whom an unmarried or separated official or employee has an exclusive committed relationship, maintains a mutual residence, and shares basic living expenses.

[In many states and cities, there is a legal definition of “domestic partner.” It is valuable to cite any relevant law, but it is best to also include a definition, even if only the definition provided the other law, so that officials don’t have to go looking for it.]

Elected Official - a person holding an office subject to municipal election under the charter or the code of ordinances.

[This seems unnecessary. But when an elected official resigns, his replacement is often appointed. It’s worth making it clear that such an appointed official is actually an “elected official.” In a government with few elected offices, they may simply be listed.]

Financial Benefit - any money, service, license, permit, contract, authorization, loan, discount, travel, entertainment, hospitality, gratuity, or any promise of any of these, or anything else of value, including a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. This term does not include campaign contributions authorized by law. A “financial interest” is a relationship to something such that a direct or indirect financial benefit has been, will be, or might be received as a result of it.

[Many jurisdictions use the language of “interest” rather than “benefit.” Above, I make [an extended argument for the use of “benefit” language](#).

Some ethics codes use separate definitions, such as “ownership interest” (interest in a business) or “interest in a contract” (see below). These more specific definitions can be useful, but they are often used primarily to determine what is considered a de minimis interest. It is preferable that an ethics commission determine what is de minimis in each instance, and that those who have *any* interest or might receive *any* benefit (or harm) seek advice, so that they can deal responsibly with the situation. When other factors are present, a de minimis interest or benefit may require withdrawal or other remedies after all.]

Gift - a financial benefit received or given without equivalent compensation. However, a financial benefit received or given on terms available to the general public is not a gift.

[A financial benefit on terms not available to the general public would include, for example, a reduced-interest loan to an official. The reduction in interest would constitute a gift. But a market-interest loan from a bank doing business with an official's government would not be considered a gift (however, there are issues about determining what is a market rate, so it is better not to get a loan from a bank doing business with one's government, if at all possible.

Some jurisdictions use the term "gratuity." This is not a good term, because it implies a small amount, as in a tip.

The Los Angeles ethics code makes the burden of proof clear in situations where the recipient of a gift argues that she gave sufficient consideration in return for the gift: "Any person ... who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value."

It is worth noting, as Chicago's ethics code effectively does, that "compensation" includes the expectation of compensation. The Chicago definition is short and simple: "any thing of value given without consideration or expectation of return."

Many "gift" definitions are anything but short and simple. In fact, they tend to be the longest definitions, unless the definition is included in the gift provision itself. The reason they are so long is that there are usually many exceptions. A principal reason why some ethics codes have so many exceptions is that the prohibition of gifts is not limited to restricted sources. When the prohibition is thus limited, the only important exception is the campaign contribution, which could otherwise be considered an indirect gift to a campaign committee associated with an official.

There is no problem including gift exceptions in the Definitions section. My problem with gift exceptions is that most of them are unnecessary, and many of them provide huge loopholes that allow large gifts to be made on a regular basis. Gift exceptions lead to a large percentage of ethics scandals. For more on this, see [the section on Gift Exceptions](#) above.

Generally, when an ethics code sets a minimal aggregate gift amount, it does so in the gift provision rather than in the definition of a "gift." But sometimes a minimum amount

is included as an exception in the definition. This is the one de minimis definition that I consider acceptable, because small “gifts” are so common. But due to how common they are, the minimum amount belongs in the gift provision, rather than hidden in the Definitions section.]

Governmental Body (or “Agency”) - office, department, commission, council, board, committee, legislative body, agency, or other establishment of a municipality, county, school district, improvement district, special district, authority, or any political district or subdivision thereof.

[It can be useful to use one term for the wide range of departments, agencies, etc. This term and list is derived from Arkansas’ rules on conflicts.]

High-Level Official - [list positions and/or types of position]

[Especially for the purpose of annual disclosure and post-employment prohibitions, some jurisdictions differentiate between officials, calling the ones required to file disclosure statements “high-level officials” or the like.]

Household Member - anyone whose primary residence is in the official or employee's home, including non-relatives who are not rent payers or servants.

Immediate Family - an official or employee’s spouse or domestic partner, the children of the spouse or domestic partner, mother, father, sister, brother, and natural, adopted, foster, and step-children.

[Some jurisdictions also include grandparents and grandchildren, aunts and uncles, nieces and nephews, as well as in-laws, anyone for whom the official or employee is a legal guardian, and anyone the official or employee has claimed as a dependent on a recent income tax return (some say “the most recent tax return,” but it is common for dependents of a divorced couple to be claimed in alternate years).

Foster children are almost never included in an ethics-oriented definition of family (Oakland appears to be the exception). I suppose that this is because foster care is usually short-term. But some foster relationships are long-term, and there are instances where officials could be seen to act so as to benefit a former foster child. Of course, an official

should not be required to do research to make sure that former foster children with which the official has no contact are not involved in matters that come before the official.]

Interest - [[Early in this book](#), I argue for the use of the term “benefit” instead of the more common “interest,” for several reasons. One of those reasons is that “interest” is much more difficult to define. Another is that “interest” without any adjective is almost always defined purely in financial terms (an “interest” in a company or transaction); “personal interest,” on the other hand, usually includes a situation where there is a financial benefit to a relative and other situations where the official does not financially benefit. Does an “interest in a transaction” include a transaction where an official’s son will benefit from it? This is usually not included in such a definition; it isn’t what one usually means by an “interest.” But when the language of “benefit” is used, one can easily include transactions that benefit an official’s child.

Below are excerpts from definitions of “interest” in local and state ethics codes. Many define “interest” as effectively “ownership interest” in a company (this sort of definition is not included below). Others define “interest” in terms of “benefit” or in terms of “interest” itself (yes, this really happens). The last definition below is the most complete, but is also very complex. I don’t recommend any of these definitions.]

Any legal or equitable pecuniary interest, whether or not subject to an encumbrance or a condition, which was owned or held, in whole or in part, jointly or severally, directly or indirectly, at any time during the city/county government’s fiscal year [this definition has three exceptions]

A benefit or advantage of an economic or tangible nature that a person or a member of his or her family would gain or lose as a result of any decision or action, or omission to decide or act, on the part of the City government or any of its agencies, officers and employees.

Any economic interest or relationship, whether by ownership, trust, purchase, sale, lease, contract, option, investment, employment, gift, fee or otherwise; whether present, promised or reasonably expected; whether direct or indirect, including interests as consultant, representative or other person receiving (or who may be receiving) remuneration, either directly or indirectly, as a result of a transaction; whether in the person itself or in a parent or subsidiary corporation, or

in another subsidiary of the same parent; whether such interest is held directly or indirectly by the civil servant, the spouse or minor child of such civil servant , or any other person with a family relationship with such civil servant owning or sharing the same household as the civil servant. [this definition has three exceptions]

Interest in a Contract - a relationship to a contract such that a direct or indirect financial or other material benefit has been, will be, or might be received as a result of that contract. The official or employee does not need to be a party to the contract to have an interest in it. “Indirect benefit” includes a benefit to the official's family or outside business or employer.

Matter - an application, submission, or request for a benefit, permit, contract, ruling or other determination, a claim, proceeding, decision, rule-making, legislation, or other similar action. “Matter” includes all actions leading up to the particular matter, including preparation, consideration, discussion, decision, enactment, and oversight. “Matter” does not include advice or recommendations regarding broad policies or goals.

[“Matter” is a word that comes up often in an ethics code, particularly in the phrase “participation in a matter,” but is rarely defined. This definition makes a stab at it. Because the word covers so many different kinds of situation, it’s important that its definition be inclusive.]

Ministerial Act - an action performed in a prescribed manner without the exercise of judgment or discretion. An example of a ministerial act is the granting of a marriage license by a city clerk.

Official or Employee - any official or employee of the city/county, whether paid or unpaid, including all members of an office, board, body, advisory board, council, commission, agency, department, district, administration, division, bureau, committee, or subcommittee of the city/county. “Official or employee” does not include:

- (a) A judge, justice, or official or employee of the court system; or

(b) A volunteer fire fighter or civil defense volunteer, except a fire chief or assistant fire chief;

[This is more than a definition. It effectively states the jurisdiction of an ethics program, at least in terms of the major group of individuals it covers. Another place to do this is in the definition of “agency” (see above). For more on jurisdiction over individuals, see [the Jurisdiction section](#) below.

Other terms are used for “official or employee,” such as “public servant” (an appropriate term in an ethics context) or more legalistic terms such as “covered individual.” The Massachusetts ethics program, which has jurisdiction over local officials, uses the term “employee.” This is problematic, because board and commission members are volunteers and, therefore, do not in any way think of themselves as “employees.” The definition makes it clear that the term includes “officials,” but definitions should clarify, not add to a term people, conduct, or activities that the term itself appears to exclude.]

Outside Employer or Business - includes:

(a) any substantial business activity other than service to the city/county;

(b) any individual or entity, other than the city/county, of which the official or employee is a member, official, director, or employee, and from which he or she receives compensation for services rendered or goods sold or produced (“compensation” does not include reimbursement for necessary expenses, including travel expenses);

(c) any entity located in the city/county or which does business with the city/county, in which the official or employee has an ownership interest, except a public corporation in which the official or employee's ownership interest is the lesser of (i) stock or bond valued at less than \$10,000 or (ii) five percent of the outstanding stock;

(d) any individual or entity to which the official or employee owes, or by which the official or employee is owed, more than \$1,000, either in the form of a note, a bond, a loan, or any other financial instrument; and

(e) any individual who meets these criteria with respect to the same entity, even if another entity is involved in a particular matter.

[Section (e) is what is so often left out of this definition. One can describe this as a business or professional relationship (and the City Ethics Model Code conflict of interest provision also refers to this), but it is important especially to make it clear that just because someone who owns a company involved a matter has a relationship with an official in a different endeavor, the relationship still gives rise to conflict that needs to be dealt with. The public sees that person as someone doing business with the city and with whom the official has a relationship, someone to whom the official has special obligations. That is what matters.

It is sometimes said that stock ownership in a public company is not relevant to an official's interests, because he or she owns a tiny percentage of the stock and therefore has no control over the entity. But the success of such a public company does have special meaning to someone who holds a large dollar amount of that company's stock (even if that amount is large only for the individual, not for the corporation) and, therefore, it does constitute an interest that could get in the way of an official's ability to act impartially (as well as the perception of how the official would benefit from the company's success).

The amount of such share holdings need not be disclosed on an annual disclosure statement. However, if there is a minimum amount that is considered relevant, it will be known that the disclosing official has at least that amount of stock in a company. This is another place where it is worth defining what is *de minimis*, since many officials have stock holdings. In addition, because many officials and employees take small loans from friends, there should be a clear dollar amount below which such loans do not give rise to a business relationship (however, such loans, if from a restricted source, should be considered gifts).]

Ownership Interest - An interest in stock, bonds, assets, net profits, or losses of a business. The value of an ownership interest is determined at its highest fair market value in the calendar year.

Participate - to consider, discuss, communicate about, investigate, advise, recommend, approve, disapprove, decide, or take other similar action, formally or informally. Participation includes active supervision of the participation of a subordinate and other forms of indirect participation.

[Although participation is a very important concept in government ethics, it is ignored by the many ethics codes that only refer to recusal from voting, or just use the term “recusal” without definition. Withdrawal from participation is the far more responsible way to handle an existing conflict.

I think it’s best to define “participation” in a withdrawal from participation provision. The City Ethics Model Code’s language in this provision is more general than the language above: “acting on or discussing, formally or informally.”]

Personal [or Non-Financial] Benefit - any benefit other than those that are directly financially advantageous, including a financial benefit to a relative, business associate, or others listed in [§100.1 of the City Ethics Model Code](#), as well as any non-financial benefit to these people or to oneself, including benefits to reputation and to the success of one's career. A “personal interest” means a relationship to something such that a personal benefit has been, will be, or might be obtained by certain action or inaction with respect to it.

[Some ethics codes require the expenditure of funds even with respect to personal benefits. But this requirement allows officials to vote, say, on whether they should have to withdraw from participation, when a committee member raises the issue at a meeting. Non-financial interests, such as reputation, are very important to people and have an equally powerful effect on their ability to make impartial decisions. For more examples of personal benefits, see [the relevant section](#)]

Political Activity - includes:

(1) Serving as an officer of a political party, of a political club, or of an organization relating to a campaign for elected office (“organization”); as a member of a national, state or local committee of a political party, club or organization; as an officer or member of a

committee of a political party, club or organization; or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party, club or organization;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for any political party, political fund, candidate for elected office, candidate for political party office, or any committee thereof or committee which contributes to any of the foregoing;

(4) Organizing, selling tickets to, promoting, or actively participating in a fundraising activity of a public office holder, candidate in an election or political party, political club or an organization;

(5) Taking an active part in managing the political campaign of a candidate for public office in an election or a candidate for political party office;

(6) Becoming a candidate for, or campaigning for, an elective public office in an election;

(7) Soliciting votes in support of or in opposition to a candidate for public office in an election or a candidate for political party office;

(8) Acting as recorder, watcher, challenger or similar officer at the polls on behalf of a political party or a candidate in an election;

(9) Driving voters to the polls on behalf of a political party or candidate in an election;

(10) Endorsing or opposing a candidate for public office in an election or a candidate for political party office in a political advertisement, a broadcast, campaign literature, or similar material, or distributing such material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering in support of or in opposition to a candidate for public office or political party office;

(13) Initiating or circulating a nominating petition for elective office;

(14) Soliciting, collecting, or receiving a political contribution or a contribution for any political party, political fund, candidate for elected office, candidate for political party office, or any committee thereof or committee which contributes to any of the foregoing; or

(15) Paying or making a political contribution or a contribution for any political party, political fund, candidate for elected office, candidate for political party office, any committee thereof or committee which contributes to any of the foregoing.

[This extensive definition comes from Chicago's ethics code. "Political activity" is often left undefined, and generally it is understood. But then issues arise as to whether it applies only to local politics or participating in campaigns, or whether it applies to, say, referendums on policy issues or only campaigns for candidates. A detailed definition is a good idea.]

Recusal - [see Participate]

Relative - a member of an official or employee's immediate family as well as ...

[The term "relative" should be used only with respect to annual disclosure forms. Otherwise, as in a conflict of interest provision, it is best to list exactly which relations give rise to a conflict or may make gifts. See [the City Ethics Model Code's list in §100.1](#).

Some cities follow the IMLA Model Code by defining "relatives," generally or in such instances as gift-giving, as anyone within up to the fifth degree of consanguinity. I feel that this term is inappropriate to an ethics code because of its unfamiliarity, its difficulty, and its common usage in law (determining incest). To be in the fifth degree of consanguinity, two individuals' first common ancestor must be no more than a total of five generations away. For example, if my grandfather (two degrees) is your great-grandfather (three degrees), there are five degrees of consanguinity between us. In law, because

consanguinity is for the purpose of defining incest, it does not include relationship by marriage. However, relationship by marriage is relevant in government ethics.]

Representation - any form of communication or personal appearance in which a person, not acting in performance of official duties, formally or informally serves as an advocate for private interests. Lobbying and service as an expert witness, even on an informal basis, are forms of representation. “Representation” does not include appearance as a fact witness in litigation or other official proceedings.

Restricted Source - includes (1) a person doing business with or regulated by the city/county; (2) a person who has within the past year directly or indirectly communicated with an official or employee regarding a city/county decision that might provide the person with a financial benefit or harm; (3) an officer, board member, liaison, or representative of such a person; and (4) a lobbyist who has, in the past year, sought, or will soon seek, to influence a city/county decision.

[#2 might also be described without the requirement of communication, for example, as someone “interested in a matter” or “with a special interest in a matter” before the city/county, or the official’s particular agency.

The City Ethics Model Code effectively defines “restricted source” in its gift provision as “a person or entity that the official or employee knows, or has reason to believe, has received or sought a financial benefit, directly or through a relationship with another person or entity, from the city/county within the previous three years, or intends to seek a financial benefit in the future.”

Probably the most important guidance regarding restricted sources is that an official or employee who is offered a gift and does not know whether or not the gift giver is a restricted source, or is acting on behalf of a restricted source, ask the gift giver before accepting the gift. If still in doubt, reject the gift. An official cannot know whether the gift giver may be seeking special benefits in the future, but since people don’t just offer gifts to anyone, it is safe to assume that the gift is being given to help establish a relationship that will be useful in the future, and will place the official in a conflicted situation that may become embarrassing and harmful not only to him, but also to the local government.

What does it mean to be “regulated” by a government. Here’s language based on Rhode Island’s ethics code, which applies to local officials:]

An individual or business funded with municipal funds, or with state or federal funds disbursed by a municipal agency, is considered “regulated” by the municipality. If a specific regulatory body exists to control or supervise the individual or entity, and such body regulates and monitors its activities, it is considered “regulated.” Utilities, insurance companies and regulated financial institutions are considered “regulated.” An individual or entity is not “regulated” because it is subject to general, tax, or health laws, for example, applicable to all individuals and businesses or, the fact that an individual or entity requires a license to operate. Those individuals or entities solely regulated by professional boards and occupational boards are not considered “regulated.”

Subordinate - an official or employee, or a consultant, contractor, or volunteer, over whose activities an official or employee has direction, supervision., or control, directly or indirectly.

Withdrawal - [see Participate]

IX. Administration

This is a chapter one would think is unimportant to anyone who is not on or interested in being on an ethics commission. But this chapter is also essential to anyone interested in government ethics reform. In fact, the single most important issue of government ethics is dealt with in this chapter: the independence of an ethics commission and its staff. This chapter also deals with other matters of importance to the public, including the ethics commission's website, its principal connection with the public and its principal ongoing connection with officials and employees.

A. Ethics Commission Independence

It doesn't serve the people to have an ethics commission responsible to the body of government it reviews.

—Anonymous comment to an Eye on Miami blog entry

The independence of an ethics commission and its staff is essential to obtaining and maintaining the public's trust in an ethics program. Only a truly independent ethics commission that represents the community, as a jury does, can be trusted to see things from the community's point of view and share its concerns.

Without the appearance of independence, the public is likely to think an ethics program is just a sham intended to make it look like officials care about ethics, when in fact they do not. The appearance of independence is what is most important, because the public cannot know the hearts and minds of an ethics commission's members and staff, nor of those who appoint them. The public can only know what relationships the members and staff have to government officials and how the commission acts, or fails to act. It is the same for an ethics commission as it is for any body of government officials. The only difference is that if there is no trust in an ethics commission, there will be no trust in the ethics program and, therefore, trust in the government will be undermined, especially when the ethics

commission or its staff makes a decision or provides advice that appears to be in a high-level official's personal interest.

If ethics commission members or staff have been selected by officials under their jurisdiction, it is reasonable for the public not to trust its decisions, especially a decision that allows an official to act in a way that appears unethical, that is, when its advice or enforcement decisions allow conduct that is seen as improper. This appearance problem is even worse when ethics commission members or staff are themselves local government officials or employees, or have special relationships with officials either through politics, business, friendship, or family. These relationships create an appearance of favoritism every time an ethics commission dismisses a complaint, advises an official that he may participate in a matter where he arguably has a conflict, or slaps an official on the hand rather than giving her a penalty.

When the New York state ethics commission, whose members are selected by high-level officials, was embroiled in controversy in 2012, the head of Common Cause New York said, "This confirms the worst fears which Common Cause New York and others have had, that the commission is set up in a way that encourages gridlock designed to protect powerful elected officials." Who's to say she's wrong? Or, more to the point, who will believe those who say she's wrong?

Here's another way of looking at ethics commission independence. In most ethics programs, the mayor and/or council wear three, and sometimes four, hats: (1) they are officials subject to the jurisdiction of the ethics commission; (2) they are the appointing authority of ethics commission members and, sometimes, ethics staff; (3) they are the appointing authority for the city or county attorney, who sometimes provides ethics advice and/or advises the ethics commission, and (4) they are sometimes also the adjudicator of or appellate body for determinations of ethics violations and sanctions.

How can anyone trust a program intended to limit the hats officials wear when in the program themselves, officials are wearing multiple hats?

Here's a third way of looking at ethics commission independence. The personal interest of officials should not be in conflict with the public interest in independent advice and effective ethics enforcement. There should not be a conflict of interest at the heart of a conflicts of interest program.

If officials felt it was appropriate to select those who would have jurisdiction over their conduct, they would say this. If officials felt it was necessary to wear multiple hats in a program that prohibits the wearing of multiple hats, they would say this. But they don't. This omission speaks volumes. High-level officials need to be prodded to speak truthfully about ethics commission independence and to consider the alternatives.

In my City Ethics blog, I half-jokingly suggested that, when the issue of ethics commission independence comes before a council, citizens attend the meeting wearing multiple hats and offer the hats to the mayor, council members, and city attorney as someone verbally lists the hats they wear with respect to the ethics program. When the hats are refused, as they will be, the speaker should ask the council members to demand an explanation for each hat and a public consideration of the alternatives. When they do not receive a sufficient explanation, as is likely, they might share with the council this quotation from Terry L. Cooper's excellent book, [*The Responsible Administrator*](#) (Jossey-Bass, 2012 (sixth edition)):

The practicality of conduct is never sufficient in and of itself. Unless a course of action can be adequately explained on ethical grounds, it is not a responsible act.

Then they should also point out the alternatives to each of the council or mayor's hats, which can be found throughout this chapter.

Sometimes councils choose to enforce ethics laws themselves. The self-enforcement of ethics laws is problematic, as anyone knows who has followed the travesty of ethics in Congress. As Dennis F. Thompson pointed out in his book [*Ethics in Congress*](#) (Brookings Inst. Press, 1995), one problem is the strong collegial interdependence on any political body: members depend on each other to get their jobs done. It is difficult both to judge colleagues objectively and to act on judgments, even when they have been objectively made.

In addition, often fellow members engage in the very same acts that are being alleged against the respondent. Not only do they have a personal interest in not enforcing rules against the conduct, but they feel it is unfair to single any member out, even if it might be politically advantageous. In such situations, it is the norms of the body itself that are at issue, and few groups of colleagues are willing to extend an accusation against one member into an accusation against all of them. They have to either acknowledge their own

guilt, or declare their colleague innocent. This is a terrible conflict situation to create for anyone. Since few people are willing to declare their guilt, this situation usually means dismissing the complaint or sacrificing a colleague, neither of which is a responsible way to deal with the matter.

There is also the problem of using ethics allegations as political weapons. Politicizing the ethics process does institutional damage, is unfair to those accused, and reinforces “the cycle of accusation. ... Making charges develops its own momentum, independent of their substance.”

Independence goes beyond the selection of ethics commission members and staff. Even individuals who are and appear to be independent of political loyalties and interference can be hampered by budgetary limitations, competing ethics advisers, and attacks from officials.

Appearance and trust are only two of the reasons for an independent ethics commission. Another is to allow an ethics commission to act on behalf of the community rather than on behalf of high-level officials. Sometimes a mayor and/or council use their power over ethics commission membership to remove members who they feel have treated them badly, that is, who have made the commission more effective. This happened, for example, in San Diego in 2009, when the chair’s term was not renewed, the first time this was done to someone who wanted to continue serving. The chair was a litigator who had been the public face of the commission for the past two years. He was considered responsible for getting the commission the authority to make its own investigations and to accept anonymous complaints, and he pushed for stronger lobbyist disclosure laws. Under his leadership, the commission also gave three council members substantial fines for campaign finance violations. And he was outspoken. Since he was not what the council wanted, he had to be removed.

Similarly, in Tulsa, an ethics advisory committee member who asked that the mayor be investigated by the committee had reached the end of his term. The mayor wanted to replace him, and the council wanted to keep him. So the mayor nominated, and the council turned the nominees down. And both accused the other of infantilism. Ethics commission members should not be political footballs, and officials who have been or may be the targets of investigations should not be squabbling over whether those responsible for the investigations should remain in office.

According to a criminal grand jury report filed in April 2012, the Suffolk County Executive and other officials attempted to interfere with and manipulate county ethics commission members including, in one case, making sure a member promised to be a “good boy” before the appointment was made. It is unlikely that this would have happened if ethics commission members were not appointed by high-level officials under their jurisdiction.

This is also true of the appointment of ethics commission counsel. In Suffolk County, a government attorney hired by the executive branch to advise the ethics commission worked only on a part-time basis, but was given the benefits of a full-time employee. This preferential treatment was seen by the grand jury as the executive branch impairing the attorney's (and hence the ethics commission's) independence. An ethics commission, and no one else, should hire its own counsel and determine counsel's hours, pay, and benefits.

The administration of an ethics program should not itself undermine trust in the local government. This is an important reason why officials should have nothing to do with an ethics program, beyond passing the ethics code (and sometimes even this is done by the community, via a referendum).

The major weakness of a truly independent ethics commission is that it may become isolated in a government, with no supporters, and therefore have trouble getting support for a budget increase or ethics reforms. But this is less a matter of structure than it is of leadership. Without leadership support for a government ethics program, it can be a struggle to run or improve the program no matter how independent the ethics commission. But the more an independent ethics commission becomes institutionalized in the culture of a government organization, the more it becomes respected, the less possibility there is of its isolation.

1. Ethics Commission Membership

The Selection Process

The place to best earn the public trust and ensure the independence of an ethics program is the process by which ethics commission members are selected. There are two ways to explain why the selection process is so important.

One, government is about power and position, and government ethics is about the abuse of power and position for personal reasons. One of the most important ways in which high-level government officials use their power is through the appointment process. They select and appoint the individuals who run and sit on departments, agencies, boards, and commissions.

It should come as no surprise that the principal goal of the Progressive movement in the early twentieth century, with respect to local government, was to take much of this power out of the hands of elected officials and place it in the hands of professional administrators. That is why the majority of cities and towns, although not counties, have a council-manager form of government, where a city manager administers and the council, which includes the mayor, makes policy. But still, most board and commission members are either elected or appointed by the mayor and/or council. Where these board and commission members are making policy with respect to planning, zoning, police and fire, and other important local issues, this makes sense.

However, an ethics commission is different from most boards and commissions, because it does not make government policy. It is an oversight body. It oversees the conduct of government officials and employees, and those doing business with the government. A police commission is also an oversight body, but a police commission is not selected by the police chief or by anyone else it has jurisdiction over. In fact, giving a police commission this power is a policy alternative to an internal agency that self-regulates police conduct. It is a decision to take this power away from the police department and give it to the public. This decision would be seriously weakened by giving appointment power to the police chief.

The same decision is made by creating an ethics commission and not allowing those over whom it has jurisdiction to have appointment power. In many local governments, employee conduct is handled by the human resources department, and elected officials handle their own conduct. A decision to form an ethics commission is a recognition of the fact that a local government should not be regulating its own behavior with respect to conflicts, that this doesn't work and doesn't gain the public trust.

Once the decision is made by officials not to self-regulate, that is, to hand their power over the government ethics process to neutral individuals from the community, it would seem to be a requirement that officials hand over all of their power, including their

appointment power and the power to control the oversight body's budget. It would also seem to be a requirement that the body's members both be and appear neutral.

Officials say that they select people of the utmost integrity, but the fact is that those people will always appear to the public to be the officials' appointees. And it will also appear that the officials refused to give up power over the ethics process. It will appear to the public that, if the officials can't have control, then they will select those who have control instead. In other words, it will look like indirect rather than direct control. No one will believe that the officials are truly willing to give up their power over the handling of conflict situations in the government.

The second way to explain why the selection process is so important is more common and straightforward. Government ethics is all about conflicts between the public interest and the personal interest of government officials and employees. The last place conflicts should exist is at the heart of a government ethics program.

What does it mean to have a conflict at the heart of an ethics program? Not only will ethics commission members have to withdraw from any matter involving an official who was involved in their selection or approval (which could include the entire council), but there will also be legitimate questions concerning the colleagues and opponents of these important officials when they come before the commission. In other words, it will be very difficult for politically-selected ethics commission members to appear fair with respect to politically active complainants or respondents. And these are the people most likely to come before them, for advice, for waivers, and in enforcement proceedings.

As quasi-judicial officials, ethics commission members not only must have no conflict regarding a matter before them, they should be impartial, like a judge. The standards for them are higher than for ordinary officials and employees. Therefore, the standards for their selection need to be higher, as well.

To simplify things, let's assume ethics commission members are selected by the mayor in a strong mayor city. How will it look if the ethics commission was to dismiss a complaint filed against the mayor, against a mayoral aide, against a mayoral appointee, against a large contributor to the mayor, against someone who ran on the mayor's ticket, against a council member who is considered an ally of the mayor, against someone who worked on the mayor's campaign? And how will it look if the ethics commission was to penalize a council member or other board or commission member who is considered an

opponent of the mayor, or to penalize the next mayor, who defeats the mayor who appointed most of its members, or the new mayor's aides, appointees, etc.?

In short, there would be a gray cloud of impropriety hanging over almost any matter that came before the ethics commission unless relatively minor officials and employees were involved. This is no way to gain the public trust.

And yet this is the way things work in the great majority of cities and counties that have ethics commissions. The mayor, the council, or the mayor with the council's approval appoint the members of most ethics commissions, just the way they would appoint the members of any board or commission. As if there was no difference, no question of jurisdiction or higher standards. Or, as if nothing could be worse than giving up the power of selection, even if holding on to this power puts into question so much that the ethics commission does, and fails to do, thereby undermining the public trust in a program intended to increase the public trust.

A 2012 situation in Concord, New Hampshire shows how ingrained the idea is that high-level officials should select ethics commission members, no matter what. A state representative filed ethics complaints against Concord's mayor and a city council member. Since the mayor and city manager had not selected members for the city's ethics board, as required pursuant to a September 2011 ordinance, they went ahead and nominated board members after the complaint was filed. The complainant protested that the mayor should not have selected the members of a board that would immediately consider a complaint against him. The mayor did not withdraw his selections and turn over selection to other individuals or entities, but decided only not to vote on his nominees, although he did vote on the city manager's nominees. The council member/respondent also voted on the nominees who would hear the complaint against him.

In the past, there was one excuse for doing things this way: that's the way everyone did it. There didn't seem to be an alternative. But that hasn't been true for years. Today, there is a trend toward having community organizations rather than politicians select ethics commission members.

Among the cities and counties that allow community organizations, business and professional associations, academic institutions, and or judges to select all or most of their ethics commission members are Atlanta, Miami-Dade County, Milwaukee, Jacksonville,

Houston, Nashville, New Orleans, Santa Fe, Jackson County, MO, Minneapolis, MN and Palm Beach County, FL.

The organizations, associations, and institutions that do the selecting include:

Leagues of Women Voters

Chambers of commerce

Bar and other professional associations (including medical, accountant, and minority associations)

Universities (usually via their president or the head of a particular graduate school, center, or institute)

Clergy groups

Labor councils

Minority organizations

Judges or judicial bodies

All of these are better alternatives than a mayor and/or council or a city or county manager.

A common criticism of this approach is that most city and county charters require all board appointments to come from the mayor and/or council. But *appointment* is not the issue; *selection* is. The mayor and/or council will still do the appointing. They will simply be limited in whom they appoint.

The question should not be whether to go with community organizations. This is the only responsible way to select ethics commission members. The question should only be how this should be done. One way is to have each organization select a particular member. Effectively, this gives each organization and individual a seat on the ethics commission, and in practice this often means that an individual associated with the organization is selected for that seat. It appears that people think this is what they are supposed to do. Or they pick someone they know and feel comfortable with.

This approach can become a problem when an organization has a contract with the local government, gets a grant from it, lobbies it, otherwise does business with it, or has a great deal of power in the community. The reason for this is that there could be a

perception that the organizations might select individuals, or those individuals who work for the organizations may act, so as to satisfy those in power, that is, those who decide the extent of an organization's benefits from the government. In any event, it puts ethics commission members in the odd position of representing a constituency that has its own interests in the community. Even if the conflicts are usually not as problematic as those of government officials, it would be best if there were no conflicts at all.

This is why it is safer for a board of representatives from community organizations to select individuals as a group, rather than individually. It may be more work, although not necessarily. But it is more likely to lead to the selection of individuals who do not appear to be representing any interests other than the public interest. At least so long as the group does not simply rubber stamp each of its members' choices.

This is how the selection process works. Individuals are encouraged to send resumes to the selection committee, and then they are interviewed by the committee as a whole or by a subcommittee. When, say, one position is open, the board selects one applicant, and then the mayor or council appoints that individual.

An alternative approach is to have the committee name three or more individuals, from whom the mayor or council could appoint one. The advantage to this is that after one of these individuals is selected, the next time a seat opens up, the committee would not have to meet again, unless the remaining individuals are no longer available or interested in serving. A way to describe this is the creation of a pool of candidates for the position.

The only problem with this approach is that the committee might feel there is only one acceptable applicant. But this is unlikely, since the committee members' combined involvement in the community should attract a large number of qualified applicants.

This raises another reason why the involvement of community organizations can be very valuable. In many cities and counties, the chief executive takes a relatively passive approach to filling spots on boards, except for the most important ones. This means many open seats on boards, including ethics boards. For example, in his first year in office, the D.C. mayor failed to fill more than 700 seats on the city's 175 boards and commissions. When it came time to fill the seats on the city's new ethics board, he did not meet the deadline, causing a controversy. Community organizations have an easier time filling seats on an ethics board, because their members are just the sort of publicly-spirited individuals who would find service on an ethics commission to be important and exciting. And

community organizations can focus their enlistment efforts on the ethics board, and most of them have a clear reason and responsibility to make the ethics program function smoothly.

Even when there are no individuals left on the list the committee gave to the mayor, the committee does not necessarily have to start the process over again every time there is an opening on the ethics commission. It could call a list of approved candidates and ask them if they were still interested. It could also keep a list of individuals who want to be considered and, every three years or so, meet to interview candidates and make a new list of approved candidates. This would allow the committee to meet less often and yet respond fast (or not have to do anything) when there is an opening on the ethics commission. This would ensure that commission seats are open for only a short period of time.

It would be best if the organizations or individuals chosen do not have strong roles in city or county politics. Universities are large landowners and employers, and often have a great deal of power, especially in smaller cities. It is better to have a program within a university represented rather than the university administration. Chambers of commerce are often major political players that effectively support one party or faction. Ethnic and racial organizations are good if they do not support or oppose local political candidates.

Professional associations are usually good choices. However, too often local governments consider only bar associations. Palm Beach County, Florida is one example of a local government that has looked further. After all, lawyers have more conflicts than most other professionals, and bar associations are most likely to select or support lawyers. It's important to remember that most professions have their own ethics codes, so that professions that do not get involved in politics or represent firms seeking benefits from the government can bring representatives to the table who have a good understanding of conflicts. Interfaith or clergy organizations are usually a good choice, especially for the sake of appearance, since government ethics does not involve following religious precepts. In terms of government ethics, a clergy organization is no better than a social worker or dentist association. Leagues of Women Voters and other good government groups are the best selections of all, but it's important to recognize that some are not as politically neutral, at least in a particular community, as one would hope.

The list of organizations on the selection committee, or that select their own commission members, does not have to be set in stone. In fact, it would be a good policy to require turnover every five or ten years, especially if the organizations are selecting their

own commission members. Even if not required in the ethics code, it's worth recognizing that things change. Organizations go out of and into existence, and sometimes become less politically neutral or become more controversial with respect to local government, or have a scandal that affects the appearance of their own propriety. If turnover of organizations is not written into the ordinance, it might be uncomfortable to raise the issue, because it will likely be taken as an attack on a particular organization rather than simply the rotation of organizations involved in the selection process.

One word can make all the difference to an arrangement to have community organizations select ethics commission members. For example, in 2012 the Fort Worth city attorney proposed to change the word "shall" to "may" in this sentence: the council will "develop a list of community, civic and professional organizations which *shall* be invited to make suggestions for appointments to the committee." The word "may" leaves it up to the council, on each occasion, including occasions where one or more council members are under investigation, to decide whether it will do the selecting or an invitation will be made to community organizations to do the selecting.

What if a mayor or council wants to have an independent selection process, but the current process is in the charter and can't be changed until the next time there is a charter revision commission? Just because a mayor or council is required to *appoint* ethics commission members does not mean they have to *select* them. The *selection* process can be contracted out to community organizations even if that is not the process set forth in a charter provision or ordinance. Only the *appointment* process must remain. A mayor or council that has the creativity to do this will win a lot of brownie points from the community.

It is important also to consider how the ethics commission chair is selected. In some jurisdictions, the mayor or legislative body selects the chair just as it selects the members. Considering that the chair usually sets the agenda and controls the meetings, this is an even more serious abuse than member selection by officials. There is no argument other than power and control for not allowing a commission to elect its own chair as well as its other officers. Again, even where a charter says that the mayor must appoint the chair, the mayor is free to ask the ethics commission to select the chair, and then appoint that individual.

Bipartisanship

One alternative to having nonpartisan organizations select ethics commission members is to have the legislative body unanimously approve all members. This sounds as if it would ensure that all ethics commission members would be nonpartisan, but in practice that is not the case. One problem is that many partisan elected officials don't usually like to name unaffiliated individuals or those registered with minor parties, unless they are required to. What they prefer to do is effectively trade votes. If the terms of two commission members end in a particular year, they can agree to fill their seats with one active member from each of the two major parties. Or in a one-party city or county, the party in power can simply choose people who are registered in the other party for the purpose of state and national primaries, but with respect to local issues are loyal to those in power. This is the difference between nonpartisanship, which is most desirable for an ethics commission, and bipartisanship, which can exclude nonpartisan individuals and include individuals actively involved with a political party or with the government.

The goal of bipartisanship is to ensure that both major parties are almost equally represented on a body. This is a terrible policy for an ethics body, because an ethics body shouldn't have any party representatives at all (although members may be registered with a party). If partisan requirements are there to make the commission look fair and impartial, one should ask, why aren't there requirements for minor parties and, especially, for those unaffiliated with any party? Any selection process that excludes or stacks the deck against independents is intended not to gain the public's trust, but to extend partisanship into places it does not belong.

In addition, having ethics commission members be chosen based on their party affiliation can lead to the appearance of impropriety when one party committee (or active party member considered to be representing the party) brings a complaint against an official from the other party. Does this lead to a conflict sufficient to require withdrawal? Some ethics commission members have done this, ever careful to follow the spirit rather than the letter of the law and cognizant of the fact that they need not only be seen as unconflicted but, due to their quasi-judicial nature, also as impartial. However, if all members are not only affiliated with a party, but selected because of their party affiliation, who would be left to hear what could be seen as a partisan complaint?

Were community organizations to select the same individuals, their party affiliation would not be important. There is no conflict being a party member. But there can be a

conflict if one is seen as representing a party, as being a Republican or Democratic member of the commission.

And bipartisanship does not work for an ethics officer or executive director, if this position too is left in the hands of elected officials. There is only one, who can be from only one party.

Nonpartisanship, which is preferable for ethics commissions, can itself mean two things. The common idea of nonpartisanship is that individuals do not run as a member of a party. But this does not mean that they cannot be active in a party, or use a party to gain support, forming special relationships with partisan officials. The other sense of nonpartisanship is that individuals be selected without respect to their party affiliation and, as far as possible, individuals who have been active in a party are not selected at all. This latter sort of nonpartisanship is what is best for ethics commission membership.

Especially if officials are involved in the selection process, it is important that ethics commission members have staggered terms. Otherwise, an ethics commission can turn over all at once, or over a short period. This allows an administration to select what will look like its own ethics commission, that is, one that will look sympathetic to it. It also means that, for a while, no one on the commission will have experience, making it more dependent on the city or county attorney office (assuming the commission has no staff of its own). Staggered terms are advisable no matter what the selection process, especially when there are no alternate members, because staggered terms assure that some members will be experienced.

Self-Selection

One alternative to community organizations selecting ethics commission members, at least after the original selections, is to have the ethics commission select its own replacements. This would preserve the commission's independence.

However, there are a few problems with this easy and reasonable approach. One is that it could turn the ethics commission into what is, or appears to be, a circle of friends. Of course, members need not select their friends, but like any individuals, if it is allowed, they are likely to recommend individuals they know and respect. Another way to say this is to note that self-selection creates an apparent conflict between a member's personal

relationships with nominees and the public interest in having new nominees start out being independent of those already on the board.

Another problem is that it can be difficult and uncomfortable for a commission's members to ask another member to leave at the end of her term. If there is to be self-selection, or selection by a group of community organizations for that matter, it is best to have a term limit, so that neither group of individuals will have to make this difficult decision.

Another problem is that, unlike community organizations, an ethics commission is not set up to seek out people to apply. It may take an ethics commission a long time to even get applicants, not to mention interview them and make a decision. This can be a serious burden, especially for a commission that has no full-time staff.

Electing Rather than Selecting

Members of all sorts of boards and commissions are elected, but not ethics commission members. At first blush, it would seem reasonable for citizens rather than officials to select ethics commission members. But when you think about it, do we really want ethics commission members who have run a political campaign, selected and supported by party committees? Even in jurisdictions with nonpartisan elections, running for office is not something many people do without support from parties or politicians. In any event, there are likely to be many excellent people who would serve on an ethics commission but would not want to run for office.

The only elected ethics commission I've read about is in the Prairie Band Potawatomi Nation, an Indian nation in Kansas. But the article I read said that an election was canceled, because no one wanted to run for the four seats that needed filling.

Lottery

The lottery approach works for juries, but very rarely is it mentioned as a possibility for choosing an ethics commission. However, in 2007 a lottery approach was included in a proposed ethics code for Middletown Springs, Vermont (pop. 823). A lottery would be a good way to ensure an ethics commission's independence and appearance of independence. In non-town-meeting cities and counties, a lottery might be limited to those who

volunteered to be members or said yes when selected and met the membership requirements.

A lottery might be an unorthodox method, but it's been used effectively in California for its [Citizens Redistricting Commission](#). It's certainly worth considering as an alternative. Ethics commission independence is so important that no reasonable independent selection method should be ignored.

Ad Hoc Ethics Commissions

Some local governments provide for the creation of a new ethics commission every time someone files an ethics complaint. This shows a complete lack of understanding of government ethics programs, placing all the emphasis on enforcement. It also makes for a lot of work and a lot of attention given every time even a minor complaint is filed. Considering that a majority of complaints are quickly dismissed or settled, it makes no sense to form an ethics commission that will likely meet once to dispense with a wrong-headed complaint. And an ethics commission formed for one complaint is going to find it hard to dismiss or settle it quickly. There is no reason to believe that the members will have any more understanding of government ethics than the complainant did. An ad hoc ethics commission ends up being totally dependent on the city or county attorney.

Although an ethics commission might look like a jury, and act like one in enforcement actions, there are important differences. One, there is no judge. And two, enforcement is only a small part of an ethics commission's job. Members should sit for at least three years, and if possible longer to get the necessary experience.

However, if a local government has no ethics program, just a conflict of interest provision in the charter or an ordinance, it's better to form an ad hoc ethics commission than to let the legislative body or city/county attorney handle it.

In 2009, the mayor of Snow Hill, Maryland (pop. 2,400) had a very unusual idea: to look outside the small town for ad hoc ethics commission members. "It's not that the citizens of Snow Hill wouldn't be honest and upright. I just think when it involves neighbors, you are better off having people who don't know the parties and are impartial." Effectively, he was making an argument for a state or regional ethics commission ([see below](#)).

Milton and Forsyth County, Georgia pick ad hoc ethics commissions from a pool of attorneys from outside of their jurisdictions. Independent, yes, but not an ethics program. And there's no reason to limit ethics commission membership to lawyers.

The Appointment Process

The appointment process can create serious problems for an ethics commission, even if the selection process is done by community organizations. Whoever does the selecting, an appointing authority may be in a position to prevent an ethics commission from operating with a full allotment of members, unless there are rules that prevent this. An ethics commission without a full allotment of members can have trouble getting a quorum, particularly in the summer, and motions can be difficult to pass and decisions difficult to make when a majority of the full membership or a supermajority is required (see [the section on quorums and voting](#)). In fact, an appointing authority, by doing nothing, can allow an ethics commission, through term endings and resignations, to drop below the number required to hold a meeting. An ethics commission without a quorum can do nothing, especially if it has no staff.

It may be hard to believe that the citizens or news media of any city or county would allow this to happen. And yet it happens. For example, in Memphis no ethics commission members were appointed for three years after the passing of an ethics code. In Erie County, New York (home of Buffalo), [the comptroller had to do a formal investigation](#) to bring it to the public's attention that the county ethics board had only one member, and that the ethics program was not functioning. In New Haven, the ethics board had only one member for a substantial period of time, and in 2013 (a mayoral election year) the seven-member board of its public campaign financing program was allowed to get down to three members.

Mayors want to protect themselves or their colleagues, or at least that's how it appears. Councils are not able to get past partisan disagreements and approve appointments. Often, appointing ethics commission members is simply not a high priority and there are no citizens begging to be appointed. There are many ways and reasons an ethics commission can be crippled.

There are ways to prevent this from happening. The best way is for an independent selection committee to select a pool of possible ethics commission members. If the mayor or council fails to appoint someone from the pool within thirty days of a seat becoming

vacant, the chair of the selection committee will select an individual and that individual will automatically be appointed. But what if there is no pool, because the selection committee has forgotten to maintain it, or everyone who was in it is unable or unwilling to serve, and the selection committee cannot come up with two or three candidates for sixty days? There should be a rule that, in this case, the mayor or council may select someone. If this appointing authority fails to act within another sixty days, then the ethics commission may itself select someone, who would automatically be appointed.

If ethics commission members are selected by the mayor, the council, or other officials, the rule should be that if the appointing authority fails to appoint someone within, say, sixty days, the ethics commission may itself select an individual, who would automatically be appointed. But this is only an inadequate fallback. Ethics commissions may themselves can have trouble finding a new member.

If there are no such rules and the ethics commission is missing one member for more than three months, or two members for more than a month, without any selection having been made, an ethics commission should act immediately. It should treat the officials' failure to act as an opportunity to change the selection process, creating a precedent that may later become law. There is no reason to wait helplessly while it is difficult to get a quorum for meetings, or until the commission has too few members to meet at all.

In such a situation, an ethics commission itself can effectively contract the selection process out to community organizations, even if this process has not been inserted into the ethics code. The ethics commission may contact a few community organizations and ask if they would quickly select a candidate for the ethics commission, either by having the individual directly apply for the position (and letting the ethics commission know) or, better, by giving the individual's name and information to the ethics commission, so that it can give the appointing authority a pool of names to choose from. It is difficult for an appointing authority to ignore individuals who have been selected by community organizations.

The next step is to bring these organizations together in a selection committee to create a pool of possible appointees for the future. This will change the selection process without changing the law, and make it far more likely that the process will later be inserted into the ethics code.

It is important to expressly provide that, when an ethics commission member's term ends, (1) that member may remain in her seat until an appointment has been made, and (2) the new appointee has attended her first meeting. With respect to the first part of this rule, the most frequent reason for a seat opening is the end of a member's term. Some members want to be reappointed, some want to move on, some aren't certain. If they are allowed to stay until a new appointee takes their place (or the decision is made to reappoint them), most members will stick around, especially if there is a clear time limit on their post-term service. Without such a time limit, some ethics commission members stay on for years, feeling that it's their duty, but serving begrudgingly. This isn't good for anyone.

With respect to the second part of the rule, the making of an appointment does not necessarily mean that the appointee is willing or able to attend meetings. It is useful to have a third part to the rule that treats a failure to attend one's first three meetings as a resignation from the commission. Otherwise, board members have to try to force someone to resign whom they have never met. This is a very difficult thing to do. I know because a board I administered was once in this position.

New Castle County, Delaware has a good rule that opens up the lines of communication with the appointing authority when a member's term is soon to end (one could even say that it allows the commission to nudge the appointing and confirming authorities until they do their duty). It even gives the ethics commission the express authority to recommend a member's reappointment or the names of possible nominees for the seat of a member who chooses not to serve another term:

(1) No later than ninety days before the expiration of the term of a member of the Commission, the Commission must give written notification of the future vacancy to the official or body which originally nominated that member. The Commission may suggest the reappointment of the member, if eligible, or may suggest the names of other possible nominees ...

(2) Thereafter, as deemed appropriate, the Commission may give additional written notification to the official or body which originally nominated that member of the fact that the vacancy will occur or has occurred.

(3) In order to facilitate a timely confirmation, once a nomination has been made, the Commission shall give written notification to the official or body vested with the power of confirmation of the fact that the vacancy will occur or has occurred.

Member Limitations

Being a member of an ethics commission is not for everyone. Just as a developer should not be on a zoning board and a police officer should not be on a police commission, a government official or employee should not be on an ethics commission.

It's not just that they would be providing oversight over themselves and their colleagues, and this would undermine the public's faith in the commission's judgment. Also, their presence on an ethics commission would discourage some officials and employees from seeking advice or filing complaints, and make others feel that they could get the answer or decision they wanted. Members of an ethics commission must be able to make independent, arm's-length judgments, and be seen to be able to do this.

No one under an ethics commission jurisdiction should sit on it, including those doing business with the local government, consultants, lobbyists, candidates or potential candidates for office or a local government job. Potential candidates can only be self-identified; prospective members should be asked if there is any prospect they will run for office or accept another appointment or a local government job, because it looks bad when an ethics commission member suddenly resigns in order to run for office on a ticket with current respondents, their allies or their opponents, or be appointed to office or hired by a high-level official.

Nor should party officials, recent government officials, individuals who do substantial work in local political campaigns, large contributors, advisers, or those who work with or are otherwise identified with major local political figures sit on an ethics commission. As with everything in government ethics, appearance is of paramount importance. If someone will not look neutral to the public, she should not be on an ethics commission, no matter how sure she is that she can act in an unbiased manner.

Here is the City Ethics Model Code member limitations provision:

No member of the Ethics Commission may be, or have been within the three years prior to appointment, an official or employee, consultant or contractor of the city; an officer in a political party or political committee; a candidate or an active member of the campaign of a candidate for any office within the Commission's jurisdiction; or a lobbyist. Nor should a member nor any member of his or her immediate family, have, within the three years prior to appointment, sought any

special benefits from the city, directly or indirectly. An Ethics Commission member or staff member, or a member of his or her immediate family, may not, directly or indirectly, seek any special benefits from the city, make campaign contributions, nor participate in any way in the campaign of a candidate for any office within the commission's jurisdiction, or of an individual currently within the commission's jurisdiction.

The term "lobbyist" in this context is best defined, as it is in the District of Columbia, as "communicating directly with any official ... with the purpose of influencing any legislative action or an administrative decision." That is, in addition to a registered lobbyist, an attorney who represents (or whose firm represents) clients' interests before the government should not sit on an ethics commission. The reason is that a lawyer who seeks (or whose firm seeks) local government benefits for his clients will be thinking of the beneficial and harmful effects on future clients (and, therefore, on himself) of his interactions with officials as an ethics commission member. He will not want to undermine his relationship with an official in a way that could harm his client. It is not just a selfish act to feel this way. One owes this to one's clients. This does not make the individual bad; it merely recognizes the underlying obligations of his professional relationships. Fulfilling one's professional obligations is very important. This is why one's professional obligations should never be in conflict.

Such a lawyer will be seen as helping his clients whenever he acts in a way that could be considered favoritism to an official – in the ethics commission member's questions, in his support for or opposition to an investigation, in his vote on probable cause, in his participation or lack of participation at a public hearing, in his final vote on a possible ethics violation.

In addition, one cannot ignore the client's view of an attorney's position on an ethics commission. A clever business person might reasonably believe that, since the attorney on an ethics commission has special power over government officials, officials are more likely to do what the attorney asks in his role as attorney and, therefore, do what benefits the client. Relationships are two-way streets, and officials have reason to believe that, if they are helpful to an ethics commission member's clients, the ethics commission member will be helpful to him when it comes to advice, waivers and, if necessary, enforcement.

There is another side to this situation, as there is to every conflict situation. What if the ethics commission was hard on an official from whom a client might seek a benefit? This could harm the client's cause, which is something a lawyer should not do. It is a breach of legal ethics, even if it may not be clearly spelled out in a legal ethics provision.

An attorney who represents clients before the government and sits on an ethics commission is in a lose-lose situation. The situation might be solved by withdrawal, but not just when there is a clear and current conflict. Withdrawal is required whenever the ethics commission member's conduct *might* have an effect on a client (present or future) or on the ethics program. This could require too many withdrawals, especially in important cases, for the attorney to responsibly fulfill the obligations of his position.

Member limitations in an ordinance should be considered only minimum limitations. It's wrong to think that anyone who has an appearance problem is fine if the problem is not expressly recognized by the ordinance. It's best to seek out individuals who are not politically involved, except with respect to particular policy issues, and who do not have relationships, positive or negative, with local government officials, especially elected officials and high-level administrators. It's not a problem if an ethics commission member is related to or a friend of an employee or even a minor official. What is damaging, in terms of appearances, is someone who has either a close family or business relationship with a high-level official, or relationships with many officials, whether through party activities, politics, or even social or club activities. It is equally a problem if a member has in the recent past sought benefits from the government and, therefore, may seem to be beholden to officials.

Take me for instance. I am an unaffiliated voter who has never held a government office in my town, but as a citizen I was very involved in bringing transparency, competitive bidding of contracts, and other reforms to my town's government, and in doing so helped defeat the party in power. Although I did not act for partisan purposes, I was perceived as being partisan, and I certainly had a number of negative relationships with government officials who were members of the party in power. Therefore, although no ordinance could possibly have excluded me from membership on the town's ethics board, I turned down an offer to sit on it.

But appearance is not the only issue. There is also pressure. Government officials, employees, individuals involved with political parties, who work for contractors, who

regularly seek permits or grants from the government, and anyone who represents these people (primarily attorneys) are likely to feel a great deal of pressure from their colleagues (as well as from their opponents) if they sit on an ethics commission. As with most conflict situations, not only the public, but also officials and others benefit from rules that prevent such situations from arising or require that they be handled responsibly. It's not good for anyone to be caught in the middle of conflicting obligations.

And lawyers, the profession most often asked, along with the clergy, to sit on an ethics commission, are also the most likely to have conflicting obligations, to have relationships with political figures as well as with clients who seek special benefits from the local government. They are also the professionals most likely to read ethics code language narrowly rather than expansively. And yet some ethics codes require at least one or more lawyers on an ethics commission.

There is an idea that having lawyers on the commission would save the government the cost of counsel. However, counsel should come not from within a commission, but from its ethics officer or staff. For a member to effectively represent the commission as a whole creates a conflict, and any lawyer who understands legal ethics will be careful not to accept such a role. If a lawyer-member does seek to act as ethics commission counsel, he should be told that this is not appropriate and be asked to stop.

Many people think it's best to fill an ethics commission not only with lawyers, but also with former officials, leaders of civic organizations, and other powerful people in the community. But these people have relationships, or may to be seen to have relationships, with some of the high-level officials who may come before them or seek their advice. This is especially true when it is the mayor who has appointed them, and it is members of the mayor's administration whom they will be overseeing.

Here is an example of an ethics commission that is not constituted so as to appear independent or unbiased. In 2007, this commission found no cause to proceed against the council president (who was about to become mayor) after she participated in a matter involving her sister.

1. (Chair) The president of a local university, an important player in the city, with strong institutional interests in council and mayoral decisions.

2. A deputy city solicitor (appointed by the city solicitor), who represented officials and, therefore, had a conflict when such officials came before the commission.
3. The head of the mayor's Office on Criminal Justice, who both advised and represented the mayor (appointed by the mayor).
4. A young lawyer whose work included defending companies accused of ethical and criminal misconduct, some of them most likely companies that did business with the city.
5. A lawyer with one of the city's biggest firms, whose clients did business with the city.

Only #2 and #3 would be excluded from membership on some ethics commissions, since they worked for the city, but none of them was without relationships and biases that undermined the trust citizens would have in their ability to make impartial decisions regarding the city's high-level officials.

It might seem that no one would be left to serve on an ethics commission, but the fact is that there are many individuals in every city and county who, through their profession or business, have had professional or business ethics training and do not participate in local government other than by voting and following the news. These make the best ethics commission members: accountants, engineers, medical and mental health professionals, social workers, academics, corporate employees, clergy, and retired professionals and business people. Outreach can be made through professional associations, community organizations, human resource departments, and universities. If community organizations are allowed to select commission members, then their memberships or mailing lists will contain many such individuals.

Often, the only limitations regarding ethics commission members are what they do once they are on the commission. It is important that members do not create any appearance of impropriety. They should go well beyond the letter of the law, especially considering that ethics commissions are quasi-judicial bodies that should not only be unbiased toward those with whom they have special relationships, but be and appear impartial in the way judges are. But in addition, most of the restrictions put on what they do while in office should apply to the period immediately before they take office.

Limitations on Member Activity

Ethics commission members should not participate in campaigns for local office or campaigns by anyone holding a local office, including campaign contributions. In fact, it would be best if they did not participate in campaigns for any office, especially in partisan contests, nor give to political parties or referendum campaigns if they are closely identified with parties or involve local issues. It's fine to take stands on particular issues, but there are issues that may be so central to current local government matters, and so identified with high-level officials, that it's probably best to stay away from them. For example, if city officials are seriously split on a public transportation project that would go through or near the city, it's probably best to stay away from that issue while on an ethics commission, because you will be seen as siding with or against individuals who may come before you, especially if allegations or requests for advice involve conflicts relating to the project itself.

Some people may argue that it is unconstitutional to require ethics commission members to limit their freedom of speech by limiting their political activity. But members should be told what the limitations are before they apply for the position, and they should be asked to confirm these limitations before they accept the position. In any event, all government officials and employees limit their freedom of speech. They accept confidentiality rules and political activity limitations, they accept conduct and civility rules, and they recognize their obligation to control their speech when they deal with citizens. Citizens have more freedom to speak their minds than do government officials and employees. After all, the First Amendment was intended to protect citizens from government.

Ethics commission members have an obligation to show government officials and employees how important appearances are, and that sacrifices sometimes have to be made in order to prevent appearances of impropriety. Ethics commission members should lead by example. But they should go beyond what is expected of officials.

For example, withdrawal from matters involving those whom an ethics commission member has recently supported is not the responsible solution for an ethics commission; such support should not be given in the first place. An ethics commission member should not do anything that is likely to require withdrawal.

In 2008, the chair of the Detroit ethics board joined the membership (that is, fundraising) committee of a legal defense fund for the mayor, against whom a complaint had been filed with the ethics board. The code of ethics did not explicitly make participation in a defense fund a conflict of interest, so the chair felt that withdrawal from participation in any matter involving the mayor would be more than what was required. But he should never have put himself in the position of helping the mayor, especially when there was a possible ethics proceeding. Once he did, he should have resigned his position with the ethics board.

The last thing anyone should hear from an ethics commission member is denial and defensiveness. For example, a New York State ethics commission member said in 2010, when the issue of campaign contributions arose, that he and his colleagues were chosen because of their knowledge of the political system, not because they're "celibate priests who are divorced from anything that goes on in the world." Another member was quoted as saying, "Do I have to stop *voting* now? It's silly." Of course, no one suggested that there was any limitation on voting. That member did not belong on an ethics commission.

Sometimes, however, ethics commission members can be unnecessarily careful in preventing an appearance of impropriety. For example, in 2010 a member of Philadelphia's ethics board resigned because he represented the Philadelphia Housing Authority (PHA) in producing documents as part of a federal investigation. There was a possibility that a PHA tenant leader and executive director of a PHA-supported nonprofit who operated a PAC could come before the board. Since the executive director was not a client of the ethics board member, directly or indirectly, it's not even certain that the ethics board member would have had to withdraw from the matter. Resignation in such a situation was, I believe, unnecessary.

Another common member limitation, which is sometimes required by city or county charter or state law, is that no more than a bare majority of members on an ethics commission be affiliated with any particular party. This is intended both to prevent control by a party and to prevent the appearance of bias. However, considering that there are so many unaffiliated voters, it would seem preferable to require that no party have majority representation on an ethics commission at all. In fact, the more unaffiliated voters the better. Here is the City Ethics Model Code provision on party representation:

Of the regular membership of the Board [five members], no more than two may be registered in the same political party, and at least one must be registered as unaffiliated. The alternate members may not be registered in the same political party.

A good way to prevent an ethics proceeding from becoming a political football is to make sure that no party can be identified with anything the commission does or does not do.

Some ethics codes have specific qualifications for some or all ethics commission members. The most frequent is to require that one or more members be practicing attorneys (which I deal with [in this section, above](#)). But some have a range of qualifications. Here are Jacksonville's qualifications, for example:

[E]ach member shall have one or more of the following qualifications: an attorney; a certified public accountant with forensic audit experience; a former elected official; a former judge; a higher education faculty member or former faculty member with experience in ethics; a former law enforcement official with experience in investigating public corruption; a corporate official with a background in human resources or ethics; a former board member of a City of Jacksonville independent authority; a former government executive with ethics experience.

The idea behind such qualifications is that ethics commission members should not simply be educated individuals who can be trained to understand government ethics matters, or professionals who have professional ethics training as part of their professional education (including everyone from lawyers and medical professionals to teachers, clergy, and social workers), but people who are in areas that are most likely to have specific training in something that appears to be similar to government ethics. I don't believe this is necessary or, in the case of lawyers and former government officials, desirable. Ethics commission members don't need government experience, nor do they need forensic audit experience because they will not be doing forensic audits, nor do they need to be a professor who has dealt with ethics in her work. Such qualifications should be applied to ethics staff, perhaps, but not to ethics commission members.

When member limitations do not appear in an ethics code, or when the limitations in an ethics code are limited, ethics commission members may add further limitations in their bylaws or rules of procedure. Here is a list of limitations to consider:

An ethics commission member must:

- (1) be a resident [or “registered voter”] of the city;
- (2) not be, or have been in the three years prior to appointment, an official (or candidate for an office) or employee of any agency subject to the ethics commission’s jurisdiction, or a consultant, contractor, or lobbyist to any such agency, or an officer of a political party;
- (3) not be, or have been in the three years prior to appointment, an official or employee of any government [because government officials and employees will be seen to favor other officials and employees];
- (4) have no special financial interest in any work or business of or official action by any agency subject to the ethics commission’s jurisdiction;
- (5) not have, in the three years prior to appointment, given more than a total of \$1,000 to candidates subject to the ethics commission’s jurisdiction or to candidates running for an office subject to the ethics commission’s jurisdiction; nor been a campaign manager, treasurer, policy- or decision-maker, or a campaign employee paid more than \$1,000, in such a candidate’s campaign;
- (6) not be an active judge or involved in the local or state criminal justice system [since ethics decisions can be appealed to courts, and there is interaction, and often disagreements, between ethics programs and the criminal justice system]; and
- (7) Ethics commission members, as a whole, should reflect the diversity of the city’s population.

Number of Members

There is no magic number of ethics commission members, but there are considerations that can help make the decision of how many members to have. The two principal considerations are the size of the jurisdiction and, in the event of a proceeding, whether or not the commission will be divided into investigatory and hearing panels.

A smaller jurisdiction will want to keep the number low, because it can be harder to recruit members. But three, which is the minimum number and the number of choice for many small towns and counties, as well as some larger ones, is a bad number for an ethics commission for five reasons:

- (1) any substantive communication between two members must be a public meeting,
- (2) any supermajority vote must be unanimous, allowing a member to block a vote regarding a fellow party member, which is disastrous for the public's trust in the ethics program;
- (3) there can be no committees;
- (4) too much work is required from each member; and
- (5) there is little room for error, that is, if one seat is empty, every vote must be unanimous, and any illness or other problem means there is no quorum.

So, for smaller jurisdictions, five members is optimal.

Jurisdictions that choose to divide the ethics commission into investigatory and hearing panels, so that there are no apparent conflicts ([see the section on this](#)), will do better having seven or nine members on their commission. This will spread the burdens better and provide some room for empty seats and members who cannot make panel meetings.

In addition to regular members, it can be helpful to have one or two alternate members. This allows individuals to learn about government ethics before they become regular members, and it also provides backup when members have conflicts, when seats are empty and, especially during the summer, when it is difficult to get a quorum. For smaller jurisdictions, a three-member commission with two alternate members solves one of the problems listed above.

State and Regional Ethics Programs

There is another important way to ensure that an ethics commission is independent of local officials and politics: form a regional or state ethics commission to deal with local

government ethics matters, or give the state ethics commission jurisdiction over local government officials and employees.

Regional and state ethics commissions provide more than independence. They also allow for expert staff that local governments are not willing to pay for themselves. And they recognize that ethical misconduct is not isolated in cities or even counties. Illinois is an excellent example of a state where a major city's ethics environment spread. Many of the cities, counties, and towns around Chicago have terrible ethics records, and the state government has also been a mess. Misconduct occurs among politicians in the same party organizations, and these politicians go from one level of government to another (in office and on party committees), as well as in and out of government, lobbying, and business, across all city and county borders. The contractors and developers that cause problems in one city cause the same problems in other jurisdictions in the state. Like war, ethical misconduct does not respect borders.

Even if reformers are successful in getting one city a first-rate ethics program, the city's officials will be tempted by the same people as before, will be colleagues of the same people on party and regional committees, and will be given money by PACs and party committees outside the jurisdiction. And to the extent city officials get involved in ethical misconduct outside the city's borders, there is usually little a local ethics program can do.

Several states have ethics commissions with local jurisdiction, but these are often so weak that local governments form their own commissions anyway. Florida and California are the best examples of this situation. Despite state commissions with local jurisdiction, there are many city and county commissions, as well.

There are smaller states that do effectively handle local government ethics at the state level, including Massachusetts and Rhode Island. Other states where the state ethics commission has some jurisdiction over local officials include Arkansas, Louisiana, Missouri, Nevada, Ohio, Oregon, Pennsylvania, and West Virginia. In addition, many states deal with the conflicts of school officials and employees at the state level, in a separate ethics program.

Besides independence from local affairs and politicians, and the ability to deal with cross-border ethics misconduct, the advantages of state ethics administration include (1) sufficient funds to pay professional administrative, investigatory, and enforcement staff, have a quality website, and institute and administer a hotline; (2) better and more uniform

advice and training; (3) more and better precedents and advisory opinions; and (4) more transparency. These advantages are generally recognized when it comes to campaign finance and transparency programs, which are generally run at the state level. For some reason, it appears harder to accept these reasons when it comes to government ethics programs.

The principal disadvantages of a state ethics program are (1) parties to ethics proceedings need to travel to the state capital (this could be solved by creating a circuit of proceedings in cities across the state employing, say, three commission members at each site and requiring a staff member and hearing officer to travel rather than parties, witnesses, and counsel); (2) because the ethics program is not local, local officials do not feel as strong a responsibility for creating a good ethics environment, and they are less likely to understand government ethics or feel compelled to provide effective ethical leadership; (3) enforcement is less likely to be aided by local journalists (there is better coverage of state-run transparency programs, because journalists have a special interest in transparency); and (4) a state ethics commission is less likely than a local ethics commission to take an active role in improving a local government's ethics environment.

A state program is best for professional advice and independent enforcement (if it has sufficient powers, which is often not the case), and a local program is best for creating a healthy ethics environment (if there is appropriate leadership and an independent, comprehensive program).

An alternative has been employed in California, where in December 2012 San Bernardino County outsourced its campaign finance program to the state ethics commission. It could have done the same with its ethics program. Campaign finance is a better area to outsource, because it involves a great deal of labor, which can overwhelm a small local ethics commission without the expensive technologies state agencies have. Another advantage to outsourcing to the state is that it might be a good way for state ethics commissions to obtain more funding.

Regional or countywide ethics administration is a compromise worth considering. It may not seem as independent as state administration, and it can also lead to lots of squabbles, as has been seen in 2011 in Broward County, Florida, where the new county program found it a challenge to bring in local towns. But regional programs have many advantages over a local program, including (1) independence, (2) cost saving, and (3) the

ability to afford at least one full-time staff member to provide advice and training, as well as to advise the ethics commission. Ethics commission members can be selected by a committee of municipal representatives, so that no member will appear to be connected to any local government. If an official from a commission member's city or town comes before the commission, that member can withdraw from the matter. But some counties (such as Miami/Dade County and Palm Beach County, Florida) do have community organizations do the selecting; this is still the best practice.

The countywide solution has worked well in Miami/Dade County and, more recently, Palm Beach County. There are also ten countywide programs in Kentucky. But this solution to providing more independence to an ethics program has not been very popular with local officials. Why? The reasons include the desire of local officials to be in control of the ethics program, in addition to the common desire not to share but rather to control one's turf, even at a greater cost to the community. Also, no one gets credit for a regional solution; the credit is shared, but the blame falls on whoever signed the regional agreement. Outsize egos have a tendency not to get along, and politicians have a tendency to form cliques based on party, position, or personal relationship, which often get in the way of cooperation. Gaining trust among officials from different jurisdictions is nearly as important as gaining trust among citizens. It is much easier to form a regional ethics program through an established regional cooperation body. But since they focus on economic issues, it takes someone who thinks a bit outside the box to raise the idea of a regional ethics program.

There are only five regional ethics commissions that I know of that are not tied to a county, three in Kentucky; one in Northwest Indiana, the Shared Ethics Advisory Commission, founded in 2005; and the Southeastern Connecticut Council of Governments Regional Ethics Commission, founded in 2012. Unfortunately, none of them has more than a couple elements of a government ethics program.

It is worth noting that the agreements between Palm Beach municipalities and the county regarding government ethics, as well as the regional and county-city ethics agreements in Kentucky and Indiana, were [Interlocal Cooperation Agreements](#), made pursuant to Interlocal Cooperation Acts that have been passed in many states. Kentucky's regional programs were created pursuant to an act expressly relating to ethics programs.

Since communities are not islands, ethics programs should also not be islands. If they must be separate (by law or unwillingness of legislative bodies to cooperate or give up power over ethics programs), ethics programs should cooperate. They should train their ethics commissions together, have annual meetings to discuss common issues they face, hand matters over to each other when ethics commission members or staff have conflicts, and seek out advice from each other when they have their own conflict situations.

Countywide and regional ethics programs should be a topic of discussion in every local government that wants a good ethics program at a lower cost than it could provide themselves, and is willing to give up control over this very sensitive area. One city or county cannot do much to create a state ethics program, but it can do a great deal through regional government associations to create a countywide or regional ethics program.

On the other hand, states can do a great deal to facilitate the creation of countywide and regional ethics programs. If a state sets up a mechanism for creating such programs, they are far more likely to be created, even without any mandate. Such a mechanism will give local ethics reformers a great incentive to get together with their fellows in other cities and counties to push for the best and most independent ethics program possible.

2. Budgetary Guarantees

The dream of every government agency or body is to have a guaranteed budget. But with respect to ethics commissions, a guaranteed budget should not just be a dream. It should be a clear message to the public that the ethics program is independent.

The only obstacle to a guaranteed budget, despite talk of more important priorities and the need for all government agencies to feel the pain in a recession, is a local legislative body's fears and need for control. The fact is that a well-run, independent ethics program saves the government (and taxpayers) money, attracts businesses, and gives the public something that is priceless: trust in the people who lead its community. This is not only worth paying for, but also worth guaranteeing.

The Arguments For and Against

In a June 2009 proposal, the New York City Conflicts of Interest Board (COIB) made the following argument for a guaranteed budget:

[T]he COIB has no natural constituency and no source of revenue. Furthermore, it regulates the very people who set its budget. Indeed, invariably the Board has before it matters involving high-level officials at the same time those officials are passing on the Board's budget, an unseemly situation. Lack of a source of assured funding also significantly undercuts the perception of the Board's independence.

Or as a citizens group in Newburgh, New York argued in August 2010, the proposed ethics commission might be "investigating the very people whom they would ask for funding."

This is a strong argument. In 2008, the argument was also made in Jackson County, Missouri, but in backwards fashion. The county legislature argued that it and the county executive could not be subject to the ethics commission's jurisdiction because they approved the commission's budget, and this would create the appearance of influence over the commission. Of course, this appearance of influence could have been solved by guaranteeing the budget. This is a way to deal with both an ethics commission's independence and jurisdiction in one sentence of an ethics code.

It's worth noting that I have never seen the conflict argument raised in Jackson County raised when a local legislative body wants to cut an ethics commission's budget. It appears to be a one-way argument, brought out only by high-level officials who do not want to be subject to ethics enforcement.

One argument against guaranteeing an ethics commission's budget is that it ties a legislative body's hands. But this is less an argument than the expression of fear and loss of control.

Another argument is that an ethics commission does not need to be independent of possible budgetary constraints in order to be impartial. But the issue here is not impartiality. It is the appearance of impropriety of a council holding its ethics watchdog's purse strings, that is, holding over the commission the threat of a budget cut if it makes a decision contrary to the wishes of those in power. And sometimes it is more than a threat. Sometimes a commission has to ask for funds to pay counsel, and this request is refused by the an ethics proceeding respondent and his colleagues.

Official control over the budget creates a conflict situation. An ethics commission is placed in the position of having to weigh its handling of a matter involving a council

member, a council staff member, or even an appointee or political colleague of one or more council members (including a city or county manager), against the preservation of the commission's staff positions and the overall effectiveness of the ethics program. More concretely, if the ethics commission has five investigations going on, does it devote sufficient resources to the one involving a council member, knowing that this might undermine the other investigations as well as future investigations? In addition, a council member comes to settlement negotiations with a big advantage over officials who do not have influence over the ethics commission's budget.

Such a conflict cannot be dealt with by withdrawal from a matter or by disclosure. It can only be dealt with creatively. And the creative solution is a budget guarantee, so that there is no budgetary relationship that gives rise to a conflict. The bonus to this solution is the increase in public trust in an ethics program that is shielded from worries about a budgetary backlash. And such backlashes, as well as the threat of such backlashes, do occur.

How to Guarantee an Ethics Commission's Budget

There are several ways to guarantee an ethics commission's budget. It's important to remember that, if a budget guarantee is not in the charter, a supermajority vote should be required in order to modify it. Otherwise, a guarantee in an ordinance is no less vulnerable than an ordinary budget. Here are some of the forms of budget guarantee that exist or have been proposed.

New Orleans' Ethics Review Board, in conjunction with its inspector general's office, is assured of an amount not less than .75% of the General Fund operating budget, and its budget cannot be vetoed by the mayor (§9-401 of the Home Rule Charter).

The Broward County, Florida inspector general's office is, according to its charter, to be funded by a .25% fee on the total value of every contract entered to by the county. If this is insufficient, the county commission may supplement the inspector general's office with general revenue funds.

Philadelphia has the following charter provision (§2-300(4)(e)):

For the first two fiscal years immediately following the effective date of this subsection, [the budget will be] at least \$1,000,000; and for all subsequent fiscal years, an amount adequate to enable the Board to perform the functions assigned to it by this charter, shall be appropriated for the work of the Board of Ethics. Should

the Council fail to make an adequate appropriation to the Board of Ethics, the Board may petition any court of Common Pleas of Philadelphia County for a mandamus to the Council to perform its duty under this section.

This provision effectively creates a budget floor for the ethics board, and even though it doesn't expressly guarantee an equivalent amount each year, it provides sufficient evidence of the funds the board needs to operate for a court to order the council to give the board an equivalent amount. This is a complicated, burdensome way to ensure a budget, but at least gives the commission leverage with the council it would not otherwise have.

An ordinance in San Diego guarantees its ethics commission a minimum staff of three named positions and a "reasonable budget" (San Diego Municipal Code Section 26.0411). The commission now has five staff members.

California's Fair Political Practices Commission, its ethics commission (which has jurisdiction over local governments), has had a guaranteed budget since 1976, when it was appropriated \$1 million and was guaranteed at least the same amount, adjusted for inflation (Ca. Gov't. Code Section 83122).

Oregon's ethics commission, which also has jurisdiction over local governments, has an unusual setup. The commission assesses state agencies, based on full-time equivalent staffing, as well as municipalities.

The Los Angeles City Charter requires an automatic annual appropriation of \$2 million into a public campaign financing trust fund, which is administered by the city's ethics commission. Some cities' public financing programs have been undermined by a failure of the legislative body to fund them.

The New York City Conflicts of Interest Board has sought the same sort of guaranteed budget that the city's Independent Budget Office (IBO) already has. The IBO's budget must be at least 10% of the budget of the Office of Management and Budget (Charter § 259(b)).

A proposal was made in 2011 for the new Cuyahoga County (Ohio) inspector general's office to be assured a budget of at least .25 percent of all county contracts, about \$1 million a year.

In 2011, the Alabama legislature approved a semi-guaranteed ethics commission budget of .01% of the state's general fund budget. This can only be modified by a 2/3 vote of the Alabama House and Senate.

In other words, the alternative approaches to a guaranteed budget include (1) the California approach of a set minimum amount, which increases with inflation; (2) the New Orleans approach of a percentage of the general budget; (3) the New York City approach of a percentage of another agency's budget; (4) the Broward County approach of a fee on contracts; (5) the San Diego approach of guaranteeing a minimum number of staff positions; (6) the Oregon approach of assessing agencies and municipalities, which would also work with counties whose cities are participating (e.g., Palm Beach County, FL) and with independent agencies and authorities that are participating in a city or county ethics program; and (7) the Philadelphia approach, which starts with a budget number and then allows the ethics commission to appeal to a court if it does not feel it is being given a budget adequate for it to perform its functions.

It is important when guaranteeing an ethics commission budget to recognize that sometimes ethics commissions are given increased responsibilities, which require an increased budget. For example, they are charged with campaign finance, or with training all government employees, or with overseeing additional agencies and authorities or, in the case of counties, towns within the county. Giving ethics commissions increased responsibilities without commensurate funds to fulfill the responsibilities is a popular way for local legislative bodies to lower an ethics commission's budget and thereby water down its effectiveness. Adding campaign finance responsibilities can be especially effective, because campaign finance requires a great deal of labor, and the short-term demands of elections make it impossible for an understaffed ethics commission to keep up with its longer-term responsibilities such as training, advice, and investigations.

Therefore, increased responsibilities must be accompanied by an increase in the percentage or minimum amount. It would be best if this possibility was anticipated by including a mechanism in the guarantee for requiring an increase in the percentage or minimum budget commensurate with additional responsibilities.

One of Several Tactics to Undermine an Ethics Commission

Reducing an ethics commission's budget, or giving it extra responsibilities without extra funds, are just two of several tactics used, often in tandem, to undermine the effectiveness of an ethics commission. Officials, usually executives and legislative bodies, sometimes fail to replace commission members, so that it is difficult for the commission to get a quorum for its meetings (many ethics commission have only one, or even no members). And sometimes high-level officials publicly criticize the executive director or the commission chair for the least problem, even calling for their resignation. And they refer to investigations as "witch hunts," implying that the ethics commission is acting for personal or political reasons, rather than fulfilling its mission.

It's worth noting that a Suffolk County, New York legislator who questioned the creation of an "unaccountable" independent ethics commission, with power over elected officials, went on to become county executive and criticized the county commission's investigation of the same "unaccountable" ethics commission as a partisan "witch hunt." In other words, criticism of an ethics commission is often about politics, not about ethics or even ethics commission independence.

These tactics may seem childish and unprofessional, but they are often effective, because the public and the news media know little about ethics programs and especially do not understand that officials should play no role with respect to an ethics commission. If councils and mayors were not involved in selecting and funding ethics commissions, then some of these tactics would not be available to them.

The Responsibilities of a Guaranteed Budget

Should an independent ethics commission do something in return for getting a guaranteed budget? The New York City Conflicts of Interest Board (COIB) has recommended the following:

A guaranteed budget, however, imposes a heavy burden upon the Board to use its funds prudently. For that reason, the proposal would also require the Board to provide a public, detailed list of its expenditures. Just as public financial disclosure works to discourage conflicts of interest by individual public servants, such a detailed public disclosure of COIB expenses would discourage inappropriate expenditures.

3. Monopoly

“I don't think we need to have an ethics officer. ... I feel we already have three ethics officers.”

—Fernandina Beach, Florida commissioner Jeffrey Bunch, referring, it appears, to the city attorney, the city manager, and the mayor

Another way in which an ethics commission needs to be independent is by having a monopoly on ethics training, advice, disclosure, and enforcement. This may appear to be not about independence, but about power, as it is when a council or agency says it needs to enforce its own ethics in order to be independent. But the situation is different with an ethics commission. An ethics commission's monopoly is necessary to ensure the independence, effectiveness, and consistency of an ethics program and to assure the public that only the ethics commission will interpret, administer, and enforce the ethics code.

The alternative is what is known as “forum shopping,” where officials and employees can choose where to get their ethics training (say, from a municipal association), where to seek their ethics advice (say, from the city attorney), and where to make their financial disclosures (say, to the state rather than to the city or county). The alternative, with respect to enforcement, is to allow, say, the legislative body or city manager to decide some cases, or give the inspector general, district attorney, or state attorney general the authority to dismiss or settle a case and prevent it coming before the ethics commission (or try the case poorly, since it is a low priority for them). The alternative is to provide inconsistent training and advice, inconsistent interpretations of ethics provisions, inconsistent disclosure requirements, and inconsistent enforcement decisions, so that no one knows what is truly required of them, so that there is effectively no guidance in a program where guidance is supposed to be the principal activity. The alternative is to allow those with connections to use their connections to get the advice they want and to avoid enforcement, that is, the alternative is preferential treatment in a program that aims to prevent preferential treatment.

a. Training. An ethics commission's training program should be both exclusive and mandatory. If the training is not sufficient, the commission should be held accountable.

There simply are no adequate alternatives. The alternatives that do exist, such as an hour or two lecture sponsored by a municipal association, do not even focus on the particular ethics program. And not only is a municipal association not accountable for the quality of its training, but its loyalty is to its members, high-level municipal officials, not to the public. There are similar problems with training by the city or county attorney's office. There is also the problem of lack of both expertise and commitment to a quality ethics program.

Nor should a council seminar with an external speaker be considered sufficient, although this may be a good supplement. Why? Because ethics training is not just a course like any other course. It is an opportunity to explain a particular ethics program, its values, its goals, and the reasons why it is important. It is also a way to get everyone on the same page. There cannot be competing visions of the ethics program, or of government ethics in general (although officials should, of course, be permitted to question elements of the program they feel are wrong or harmful and recommend ones they feel are important to add).

Officials should be asked for input, and it is very useful for them to participate by showing their support and sharing relevant examples from their experiences. But they should not determine the content or approach of ethics training, nor should they do the training.

In large cities and counties, training is sometimes done within departments and agencies by their own ethics officers. These ethics officers, however, should receive a train-the-trainer course from the ethics commission, again so that everyone is on the same page.

b. Advice. Since an official who follows ethics advice cannot be charged with an ethics violation, officials cannot be allowed to get this advice from someone they feel will give them the green light to do what they want. Nor should they get advice from someone the public might reasonably see as representing their interests, rather than the public interest.

A large percentage of ethics scandals feature an official getting the go-ahead from a government attorney. Not only is the official off the hook, but the government attorney is not held accountable either. At worst, he made a mistake. The result is that, instead of preventing ethical misconduct, the advice undermines the ethics commission's ability to enforce the ethics code and create a healthy ethics environment.

When a government attorney gives ethics advice, the problem is not necessarily the quality of the advice, but rather the provision of ethics advice at all. A government attorney is likely to have limited knowledge of government ethics, and a lawyer should not be providing advice about an area in which he lacks expertise. In addition, a government attorney has an interest (or, at least, a perceived interest), personal or political, in helping his “client,” the official, in a legal (representing the official, trying to help the official do what he would like to do, if it is legal) rather than an ethical (representing the public, trying to help the official act in a way that will not create an appearance of impropriety) way (for more on this, see [the section on government ethics advice](#)).

A government attorney giving an official the answer he wants is a win-win situation for the official and the government attorney, but it is a loss for the public. Ethics advice must come from someone who does not otherwise represent the official, and someone who is not politically involved.

A government attorney approached for ethics advice by an official should explain to the official that if he was to advise the official that she could participate in the matter, it would look as if the official had gone to the person she believed would allow her to do what she wanted. Recognizing this, the government attorney has no choice but to tell the official to go to the ethics officer or commission, or advise the official not to participate or not to accept the gift.

Another reason for an ethics commission to have a monopoly on ethics advice is to ensure consistency and create a public body of advice on which officials can rely. When government attorneys, supervisors, and others are permitted to give ethics advice confidentially, without any accountability or transparency, this seriously undermines the attempt to create a public body of advice. Instead, there is a hodgepodge of advice that, when officials discuss conflict situations, will make them confused about what is the most responsible way to deal with these situations.

c. Disclosure. A monopoly on disclosure is the norm, but there are states that require financial disclosure from local officials. The state disclosure requirements are sometimes less demanding than the local requirements, and sometimes state law places its disclosure requirements above the local requirements, so that certain local officials do not have to file locally at all. The local ethics code should require that both financial disclosure forms be filled out. If officials insist that state law overrides local law, local state

representatives should be asked to present a bill allowing local ethics programs to require both disclosures to be made (the local form may include the state form within it, to make it as easy as possible for officials to prepare). For more on this topic, see [the section on annual disclosure](#).

d. Enforcement. A monopoly on ethics enforcement is the most difficult monopoly to achieve. Many more individuals and bodies are involved in the enforcement business than in training, advice, and disclosure. This fact emphasizes how special government ethics programs are in the priority they give to training, advice, and disclosure.

Local legislative bodies sometimes want to have more control over the enforcement part of an ethics program than they can have by selecting ethics commission members and holding the commission's purse strings. With respect to officials, sometimes they limit ethics commission enforcement to making recommendations to the legislative body, a situation commonly referred to as "toothlessness." Sometimes they prohibit the commission from having jurisdiction over their members and their staff altogether. Instead, they self-regulate their members' ethics, as Congress does (and with no better results).

Similarly, mayors and city or county managers also sometimes seek to prevent ethics commissions from having the authority to enforce the ethics code against employees. Unions, too, sometimes insist that ethics matters have to be dealt with through their grievance procedures rather than via the government ethics process.

If legislators, lawyers, or others exempt themselves in any way from the ordinary enforcement process (see [the section on ethics commission jurisdiction](#)), or play any role in it, other officials and employees will see the program as unfair and the public will see ethics enforcement as untrustworthy, especially when complaints are dismissed or serious violations lead to no sanctions. The ethics enforcement process needs to be the ethics commission's monopoly in order to convince the public that enforcement is unbiased and unaffected by politics.

Some legislative bodies pass ethics codes that make ethics violations criminal offenses. This gives enforcement authority to criminal enforcement agencies, including the police, the district attorney, the state's attorney, and the state attorney general. Sometimes ethics commissions are not allowed to proceed if there is a criminal investigation or if criminal charges have been dismissed or settled. Sometimes the commission has to wait until any criminal matters are resolved, whether they're ethics violations or criminal

violations, such as bribery or fraud. See [the section on criminal enforcement](#) for more about this important issue.

Of course, crimes such as bribery and embezzlement must be handled by criminal authorities, but government ethics violations should not be handled by anyone other than the ethics commission and its staff.

The other major area of conflict with respect to enforcement is with inspectors general and, sometimes, auditors. Their focus is supposed to be on fraud, waste, and the mismanagement of government resources. But sometimes they are given jurisdiction over conflicts of interest matters, either fully in the form of an ethics program led by an inspector general or auditor, or partially in the form of their role as investigatory arm of the ethics program.

When an inspector general runs an ethics program, it usually takes a back seat to what are usually considered more pressing concerns. The result can be that there is little ethics enforcement (see [the section on this below](#)).

When an inspector general does investigation, there can be serious coordination, or turf, problems, as have occurred, for example, in Chicago. It's fine for an inspector general to handle investigations, when requested to by an ethics commission. If this is the IG's only role, the only problem is the priority the office gives to its ethics investigations. IG investigatory authority becomes problematic when tips and ethics complaints go directly to the inspector general, or where the inspector general can initiate or investigate tips and complaints itself, whether or not directed to by the ethics commission. This can create an enormous amount of antagonism, as well as inconsistent interpretations and sanctions. Instead of officials forum shopping, complainants can forum shop, filing their complaints where they think they'll get the most serious sanctions. And inconsistent interpretations and sanctions, not to mention competition in looking the toughest, anger officials, who feel that the ethics program is unfair to them, and provide them with little guidance. The result is opposition to the program by high-level officials.

In addition, inspectors general lack training in government ethics and lack the knowledge of ethics problems in the government that comes from giving ethics advice on a daily basis. This means that, when an inspector general gets a tip, it lacks the necessary context to determine where it fits in the city's ethics problems and to determine whether it is authentic and worth looking into.

And since the inspector general is involved neither in setting ethics policies or in interpreting ethics provisions, it is inappropriate for it to enter into settlements with officials. This should be done only by the ethics commission. In addition, since settlement is the way the great majority of ethics proceedings are concluded, giving this authority to an inspector general effectively takes the ethics commission out of ethics enforcement.

Finally, an ethics commission's monopoly on enforcement should apply to what officials may say in public about a conflict situation. They should say nothing. Not only is an ethics proceeding outside of their jurisdiction. They can also be seen as trying to influence the outcome, which is a misuse of their office.

In San Antonio in 2012, after the deputy city manager responsibly asked the city's ethics commission whether he had violated the ethics code by participating in a particular matter, the mayor, the city manager, and the city attorney (who is the city's ethics officer, but only has a role with respect to advice) all publicly gave their opinions about what the city manager should have done and whether he was in violation of the ethics code (of course, they said he was not in violation). Officials should keep their mouths shut and let the ethics program handle the matter all by itself.

4. Ethics Commission Initiative

Giving an ethics commission the authority to initiate investigations on its own and file its own complaints is an important sign of whether government officials are truly willing to give a commission independence and authority. See [the section on ethics commission complaints](#) for more on this topic.

B. Ethics Commission Staff

1. Borrowed Staff

The great majority of ethics commissions have no full-time staff member. They usually depend on the city or county attorney's office for legal help, and for other support they usually depend on either the same office or the clerk's office, the auditor, comptroller, ombudsman, or inspector general's office, or the human resources department.

This often results in serious conflicts, which can undermine the ethics program and, when the conflict leads to withdrawal from participation, force the ethics commission to scramble for help and the funds to pay for outside legal or other services.

These conflicts especially occur with respect to advice and enforcement. With respect to advice, the city or county attorney is an important political position, which means that the office's advice will not be considered neutral. With respect to enforcement, those who are respondents in ethics proceedings are also clients of the local government attorney.

Further, while it seems reasonable for an attorney to give advice concerning ethics codes to the individuals they usually advise, there are two important differences. One is that ethics advice is not limited to the words in an ethics code. Ethics and law are two different things.

Two, an official who seeks legal advice is seeking advice that's best for the local government. An official who seeks ethics advice is often looking for an answer that is best for him, not for the government. An attorney can, of course, refuse to give the official the answer he is seeking, but it is hard for an attorney to say to a client that certain conduct (such as voting on a grant to an organization run by a close friend and campaign manager) may be legal, but that it shouldn't be done. Or that certain conduct (such as withdrawing from a matter involving a former business partner) is not legally necessary, but an official should do it anyway. That's not how attorneys usually provide advice. But it is the way government ethics professionals provide advice. (See [the section on government attorney ethics advice](#) for more on this topic.)

When it comes to investigations, how can an official's attorney be expected to convince the public that she is doing a full investigation of someone she relates to in a lawyer-client manner? The same goes for settlement negotiations and advice to an ethics commission from someone who also represents the respondent and the respondent's boss and colleagues.

There are so many conflicts, it makes no sense to have a local government attorney involved in any way in an ethics program. A city or county attorney's office should not be staff to an ethics commission, nor should it give ethics advice to officials. And yet it is common that such attorneys are involved in everything from training and advising officials to investigating officials and advising the ethics commission.

A city or county clerk is also an important political position, so the clerk's involvement in ethics matters will also not be considered neutral. Secretarial help from the clerk's office, however, is usually appropriate.

But it is better that the help come from a relatively independent office, such as that of an auditor, comptroller, ombudsman, or inspector general. One thing these offices can offer, besides secretarial help, is investigatory help. In some jurisdictions, it is the inspector general's office, or an equivalent, that does ethics investigations. This means professional investigators that the ethics commission would have to pay top dollar for are available to do the work on a salary basis. As long as ethics investigations are not put at the bottom of the pile, this is a great solution. Auditors and ombuds often have investigators, as well.

The human resources department is not a good place to get anything other than secretarial help. When an ethics program is based in a human resources department, which is reasonably common in towns, government ethics is usually broadened to include all sorts of employee conduct. Ethics matters are treated just like disciplinary problems, and government ethics advice and training are not usually available, and disclosure is not required.

Most important, officials are generally not included in an HR-based ethics program. This is a good way to undermine both government employees' and the public's trust in the ethics program. It also points to an important difference between ethics and conduct codes. Conduct codes usually apply only to employees, and ethics codes usually apply to both officials and employees, as well as others. But with ethics codes, it is usually officials who cause the biggest problems, because to abuse one's position in a harmful way, one must have a position with authority. The average employee usually can't do more than misuse government property.

See a [2008 report from the Austin City Auditor](#) that compares the personnel and structures of the ethics programs in seventeen cities.

2. Self-Staffing

Usually at least one ethics commission member is an attorney. In fact, some ethics codes require this. Therefore, some officials believe that the best, cheapest solution is to have an attorney on the ethics commission act as its attorney or even as its ethics officer.

There are three problems with this clever money-saving solution. One is that this is a large burden to place on a volunteer. Two is that it is unlikely that the attorney has any expertise in government ethics. Three is that it is inappropriate for a board or commission attorney to sit on the board or commission. Would a council allow the city attorney to be elected to council and continue to represent it? For a member to represent his colleagues creates a conflict situation, and any lawyer who understands legal ethics will be careful not to accept such a role.

On the other hand, in a small town or county that is unwilling to spend a penny on staffing an ethics commission, it's better to have an ethics commission member obtain sufficient expertise and handle ethics advice, than it is to have this done by the town or county attorney.

3. Contracted Staff

For less populous towns, cities, and counties that choose to have their own ethics program, the best way to have an independent staff is to contract out most or all of the ethics commission's staff needs to a government ethics professional or a lawyer or public administrator who is trained in government ethics and who rarely, if at all, represents anyone in matters before the particular local government. The contracted ethics officer could work for another local government, or be retired from another government, or be a municipal law specialist who does work for or before area local governments, but not for or before the particular government.

The contracted ethics officer should oversee ethics training, provide informal ethics advice, review disclosures and make sure they are made on a timely basis, investigate allegations, and advise the ethics commission on formal advisory opinions, ethics proceedings, and other matters. Where an investigation or legal issue is beyond the ethics officer's knowledge and skills, the ethics commission should be permitted to hire an outside investigator or attorney.

There are often two obstacles to such a situation. One is that most ethics commissions are given a very minimal budget, or none at all. They cannot afford to hire an ethics officer, an investigator, or an attorney. It is important to have a budget sufficient to at least pay a part-time ethics officer. Otherwise, when a matter arises, the commission has to go begging for funds, often to the respondent, the respondent's colleagues, or the

respondent's appointing authority. If the commission is not given the necessary funds, it looks like the mayor or legislative body is protecting himself or its members. This situation should not arise, because it seriously undermines public trust in the government and in its ethics program.

The second obstacle is that many city and county attorneys believe they have a monopoly on representation of all boards and commissions. For example, in 2010 the El Paso County Attorney argued that she had a constitutional and statutory *duty* to represent county entities, and that because an officer cannot "be ousted from his legal duties," the ethics commission may not hire outside counsel "without the express consent of and within the sole discretion of [the county attorney] to determine if she is unable or unwilling to provide said legal services."

This county attorney, and those who agree with her, do not seem to understand the difference between a duty and a right. A duty means that you are required to provide services upon request, not that you have a right to prevent others from providing these services upon request. And yet the state's [attorney general agreed with the county attorney](#). The chair of the ethics commission, himself an attorney, immediately resigned in protest. But other local government attorneys will likely use the attorney general's opinion to support their view that, despite the conflicts it creates, they have some sort of "right" to represent the ethics commission as well as those who come before it.

A question that is often asked is, Where do you find someone with expertise in local government ethics? The fact is that there are currently few people with this expertise, for the simple reason that it is not much in demand. In most states, there *are* a few individuals who have worked in the state's and some cities' ethics programs, and a few professors have some expertise in the field. There are also people all over who have worked in the huge federal government ethics program. Former ethics commission staff might be practicing law or doing something else that would allow them to act as part-time ethics officer.

In most cases, however, someone (most likely, but not necessarily, an attorney) will have to develop the expertise. The local government might be willing to pay for training, but this is hard to find, as well (a nearby professor with expertise or a state or city ethics program are the best places to try).

But for the most part, a part-time ethics officer (even a new full-time ethics officer) will have to educate herself (I, for example, am self-taught). Fortunately, this is much

easier now than it ever was. There is this book, as well as the books in [the bibliography](#). There is [my blog](#). And there are hundreds of [advisory opinions and decisions available online](#), which will provide a new ethics officer with a great deal of experience analyzing particular conflict situations.

The problem is that when an individual spends only a small part of her time on government ethics, there is insufficient incentive to do the research necessary to obtain the expertise. This is why it's best that a part-time ethics officer work for multiple local governments' ethics programs, or that a local government reaches out to nearby towns to bring them into its ethics program or to create a regional ethics program that can afford a full-time ethics officer or a part-time ethics officer for whom ethics work is a substantial percentage of her work.

4. Full-Time Staff

A full-time staff member ensures continuity and the daily focus of an individual on a local government's ethics needs, including training, advice, disclosure, enforcement, and code reform. If there is not enough work or funds for a full-time staff member, the individual could also deal with the other areas of local government ethics, that is, campaign finance and transparency. Even if these matters are handled at the state level, there is usually not enough training, advice, and information online in these areas. During elections, the staff member could advise local candidates, and having someone available to advise boards and agencies on how to deal with document requests and meeting issues can be extremely helpful.

Jurisdictions that cannot afford a full-time staff member can share one with other towns. This is easier and less expensive than each of them contracting out the work. This can be done even if the towns have separate ethics commissions, but it might lead the participating towns to consolidate their ethics programs.

Cities and larger counties often have more than one full-time staff member. The more staff there is, the more the staff members can specialize in areas, such as training and advice, investigation, enforcement, information technology, and the areas of transparency, campaign finance, and lobbying.

5. Staff Without an Ethics Commission

There is an alternative to an ethics commission without a staff: a staff without an ethics commission. This is, effectively, the inspector general approach to ethics. An individual, who might or might not have staff, either hired or under contract, trains, advises, investigates, and makes recommendations to the legislative body.

There are four problems with this approach, in the ethics context. One is that it allows the legislative body to remain in control of ethics enforcement. Two is that, when this approach is taken, the role of ethics officer is usually given to an important official, such as a city or county attorney, clerk, or auditor. Sometimes the role is given to a close associate of the mayor or council president. Rarely is the individual independent, or seen as independent.

The third problem is that an ethics commission brings the community into the ethics process. Since the purpose of an ethics program is to maintain the public's trust in government, it does not seem appropriate to exclude the public from the program.

The fourth problem is that an inspector general or auditor deals primarily with issues such as waste, fraud, and mismanagement. IGs and auditors aren't trained in government ethics. Therefore, financial management and criminal matters generally take precedence over conflicts of interest. Ethics is a poor relative that usually gets ignored. In addition, Igs' criminal frame of mind is inappropriate to government ethics.

The consequences of these problems can be seen in the stark contrast between the ethics programs of neighboring counties in southern Florida. At about the same time, Broward County set up an ethics programs that runs out of an inspector general's office, and Palm Beach County set up an ethics commission. As of August 2012, the Broward IG had not investigated a single ethics matter, while the Palm Beach EC had "vetted almost 100 possible ethics violations [and] punished a few people," according to Brittany Wallman of the *Sun-Sentinel*.

Even more serious, whereas the Palm Beach County ethics program had given ethics advice in 225 matters, and has many of these [advisory opinions](#) on its website, there is nothing about ethics advice on the [Broward County IG website](#).

6. The Hearing Officer

Many officials believe it is better at the public hearing stage of an ethics proceeding to have a hearing officer, often a former judge, hear and decide the case than to have the ethics

commission, or a hearing panel of the ethics commission, do this. Having a hearing officer makes it unnecessary for the commission to hire counsel to make sure the rules of evidence and procedure are correctly followed. This frees an ethics officer to present the case, while someone else oversees the procedural matters.

But should the hearing officer also decide the case? Is an ethics case appropriate for what is essentially a jury to hear the matter and reach a decision? It is the common view that this is preferable. As in a criminal case, it presents the decision as one made by citizens, not by the government or by a judge. However, if these citizens have been chosen by officials, a hearing officer obtained randomly from a panel may appear more unbiased. If the commission members have been chosen independently of the government, then there would appear to be no strong argument for having a hearing officer make the decision.

One problem I have with the hearing officer approach, which is used at the state level in Louisiana and Connecticut (the Louisiana ethics program has jurisdiction over local officials), is that while a former judge is unbiased, there is no reason to believe that a former judge is knowledgeable about government ethics. I have read a lot of judicial decisions relating to government ethics, and I've found that many judges do not appear to understand government ethics, and often are confused about the way it differs from judicial or legal ethics. For example, judges often talk as if government officials were supposed to be impartial, the way judges are. But officials are often elected precisely to *be* partial, that is, due to their support or opposition to, say, a development project or privatizing government services. Also, a former judge, especially if not an administrative judge, can make ethics hearings more complex and, therefore, more expensive.

I think that the combination of a hearing officer and an ethics commission hearing panel is the optimal way to employ a hearing officer, especially for an ethics commission without a staff.

7. Hiring and Managing Staff

As with the selection of ethics commission members, the most important decision with respect to staff is who hires staff (and manages and fires staff). This should be one of the ethics commission's most important duties. No one should be involved in the hiring of staff members, other than an executive director or ethics officer who are themselves hired by the ethics commission.

The reason this is so important is that ethics staff should be beholden to no one but the commission itself. Ethics staff should have no conflicts, real or apparent. Staff's priorities should be the commission's. Staff should fight for the commission's budget, and the commission should determine what the ethics officer or executive director, and other staff, are paid.

In League City, Texas, which amended its ethics code in 2009 and 2011, the city attorney selects the Ethics Compliance Officer. This selection had not been made before the first ethics complaint was filed ... against the city attorney. An ethics officer cannot be selected by someone over whom she will have jurisdiction, not only for the purpose of enforcement, but also with respect to advice, disclosure issues, and waivers.

Government officials must know that they can have no authority over ethics staff. If there is any doubt about this, the commission will not be able to trust its staff, nor will the public. Every recommendation made by staff will be questioned, as will every one of its acts and omissions.

Nearly all cities and counties that have an ethics officer or executive director do allow the ethics commission to hire and fire her. In 2011, Jacksonville's charter was revised so that the city's ethics officer would be appointed by the ethics commission. The principal holdout is Chicago, where the mayor appoints the executive director.

In Atlanta and Seattle, the ethics commission's selection must be confirmed by the council (and in Atlanta also approved by the mayor). This may not seem problematic. However, in 2012, Atlanta's council did not quickly confirm the ethics board's selection. Instead, there was a failed attempt to change the selection process so that the council would have the final choice of who was selected as ethics officer. This led the woman selected by the ethics board to take herself out of the running.

There is no good reason for a council or mayor to confirm or approve an ethics commission's selection. This power can be abused when the council or mayor has had problems with the ethics commission or with the person the commission selects, or simply wants to hamper the ethics commission by delaying the hiring of a new ethics officer.

When party leaders have a role in the selection process, serious problems can arise. Take the selection of Montana's Political Practices Commissioner (effectively the ethics officer for a state with as many people as a small city) in 2011. The legislative party leaders each selected two individuals, with the governor to make the final choice. The party leaders

selected a former secretary of state who had had legal problems, an ex-lawyer who had been disbarred in two states, a woman just completing law school, and the spouse of a state senator, an active campaigner and legislative aide, and a member of her party's state committee (the last was the one selected by the governor).

These choices send a message to the public that the legislative leadership does not care about appearances of impropriety or, in the case of the law student, in having an ethics officer with experience. It was not surprising when the party in power refused to approve the nomination of an active political figure from the other party. It rejected the governor's choice, and the process had to start all over again. This is no way to run an ethics program.

8. The Ethics Officer's Duties

The most important administrative duties are training and advice. The least expensive approach to training, in a small town or county, is to have one or two ethics commission members trained in government ethics, and have them train the most important officials and employees, using materials they used in their course and others they find online or get from cities and larger counties. The best thing about doing this is that, if the members get a good deal of training, and take advantage of the educational opportunities online, the same individual can handle most informal ethics advice, as well.

This sounds like a great, inexpensive solution if there is an ethics commission member or two with the time, desire, and ability to do it. And yet this is not generally done. The city or county attorney's office does the training and/or provides informal advice, instead. Or no training or informal advice is available at all.

The best approach for smaller jurisdictions is for an ethics commission to contract for a part-time ethics officer or a full-time ethics officer along with nearby local governments. If the legislative body is willing to invest the funds, a city or large county should hire its own full-time ethics officer.

The ethics officer's principal duties are to provide ethics advice and to provide training through classes and on-line materials. The ethics officer also ensures that disclosures are made on a timely basis, and checks to make sure that the disclosures are complete.

The ethics officer also works for the ethics commission, preparing the agendas, memos, and advisory opinions for its meetings, presenting tips, media articles, and

complaints, and recommending whether to dismiss or investigate the allegations (or turn them over to other authorities), investigating where she has the appropriate skills and resources, and working with the ethics commission on all the aspects of an ethics proceeding.

One of the advantages of having a full-time ethics officer is that she will be able to go beyond the required and reactive aspects of the job to consider such things as improvements to the ethics code and program, transparency in the local government, procurement issues, and the like. The ethics officer can work with human resources to coordinate conduct and ethics issues; with unions to get support for ethics training and to increase advice; with procurement professionals to get contracts to reflect the local government's ethics laws and to get contractors and prospective contractors on board to better ensure the integrity of the contract process; with land use professionals and board members to focus on special land-use related ethics issues and to get developers and their agents, including realtors and attorneys, on board to better ensure the integrity of the approval process; with those who deal with grants to focus on grant-related ethics issues and to let those who seek and receive grants know that with the grants come obligations to help officials and employees deal responsibly with their conflicts; with information technology professionals to improve access to budget and other government information; and, of course, with the top elected and executive officials to help them gain a deeper understanding of the value of an ethics program to the local government, in terms of public trust, the lack of disruptive scandals, and financial savings.

A full-time ethics officer can also supplement ethics classes by drafting regular e-newsletters, guidelines on particular issues, and answers to frequently asked questions. The ethics officer can also make presentations to community groups in order to educate the public about government ethics, to better ensure the effectiveness and continuity of the program.

Finally, a full-time ethics officer can become an important role model with respect to government transparency by creating a website where all information is available on a timely basis, and easy to find (e.g., documents are searchable and indexed) (see [the section on websites](#) below).

9. Departmental Ethics Liaisons

Another duty of ethics officers, in larger jurisdictions, is to coordinate departmental, board, and agency ethics officers or liaisons. These ethics liaisons are ordinary employees or board members throughout the government who provide the first level of guidance (usually that something is or is not an ethics issue and, if it is, whom to contact), distribute notices and publications, remind officials and employees about disclosure due dates and dates of training sessions, help them fill out their disclosure forms, and do in-person training. They can also be the individuals who feel an obligation to raise ethics issues at meetings and in ordinary conversations.

Too often, it is felt that ethics liaisons have to be lawyers or managers. This is not necessary. It is better to have employees act as ethics liaisons, with the active, vocal support of managers. If well trained and coordinated, they can make a great difference to an ethics program. Their contact information should be easily available on the ethics commission website, as well as on agency, board, and departmental websites.

In August 2012, Chicago decided to add departmental ethics officers, to be trained by the ethics board. This should start a trend.

10. A Mayoral Ethics Officer

Sometimes a strong mayor wants to have an ethics officer of his own to supplement the ethics commission's staff. Such an ethics officer can do one or more of several things, such as ethics training for employees, advice to the mayor with respect to ethics reform and formal processes that will strengthen ethics and transparency in the administration, overseeing transparency compliance in the government, outreach to government employees and the public, and providing ethics oversight over the procurement program, the disposition and use of government property, the grant and housing programs, and the provision of government services.

Two examples of this type of ethics officer are [Philadelphia's Chief Integrity Officer](#) and the District of Columbia's former Ethics Counselor (also known as Special Counsel for Ethics), a position in the office of the attorney general (the city's corporation counsel).

It is important to make sure that a mayoral ethics officer does not create an alternative forum for ethics advice and enforcement. It should be an office that complements the ethics commission and helps improve compliance and the administration's ethics environment.

C. The Website

A website is a great place to let officials, employees, the press, and the public know about a government ethics program, understand what it does and why, find minutes, advisory opinions, and decisions, and receive training in a wide variety of ethics issues. In other words, a website is a great place for training and transparency. Since training and transparency are also central elements of a government ethics program, an ethics commission's website is an essential part of its mission.

The commission's website is also the only place where it can completely control how it is perceived. That is, government ethics and its priorities can be clearly presented on the website, from the home page through each of the ancillary pages, and in the documents linked to in these pages. Websites are the perfect antidote for a program that is poorly understood and too often ignored until there is a scandal.

The website design doesn't have to be expensive. What is important is that the website be clear, complete, and kept up-to-date. It presents a poor image, and is unhelpful to say the least, when an ethics commission website is hard to navigate, lacks contact information, and does not contain minutes of recent commission meetings. Basic website templates are now packaged with ordinary word-processing software, and more sophisticated designs are not that expensive. With respect to features relevant to local government ethics, go beyond what is written here. Look at the websites of programs in other cities, counties, and states for good ideas that you can employ.

The most important consideration in designing a website is looking at everything from the point of view of the various kinds of users. Don't organize a website the way your office is organized. No one cares about your internal divisions or titles. Few people care much about anything bureaucratic. They usually care about something very concrete: a particular situation they're in and what to do about it; when the next meeting (or training class) is or what was decided at yesterday's meeting; who can I call to make sure I don't get into trouble; how to go about reporting questionable conduct or seeking advice.

Designing a website is a good time to consider your office's priorities, because a website will usually display them, whether intentionally or not. You may spend more time on enforcement than anything, but is that really what you want to emphasize? Or would

you rather use the website to try to lessen enforcement by increasing the attention given to training and requests for advice?

1. Transparency

An ethics commission's choices in designing a website will let the public know how important transparency is to it. Recognizing that transparency is one of the three areas of government ethics, an ethics commission should make the ethics website an example of transparency for the entire government.

The alternative is to focus on confidentiality, accepting the idea that the private concerns of public servants regarding their conflict situations are more important than public and educational concerns. Put this way, it's hard to choose confidentiality over transparency. It should be. Creating or improving a website is a good time to take a fresh viewpoint on everything an ethics commission does.

Concretely, will the website contain not only formal advisory opinions, but also useful informal advice? Will it contain investigation reports, hearing transcripts or audio, settlement agreements, the reasons for the dismissal of complaints?

Since confidentiality is the default position of most lawyers and politicians, it is valuable to spell out website requirements in the ethics code or in regulations, or transparency is likely to be short-lived. Don't assume that any information will remain online or that it will be made, or kept, as accessible as possible if it is not required, or even if it is not expressly allowed. Any omission will be used by lawyers arguing for confidentiality.

Following is information about how to present online certain areas and aspects of government ethics.

1. Advice. Philadelphia has an excellent way of dealing with ethics advice. It has at least three levels of advice: formal advisory opinions, public advice of counsel, and nonpublic advice of counsel. The requester can choose whether the advice is public or nonpublic, but the major difference is inclusion of the requester's name, not whether the advice itself is kept confidential and, therefore, inaccessible to other officials and employees. Either way, the advice is placed on [the Opinions page](#) of the website, to inform everyone of how the rules are applied to particular situations.

The advice should be better organized than it is on Philadelphia's page, so that it can be more easily used. Advice should be indexed by subject matter and by code section, and searchable for keywords. It should be summarized or explained where necessary, and collected in special information sheets on particular topics. The goal should be to use advice to provide continuing ethics education and to make the ethics program's guidelines increasingly clear and concrete, so that it is easier for officials to deal with their conflicts responsibly.

[Atlanta](#), [Seattle](#), and [Boise](#) (for Boise, see Opinions by Code and Opinions by Number links on the left margin) index their advisory opinions both by subject matter and by code section. [King County, WA](#) has an attractive and informative subject matter index, while [Honolulu](#) has an extensive subject matter index. [Miami/Dade County](#) provides both formal opinions and informal opinions ("responses to inquiries"), but it does not index the responses to inquiries.

Since ethics commissions usually do make their enforcement decisions available online, omitting advice supports the mistaken notion that ethics commissions care more about enforcing and penalizing than they do about advising.

2. **Enforcement.** The placement of enforcement materials on an ethics commission's website may be limited by confidentiality requirements in the local ethics code or in state law. But generally, once there is a finding of probable cause or if the respondent waives confidentiality either expressly or by publicly discussing the proceeding, all materials, including the complaint, response, investigation report, and finding of probable cause, become public documents.

If they are public documents, full transparency in this day and age requires that they be made available online, even if this is not required by law. Knowing that these materials will be made available online also acts as a deterrence to misconduct and as an incentive to settle an ethics matter as early in the process as possible. And placing these materials online also protects officials, because it will make ethics commission members more clearly recognize the consequences of a finding of probable cause. Despite satisfying these three valuable goals, it is extremely uncommon for ethics commissions to put online anything other than final decisions (of which there are few), settlement agreements and, in a few cases (such as in [Massachusetts' press releases](#)), findings of probable cause.

In fact, I could not find any website that had a page for current ethics proceedings. This means that people will turn instead to media and blog websites to learn about current proceedings. This does no good for the commission, the respondent, or the public.

It is valuable for ethics commission members to recall the importance of transparency to furthering the public's trust in government and in the ethics process itself. It is also valuable to recognize that these are not personal matters, but the conflict matters of public servants. Placing ethics proceeding materials online discloses their private matters only to the extent they involve relationships or interests in conflict with their public obligations, which are supposed to be publicly disclosed, in any event.

Also important, and rare, is making available court rulings on ethics provisions and the powers of ethics commissions (again see [Massachusetts](#), but make sure to provide links to those decisions that are available online (or make them available), something that is not done on the Massachusetts website). Remember that, in many states, there are court rulings that apply to all local ethics programs as well as rulings that apply to provisions that are similar to or the same as yours. These decisions need to be taken into account by a government ethics program and those who deal with it. Explanations of these decisions and their effects on officials should be provided on the website, as well.

3. Meeting Notices, Agendas, and Minutes. Online access to public documents is not enough to ensure full transparency. Especially in the case of meeting notices, agendas, and minutes, timeliness is required, as well. Too often, I've visited ethics commission sites and found no minutes of recent meetings, nor notices or agendas for upcoming meetings. These are essential not only for those interested in these meetings, but also to set an example for other local bodies and agencies. In fact, even if it is not an express duty of an ethics commission, if no one else is doing it, it is appropriate for an ethics commission to supervise the timeliness and easy availability of the agendas and minutes of other bodies and agencies in the local government. The ethics commission might not be able to enforce the rules (which are usually state rules), but they could either file actions with the state transparency commission or keep a page reflecting which bodies and agencies regularly post their meeting documents (as well as audio-video materials) on a timely basis.

4. Public Records Requests. One thing missing from most ethics commission websites is information on making public records (FOI) requests. State law will usually govern this, but ethics commissions should set an example by making records requests easy.

They should place on their website required forms and links to the city or ethics commission's public records policy. The name and contact information of the ethics commission public records officer should be included, as well as information on how to make the request, if it is not included on the form. See [the Philadelphia page](#) and [the Chicago page](#) on public records requests.

2. The Home Page

Since education in order to prevent ethical misconduct is a top priority of a government ethics program, everything about its website should be analyzed with respect to educating officials, employees, those who do business with the government, the press, and citizens. For example, the home page should let people know what government ethics is and exactly what areas of government ethics the commission has jurisdiction over ([the Honolulu home page](#) does this better than most; [San Diego](#) has a good "About the Commission" page).

Each area should have a separate home page of its own, because most people visiting the website will be interested in only one area: conflicts, campaign finance, lobbying, transparency, or public financing. It's also important to provide different entryways for different audiences. For example, [San Diego's home page](#) has links to separate pages for candidates/committees, city officials, and lobbyists. Commissions that have multiple responsibilities should have less on their main home page, and more on the separate area and/or audience home pages.

Since many people will have arrived at the wrong site, it is responsible to have, on the home page, links to the sites these lost people are looking for, with information about what each agency has jurisdiction over. Most sites have these listed under "Links," but it would be more helpful to have these links in a box somewhere on the home page, under a title such as "You May Be on the Wrong Website." Here are examples of possible links:

Human Resources – most employee misconduct, discrimination

Inspector General – fraud, waste, financial mismanagement

District or State's Attorney – bribery, embezzlement, and other crimes

State Ethics Commission – state officials and employees, including those based in the city or representing the city's citizens

State Elections Commission – campaign finance matters, including local candidates

Disciplinary Committees – lawyer, judge, and court personnel misconduct

In addition, the ethics commission should provide two jurisdictional lists. One should be of all boards, departments, agencies, authorities over which the ethics program has jurisdiction; the other those over which it lacks jurisdiction. It would be very useful, both to officials and employees of excluded agencies and to the public at large, if the online list of those over whom the ethics program lacks jurisdiction was to identify the reason why there is no jurisdiction, as well as what office or agency *does* have jurisdiction, if any, with a link provided to that office or agency's website.

The categories on the home page should be as general as possible. For example, “Advice” rather than “Advisory Opinions,” unless there are higher-level categories, as on the [Massachusetts home page](#), which has six general categories in a drop-down menu: Commission Services; Laws & Regulations; Opinions and Rulings; Education and Training Resources; Disclosure Forms; and Press Releases, Meetings, and Publications.

Some people will come to an ethics commission website to see what’s new, that is, new advisory opinions, settlements, and decisions, regulations and amendments to laws, meeting notices and changes, reports, advisories, educational materials, newsletters, announcements, and press releases. For very active commissions, it is best not to clutter up the home page with these, but to have a prominent “What’s New” link to a page that has organized links to each of these areas. The one thing that should be on the home page is information about the next commission meeting.

For less active commissions, a section of the home page that includes what’s new is helpful for those who come frequently to the home page. One way to organize this material is by date (see [Philadelphia’s home page](#), but its list goes too far into the past; [Chicago’s list](#) is a bit too short).

Massachusetts also has a link on its home page to an [Event Calendar](#), which is a great thing to have for active commissions.

If an ethics program is working well, the number one reason officials and employees will visit the website is to get basic information that will help them make ethics decisions or ask for ethics advice. [New York City](#) has a “Get Legal Advice” tab you can click in the top right-hand corner of its home page (second in a column of four tabs), which leads to a helpful page. [San Diego](#) puts “Help and Advice” as the first of eight buttons at the bottom of

its home page, and the advice page intelligently points out that there are many resources on the website to consult, but that people are welcome to call or e-mail for advice. And [Massachusetts](#) puts “Request Advice” second on its “Commission Services” page, and this links to a good page on the various ways to request advice. [Philadelphia](#) has an “Ask for Advice” link lost in the middle of a 15-link column on the left side of its home page, but it provides little information, just a written form for requesting advice. [San Antonio](#) has a link (the first of three) to a well-written page under the poorly named “Opinions,” entitled “How to Request an Advisory Opinion.”

However, most ethics commission websites have no link at all to information about obtaining ethics advice. Many of these do, however, have links to report misconduct, as if enforcement was more important (or more sought after) than advice. This suggests that the designers of the site did not properly prioritize the commission’s duties.

In fact, the typical small city or county’s ethics commission home page features the commission members instead of their services, which sends the worst message of all about the commission’s priorities. Although it’s important both to humanize an ethics program and to have information about the members and staff, they should not be the website’s focus.

Ethics commissions should seek contact as much as possible, especially for advice. The more officials and employees who seek advice, the better the ethics program. Therefore, it should be possible to call or e-mail staff members and, where there is no staff, the commission chair or some other representative. This contact information should either be on the home page (usually at the top or the bottom, or in a box toward the top) or, where there are multiple staff members, on a “Contact Us” page that is clearly linked to on the home page and all other relevant pages (see the [Philadelphia “Contact Us” page](#) for a rare example of providing all staff members’ e-mail addresses).

Where there are multiple staff members providing advice, one alternative to having everyone’s direct phone number listed is to have a specific advice line, which is forwarded to a staff member’s phone or e-mail box each day. But nothing says openness like a full list of staff names, positions, and contact info.

3. Laws, Rules and Regulations, and Bylaws

The website should have links to all the laws and rules and regulations that apply to conflicts within the jurisdiction, including applicable state and federal laws. The links should appear together in the same area of the home page, or be featured on a separate page.

The ethics code should be presented separate from relevant charter provisions or other city or county ordinances, and all the laws should be made available in a downloadable, searchable PDF format, or in HTML on their own webpage with a link to a PDF version. Any defined term should be internally hyperlinked to the term's definition. This is a process that takes only a couple of hours and can be done by a young intern.

The ethics commission's regulations and rules of procedure should also be available online. There should be rules that apply to the commission's various proceedings, that is, not only to enforcement, but also to advice, waivers, dealing with disclosure problems, etc.

And there is no reason why an ethics commission's bylaws should not be available online. Rarely will officials or citizens need to consult them, but there will be occasions when they may want to. And online access makes it easier on commission members. When an issue comes up at a meeting and no one has a copy of the bylaws, all that's needed is a smartphone.

4. Guidance

Since training and advice are the two most important elements of an ethics program, and since written, audio, and video materials are expensive to produce and distribute, the website should be the most important forum for continuing education.

Training

When it comes to basic training materials, as well as the website as a whole, the magic word is user-friendly. With respect to documents, this means that the language should be intended for a layperson, and the documents should be easy to use and searchable, with clear titles, good tables of contents, and a glossary of terms.

There is no reason why the ethics provisions themselves should not be used as an educational resource, since many people, especially lawyers, will look there first. It is useful to include within the code, or in a separate version of it, comments and concrete examples to the ethics provisions. Being concrete as possible is important.

Educational materials should have their own page. See [the section of this book on training](#) for the sorts of materials that should be considered. It's important to remember that borrowing from other governments' materials is acceptable (they're not usually copyrighted), but it's best to ask permission for more than minor borrowing. If an entire educational document is seen as useful, the website can link to it (with a note on why and how it is useful), without any cost or need for permission. That includes this book.

Advice

It is important to post advice that has been given, in an easy-to-use manner, and to have complete contact information for whoever provides advice. But an ethics commission also needs to make a point of showing officials and employees how important it is to seek advice from the ethics officer whenever they think they have a question involving a relationship or other conflict situation, whether it is theirs or that of a colleague who they feel is not dealing responsibly with the matter and will not seek advice himself.

The commission needs to anticipate and respond to obstacles to seeking advice. It should let officials and those doing business with the government know that seeking ethics advice is not being goody-goody or admitting that one has done something wrong. Officials need to understand that having a conflict is not wrong; it's how the conflict is dealt with. It's a professional issue. Ethics advice is about how to deal with a conflict professionally and responsibly. It's no different than seeking legal or financial advice. This can never be said too often, because understanding this makes one more likely to ask for advice. And the failure to understand this is at the center of so many problems an ethics program faces.

It's also important to let officials know that asking for ethics advice means preventing trouble for themselves and scandals for their board, agency, party, and local government. It's the flu shot everyone in government needs to get in order to prevent the appearance of corruption. To appreciate this, officials need to be reminded that the public only sees their relationships and their actions, not their motives and values.

Many ethics commissions provide an online form for requesting an opinion. Generally, it's better to talk with someone, because few officials or employees are going to ask their question right or provide sufficient information. But it doesn't hurt to provide a form for people who are hesitant to call and for whom a form is easier to fill out than a blank e-mail page. Just make sure to have them provide a phone number and/or e-mail

address for follow-up questions and possible discussion of the issues involved. And let them know that they can call, as well.

It is important to provide as many ways as possible to seek advice, because all of us have ways we are more comfortable with. A form, a phone call, an e-mail, a letter, even a text message, every possibility should be made available for contact. Too many commissions limit officials to filling out an online form, which may not be the best way for many people, and may also, due to poor design, limit them from, for example, sending relevant documents or telling the whole story.

[Click here](#) to find a page of advisory opinion links.

5. Disclosure

Since disclosure is all about making information public, the commission website is the perfect place to provide it. All three forms of disclosure should be available online: annual, transactional, and applicant disclosure. Lobbyist disclosure and gift disclosure should also be available in jurisdictions that require these (see the [Seattle lobbyist page](#) for links to good online lobbyist disclosure information). The old days of going to the clerk's office during work hours is far behind us, whether or not the relevant laws have been updated.

Transparency laws, as ethics laws, are minimum requirements.

The home page should have a disclosure area. It should include a link to a page with forms for the kinds of disclosure. The forms should include instructions. And they should be fillable and searchable PDFs, so that they may be filled out online rather than printed out and mailed in (fillable PDFs can be printed out and mailed in, if the official prefers to do that; but then they need to be shot and turned into searchable PDFs). If it is more appropriate, spreadsheet files can be used instead, but for each kind of disclosure, only one form of file should be allowed. If the disclosure form must be sworn, it can include an electronic signature or, in the alternative, it can include a statement that has the official say that, by pushing the button to send the disclosure form to the ethics commission, the official is swearing as to its accuracy.

Disclosure is an extremely sensitive area for most officials. The disclosure page should be employed to explain why each type of disclosure is important (including the ways in which it helps the official himself) and why the information is made available to the public. It should also make it clear that what officials are being asked to disclose is limited,

that a great deal more is disclosed by U.S. Senators and cabinet members, for example, which is what people usually think of when they think of annual disclosure. Finally, the page should make it very clear who must file the disclosure forms and when, and it should provide a number to call and an e-mail address if anyone has a question about disclosure or filling out the forms.

The disclosure page should include a link to pages that include the actual disclosures filed by officials and others. The forms should be searchable, and not just by name, because often people don't know the names of officials and employees in a particular department or agency, or on a particular board, but want to know, say, if any member of the ethics commission has a potential conflict regarding a matter before the commission. See [the Palm Beach County gift disclosure page](#) for a good way to do this.

Sadly, transactional and applicant disclosure forms are rarely made available on ethics commission websites. This is a shame, because they show the public that both officials and those doing business with government are openly disclosing their relationships with each other. See the bottom of the [San Antonio home page](#) for a rare example of making these available (they're called Conflict of Interest Reports), albeit only by month and year (they should be searchable also by name, agency, and type, that is, contractor, land use permittee, grant requestor, etc.).

It appears from looking at several ethics commission websites that commissions tend to think of their role primarily as serving officials by making it easy for them to file disclosure forms rather than serving the public by making filed forms easily available online. It is important for ethics commissions, like every government agency, to constantly question who they are serving and how this service can best be done, taking into account personnel, financial, and legal limitations, of course.

6. Enforcement

As always, enforcement comes last. Although many people, especially in the news media and blogosphere, might want enforcement to be the principal feature of an ethics commission website, a website provides the ethics commission with the opportunity to show that there are more important things than enforcement . . . such as everything else in the ethics program.

As discussed above, it's important for the sake of transparency, as well as education, that enforcement-related documents that are public be placed on the website. The documents, complaint forms, information about the hotline, and links to other enforcement agencies, with a discussion of their differing jurisdictions, should be linked to on a separate enforcement page, which should be linked to on the home page in a manner no more eye-catching than any other section of the page. See [the section on complaint forms](#) for how to draft such forms, and for guidance in filling them out.

An important part of the enforcement section of the home page should be the suggestion, or requirement, that officials and employees either report, or seek advice regarding, any situation they know about where an official or employee does not appear to be dealing responsibly with a conflict. This could include the placement of a "Report an Ethics Violation" button or link on the home page.

Websites that over-emphasize enforcement make it appear that this is what government ethics is about. This supports the stereotype that ethics commissions are out to get officials rather than to prevent ethical misconduct and, thereby, to increase the public's trust in the local government.

7. Data Collecting

Local government ethics is afflicted with a serious lack of data and other information. There is very little information available about the number of complaints that are received, not to mention what allegations are made, including the areas they fall under, whether conflicts, withdrawal, gifts, representation, post-employment, etc. There is even less data or information about hotline calls, advice requests, ethics commission discussion topics, and enforcement outcomes (dismissals, settlements, findings, sanctions, etc.).

Ethics commission members and others who run ethics programs have an obligation to share as much data and information as they legally can in a form that makes the information accessible online and collectable by both other ethics programs and academics who want to analyze and share the information in ways that will benefit all ethics programs.

A few ethics commissions present some of this data and information in their annual reports ([see below](#)), but most either make little or no information available, either due to lack of staffing, laziness, or a belief that confidentiality is more important than the transparency necessary to bring the public into the ethics program and to allow data-

gathering and analysis to help ethics programs function better and to show those jurisdictions without ethics programs what such a program can accomplish.

Data and information sharing is especially important to determine the methods and pervasiveness of institutional corruption, that is, of conduct that is legal but creates an appearance of impropriety. Institutional corruption is often more harmful than illegal misconduct because it has legal legitimacy and is, therefore, pervasive throughout a government organization. However, since institutional corruption does not lead to successful ethics proceedings, it is only through tips and dismissed complaints that it can be viewed.

Feedback

Not sure what to try? Want to see what has worked so far? Ask your followers on Twitter, or others who are interested in your website. Here's a tweet from the New York City Campaign Finance Board from March 2012:

Visit our website a lot? Have suggestions as to what you want changed? Let us know!

You can also place a sign on your home page (and the bottom of every page) asking for feedback, so that when you click it, it opens up an e-mail directly to the right individual (Massachusetts has a form for this; see the link at the bottom of [its homepage](#)). You can even be more specific, asking things like, "Is the home page more user friendly?" or "How did the index to advisory opinions work for you?"

No one likes filling out surveys, but they're more likely to provide feedback if you make it really easy, especially with single questions and a one-click link to your e-mail or, if it's a Yes or No question, two or three buttons to choose from. Feedback is worth the bother.

Ethics commissions can also ask for written recommendations for improving the ethics program, and also do interviews of individuals and organizations that have shown an interest in government ethics.

8. Annual Reports

As a segue into the next section, on annual reports, I want to emphasize how important it is for ethics commissions not only to draft annual reports of their activities, but to make them available to their city or county's officials and employees, the press, and the public by placing the reports on their website, and leaving them there. This is done in larger cities and counties, but what about ordinary local governments?

Late in 2008, I did a survey of the websites of those cities and towns in my state whose ethics codes require the preparation of annual reports (only 23 out of 169 towns and cities; Connecticut has no counties). The 23 municipalities include all but one of the largest cities in the state. On those 23 municipal websites, I could not find a single annual ethics report, or an ethics report of any kind. Not a single one. Assuming some reports were drafted, there is no excuse for not placing them on the website, which costs nothing, not even much time. If the reports were not drafted, the ethics commissions need to be held accountable. Notice how often officials speak about accountability problems with ethics commissions, but when they do not fulfill their duties, they are silent. It is primarily when they penalize officials that ethics commission accountability becomes an issue.

An ethics program cannot be effective unless officials, employees, the press, and the public notice what they are doing and understand why it is important. It is the responsibility of every ethics commission, whether an annual report is required or not (this shouldn't matter), to do everything it can, especially on its own website, the only medium it controls, to make its ethics program noticed. And understood.

D. Annual Reports

Ethics commissions should be required to prepare an annual report on their activities. This requirement should be included in the ethics code or in the charter provision that provides for the creation of the ethics commission. Here is the City Ethics Model Code provision:

The Ethics Commission must prepare and submit an annual report to the legislative body, summarizing the activities, decisions, and advisory opinions of the Commission. The report may also recommend changes to the text or administration of this code. The report must be submitted no later than October 31 of each year, covering the year ended August 31, and must be filed with the City Clerk and made available on the city website.

However, even if there is no requirement, an ethics commission should still draft an annual report.

An annual report serves multiple purposes. One, it provides an ethics commission with the opportunity to take stock of what it has done over the past year. With many ethics commissions, this can be embarrassing, because many ethics commissions rarely, if ever, meet. They feel that if no one has filed a complaint, they have nothing to do. When they do not have to report their inaction, they don't think much about it and they're not nearly as embarrassed about having done little or nothing. When they do have to summarize their activities, decisions, and advisory opinions, and there is nothing to summarize, one or more members might start a discussion about the ways in which the ethics commission could be proactive (see [the checklist of things an ethics commission can do](#)). If nothing else, the requirement to prepare an annual report means that an ethics commission has to meet at least twice a year: once to assign the report to an individual or subcommittee, and the second time to approve the draft report.

Ethics commissions that have been active can use the preparation of the annual report as an opportunity to look back and analyze what happened and did not happen over the past year, comparing it to past years. Preparing a report is also a good time to reconsider such things as the website, the newsletter and other publications (or the lack thereof), and recommendations for possible improvements to the ethics program (see [the following section](#)). The report should look not only at the past year, but also toward the future.

Two, the annual report can be used to send a message to the legislative body, as well as to the public (and educate officials and the public, too). It's hard for the press to ignore even a sem-interesting report. If things have been relatively quiet, the report can remind the legislative body (and the public) that the ethics commission exists. If the ethics commission has sufficient staff, it can brag about all it accomplished. And if it has no staff or insufficient staff, it can tell the legislative body all the things the ethics commission could not do because of limited resources. For example, it can say that it provided ethics training to only the highest officials, but with an ethics officer it could provide ethics training to everyone, including contractors. It can say that it provided advisory opinions to ten officials, but that because it had no ethics officer, dozens of officials who needed quick ethics advice before a meeting could not obtain professional, independent ethics advice when they needed it. It can

also discuss limitations and delays regarding investigations and hearings, the bad press that came from dependence on the city or county attorney's office, and other problems that have arisen.

Three, the annual report can let everyone know which officials violated the ethics code and which officials were accused, but found not in violation. It is important that this information be made easily available in one place. With a little bit of imagination, the report can go a step beyond individual violations into a discussion of patterns and norms, that is, it can look at institutional corruption, as would the report of a civil grand jury.

Through discussions during training programs, requests for advice, complaints, investigations, and hearings, an ethics commission and its staff get a pretty good idea what the particular local government's most prevalent ethics problems are. It will come to recognize the difference between individual ethics violations and misconduct that is commonly done and generally accepted. Identifying the common forms of misconduct is more valuable than finding individuals in violation, because it causes people to question what has gone unquestioned, and it can lead to a public discussion about issues that have been kept under wraps.

Four, annual reports provide information not only to the particular community, but also to other local governments. Those seeking to set up or improve their ethics programs can, through other communities' annual reports, learn what similar jurisdictions are doing, what the problems are, what solutions are working, what limitations are problematic, etc. If all ethics commissions drafted good annual reports, those studying local government ethics would have enough information to create a clear picture of the field, not just its laws, but its activities. Alas, this is not yet the case.

It's worth taking a look at the [2010 annual report from Philadelphia](#), an easy-to-read, down-to-earth, honest look at what happened over the past year. It talks about the ethics board's accomplishments, what it focused on, and what it was unable to do. Although the tone is modest, it quotes from the last column of Philadelphia *Daily News* columnist Dave Davies, where he described how he wanted "to shine a light on the most remarkable thing I've seen in 25 years of covering city politics: at last, the appearance of a watchdog that isn't afraid to bite. . . ."

The emphasis of the report is not on enforcement, but rather on advice and training, and on the drafting of new regulations. There are summaries of formal advisory opinions and

advice of counsel, organized by topic, and a graph that shows a breakdown, by topic, of the informal advice that was given. And there is an appendix with brief descriptions of each formal opinion and advice of counsel.

After training, advice, and the new regulations are described in depth, there are three pages on enforcement activity. One of them looks back at the board's first four years of enforcement, providing numbers and a graph. There is also a lengthy discussion of the two pending suits filed against the board.

Then the report includes recommendations to the council for changes to the ethics code. This topic will be discussed in the following section.

The reports ends with a section called "Looking Ahead."

For alternative approaches, see a [Jacksonville annual report](#) organized around the ethics commission's duties as enumerated in the ethics code, and [a beautifully designed report from Chicago](#), which emphasizes education.

Also worthy of a look is a special [five-year report from Atlanta](#), which provides an excellent view of a new ethics program's accomplishments. It also looks ahead to what more can be done. There are discussions as well as tables and graphs on training, advice, disclosure, and enforcement. And there are boxes, called vignettes, which feature certain common issues and show in concrete ways the progress that has been made. Also check out [an Atlanta report](#) setting out a work plan for the upcoming two years.

Also worthy of a look is a report you don't want to file (although at least an attempt was made): [the 2010 report](#) from the Live Oak, Texas ethics review board.

Some ethics commissions also prepare separate reports for such areas as financial disclosure, lobbying, campaign finance, and hotlines, providing summaries of activities, often in the form of tables or graphs. See, for example, an [Atlanta financial disclosure report](#) and an [Atlanta hotline report](#).

Another kind of ethics commission report is the report of the ethics officer or director to the commission. Verbal and sometimes written reports are generally expected at each regular ethics commission meeting, but it is good to have one's staff put together a report that contains full statistics and other information, so that the commission has a good overview of what has been happening. This can also be a way of preparing the annual report to the legislative body and the public. Atlanta's ethics board requires a quarterly report from its ethics officer of all complaints that are dismissed administratively, and Tampa's requires

an annual report from its ethics officer regarding “the compliance or non-compliance with financial reporting, gift reporting, lobbying registration and reporting, and ethics education and certification requirements of this Code.”

It is helpful to provide more detail than can usually be found in an ethics code (usually there is simply a requirement to file a report annually with the council). This can be done in an ethics commission’s rules and regulations. Here is the New Orleans ethics board regulation:

The Board must prepare and submit an annual report to the City Council and Mayor detailing the activities of the commission during the prior year. The format for the report must be designed to maximize public and private understanding of the commission's operations. The report may recommend changes to the text or administration of this Chapter. Additionally, the annual report must be posted on the website of the Board, and a copy must be sent to the Inspector General.

It would be best if more details were provided, for example, the data that must be included, the period for which the data should be collected, a summary of important decisions and advisory opinions, changes made to training courses and materials, rules and regulations, the process for filing complaints, seeking and providing advice, providing disclosure, etc., a description of any pending or resolved suits, a description of hearings on ethics issues not directly related to advice or enforcement proceedings, recommendations for changes to the ethics program, and a look ahead to the following year.

For the importance of placing annual reports on the ethics commission website, see [the subsection of the Website section above](#).

E. Recommendations for Ethics Program Improvement

It is best to expressly require in an ethics code that the ethics commission annually make recommendations to the mayor and local legislative body regarding improvements to the ethics program. Assuming that the ethics commission is active, no one knows more about what aspects of the program have been working, and what have not, than ethics commission members and staff. If the ethics commission has been sitting on its hands, this requirement forces it to do something at least once a year.

A requirement that an ethics commission make recommendations makes it much easier for the ethics commission to play the important role of ethics reformer. No one can say the commission is trespassing on the legislative body's territory by making the recommendations. This requirement also makes it mandatory that the legislative body seriously consider the ethics commission's recommendations, since it asked for them (unless the requirement came from a referendum). Local legislators like to sponsor ethics reforms to make themselves look good, but their reforms are rarely those an ethics commission would recommend. Knowing that the ethics commission might make them look bad, a smart legislator will work with the ethics commission to make herself look good. This sort of cooperation is a win-win situation for everyone.

A big difference between the reforms that ethics commissions and legislators recommend is that while a legislator is often trying to put out the last fire, an ethics commission is more likely to be responding to procedural problems, more likely to be taking a long-term view, and more likely to have considered reforms that have nothing to do with the latest scandal, including reforms it has seen in other cities and counties, or even ones it has read about in this book.

The most common way to present recommendations to the legislative body is to include them in the annual report (see [the previous section](#)). But there may be times when the legislative body is actively talking about ethics issues, and the annual report is months away. In such instances, the ethics commission will want to make recommendations regarding bills before the legislative body, as well as making additional recommendations for the legislative body to consider. An ethics commission should never sit on the sidelines when there is talk of ethics reform, and a requirement tied to an annual report should not change this.

When it comes to making recommendations, it is important to consider whether a particular change has to be done by ordinance, charter revision or, in some cases, referendum. In many cases, in fact, changes don't even have to go through the legislative body. They can be made through amendments to an ethics commission's regulations or rules of procedure, or even through interpretations of ethics provisions at the ethics commission's own initiative. When there are important changes that need to be made quickly, they can often be accomplished through regulation amendments, and then recommended as amendments to the ethics code or charter, as well.

Ethics commissions also need to keep state law in mind when they make recommendations. State law sometimes limits a local ethics program's options. On the other hand, it may allow things the local legislature did not include in the ethics program, such as the power to subpoena witnesses and documents. When an ethics commission feels an improvement is important, but state law does not allow it (or it isn't clear), it should try to get support for a change to state law, discussing the matter with not only the local legislative body, but also with local state representatives. A lot of state limitations go back long before government ethics programs became common, and have unintended consequences that the state legislature will be happy to get rid of (or won't care enough about to block a bill sponsored by local representatives). Sometimes, for example, there are penalty limits that are fifty years old, and need updating. Sometimes the language in the state law is not clear, and it has not been litigated and no one has bothered to do anything about it.

A regular review of an ethics program is a good way to focus attention on ethics issues. It is helpful to officials and employees, as well as to the public. If it is handled correctly, it can be a valuable supplement to ethics training, because views on the code and on ethical problems in the government will appear in the news media and become a subject of discussion inside and outside of government. The result, over time, may be a deeper understanding of conflicts and more trust in government.

There are two kinds of recommendation that do not involve laws, but do involve the legislative body. One is the ethics commission budget. The commission should prepare a good argument for needed budget increases or, in a bad economic time, the preservation of its budget. The budget request should be very clear how the extra funds will be spent, with a description of work that could not be done in the past year or two due to a lack of staff or funds for, say, an attorney. It's important to make it clear to the legislative body that the ethics commission is doing its work at the lowest cost possible. For example, the commission might choose to turn a full-time counsel position into a part-time or on-call position to save money to help pay for something the commission feels is more essential.

The other sort of recommendation that does not involve laws is a recommendation of individuals to be considered for ethics commission membership. If an ethics commission's members are selected by officials rather than by community organizations or the commission's members themselves, there is no reason why the ethics commission cannot make recommendations for individuals to fill seats that will be opening. The commission can

even ask community organizations to nominate people, and pass these names on to the mayor or council. A lack of authority does not require passivity. An ethics commission that takes an assertive approach can get a great deal done and can make it far more likely that the public will come to trust it to do its job for them.

F. Public Relations

Because government ethics is an area that is so poorly misunderstood, public relations is especially important to it. The better it is understood, the more likely it will have the most beneficial effect, the less likely there will be scandals that should never have become scandals, and the more likely there will be a relatively comprehensive and independent ethics program.

One reason it is important to develop the community's understanding of government ethics is that this will come in handy if there is an ethics scandal and the ethics commission is faced with a difficult enforcement proceeding. Officials may try to play on the community's ignorance of government ethics and its skepticism about an unelected body it's never heard of going after officials the community has elected.

Ethics commissions have an obligation to do what they can to explain ethics scandals to the public so that they do as little damage as possible. And this is easier to do if you prepare the public and press in advance.

Websites and annual reports, as discussed above, are important ways to publicize a government ethics program, but they will not be seen by many people. Talks to community organizations, letters to the editor and op-ed pieces during a scandal or a period of ethics reform, local magazine features, local talk radio and television shows, even comments on local blogs and to local newspaper articles that are discussing ethics issues can do a great deal to increase an ethics program's visibility and to correct misunderstandings about government ethics.

It is important for an ethics commission to cultivate good relations with the public and with the press (teaching reporters about government ethics is important, because they can then educate the public). A website should provide information that can be used by the public, including in schools and universities, and by the press. The press is seriously understaffed these days. The easier it is for the press to get access to timely information

online, the better. Press releases and e-mail updates are also important to make it easier for the press to cover government ethics. The press is greatly pleased by transparency, and angered by “confidentiality” and “No comment.” Ethics commissions should be allies of the press in supporting this area of government ethics.

Send out meeting notices, agendas, and minutes to an e-mail list of all reporters and bloggers that follow the ethics commission. When confidentiality requirements limit what you can say about a case, don’t simply say, “No comment.” Talk about the matter in a more general way, putting it into the context of the commission’s mission to prevent misconduct. This might be a good time to talk about bigger problems, like the fact that higher officials do not seek ethics advice or, worse, go to the city attorney instead of the ethics officer; or the difficulties the commission has with the appearance of impropriety due to its members’ selection by colleagues of the individual (or the body she sits on) whose matter is before the commission. It’s better for a commission to raise such an issue itself, arguing for change, than to have the press or the public raise the issue. But it’s best to keep things simple: one issue at a time, and the issue should be as relevant as possible to a recent event.

Although relations with the press are important, there is no reason why an ethics commission has to simply accept the news media’s or the public’s focus on enforcement. Often, newspapers focus solely on ethics enforcement, criticizing ethics commissions as paper tigers (a typical headline reads, “Ethics laws are puppies, not pit bulls”). When reporters and editorials bring up enforcement, an ethics commission should explain, to them and to the public, in the form of a letter to the editor or an op-ed piece in response, how this is only one function of an ethics commission, and only one form of deterrence of ethical misconduct. There is no reason for an ethics commission to be silent when an ethics program is wrongly portrayed. But it is important not to appear defensive. It is important to admit limitations relating to enforcement, and call for removing them, while emphasizing the many ways in which the ethics program is successful and valuable to the community.

The goal is to take control of framing, that is, of the tone and language used to discuss and the attitudes taken toward government ethics. And, most important, to affect how and when government ethics becomes a public issue. This requires an ethics commission to take an assertive and positive role, and to appear at all times independent of officials and political parties, and sensitive to election times and current issues and antagonisms.

Ethics commission members and staff have to be careful not to be too personally defensive, as well. They sometimes put their personal feelings ahead of their obligation to be fair and honest. The last thing an ethics commission member should do is publicly attack someone involved in an ethics proceeding, or someone who criticizes the commission, or one of its members. One of the worst things I've seen an ethics commission member do is file an attorney grievance proceeding against a lawyer who overzealously criticized an ethics decision. Criticism of both the commission and its members will happen, and some of it will be distasteful and untruthful. There are many instances where a judicious response, such as a blog comment, is valuable to educate the public, and other instances where the judicious thing to do is say nothing. To file an action against a critic, and to have that action supported by the commission and its staff, can only hurt the reputation of an ethics program and send the message that a litigious mentality is appropriate to a government ethics program, thereby encouraging suits by officials against the ethics commission and against complainants and witnesses.

Ethics commissions should also be careful not to focus too much on their need for more funds and personnel, because this can make them look greedy, especially if it is not clear what the benefits will be and what is not happening due to lack of funds and staff.

In 2009, the Oakland ethics commission invited members of the press, government, and community groups to come to an ethics commission "retreat" to share with commission members their views on how the commission could do a better job. The invitation specified discussion topics, but left the discussion open-ended, as well.

In 2012, the New Orleans Ethics Review Board started a "community listening initiative," a series of "listening sessions" throughout the city to hear residents' views and perceptions of ethics in city government. The board's goal was to meet with neighborhood associations and other community organizations to explain its role in administering the city's ethics code and "promoting the public's confidence" in city government. Unfortunately, the board appears to be taking a passive approach, asking organizations to contact it. Ethics commissions need to reach out to community organizations.

When an ethics commission screws up, its members have the same responsibility as any official to admit what they did, apologize, and take actions to make amends and to prevent the same sort of thing happening again in the future. Apology is the responsible way

to handle mistakes. It is another area where an ethics commission can provide a valuable example.

An ethics commission does not need to be overly neutral in its presentation of itself to the public. It has a role and a mission, and it should do what it can to let the public know about this role and mission. Of course, it cannot comment on ongoing matters except in a descriptive manner, but there is no reason why it cannot refer to past matters or to problems implementing reforms just because it might ruffle a few feathers. Sometimes, it can be useful sometimes to ruffle feathers, and the public likes to see feathers ruffled. Sometimes it's the last thing an ethics commission wants to do. If it's done, however, it needs to be done responsibly, with tempered language and tone.

An ethics commission must also make sure that it does not create bad public relations, and does not set a poor example or go too far beyond its role and mission. It is useful to provide guidance to ethics commission members regarding their personal role in public relations, so that fewer mistakes and missteps are made. It is important to let members know they need to make it clear whether they are representing the commission or simply sharing their personal opinion. It is also important to make it clear to members who can and cannot correct the news media, or individuals in public forums, on behalf of the commission, and the limits on what they should do and say publicly as citizens.

Here is some useful language derived from San Diego's operating policies. This language could be placed in rules and regulations, or in bylaws.

Whenever a commission member communicates with the news media, or appears at a public hearing or before another city body or agency, the member should make a reasonable effort to explain to the audience whether he or she is expressing an opinion that is the individual commissioner member's or that of the commission as a whole, as the member understands it. Commission members and staff should exercise special caution before making a public comment regarding a pending proceeding.

Whenever the commission learns that an act, discussion, or decision of the ethics commission has been misinterpreted or misrepresented in the media, at a hearing, or in a public forum, the commission should act through the chair or the chair's appointed representative to make every reasonable effort to correct the misinterpretation or misrepresentation, as soon as practicable. If the

misinterpretation or misrepresentation involves the words of a particular commission member, the commission member should consult with the chair or the executive director before seeking a correction.

G. Relations with Law Enforcement Agencies

Relations with law enforcement agencies can be difficult for a local ethics commission. Law enforcement is generally considered more important than government ethics, even though law enforcement applies to everyone and local government ethics applies specially to those who manage our communities, that is, to individuals with special obligations. Law enforcement has been around far longer, has far more people involved in it, far more money and political interests tied up in it, far more power, and far stronger sanctions. All this ensures that a local ethics commission will be a junior partner in its relationship with law enforcement. This is true not only of the police, city and county attorneys, district attorneys, and criminal courts, but also inspectors general, auditors, and comptrollers who deal with fraud and other crimes. Even grand juries are often empowered to make government ethics recommendations without the need to consult with relevant ethics commissions. It is valuable to recognize that an ethics commission is the Rodney Dangerfield of law enforcement, and try to have a healthy, humorous, but not too self-deprecating attitude about it.

It is important to have good relations with law enforcement agencies for several reasons. One is that their cooperation with investigations is important. Most ethics commissions depend on law enforcement agencies for investigations, and even those that do not will sometimes depend on their cooperation and want to make sure they don't create obstacles to obtaining information.

Two is that it is common for multiple agencies, at various levels, to be investigating a matter, or related matters, at the same time. It is important that multiple investigations do not get in each other's way. The best way to do this is to establish personal relationships and procedures that provide for cooperation, information sharing, and ways of determining precedence, so that, in some cases one investigation or even proceeding can go first, and in other cases investigations and proceedings can go on simultaneously, with a focus on different acts or situations.

A third reason to have good relations is that law enforcement agency decisions can have a powerful negative effect on an ethics program. The public doesn't distinguish between enforcement agencies. All they see is a local official accused of wrongdoing. If law enforcement agencies are seen to be letting officials off, either by refusing to file charges or by filing the weakest charges possible (or, on the other hand, going after an official of the other party in a way that appears partisan), settling a case in a way that seems to favor the official, or not fighting an official's legislative immunity defense, there is no difference to the public from having an ethics commission do the same thing. Therefore, it can be important for an ethics commission to have a relationship that allows it to have input into the decision-making process of law enforcement officers and attorneys in those matters that are likely to affect an ethics program (and vice versa).

One concrete example of harm that law enforcement can do to an ethics program occurred in Baltimore in 2009 and 2010. Faced with two officials' legislative immunity defense, the district attorney not only argued the matter poorly. He also stipulated that there is a legislative immunity defense for civil and administrative matters, that is, relating to ethics commission enforcement. If the city's ethics board had had a working relationship with the district attorney, it might have not only prevented this unnecessary stipulation, but have helped the district attorney do a better job of showing the court the difference between common-law and constitutional legislative immunity.

Relations with law enforcement agencies should be formed in advance, not in the midst of enforcement matters, when there can be turf wars. The worst time to form cooperative relationships is when there is active conflict between different laws and offices, and issues of power, precedence, and credit. The time to form these relationships is during training sessions (and even before, when setting up the training sessions); by setting up discussion groups on specific topics, such as procurement (where law enforcement most often gets involved; see [the section on procurement cooperation](#)), grant-related fraud, and lobbying; and in meetings to discuss the issue of referrals and precedence, when there are not any pending matters to work out. For such meetings, it is important to put together detailed, realistic case studies (based on past cases in one's own and other jurisdictions), so that conversation is as concrete as possible. It is easy to say that a law enforcement investigation takes precedence in general, but not always easy to say this in specific

situations. (Also, see [the section the requirement of cooperation](#) with ethics investigations.)

The worst way to deal with the ethics-criminal enforcement relationship is to write a law or regulation that places ethics in a junior position vis à vis law enforcement. For example, Boise has an ethics regulation (VII(K)) that not only requires that the ethics commission share “credible evidence of a crime” with the appropriate law enforcement agency, but also requires that the ethics commission stay its investigation, even if the possible crime has nothing to do with the ethics proceeding. This regulation shows that even some ethics commissions consider their work to be seriously subordinate to law enforcement, to the extent that they draft a regulation unreasonably capitulating in advance when any sign of crime comes to the ethics commission’s attention.

What makes this capitulation especially sad is that local ethics laws are written solely with local officials in mind and, when enforced by an independent body, consists of community oversight of those managing their community. Criminal laws, on the other hand, are written with all citizens in mind and are enforced by local and state officials prosecuting their fellow officials. In other words, favoring criminal enforcement means accepting external, political enforcement as preferable to independent, community enforcement.

Another important element of a relationship between ethics commissions and law enforcement agencies involves the release of records. This became a major issue in Chicago in 2012, when the city attorney was involved in a suit with the inspector general over the IG’s access to information regarding city officials (the city attorney tried to block access).

Record requests can be dealt with either through agreements between the ethics commission and particular law enforcement agencies, through written ethics commission procedures, or on an ad hoc basis. Dealing with record requests on an ad hoc basis can cause a sense of unfairness and, therefore, serious friction between agencies, undermining cooperation even with agencies not involved in the particular matter. Written ethics commission procedures can make it look like the ethics commission is inflexible and trying to dictate to law enforcement agencies rather than cooperate with them. And yet it is difficult, and a lot of work, to make individual agreements. However, if one good agreement can be reached, other law enforcement agencies might be willing to sign on to it. In the alternative, everyone might be willing to sign one agreement, or there might be

an agreement, in writing or understood, to which an ethics commission can sign on as an equal partner, if this is acceptable to law enforcement agencies (and if it is consistent with the ethics program's goals and values).

San Diego has taken a hybrid approach, which is worth considering. Its operating policies contain a record release procedure, but the procedure allows the ethics commission to consider each request separately. Note that the provision (below) treats the ethics commission itself as a law enforcement agency, something that is not common but is, at least in part, true.

Release of Records to Other Law Enforcement Agencies

(a) The Commission staff will confirm or deny the existence of an Ethics Commission investigation for any law enforcement agency. This will help avoid duplication of efforts by governmental agencies. In other words, if the Commission is currently working on an investigation, another law enforcement agency may decide to wait for the Commission's determination before proceeding.

(b) If the Commission has already completed an investigation, and a law enforcement agency has obtained a release from a respondent/witness authorizing the disclosure of investigative records related to that respondent/witness, then Commission staff will provide the law enforcement agency with a copy of such records. The production of investigative materials will be limited to documents and statements provided by respondents/witnesses, and will not include any closed session materials.

(c) If a law enforcement agency submits a request for documents that are contained within a pending investigative file, the request will be considered by the Commission in closed session, regardless of whether the request is accompanied by a release from a respondent/witness. At that time, the Commission shall confer with the General Counsel regarding any legal issues that are related to the sharing of documents, and the Commission may seek input from the Executive Director regarding any relevant policy considerations. The Commission shall then determine whether some or all of the documents requested will be provided to the law enforcement agency.

(d) If a law enforcement agency submits a request for documents that are contained within a closed investigative file, and does not accompany the request with a release from a respondent/witness, then the Chair shall docket for the Commission's

consideration at an open session meeting the matter of establishing an ad hoc subcommittee for the purpose of reviewing the particular request. The Executive Director shall confer with the ad hoc subcommittee before deciding whether some or all of the documents requested will be provided.

H. Rules of Procedure, Regulations, and Bylaws

An ethics code should have a section on the ethics commission's jurisdiction, powers, and duties. One of the duties should be, as the City Ethics Model Code words it, "to solely prescribe and promulgate rules, regulations, and bylaws governing its procedures and its internal organization in a manner consistent with the code."

Rules and regulations define terms and otherwise flesh out the language in an ethics code and, thereby, provide better guidance. For example, an ethics code may say nothing about training other than that the ethics commission should be in charge of it. Regulations on training can make it clear to officials and employees, as well as to future ethics commission members and staff, exactly what is meant by training and what everyone is required to do, at a minimum. Otherwise, an excellent training program can turn into a short online training manual.

An ethics code may not provide procedures for providing advice, dealing with complaints, investigating allegations, or holding hearings. Rules of procedure should detail all of these processes.

Rules and regulations also allow an ethics commission to broaden ethics laws, including the ethics commission's authority. Because drafters of ethics codes tend to focus on ethics provisions rather than procedures, this leaves many holes in the administrative and enforcement, which need be filled through rules and regulations. An ethics commission has every reason to assume that any authority that was not expressly withheld from the ethics commission, but which relates to the ethics commission's powers and is within its area of jurisdiction, can be provided through rules or regulations. For example, if an ethics code does not expressly give an ethics commission authority over those seeking and doing business with the local government, the ethics commission should take authority over them, for example, by requiring applicant disclosure and requiring their officers to

attend training sessions. If the local legislative body feels that the ethics commission has gone too far, it can always make changes to the ethics code.

The most important rules involve the procedures for seeking and providing advice and waivers, and conducting investigations and hearings. Topics in the rules and regulations may include (the links are to relevant areas in this book):

Rulemaking procedures

[Commission Meeting procedures](#)

[Commission Member and Staff Conflicts](#)

[Commission Jurisdiction](#)

[Additional Definitions](#)

[Training Requirements](#)

[Rules Relating to Conflict Provisions](#)

[Advisory Opinion, Informal Advice, and General Guidance](#)

[Waivers and Exemptions procedures](#)

[Annual, Transactional, and Applicant Disclosure, including oversight and enforcement](#)

[Public Records and Retention procedures](#)

[Confidentiality](#)

[Ex Parte Communications](#)

[Time Extensions](#)

[Complaints: filing, initiating, notice, reviewing, dismissing, and amending](#)

[Responses to Complaints](#)

[Preliminary Inquiry procedures](#)

[Referrals to and Cooperation with Other Agencies](#) (also see [here](#))

[Settlement Procedures](#)

[Investigation procedures](#)

[Probable Cause procedures](#)

[Pre-hearing procedures](#)

[Hearing procedures](#), including

Service of Documents

Computation of Time

[Selection of Hearing Officer](#)

[Subpoenas](#)

Venue

[Separation of Roles](#)

[Stays and Continuances](#)

Stipulation or Admission of Facts

[Role of Complainant](#)

Conduct of Hearings

Rules of Evidence

[Standard of Proof](#)

Testimony, verbal and written

[The Record](#)

Appearances, including failure to appear

[Deliberation](#)

[Disposition](#)

[Sanctions](#)

Reconsideration/Rehearing procedures

[Reimbursement of Reasonable Legal Fees](#)

[Appeal/Judicial Review Procedures](#)

Issues involving rules and regulations are dealt with in the relevant sections throughout this book. But those areas that are not dealt with elsewhere are dealt with in this section, especially those areas usually dealt with in bylaws, such as ethics commission meeting procedures.

It might be useful to check out some rules and regulations to determine what to include, as well as to find good language. Here are links to some regulations and administrative rules: [Seattle](#), [Chicago](#), [Philadelphia](#).

One approach is to separate out [hearing procedures](#) and [operating policies](#), as San Diego does (it also has many [enforcement procedures](#) in ordinance form).

Seattle has a provision in its rules of procedure that is worth considering: “The Commission may waive or alter the provisions of any of these rules in order to serve the ends of justice.” This gives an ethics commission leeway to deal with the unintended consequences of its own rules. This is often done anyway, but it is a good practice to be up front about it and let officials know that this might occur.

Every board has bylaws, which usually apply to its internal organization, including such things as membership requirements, officers’ responsibilities, meetings, voting, committees, agendas, and rules of order. Here are links to some sample bylaws: [Palm Beach County](#), [San Francisco](#), [Rhode Island](#). [San Diego](#) calls them Operating Policies.

1. Rulemaking Procedures

Rulemaking authority and procedures should be spelled out in an ethics code. If this is not done, it may lead to conflict between the ethics commission, the local legislative body, and the mayor or manager.

It is best to give the ethics commission sole authority to promulgate rules and regulations, procedures, and bylaws, consistent with the ethics code and other local and state laws, as the City Ethics Model Code recommends in §207.4(a).

Of course, a legislative body may amend the ethics code (unless it is included in a charter) to affect or negate ethics procedures promulgated by the ethics commission. But at least this is done as a response to ethics commission initiative, rather than through oversight or interference in an ethics commission’s performance of its duties.

An alternative is to give the local legislative body the right to disapprove rules and regulations, as is done in this provision from Chicago’s ethics code:

[T]he Board of Ethics shall have the following powers and duties: ... To promulgate rules for the conduct of Board activities, including procedural rules consistent with the requirements of due process of law. Provided, however, no such rules and regulations shall become effective until 45 days after their submission to the City Council. And, provided further, no such rules and regulations shall become effective if, during said 45-day period, the City Council, by majority vote of aldermen entitled to be elected, acts to disapprove said rules and regulations

2. Ethics Commission Meeting Procedures

Rules relating to ethics commission meetings are commonly dealt with in bylaws, but also can be included in rules and regulations. Since most ethics commission bylaws are not made available on their websites, and these rules can be very important in certain circumstances, it is best to include meeting procedures in the rules and regulations, even if the provisions are only a copy of what is in the bylaws.

a. Meeting Dates. It is important to specify how often an ethics commission should meet, as well as how and when the meeting dates should be determined. Many ethics commissions only meet when a complaint is filed or an advisory opinion is requested. But as the [Checklist on Ethics Commission Activities](#) makes clear, there is a lot more for an ethics commission to do. Nothing is likely to be done if there are not regularly scheduled meetings.

Therefore, it is best to specify that an ethics commission will meet monthly and to have commission's bylaws require that, at its November meeting, the commission form a list of the following year's meeting dates (it's best to specify November, so that if there is no November meeting, the dates can be set at the December meeting, and also to make sure that the commission grabs meeting space before it's gone). It's important to send the schedule of meeting dates to the appropriate person to reserve a regular meeting room for these dates and times. Then the meeting schedule should be placed on the ethics program's website.

One meeting should be named the Annual Meeting, and it is on this date that the ethics commission should elect officers and approve its annual report.

If meetings are to be taped or televised, this should be specified in the bylaws.

b. Special Meetings. There are two occasions when it is appropriate to call a special meeting. One is when a regular meeting must be canceled due to a lack of quorum, a storm, or other reason. The other is when an important issue arises between meetings or that cannot be handled at a regular meeting, such as an enforcement hearing. The procedure for calling a special meeting should be specified in the bylaws. It is best to allow either the chair or any two other members to call a special meeting.

c. Executive or Closed Sessions. Since transparency is an important part of government ethics, the procedure and rules for executive or closed sessions should be clearly specified, and limited, in an ethics commission's bylaws. The relevant state and local laws and opinions should be specified, and the required procedure should be carefully described.

But these should be considered minimum rules, not *the* rules. For example, when the state requires that agendas be made available to the clerk at least 24 hours in advance of a meeting, an ethics commission may require itself, in its bylaws, to make them available online at least 48 hours in advance of a meeting. And just because the state allows agencies to charge 25 cents a page for FOI requests, an ethics commission may choose to charge nothing at all or just the cost, especially when the documents are digital and sent digitally. In fact, it should take the initiative by making available on its website as many documents as it may make public.

Many ethics codes have confidentiality provisions, and confidentiality requires a closed session. Most of these provisions apply to ethics advice (at least the name of the official who seeks it) and to enforcement proceedings (at least up to a finding of probable cause). Often, state law will allow for exceptions in ethics programs or a state FOI body or a court will cut out a specific exception, usually on the basis that an ethics commission is a quasi-judicial body. An ethics commissions should try not to make any further information confidential. And it should run all of its confidentiality rules by the state FOI body, if there is one, to make sure they are consistent with state law. This is far better than waiting for a complaint to be filed, and the ethics commission to be embarrassed in the news media for hiding information or closing a meeting in violation of the law.

Rules relating to communications among ethics commission members should also be specified in the bylaws, so that they know the proper ways in which they may and may not e-mail, text, and meet (in person, on the phone, or via instant messaging) with other

members. Ethics commission training should emphasize that inter-member communications are essentially closed meetings, and that it is therefore best to communicate through staff and not to cc the other members.

It is best to require that a supermajority of, say, 2/3 be required to vote for the commission to go into an executive or closed session. If there are kinds of meetings (such as an enforcement hearing) that are not covered by the state or local government's open meeting law, they and the rules that apply to them should be carefully delineated. If there is a question about whether they are covered, the FOI authority should be consulted for advice.

d. Other Transparency Issues. Also, it is useful to discuss what to do about confidentiality once certain events occur, such as a public mention of a complaint being filed (and consider to what extent it matters who made it public). Clearly, if the respondent made it public, this is a waiver of any right to confidentiality. But what if it's not known who gave out the information? Should the ethics commission simply say "No comment" in the midst of media coverage of a scandal, full of misstatements of fact and misunderstandings of law and ethics?

One problem is that confidentiality is usually assumed, rather than treated as the least desirable option. When confidentiality is assumed, the ethics commission doesn't ask the respondent whether he is willing to waive confidentiality, so that he will be seen to be open and not hiding something. What an ethics commission should do is ask the respondent right up front to waive any confidentiality and, if circumstances change, especially if the proceeding is disclosed to the public and it becomes even more in the official's interest to open the case to the public, ask again. The ethics commission should not only ask, but should discuss with the respondent the benefits to him and to the ethics program of (1) being open about the official's possible failure to deal responsibly with a conflict situation, (2) allowing the ethics commission to correct misstatements and misunderstandings, and (3) being able to assure the public that the matter is being dealt with responsibly by an independent body (if there is such a body in the jurisdiction). Openness (as opposed to working behind closed doors) is a good way to show that the situation is not a scandal that needs to be kept secret, but rather an open administrative proceeding to determine whether a public official followed the ethics rules. There is more scandal in what appears to be a cover-up than in ethical misconduct itself.

e. Telephonic Meetings. Some jurisdictions allow board and commission members to participate in meetings over the telephone. However, there should be notice and a meeting room (where some or most of the commission members are in attendance) where the caller or the conference call can be heard by the public, and the public heard by all the ethics commission members. Here is language from the Chicago ethics board's regulations that applies to this situation:

The Board may consider, discuss and make determinations on any matter through a conference telephone call in lieu of an in-person meeting, so long as a quorum is present in person. The call shall be broadcast over a speaker phone or other similar device. The entire conference shall also be recorded by an assigned staff person.

f. Quorum and Voting. The rules on what constitutes a quorum and what number or percentage of members is needed for each sort of vote should be set out in one section of the rules or bylaws, even if they appear in the ethics code. Voting issues frequently arise. Most of them are dealt with in Robert's Rules (the latest edition of which should expressly be named in the bylaws as the default meeting rules, that is, the rules that apply when an ethics commission rule does not set forth a different rule), but some issues are specific to certain situations.

Votes to find probable cause or find someone in violation of an ethics provision are especially important. If there are no voting rules in an ethics code, an ethics commission should make it clear that a majority of members present and voting (not including anyone who has withdrawn from participation in the matter) is sufficient in both instances. Some ethics codes require supermajority votes in one or both of these instances. The problem with this is that a supermajority requirement can make it either nearly impossible for enforcement to occur or can put the control of each enforcement vote in the hands of the official's political party, when ethics commission members are selected by officials.

Also problematic are rules that require a certain number of votes rather than a certain percentage of votes. If there are seven ethics commission members, and a supermajority rule requires a 2/3 vote for a finding of a violation, this means that five votes are required if all members are present, but only four votes if one member (1) is absent, (2) has withdrawn from the matter, or (3) was unable to attend one or more hearings

where there is a rule preventing such a member from voting. If two members are unable to vote, then four votes are still required.

If, on the other hand, a rule requires five votes for a finding of a violation, it means that when two members are unable to vote, a unanimous vote is required for a finding of a violation. Especially when ethics commission members are partisan, it is very rare that there is unanimity.

Not only do supermajority rules, especially those based on number rather than percentage of members, make it difficult to enforce an ethics code. Supermajority rules also undermine the public's trust in the ethics program, they make it less likely that citizens will go to the bother of filing what they will see as a quixotic complaint, and they make officials feel protected from enforcement and, therefore, unlikely to take an ethics program seriously.

Another rule that causes problems is one that determines majorities in terms of the number of members rather than the number of members present. In such a situation, a majority vote of members can easily turn into a supermajority vote. For instance, if two members are missing on a seven-member commission, any motion would require an 80% supermajority (4 of 7 members, but 4 of 5 members present) to pass.

It is also important to expressly state that ethics commission members who are present and have no basis for withdrawal are required to vote. Abstention by members should not be permitted.

When problematic voting rules are included in an ethics code, an ethics commission can recommend that they be changed, reminding the public that the simplest way a legislative body can undermine the enforcement part of an ethics program is to require supermajority votes. When an ethics code does not clearly define a supermajority vote, an ethics commission can add the necessary details in its rules and regulations, limiting the damage the rule can do.

Because an ethics commission is small, Robert's Rules' requirement that most motions must be seconded should be dispensed with in the bylaws. There is no reason not to consider a motion by a member that has not been discussed and, therefore, no one else on the commission may yet understand and be willing to second.

Quorum questions can also arise, especially if an ethics commission has [alternate members](#) (which is advisable so that a quorum is easier to achieve, among other reasons)

and if there are requirements that members can only vote in a proceeding if they have attended all hearings. Since most ethics commission members have jobs and family crises, and take vacations, there are many absences. Therefore, quorum requirements should be as low as legally possible.

Here is language for a quorum and voting provision:

A minimum of four of the seven commission members constitutes a quorum. A vote of a majority of the commission members present at any meeting at which a quorum is present constitutes action by the commission, unless otherwise stated in the ethics code or these bylaws. Voting on all questions coming before the commission are to be by motion, with no second required.

In addition, it is valuable to have someone (staff or member) responsible for reminding members the day before and the day of a meeting, and asking each time whether members will be able to make the meeting, so that, if necessary, it can be rescheduled rather than the month skipped, as so often occurs.

g. Public Comment. It is important to remember that one of an ethics program's most important goals is to increase public participation in government by increasing the public's trust in government and its belief that an ordinary citizen's opinions are as important as those of more connected individuals. Therefore, an ethics commission should go beyond what is required to allow the public to participate in meetings.

The rules on public participation should be specified in an ethics commission's bylaws, in accordance with relevant open meeting laws. It should be expressly recognized in the bylaw provision that any rules on public comment (such as time limits or public comment periods) are minimal requirements, and that the ethics commission should provide as much opportunity for public comment as is consistent with available time and fairness to other members of the public.

Public comments should be requested at the beginning of a meeting, so that the public can be heard before matters are voted on. But public comments and questions should also be welcomed during the meeting, when the public comes to understand a matter better and to have more information upon which to base comments and questions.

To make it easier for members of the public to participate, it is best not to require individuals to sign up to speak in advance. After all, they may have unanticipated questions or things they would like to say after they hear a matter discussed.

To make it clear that the public is not being silenced for a particular ethics hearing, it is best to put in writing that public comments are not permitted during hearings. The public should be reminded that, during a hearing, it is the commission or a hearing panel of the commission that is representing the public, like a jury in a criminal trial, where there is also no other public participation. This statement is easier for the public to accept if commission members have been selected by community organizations rather than by officials under their jurisdiction.

h. Agendas. It is valuable to expressly state the process for drafting agendas as well as describing the content of agendas. Here is some language, based around San Diego's:

Agendas are to be prepared through the joint effort of the commission chair and the executive director at least a week before the meeting date. Before being filed as required by law and posted on the commission website, no less than three days before a regular meeting if possible, draft agendas should be sent to all commission members for comment. Agendas should contain a meaningful description of each item on the agenda, so as to alert the media, those involved in a matter, and those whose interests may be affected by the matter that he or she may have reason to attend the meeting or seek more information about the matter. Agendas should be e-mailed to parties involved in matters on the agenda, to the extent possible, as well as to all journalists who have requested to be on the commission's mailing list.

It is important that agendas be prepared as much in advance of a meeting as possible, so that those involved in matters, and citizens, have sufficient time to prepare for the meeting. It is, therefore, advisable that commission staff or chair draft an agenda a week and a half before a meeting, so that the final agenda can be posted and e-mailed at least three days, and preferably a week, before a meeting.

The Atlanta ethics board bylaws, for example, require that each draft agenda be sent to board members at least seven days in advance. The agendas for special or rescheduled meetings may not be able to be prepared so far in advance. Remember, it is always possible to make changes to an agenda and file, post, and e-mail the amended agenda. Holding it back till the last second due to a possible change is usually not the most responsible choice.

Ethics commissions should deal in their bylaws with the process by which items appear on an agenda. Generally, an ethics officer, executive director, or chair will prepare the agenda. Whoever does this should e-mail all members and staff well in advance with a draft agenda, asking for items they would like to add to the agenda or changes they would like to make. The commission should also recognize that officials as well as members of the public will sometimes ask for an item to be placed on an ethics commission agenda. The ethics officer or executive director should confer with the chair about including such items on the agenda.

The agendas of many bodies have a consent list, that is, a part of the agenda where routine matters are dealt with quickly, or all at once if someone makes such a motion. There is only discussion of an item on the consent list if someone asks for it (and then it is taken off the consent list, and placed as an additional agenda item). Although a consent list can save time for a very busy ethics commission, especially one that must approve every decision to dismiss or the like, it looks like the commission is trying to dispose of potentially controversial matters without discussion or even separately identifying them. Therefore, it is best not to have a consent list except, possibly, for commissions in large jurisdictions about a limited range of matters, or when time is otherwise truly at a minimum, so that the commission does not create the appearance that it is forcing matters through without discussion, public participation, or transparency.

i. Minutes. Open meeting laws rarely specify anything about minutes other than that they be kept and filed with the clerk's office. This is not sufficient for an ethics commission. An ethics commission's bylaws should specify that the minutes be placed on its website within three days after a meeting, and that the minutes do more than merely provide a bare outline of a meeting. Especially since most ethics commission meetings are not filmed, minutes should include summaries of member speeches, public comments, and statements by ethics commission staff and counsel. Someone should be able, from the minutes, to determine how and why an ethics commission reached its decisions. In addition to filing and placing on one's website, it is helpful to send minutes to reporters and bloggers who ask to be on the commission's mailing list.

It is difficult for an ethics commission member to participate and, at the same time, keep good minutes (especially of what he himself says). Therefore, it is best to have them kept by a staff member, if there is one, or by a knowledgeable legal assistant. Whoever

keeps the minutes should run them by the chair and secretary before they are filed and placed on the website.

An ethics commission cannot afford to ignore the fact that who writes and edits its minutes can determine how the commission's deliberations are presented to and, therefore, seen by the public, including by reporters and bloggers who did not attend or, even if they did attend, depend on the minutes for their quotations. Ignoring this fact, minutes are often limited and are approved with little thought (except, sometimes, spelling errors) by ethics commission members. The chair or secretary should regularly remind members about the importance of minutes, and recognize their obligation to prevent anyone from using the minutes to keep certain information or speeches secret, or be biased toward any group or view.

j. Committees. Committees are a good way to divide work among ethics commission members, especially when the commission has no staff. Ongoing committees are usually referred to as "standing committees"; special committees are referred to as "ad hoc committees." Possible committees include an investigatory committee and a hearing committee (which may be standing or ad hoc, and is usually called a "hearing panel") (see [the subsection on Separation of Roles](#)); a committee to consider recommendations for changes to the ethics code; a committee to prepare the annual report; a committee to review annual disclosure forms and their updates; a committee to draft advisory opinions; a committee to oversee training or the preparation of training materials; a committee to handle community outreach; and an ad hoc committee to review the qualifications of those applying for a position, such as ethics officer, executive director, outside counsel, or special investigator.

Committees should ordinarily be small, two to three members, who focus on a project and report to the commission. In some cases, it is best to just assign one member to focus on a particular job, for example, dealing with freedom of information requests or working with the city's information services department to keep the ethics program's website up to date.

Ethics commission committees are not about power, the way they are with legislative bodies. There should be no "committees of the whole." Committees should be formed only when they are useful. Committees should never be formed for the purpose of holding closed meetings. They should follow the same rules as the commission with respect

to open meetings, notice, and transparency, even if it is not clear from the law that they are required to.

Any committee that meets between ethics commission meetings should report to the commission at the following meeting. This requirement may be specified in the bylaws.

k. Compensation. Ethics commission member are generally not paid for attending meetings (or any other activities), but sometimes they are compensated for costs, such as copying, parking, or transportation. If so, this may be specified in the bylaws.

l. Removal for Failure to Attend. Sometimes, ethics commission members fail to attend meetings, for one of many reasons. Even if the reason is a good one, such as a long-term illness, members should be encouraged to resign if they cannot attend meetings for several months or a majority of meetings over a year, or even if they spend more than two months a year out of town (especially in the summer, when it can be hard to get a quorum). It is best if there is a rule, because otherwise it is very hard for commission members to ask for their colleague's resignation. And there should be a rule in the bylaws for removal, in case a member fails to resign or is unable to resign, even when asked. Here is language for this:

Any board member who fails to attend a majority of commission meetings and hearings during a one-year period must be asked to resign. If the member does not resign within a month after having been asked, he or she may be removed by a majority vote of the commission.

l. Dissenting Statements. Bylaws should expressly permit ethics commission members to make dissenting statements as part of any decision or report the commission makes. Here is language from Milwaukee's rules of procedure:

Any member may file a minority report dissenting in whole or part from a Board report, which shall become part of the file.

3. Officers

It is common for a board or commission to have four officers: chair, vice-chair, treasurer, and secretary. But if there is staff to handle the budget and taking of minutes, there is no need for a treasurer or secretary.

It is best not to assume that the duties of each position will be understood. Instead, they should be expressly stated in the bylaws. Here is sample language:

1. Officers. The officers of the commission are Chair, a Vice-Chair, Secretary, and Treasurer.

2. Chair. The Chair presides at all meetings of the commission and signs all contracts and other instruments on behalf of the commission, as authorized by the commission. The Chair sets policy and serves as the liaison to the media and to other departments, agencies, and committees. The Chair is responsible for filing and distributing agendas.

3. Vice-Chair. The Vice-Chair assume the chair in the case of absence or incapacity of the Chair, and performs the duties of chair until a new chair has been elected. If neither the Chair or Vice-Chair is present, those members present must elect a chair for that meeting.

4. Secretary. The Secretary maintains a record of the attendance of commission members, take minutes of all meetings of the commission, and acts as the contact between the commission and the city's information services department with respect to the ethics commission website and other matters. The Secretary is responsible for filing and distributing meeting minutes.

5. Treasurer. The Treasurer keeps accurate accounts of all sums due and all expenditures and distributions made, signs all checks on the ethics commission's accounts, and reports the financial condition of the commission at each regular meeting.

6. Election. At each Annual Meeting, the commission elects its officers from among its regular membership. Officers hold office for one year or until their successors are elected. If an officer resigns, the commission should elect a replacement at the following meeting. If the chair and vice-chair are absent from a meeting, even for only a portion, the commission must elect a temporary chair.

4. Staff Responsibilities and Oversight

Staff responsibilities are usually determined as a commission learns what each staff member does. They change as the number of staff, or each staff member's skills, change. For example, one executive director may also be general counsel, while a replacement may require separate counsel, either internal or external. Staff responsibilities should be handled in the form of job descriptions, which should be reviewed and, when necessary, updated at least annually, at the time when the ethics commission does its annual performance evaluation of its director or ethics officer (it may want to do a second performance evaluation during the year, especially if its director or ethics officer is relatively new to the job).

Staff oversight is something that is generally ignored until a problem arises. It is best to deal with it in a commission's bylaws. Oversight includes hiring, raises, promotions, and discipline. If there is only one staff member, the ethics commission should have full authority to hire, fire, and discipline her.

If there is more than one staff member, the director or ethics officer is generally given primary oversight over the other staff members with language like, "The ethics officer has the authority to hire and remove employees, as well as counsel, consultants, and other contractors, within constraints set forth by the Civil Service Commission, the Personnel Department, administrative regulations, and the ethics commission's budget."

5. Commission Conflicts and Oversight

Because an ethics commission is a quasi-judicial body, that is, one that makes decisions, and may penalize or recommend sanctions, regarding individuals, and because the conduct of its members and staff should be exemplary, the commission and its staff should be held to a higher standard than other local government officials and employees. To do this, it should have its own conflict provision that is more akin to judicial rules, except that judges are the sole determinants of whether they recuse themselves or not. The rule should be broader than for other officials and based on appearance of impropriety. This difference should be expressly stated in an ethics code or, if the legislative body has chosen not to deal with the issue, in the ethics program's regulations or bylaws. When it is not, ethics commission members generally believe the ordinary rules apply to them.

Government officials and employees who provide legal advice or other support services should not be considered "staff" for this purpose. However, the fact that the ethics commission may be placed in a conflicted position if an ethics complaint is filed against such

part-time helpers emphasizes how important it is for an ethics commission to have its own staff and to make as little use as possible of officials and employees under its jurisdiction.

Conflict situations are more likely when ethics commission members or their staff are appointed by officials under the ethics program's jurisdiction. Such people not only are more likely to be politically or commercially involved with the government or with officials, but the perception of their relationship to officials is greater, since they have an appointee-appointing authority relationship with the mayor and/or council. This relationship alone can undermine trust in those making decisions about the ethics situations of high-level officials and their appointees. Any other relationship, even a minor or indirect one, can be very damaging.

In a perfect world, an ethics commission member or staff member would be expected to deal responsibly with his own conflict situation, like a judge. However, in the real world, even those trained in government ethics often deal personally rather than professionally with their own conflict situations. For example, in 2012 the British Columbia conflict commissioner felt that he could be impartial in a matter involving his son's close associate, a high-level official in the provincial government, who had appointed the son to office. He saw it as a matter of integrity rather than as a matter of appearance. He soon came around, but even then defended his decision not to withdraw from two earlier matters involving the same official.

Therefore, members and staff should, like any official, have an independent, professional ethics adviser, so that they do not need to make such decisions on their own. It is best if commission staff are not put in the position of giving ethics advice to members who have the power to fire them. As for staff need for ethics advice, only in larger cities and counties is there more than one ethics adviser on staff, and even then, their relationship of supervisor and subordinate may introduce bias into the advice.

Therefore, it is best to anticipate the need for advice and establish a relationship with an ethics adviser in another city or county, or at the state level, a former or retired government ethics professional, or an attorney with special training and experience in government ethics. A mutual relationship with an active ethics adviser in another city or county would seem to be the best choice. Such a mutual relationship would also be useful when an ethics officer needs to brainstorm a difficult issue he is facing. More than one such mutual relationship might be useful, since different ethics officers have had to deal with different issues in the past, and may have different viewpoints to offer.

It may not be necessary to put this relationship in writing, but it would be valuable to require in writing that an ethics officer set up at least one such relationship, disclose it to the ethics commission and, if there is any question about the qualifications of the other ethics professional, have it approved by the ethics commission. It would also be valuable to ensure that ethics advice to an ethics commission member or staff member be made available to the public (1) so that it provides ongoing guidance and (2) so that the public knows that people involved in the ethics program are practicing what they preach.

When it comes to enforcement, an ethics commission and its staff should not be self-regulating. But they should also not be subject to the will of the local legislative body or mayor, as they sometimes are. Some ethics commission members are subject to removal by their appointing authority (mayor and/or council) for “gross misconduct,” but most ethics codes say nothing about ethics jurisdiction (for enforcement or advice) over commission members or staff beyond such removal language. Removal is rarely the appropriate sanction.

There are problems with allowing a mayor or local legislative body to have jurisdiction over an ethics commission’s members and staff with respect to their possible ethics violations. A mayor and local legislators are the people most likely to have had run-ins with an ethics commission, and therefore want to get even (or be seen as wanting to get even). These officials might also be seen as showing preferential treatment to their appointees.

Another problem occurs when an ethics commission makes a decision against a local legislator or in favor of a mayor, and local legislators argue that the commission is being influenced by the mayor, that is, engaging in ethical misconduct. This occurred in Suffolk County, New York, when in 2010 the county commission decided to investigate the ethics commission after the ethics commission found that the county executive did not have to file a county annual disclosure form (the ethics commission correctly interpreted a poorly written state statute). The county commission acted without a complaint or evidence of any ethical misconduct on the part of any ethics commission member. The investigation was a primarily political act. It is very damaging to an ethics program to be pulled into a political feud like this. It seriously chills the activities of an ethics commission when its members know that if it reaches a decision that a majority of local legislators might disapprove of, it might be investigated and the individuals’ reputations impugned.

Nor should the ethics commission enforce the ethics code against its staff, because its members have too close a relationship with staff to get sufficient distance to see conflict

situations clearly, either when the issue is advice or enforcement. On the other hand, an ethics commission may be so concerned with looking like it is not giving its staff preferential treatment, that it may too hard on a staff member.

The best way to ensure capable and neutral enforcement of the conflict situations of ethics commission members and staff is for them to make a formal exchange arrangement with another ethics commission, locally or at the state level (but not one with which it has a mutual advice or brainstorming relationship), to deal with any complaints filed against their members. An alternative is for a local ethics commission to give a state ethics commission jurisdiction over its members and staff. Either of these can be done without approval from the local legislative body if the ethics code says nothing about such jurisdiction, as is the norm. Procedures should be formalized in the rules of procedure or the bylaws.

Staff disciplinary as opposed to ethics matters should be handled by the ethics commission. However, in some situations, an ethics commission might not be sure whether a matter involves a disciplinary or ethics issue (or both). For example, Philadelphia's executive director told the city's ethics board that he had given confidential information about an ethics matter to a reporter. The ethics board treated this as an ethics issue when, in fact, it was a discipline issue, because there was no question of personal benefit from the information. The problem was that the rule was in the ethics code, not in the board's rules or bylaws. In such instances, another ethics commission, with more distance from the situation, could be very helpful in determining what sort of matter it was.

When an ethics commission member or staff member is a practicing lawyer or other professional, their activities and those of their firm often give rise to the appearance of a conflict. This occurs because professionals have a wide network of relationships, including, directly or indirectly, individually or through one's firm, with those who seek special benefits from the city government, as well as with government officials themselves, candidates, and major campaign contributors. In other words, legal practice can create a lot of conflict situations, including ones the member may not even know about. It is not good for an ethics commission member to be accused of dealing irresponsibly with a conflict, and have to insist she knew nothing about the relationship, when her lack of knowledge cannot be proved. This is one argument for limiting the number of practicing attorneys on an ethics commission, as well as for prohibiting ethics staff from practicing law on the side.

Here is language based on the Chicago ethics board's conflict of interest provision:

It shall be the policy of the Board of Ethics that no member or staff member may participate in the consideration of or vote on any matter if that matter: (1) concerns an individual or entity that has a direct or indirect business or professional relationship with him or her, or with his or her firm or employer; or (2) involves an individual or entity with whom the member has or expects to have significant dealings in a public or private capacity. Nor shall any member or staff member participate in the consideration of or vote on any matter if for any reason such participation or vote would cause the appearance of impropriety on the part of that member, staff member, or of the Board in general.

Note that this language is much more simple than lawyers and legislators ordinarily use. What is important is whether the individual has a relationship with anyone involved in the matter or, in this case, even expects to have significant dealings with anyone, something that is not asked of ordinary officials.

I'm not sure, however, whether it is enough to say merely "appearance of impropriety." It should be the standard, but it is a hard standard to enforce, and it can be applied unfairly. Who is to say whether participation would cause an appearance of impropriety (and to whom would it appear improper)? It is better to add a requirement to seek advice, which I have recommended for officials in general, but which should certainly be expected of ethics commission members and staff. If there is any question that participation might appear improper, a commission or staff member should withdraw from participation or seek binding advice from the commission's official ethics adviser.

This requirement not only ensures public trust in those who run the ethics program, but also takes the burden off the individual, who might very well withdraw when there is no need to, just to be sure. Unnecessary withdrawal can itself cause problems, such as losing a quorum or, where there is only one staff member to perform a function, hiring someone to fill the staff member's role in a matter. It is better that the ethics commission or staff member seek advice from an external ethics adviser.

Here is alternate conflict language. I have also added language to make it clear that conflicts need to be identified. A commission or staff member cannot merely announce that she is withdrawing from participation.

The standard for participation in a matter before the commission is whether a commission or staff member's conduct or relationship with someone involved in a matter might create a reasonable appearance of impropriety. If a commission or staff member has a direct or indirect relationship with anyone directly or indirectly

involved in a matter before the commission, or otherwise believes there is a possibility that his or her participation might create an appearance of impropriety, the member must either withdraw from participation in the matter or seek binding advice from the individual or office designated as the commission's external ethics officer. A commission or staff member's announcement of withdrawal from participation in a matter must include an identification of the basis for such withdrawal.

There is a possibility of ethics commission oversight that goes beyond the conflict situations of individual members of the commission. For example, investigations or audits can be done of ethics commissions. For example, in 2013 a state senator called for the state auditing office to audit the Palm Beach County ethics commission. Focusing on one ethics commission, without any specific allegations, raised the issue of whether this was done in retaliation for the commission's rejection of a job application by the senator's aide. There should be no such question involving personal matters relating to any such oversight request. However, when such an audit is requested, the ethics commission should not be involved in making accusations against anyone involved in the request. It should leave this to other officials or to good government organizations. Otherwise, it might look like the ethics commission has something to hide.

Another way to provide ethics commission oversight which has been employed in recent years is an investigation by a grand jury. In 2012, both the San Francisco and the Suffolk County, New York ethics commissions were investigated by grand juries, civil and criminal respectively. In San Francisco, the decision was made by a standing civil grand jury, which should guarantee political neutrality. There had been a lot of complaints about the ethics commission, which appeared to be denied completely by the commission and its staff. In Suffolk County, a criminal grand jury, presumably called by a prosecutor (possibly for political reasons), was focused on the county executive, and the ethics commission was included because its members were chosen by the county executive, and there were allegations that it was acting on the county executive's behalf. Yet another reason for officials not to select ethics commission members. The grand jury did have some valuable recommendations for improving the county's ethics program.

6. Further Definitions

The definitions section of an ethics code is usually limited to the most basic terms, such as “financial benefit,” “official or employee,” and “outside employer or business.” Regulations should be used to provide further definitions, in order to provide better guidance.

Regulations can also include examples that more concretely show what the definitions mean. Nothing is more valuable than examples. It is important, however, not to be too stingy with them, because if there are only one or two examples, it is natural for people to wrongly extrapolate them to their situation. See [San Francisco’s conflict of interest regulations](#), whose definitions section (at the end) has multiple examples (in fact, there are examples throughout the regulations).

It is also important to try to have an equal number of examples that fit the definition and that do not. If too many of the examples are of exceptions to requirements or prohibitions, it will appear that the definitions are intended to limit the ethics code’s impact on officials rather than to make the ethics code more concrete and, thereby, easier to understand.

It is equally important not to use definitions to expand the scope of an ethics code in a way that will catch officials unawares and, thereby, be unfair to them. There should be no rules in a definitions. The goal, as with an ethics code’s definition section, should always be guidance.

See [the chapter on definitions](#).

I. Checklist of Ethics Commission Activities

Many ethics commissions are nearly inactive. They rarely if ever hold meetings, because they are waiting passively for complaints to be filed and requests for advisory opinions to be made (sometimes they also have trouble getting a quorum; sometimes this is a result of their inactivity or their passivity when officials fail to fill positions on the commission). They do not schedule meetings, or hold ones already scheduled, until they receive a complaint or a request. The main reason for this is that ethics commission members don’t know any better. That is the reason for this section.

But ethics commission members rarely plead ignorance. The most common rationalization for not doing more, for not creating a website, setting up a training program, or improving an ethics program is that no one uses or complains about the current program, no complaints are filed, few advisory opinions are sought. Therefore,

there must not be any ethics problems, everything's good, nothing needs to be improved, nothing needs to happen.

There are two reasons people make no use of an ethics program. One, the ethics program is passive. No one knows about it, no one understands it, and therefore no one lifts a finger. After all, if the ethics commission doesn't care enough to meet, create a website, set up a training program, send around newsletters, why should other officials get involved?

The second reason is that the ethics program has a trust problem. The members of an ethics commission have been selected by the very people they're supposed to be keeping an eye on. The ethics commission has no teeth, and is completely dependent on the good will of the very people they're supposed to be keeping an eye on. In short, without trust, who in his right mind would make use of an ethics commission? So the few complaints that are filed are political, which further undermines trust in the ethics program. And officials get their advice from the city or county attorney's office.

Passivity is not a responsible way to run a government ethics program. With this book (and the *Nutshell* version), ignorance is no longer an excuse. There is no reason for an ethics commission not to meet regularly. There is a great deal that an ethics commission can do. Below is a checklist of the activities that ethics commissions can and should be participating in.

1. **Training.** Create or improve ethics training, for officials, for ethics commission members, and for those who do business with the government. This may include (1) working with nearby ethics commissions, a local public administration program, or a municipal association to create or expand ethics training; (2) creating or getting permission to use online training materials; (3) drafting regular (say, quarterly) newsletters, to keep ethics issues in the minds of officials and employees; (4) sending ethics commission members to a good training program, or having a trainer come to the city or county to train the members and to train local trainers, as well; and (5) discussing sections of this book together, as well as selecting advisory opinions from other jurisdictions to discuss. When ethics commissions do not have staff, as most do not, meetings without any important agenda item can be used for self-educational purposes. Think of an ethics commission as a government ethics book group.

2. **Advice.** Just because there are no requests for advisory opinions doesn't mean that an ethics commission cannot provide guidance on ethics matters. General advisory opinions, sometimes called Advisory Alerts or Guidelines, are useful ways to make ethics provisions more clear and concrete (see [the discussion of general advisory opinions](#)). Ethics commission members can do things to get officials accustomed to seeking ethics advice from them. For example, they can ask high-level officials to publicly seek ethics advice; they can hold a public meeting, asking officials and citizens to ask about ethics matters; they can include in the newsletter advice from nearby cities and counties, so officials can learn to see what sort of situations lead officials to seek advice. No ethics commission should sit on its hands waiting for officials to come to them, if officials in its city or county aren't yet accustomed to asking for advice.

3. **Ethics Code Recommendations.** At least once a year, an ethics commission should hold a discussion about the quality of the ethics program and the ways in which it might be improved. This discussion need not be limited to ethics provisions, nor need it be limited to one meeting. It's best if one or two issues are dealt with at each meeting over a period of months. The commission may also consider such topics as the ethics commission's independence, its authority to initiate investigations and file complaints, an extension of jurisdiction to cover contractors and others, staff, attorney, and budgetary needs, cooperation or consolidation with nearby ethics commissions, relations with law enforcement agencies, annual and applicant disclosure, procurement policies, the establishment of a hotline, legal fees, attempts by officials to undermine the ethics program, etc. The results of these discussions should be made known to the local legislative body in the form of recommendations, including recommended changes to the ethics code. A good goal is make formal recommendations on an annual basis, often as part of an annual report. But it is valuable to make recommendations any time there is discussion of ethics reform in the legislative body or in the community.

4. **Annual Report.** Many ethics codes require that an ethics commission draft an annual report of its activities, but even if one is not required, it is a good idea both for the local government and for the ethics commission itself. It is a good opportunity to consider what the commission has been doing, and what it is has not been doing. See [the section on annual reports](#).

5. **Community Outreach.** Citizens and the press usually have a limited understanding of government ethics and what an ethics commission and an ethics program do. An ethics commission can send speakers to community groups, consider how to better educate the press and bloggers on ethics issues, and improve the public aspects of its website (see [the section on ethics program websites](#) and [the section on public relations](#)).

6. **Website.** Creating and maintaining a good website is one of the best uses of an ethics commission's time. An ethics commission's website reflects its importance and value to the community and to government officials and employees. It is also the best and least expensive way to educate the public and government officials and employees about government ethics. No website, or a website that only provides the names of the ethics commission members, means a lost opportunity. See [the section on websites](#) for ideas on what can be done.

7. **Rules of Procedure, Bylaws, and Regulations.** If an ethics commission lacks bylaws, regulations, and rules of procedure, especially those relating to enforcement procedures, they should be a high priority. They should also be reviewed annually, to see whether changes in the program, changes to state or local laws, and the commission's own learning experiences require changes to these important documents. Entire areas may be added, such as settlement procedures, the consideration of situational forces in investigations and enforcement procedures (including the addition of respondents complicit in violations), and confidentiality.

8. **Awards.** Ethics commissions are not restricted to enforcing ethics laws in a negative sense. They may also give awards and other sorts of recognition to those who encourage open discussion of ethics issues, report ethical misconduct, or choose not to indulge in it themselves when those around them do. And they can do this on an ongoing basis, just like they give advice and deal with tips and complaints. See [the awards section](#).

9. **Current Events.** If an ethics commission is allowed to initiate investigations, it will have to discuss current events in its city or county. Its members should understand what is going on, read the local newspapers, and have access to tips either through a hotline or informally made via phone, e-mail, or in person. Some of their discussions of current events, especially those based on tips, will be confidential, done in executive session. But

with respect to public information, such as newspaper articles and blog posts, the conversations should be public. Such discussions not only lead to possible investigations, but also act as training exercises, helping members to better understand government ethics and the customs of their particular government. Such discussions also help create a working team of individuals, which will be helpful when there are difficult advisory opinions and ethics enforcement actions to deal with. It also deters misconduct if officials know the ethics commission is regularly discussing their handling of conflict situations, even when no complaint has been filed.

10. Discussion of Ethics Environment. Even the weakest ethics commission in the worst ethics environment, where few officials ever seek advice and no one bothers to file an ethics complaint, can do something very important. It can hold public discussions and hearings on various aspects of the ethics environment, such as unwritten rules, reward systems, the discretion given to individual elected officials, demands of loyalty, secrecy, patronage, instances of intimidation of employees and disrespect of members of the public, and partisan rancor. Bringing these topics into the public eye can do a great deal to make it clear how much the government organization needs to do to change its environment so that it operates for the public interest rather than the interest of its officials. [See below](#) for more on this topic.

J. Going Beyond the Call of Duty

Some ethics codes limit what an ethics commissions is required to do. Sometimes ethics commissions are permitted only to investigate complaints and make recommendations to the local legislative body (although the best practice is to allow ethics commissions to initiate their own investigations and file their own complaints). When government ethics issues arise outside of formal complaints, no one else in town will likely know as much about government ethics as the ethics commission, or feel obligated to deal with the issue. Therefore, ethics commission members may be the only people in a position to act. But what can a limited ethics commission do?

Generally, ethics codes do not place limits on an ethics commission, but are only limited, providing little guidance for the ethics commission. When they do place limits, they usually apply only to the commission's enforcement role, because that is what officials fear most, and what they think government ethics is all about. Ethics commissions are

usually free to discuss, investigate, hold public hearings and discussions, and make recommendations on any issue or situation they choose to. They can act on the basis of a hotline call, newspaper articles and blog posts, or a complaint that had to be dismissed because it did not state an ethics code violation, but did describe possible ethical misconduct.

And even where ethics commissions may initiate their own investigations and complaints, the rules usually apply only to the specific conduct of a specific individual. That is, there is nothing that says ethics commissions may (or may not) investigate matters where it is not clear who is responsible for a situation that creates an appearance of impropriety. This does not, however, mean that an ethics officer or commission can't do anything.

After a hotline call was received by the Jacksonville ethics officer concerning a huge landfill contract that was not being bid out, she and the ethics commission made the issue public and, thereby, prevented the no-bid contract from going through, even though it was legal. Making issues public and getting citizens and good government groups involved cannot only prevent immediate misconduct, but also lead to changes in laws that make such conduct not only unethical, but also illegal, that is, formally within the ethics program's jurisdiction.

If it believes that illegal ethical misconduct is going on, but is not permitted to initiate its own investigation, an ethics commission can start its own investigation by having one of its members file a complaint. If there are patterns of conduct, it can file the complaint not against one or two council members, but against the whole lot of them, arguing that complicity and inaction are forms of ethics violation, even if the ethics code does not consider them violations.

If no one is seeking ethics advice and direct attempts to solicit such advice do not work, the ethics commission can give officials advice they didn't ask for and, thereby, shame them into asking for advice in the future. If members of a particular board are participating with conflicts, an ethics commission member can attend board meetings and rise in protest whenever she sees such participation occur.

Taking the initiative, even when an ethics commission has no teeth and no legal power to take initiative, can be very effective very quickly. Public discussions, alliances with community and good government groups, can also make an important difference. When the commission has gained the attention of the news media, its recommendations to

the legislative body will be much harder to ignore. The news media love it when watchdogs bark in such a way that it sinks in.

1. Failure to Follow Formal Processes

Much misconduct that cannot ordinarily be enforced by ethics commissions involves the failure of officials and employees to follow formal processes. Usually, the illegality of the failure cannot be enforced by anyone but the local legislative body, few people recognize or understand the failure, and yet the failure to follow formal processes effectively replaces legal rules with unwritten rules that lead to ethical misconduct.

Formal processes are an overlooked aspect of government ethics, largely because they don't fit easily into any particular ethics provision, even if the failure to follow formal processes contributes to many ethics violations. Failing to set up or follow formal processes, and exploiting loopholes in these processes, are principal ways that officials use their office to benefit themselves and others. This is true especially of the hiring, grant-making, procurement, land use, and land sale and acquisition processes.

For instance, laws that govern the bidding out of contracts are rarely under an ethics commission's jurisdiction. But the failure to bid out contracts and the misuse of specifications to limit who can get a contract are principal means of favoring family members and business associates. These acts are also central to both bribery and kickbacks. Therefore, if an ethics commission sees that contracts are not being properly bid out and no one is doing anything about it, the commission has an obligation, if not a legal duty, to discuss the matter and speak out about it.

Government land sales and acquisitions is another area where formal processes are often ignored, leading to ethical misconduct. Problematic land acquisition deals like those in Gwinnett County, near Atlanta, could be discussed by an ethics commission. As it turned out, a grand jury was called to investigate these deals, which were supposedly made for the creation of parks, but the parks were never created. The grand jury interviewed county officials about the formal land acquisition process and found that none of five land deals followed this process. What is especially troubling is the grand jury's finding that "No present or past commissioner who testified before the Grand Jury displayed any familiarity or understanding of this process."

It isn't that the officials took advantage of loopholes, bullied employees, or schemed to get around the land acquisition process, as so often occurs. They simply ignored the process as if it didn't exist, as if they had no obligation to learn the process. Instead, they

acquired the land the way they wanted to do it. Instead of following the rules, they acted to benefit their families and friends, and their colleagues' families, as well. After all, what is important to those who follow unwritten rules is not the public, but the mutual obligations among officials.

Informal customs override formal rules in many cities and counties. The particular custom in Gwinnett County was referred to as the "custom of district courtesy," which provided that no land acquisition matter would be put on the agenda for review by the board of commissioners unless staff received the approval of the commissioner for the district in which the land was located. Many local governments, including Dallas and Prince George's County, Maryland, have had the same custom. Ethics commissions can discuss these informal customs and recommend ways to end them.

Why should it matter that there are customs like this? Besides flying in the face of the rule of law, according to the grand jury, this custom cost Gwinnett County taxpayers \$3.4 million for the five land deals alone (there were apparently many other such land deals). And just imagine where all that money went, that is, what fueled those informal custom. And imagine how much the discovery of how the public was plundered by its officials undermined the public's trust in their county government. Then think how much better things would have been if the county had had an ethics commission that stopped the land acquisitions early on, brought the "custom of district courtesy" to an end, and showed the public that the ethics program worked to protect them.

2. Institutional Corruption

The failure to follow formal processes is at the heart of institutional corruption. This is a term I use throughout the book, and it needs defining. Dennis F. Thompson provides what I think is the best definition in his book [*Ethics in Congress*](#) (Brookings Inst. Press, 1995):

Legislative corruption is institutional in so far as the gain a [legislator] receives is political rather than personal, the service the [legislator] provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the legislature or the democratic process.

What this complex definition needs is a good example. A council member intervenes in a zoning board matter on behalf of a large campaign contributor. Helping a constituent is one of a council member's roles and, unless the city or county has a public

financing program, so is raising campaign contributions. The only individual corruption possible here would be an express promise that the council member would intervene if given a large contribution. But this would be bribery, a crime that is almost impossible to prove unless someone's phone is tapped. In any event, bribery is very hard to prove, and it is not something government ethics deals with.

Looked at through the above definition of institutional corruption, the situation looks very different. The council member's gain is clearly political, not personal. That's the easy part. But is the service procedurally improper? In other words, is it one of a council member's roles to intervene in a zoning board matter? Is this a formal process based in law? No, it is not. It is an unwritten rule that council members intervene like this.

Finally, it is arguable that the connection between this improper service and the proper political gain would make it appear to the public, if it knew, that if you have the money and the moxie, you can get a council member to intervene in a proceeding where the council has no role. This appearance damages the public's view of both the council and the local government's processes.

In some municipalities, zoning board members, and others, expect pressure from council members. Within the government, it is not considered something inappropriate, just politics, the way things are done, the deals that have to be made. This is, in fact, a principal feature of much institutional corruption: inside the system, it isn't seen as corruption. It isn't even questioned. It's simply done.

And yet this sort of conduct is much like acts of individual corruption, only more pervasive. It involves the abuse of public office for the purpose of providing preferential treatment. It involves secrecy. It requires the tacit acceptance of others. But unlike most individual corruption, everyone does it. This makes it worse, not better.

Too much ethics reform focuses only on the ethics code and only on sanctions against bad apples. To prevent ethical misconduct, it is important to also bring reform to the kind of "district courtesy" discussed in the previous section;" to council member expense allowances and other sorts of slush funds; to the use of expeditors; to the provision of constituent services as a way to benefit large campaign contributors; and to the processes involved in procurement, land use, hiring, grant-making, and business licensing. It is at least as important to clean out the barrel as it is to deal with the bad apples.

3. Going Beyond One's Jurisdiction

Although it is valuable for an ethics commission to uncover ethical misconduct such as this, it is important that it does not start enforcement proceedings that go beyond its areas of jurisdiction. This shows a lack of understanding of what government ethics consists of, and it creates confusion among officials and the public that can be very damaging to an ethics program's support and credibility.

For example, an ethics commission should not get involved with a case involving an official caught taking illegal drugs. Even though illegal, this is a personal matter (or, if the drugs were taken during office hours, a personnel matter), not a conflict matter. Ditto for an official who tells lies or who verbally (or, for that matter, physically) attacks his colleagues. It is only when an official abuses his position to benefit himself or someone else that it becomes a government ethics matter. Institutional corruption, for example, is such an abuse of position. Doing drugs, having an affair, getting angry is not.

If an official does not act through the proper channels, for example, by giving orders to an employee over whom he has no direct authority, this is an abuse of position, but it is a matter that should be dealt with by the official's appointing authority or, if it is done by a local legislator, by the legislative body. If this kind of interference becomes a pattern, it is something that the ethics commission may want to discuss. But it is not something it should allow to go forward in an enforcement proceeding.

4. Job Questionnaires

It's never too early for disclosure. It is easier, and better for the public trust, to deal with possible conflicts before they become a reality. One way to do this is with job questionnaires, which require disclosure to the appointing or hiring authority, so that possible conflicts, and the ways of dealing with them responsibly, can be discussed as part of the hiring process and, in the case of ongoing conflicts, the applicant can be turned down on this basis. Although it goes way beyond the disclosure that any local government would require, much can be learned from the [Obama Administration questionnaire](#) for job applicants.

There is no reason why an ethics commission or ethics officer could not work with a mayor or city manager, and/or the human resources department, to draft conflict-related questions and to work out a process to advise job applicants and train hiring authorities regarding the responsible way to handle conflicts that are disclosed on job questionnaires.

When prospective employees and officials are not asked about their potential conflicts, what you have is a don't ask-don't tell approach. As a television military analyst

said about the problem of analysts like him working for military contractors and having their writing vetted by the Pentagon, “The worst conflict of interest was no interest.” The networks just didn’t want to know.

If you don’t ask, that means you chose not to act responsibly from the start. You are effectively telling people with conflicts that it is okay to keep them to yourself, that their special relationships are private information they are permitted to keep hidden even though they will undermine the public trust when they come out. An ethics commission should try to get officials to want to know, and to let newcomers know that they are expected to be responsible from the start.

5. An Ethics Commission with Lips?

It’s important that ethics commissions have “teeth,” that is, enforcement powers. But what about lips?

One of the unfortunate aspects of government ethics programs is that, while ethics commissions are usually given the authority to penalize those who violate the ethics code, they are not expressly given the authority to reward those who withstand the pressures placed on them in order to report ethical misconduct or not indulge in it themselves. Perhaps ethics commissions should be given “lips” with which to give a metaphorical smooch to those with the courage to stand up to intimidation, resist temptation, or recognize that their loyalty is to the public. A metaphorical smooch would also be in order for those who quickly admit to their misconduct and help the ethics commission, and the public, understand the origins of such misconduct in the unwritten rules of the local government’s ethics environment. For more on this, see [the awards section](#) in the Enforcement chapter.

An Administration with Lips

Ethics commissions are not the only part of a local government that should reward officials and employees for reporting and admitting ethical misconduct. Government leaders, both elected and administrative, should also do this. They should reward public servants for raising ethics issues at meetings and for dealing responsibly with their conflicts. Jack Welch, former CEO of General Electric, once publicly praised a manager who had failed to reach his sales targets because he refused to pay a bribe to win a contract to build engines for a foreign airline. How often does a press release like this come from a mayor's or city

manager's office? And how often does one come from an ethics commission or ethics officer?

Rewards by officials can take the form of raises and promotions based at least in part on ethics-related behavior, annual departmental and agency awards, and recognition by administrators and boards of special service. No incentive is better than public praise and recognition, and nothing sends a clearer message about an administration's values and goals.

X. Enforcement

Many people seem to think that government ethics is all about enforcing an ethics code, fining officials who act unethically or kicking them out of office. What else could it be about? Most of an ethics code consists of enforceable provisions, enforcement procedures, and sanctions.

The fact is that, in a well-designed and -managed government ethics program, there should be little enforcement. That is, if officials are trained and encouraged to discuss ethics issues and seek ethics advice, the three types of disclosure are required, and leaders lead by example, the few complaints that are filed should be dismissed or quickly settled.

Enforcement may be what officials worry about and what most articles and blog posts are about, but it isn't what government ethics is really about. Prevention is far more important. It's in the quiet area of prevention that the public trust is truly earned. In addition, this is where a government ethics program saves the community a great deal of money with respect to procurement, development projects, land sales and acquisitions, and grants.

It is enforcement's minor role in a government ethics program that causes this chapter follows chapters on training, advice, disclosure, and administration. It does happen to be the longest chapter, but only because there are a lot of stages to an ethics proceeding (like any proceeding) and a lot of procedural issues to consider. This is also the area where clever officials can make an ethics commission toothless in a wide variety of ways. This chapter looks at those ways, and explains how to prevent them.

This chapter also seeks to show that, although its enforcement authority may be limited, an ethics commission can make a big difference with respect to pervasive ethical misconduct in its government. For example, if it becomes clear that first responders are recommending towing companies, and the sheriff's office refuses to do anything about the problem, an ethics commission should recognize that this is a government ethics issue and hold a discussion or public hearing on the matter to try to find a way to prevent this misconduct from continuing. It can make recommendations or discuss the matter with other agencies in order to ensure enforcement, even where it cannot enforce itself.

It's worth noting up front that ethics proceedings can be problematic. They can be costly, they can undermine the public trust through the headlines that accompany them and

through dismissals by an ethics commission whose members appear to the public to be chosen to represent politicians rather than the community. Proceedings can also cause high-level officials to seek clever ways of preventing ethics commissions from acting, everything from failing to replace members to filing expensive suits against the ethics commission. Next to ignorance, officials' fear of ethics proceedings against them is the highest obstacle to the creation and preservation of good ethics programs.

It is due to these problems that it is so important to emphasize prevention, provide for clear settlement procedures (most ethics proceedings should be quickly dismissed or settled), and make an ethics commission as independent as possible. It is also valuable to make the process as unlike the criminal process as possible. Ethics proceedings are administrative in nature and rarely include anything like a trial. They should encompass not only those accused of ethics violations, but also those colleagues and businesses seeking special benefits from the government that were involved in the conduct in question.

It's hard to break out of the criminal enforcement mindset and see ethics violations not as crimes, but rather as failures to deal responsibly with conflict situations and failures to fulfill an official's fiduciary duties. It's worth considering creative ways of lessening the appearance of a criminal proceeding (for the sake of both officials and the public). For example, instead of filing a "complaint" (like a criminal complaint), Chicago asks people to file a "request for an investigation," and Boise asks people to file an "inquiry." There is no reason to call anyone involved in an ethics proceeding a "prosecutor." Miami's name for the attorney who argues cases concerning respondents is a good one: "Advocate." This is the term I use in this book. In an ethics proceeding, there are no judges, although sometimes there are hearing officers. There is no jury; there is a sitting ethics commission or a hearing committee of the ethics commission. There is no trial, just "hearings." This is why Philadelphia, for one, refers to them as "Administrative Enforcement Proceedings."

I use the term "complaint" in this book only because it is the term used by the great majority of jurisdictions. But it is a criminal term. If I were creating a new ethics program, I would use a term such as "report" as a short form for a document that reports the mishandling of a conflict situation. This better describes what is really involved, and it reflects the great difference between an ethics proceeding and a criminal proceeding.

This chapter uses the common language of local government ethics programs, much of which is good. But the more criminal-oriented language is not set in rock. It's important to recognize that, when one uses the language of criminal enforcement, not only is one misrepresenting what government ethics is. One is also making it more likely that officials

will fight against the ethics program, and that the press and public will see ethics proceedings as no different from fraud and bribery trials. This creates a vicious circle of headlines, fear, anger, and retribution that can destroy an ethics program.

A. Filing Complaints

1. Who Can File a Complaint

Considering that increasing citizen participation is one of the principal goals of ethics programs, one would think that anyone should be allowed to file an ethics complaint. But some ethics codes only allow local government officials and employees to file ethics complaints. Why? It can be frightening to officials that anyone can file a complaint against them. One Broward County commissioner asked in a discussion about a draft ethics code, “It can be a homeless person? It can be a person who is not well?” Imagine drafting a provision that excluded the homeless and the mentally ill. This is a sign of panic at the idea of the public having the power to raise the possibility that a local government official engaged in ethical misconduct.

The fear of the unknown is powerful. You can see how powerful it is when someone is more afraid of an unknown citizen than of a political rival who has a lawyer draft a foolproof complaint.

The great majority of ethics codes do follow the best practice of allowing anyone to file a complaint, usually not even limiting this to city or county citizens.

But what about entities? Many individuals are afraid or lack the resources to file their own complaint. Some individuals are afraid to stick their neck out, or are afraid of the effect on their jobs of filing an ethics complaint, especially if they work for the government or for an entity that does business with the government (and these are the people most likely to know about official misconduct). They might also be afraid that the official will file a suit against them, or otherwise retaliate. In most cities and counties, government employees do not have the choice of calling a hotline and leaving an anonymous tip.

It is unfortunately all too common for those accused in an ethics complaint, known as “respondents,” especially those with deep pockets, to file libel and other kinds of suits against individuals who file ethics complaints. It doesn't matter if the suit has any validity; it harms the complainant and scares away future complainants (see [the section below on SLAPP suits](#)). Filing as a group, rather than an individual, can make this less likely to happen, and give the complaint more legitimacy as well.

Allowing entities to file a complaint is especially intended for civic organizations and other citizen groups. It also allows political parties to file complaints, but where entities are not allowed to file, a party chair will usually file on behalf of the party, so there is little difference.

Like anything, allowing entities to file can lead to abuse, for example, by having a company file so that its owner's name is not on the complaint. But all in all, it is better to allow entities to file complaints. Few local governments expressly allow this, but many do not place any limits on who can file. Here is the City Ethics Model Code language, which makes it clear who can file:

Upon receipt of a complaint on a form prepared by the Ethics Commission pursuant to §208.2, which any person or entity may file . . .

2. Sworn Complaints

It is common to require that complaints be sworn. This means that a sentence appears above the signature line (or, if online, a check box) stating that the complainant swears that the facts stated in the complaint are true to the best of his or her knowledge. This seems very reasonable, but there are two problems with this.

One is that an entity's representative will often not be able to swear to the facts stated in a complaint, at least based on her personal knowledge, so the requirement to swear to facts can prevent entities from filing complaints.

Some ethics codes, for example that in Palm Beach County, go so far as to require that all information be "based substantially on the personal knowledge of the complainant." This is very restricting, especially in jurisdictions where the ethics commission cannot investigate a matter on its own initiative, based on a tip. This restriction means that complainants cannot depend on second-hand information, including investigations by reporters. Often an investigative report in a newspaper confirms a government employee's suspicions and gives her the confidence to file a complaint. A complainant cannot be expected to then do her own investigation to confirm her suspicions and what was reported. All that is required is that the complainant believes she has enough information to seek an investigation by the ethics commission. The ethics commission can decide for itself whether there is sufficient evidence to go to a public hearing.

A requirement of personal knowledge also limits who can file a complaint. In fact, those who are most afraid of retaliation will be, in many cases, the only ones who could file

a complaint based on personal knowledge. This seriously decreases the possibility that ethical misconduct will be reported, especially when an ethics commission lacks the authority to initiate an investigation without personal knowledge. Investigations are supposed to be done by the ethics program, not by citizens.

For example, when the chair of Kentucky Common Cause filed a complaint against a Louisville council member based on a *Courier-Journal* investigative report, the council member's attorney raised the personal knowledge issue, accusing Common Cause of being "nothing more than a conduit or vehicle for the claims of *The Courier-Journal*." Newspapers, however, do not generally file ethics complaints. Like inspectors general, their role is to investigate, not to enforce. The one exception is freedom of information, an area where the press has a special interest. Otherwise, is the role of citizens to file ethics complaints.

The complainant could be asked to make it clear in the complaint which information came from a second-hand source, but even if the complaint form told the complainant to make the origin of his evidence clear, many people would not do this well or accurately. This would leave them open to libel suits, or the complaint open to dismissal on the grounds of saying one has personal knowledge when this isn't true.

The second problem with requiring a complaint to be sworn is that, if it turns out that one or more pieces of information is false, the complainant can be sued for damages or criminal charges can be made against him for perjury. The issue in court would be whether the complainant knew or had reason to know that the fact was false. This determination is outside the control of the complainant. That is, even if the complainant did not know or feel she had reason to know that part of her statement was false, she could be determined to have committed perjury.

Since uncertainty is common and most people's communication skills are limited, the thought that you might be sued or convicted of perjury if you are wrong about a fact, or if your wording is such that you appear to be stating something you did not intend to state, can prevent a lot of people from filing complaints.

A third problem that arises with a sworn complaint is that when an entity, such as Common Cause, chooses to file a complaint, the individual representing the entity must swear to personal knowledge that she is likely not to have. This makes it hard for good government organizations to file an ethics complaint. Entities should be encouraged to file complaints. They are in a much better position than anyone outside a government organization to file an ethics complaint. They pay attention to what is going on, understand and care about what is happening, and can act with more courage, expertise, and respect

than an individual. They also can better handle the expense of drafting an ethics complaint and have the expertise to do it in a way that will not be dismissed due to the failure to follow rules or consider complex issues such as jurisdiction and commission authority. What they do not have is personal knowledge, and it is difficult for them to swear to every word in their complaints.

Some ethics codes go beyond requiring that complaints be sworn or based on personal knowledge. They expressly contain sanctions for those who make knowingly false allegations in their complaints. In fact, there are some ethics codes that penalize complainants for false, or even “frivolous” complaints, but do not provide for penalizing officials who violate the code. Others provide for larger penalties against complainants than against officials, even though officials have far greater obligations to the public than do citizens filing a complaint. Officials who defend their own false statements by referring to First Amendment free speech, do not make the same reference when they penalize citizens for making false statements, even though the Bill of Rights is primarily intended to protect citizens from officials, not officials from citizens.

An especially egregious example is a provision added to Chicago’s ethics code in August 2012. The beginning of the provision is unusual, but desirable. It makes it a violation to “intentionally obstruct or interfere with an investigation.” This is effectively a requirement of cooperation (see [the section on this](#)), but a positive requirement is preferable.

Then the provision suddenly shifts toward making it a violation to “intentionally make a false, frivolous, or bad faith allegation.” And the fine is from \$500 to \$5,000, which is larger than for violations of many other ethics provisions. How can anyone feel safe filing a complaint that might be termed “frivolous” or in “bad faith,” terms that are not even defined?

Officials depend on the reluctance of employees, other officials, and those doing business with the government to file an ethics complaint. Many would like ordinary citizens to be equally reluctant. The officials who pass ethics codes with significant penalties for false or “frivolous” statements in complaints, and relatively small penalties for ethics violations (often nothing more than a reprimand), are effectively saying they are far more concerned about themselves than about the public. This approach to enforcement sends the message that officials are not really interested in there being government ethics enforcement, and this undermines the public’s trust.

3. Complaint Forms

It is helpful for an ethics commission to provide an ethics complaint form on its website. A complaint form should not only contain the appropriate format, language, and instructions, but also guidance on the most important issues facing the complainant.

The best combination of complaint form and guidance I have found online is that [provided by the California Fair Political Practices Commission](#). Its form can be filled out online, but needs to be printed out, signed, and mailed in (this is unnecessary; checking a box that says that your statements are true should be sufficient, if this is required by a jurisdiction (see the previous section for arguments against this)). The form includes information about possible witnesses, which is helpful for investigators, but is usually omitted from complaint forms. The page of guidance makes a good case for calling the commission before filing a complaint. This makes it much more likely that people will not file complaints that do not allege an ethics violation, which means fewer dismissals. A lot of dismissals can make it look like an ethics commission is lax, when the real problem is that most complainants do not understand government ethics. The page also provides information about the commission's hotline, for those who may prefer to make a tip rather than file a complaint. It is only fair to let complainants know what they are getting into, and what alternatives there are.

[Rhode Island's page of guidance](#) is even better, including information on the entire enforcement process, including settlements. The ethics commission, clearly in an attempt to prevent a rush to file a complaint without thinking everything through, requires that the complaint form be obtained from the commission, rather than placing the form on its website. The commission highly recommends a call or visit to the commission before filing a complaint.

Information on filing a complaint is among the most important enforcement information that appears on an ethics commission's website. It should be as complete and clear as possible. Most of the language I've found is too legalistic, and terms like "sworn complaint" are usually not defined. Ethics staff should put themselves in the shoes of an ordinary government employee or citizen who has no lawyer, and give that person all the information he needs to make an educated decision whether, how, and when to file a complaint or a tip, including whether to do it anonymously, whether to do it alone, steps that might be taken before filing the complaint, what to do about officials who may be guilty of misconduct, but not ethical misconduct, and the like.

If a jurisdiction allows anonymous complaints or tips made through a hotline, this should be made very clear in the information on filing a complaint. Otherwise, the existence of a complaint form suggests that this is the only way information or allegations can be presented to the ethics commission.

One thing to be careful about, with complaint forms and in any kind of summary of ethics rules, is misrepresenting them. For example, in Chula Vista, California, the complaint form said that “Complaints must be filed within 60 days of the alleged violation.” If true, this would be a serious problem, because rarely are violations discovered so quickly, and even then, it takes time to try other ways of dealing with them or to get up the nerve, and sometimes hire counsel, to draft the complaint. But it was not true. The law actually read, “All alleged violations must be submitted within 60 days of occurrence or when it should have been discovered with the exercise of reasonable diligence.”

4. Ethics Commission Complaints

[As I argue at length in the next chapter](#), an ethics commission cannot effectively enforce an ethics code unless it has the power to initiate investigations and file its own complaints. Next to the selection of ethics commission members by community organizations, giving an ethics commission the authority to initiate investigations on its own and file its own complaints is the most important sign that government officials are truly willing to give a commission independence and authority.

The process works like this. Someone contacts the ethics hotline or the ethics commission office and provides information regarding a possible ethics violation. Or a commission member or staff member comes across allegations in the news media or in a blog. Or a referral is made to the ethics commission by a department or agency (when this referral is of a complaint made to the other agency, but alleging a violation of an ethics provision, the ethics commission should treat it as an ordinary complaint). Or someone requests ethics advice about past conduct (Chicago’s ethics board contemplates this situation in its rules and regulations: “A person requesting any formal or informal advisory opinion . . . may withdraw such a request at any time. Such a withdrawal, however, in no way affects the Board’s power to initiate its own investigation into the activities in question.”).

First, a determination is made whether or not to look into the allegations or the conduct described. A decision not to inquire further usually occurs when the allegations would not constitute an ethics violation even if they were true. This happens a lot due to a

basic lack of understanding that government ethics means conflicts of interest, and what a conflict is.

If the inquiry turns up evidence that supports the allegations, the commission or its ethics officer or executive director then makes a determination whether to file a complaint or, if it is a [de minimis violation](#), to send a warning letter.

It is important to distinguish an “inquiry” into informal allegations from the investigation of formal allegations. Investigations prior to a finding of probable cause are referred to as “preliminary investigations.” An inquiry into the possible truth of informal allegations is even more preliminary. The goal is to determine not whether there is probable cause, but whether the allegations appear to have sufficient basis in fact to require a complaint and formal investigation.

An inquiry should also be distinguished from an investigation by the fact that it should be and remain confidential. It should not even be noticed to officials it concerns. An investigation generally follows notice to the respondent and becomes public when probable cause is found. An inquiry is primarily a check to make sure that anonymous allegations, referrals, and information found in the news media or through rumors are worthy of even being investigated. If they are not, there is no reason to alert officials.

Only the ethics commission should be told about inquiries, if they are initiated by a staff member. One, the staff member might want to seek the ethics commission’s advice about difficult or sensitive determinations, which would be done either through a private consultation with the chair or in an executive session (which would be announced as the discussion of an inquiry). Two, the ethics commission should know the nature and number of all informal allegations and referrals, how many were and were not inquired into (and if not, why), and how many ended up being formally investigated. The ethics commission’s oversight role includes knowing how its staff is handling such matters, and it should feel free to ask questions about what occurred, generally and specifically.

This simple process is one of the most controversial parts of the ethics process. It opens up the ethics process not only to formal complaints, which are rare and often require a great deal of courage, time, and knowledge on the part of the complainant, but also to tips, news reports, and rumors (and referrals, which are sometimes ignored in a discussion of ethics commission initiative).

It’s interesting that where tips, news reports, and rumors are considered enough to start a criminal investigation of an ordinary citizen, government officials find it so hard to

allow ethics investigations based on the same sort of tips, news reports, and rumors, even though officials have far stronger obligations to the public than do ordinary citizens.

In 2009 a St. Mary's City, Georgia council member said that prohibiting anonymous complaints "gives council members the chance to directly confront anyone filing a complaint." Accused criminals don't have the right to confront anyone who tips off the police; why should a government official? Of course, nothing will happen unless the investigation confirms the tip, and no finding will be made until after a public hearing, where witnesses can be confronted. The primary difference that allowing ethics commission initiative makes is lessening the fear of retaliation involved when a government employee files a formal complaint. It does not jeopardize officials.

Here is the City Ethics Model Code provision that allows ethics commissions to act on their own initiative:

The Ethics Commission may, on its own initiative, determine through an inquiry into informal allegations or information provided directly to the Commission, through the hotline, by referral, in the public news media, or otherwise that a violation of this code may exist, and prepare a complaint of its own. The Ethics Commission may also amend a complaint that has been filed with it by adding further allegations, by adding respondents involved in the same conduct, directly or indirectly, by action or inaction, or by deleting allegations that would not constitute a violation of this code, have been made against persons or entities not covered by this code, or do not appear to be supported by the facts. The Ethics Commission may also consolidate complaints where the allegations are materially related.

Note especially the second part of this provision. The power to add allegations and respondents is part of the ethics commission's power to act on its own initiative. The ability to delete allegations is one that protects officials from spurious allegations and allegations of conduct outside the jurisdiction of the ethics commission. But you can't allow an ethics commission to delete allegations without allowing it to add allegations.

The power to consolidate complaints can create huge cost savings, while allowing the ethics commission to deal with related conduct all at once, whether it is a pattern of behavior by one individual or separate individuals involved in the same behavior. Adding allegations and respondents, and consolidating complaints, are ways of expanding an ethics proceeding to include everyone involved and all the conduct they are alleged to have

engaged in. See [the section on Expanding a Proceeding](#) for more about this important aspect of ethics enforcement.

What happens if the required majority of an ethics commission's members votes against initiating its own complaint (assuming the ethics commission votes on this; many ethics codes allow the ethics officer or executive director to make this early determination), and members of the "minority" feel it is important to do so? Since many ethics codes require a supermajority vote or a vote of so many members (both of which I oppose), the "minority" might actually be a majority of those voting. In fact, it could be all but one member.

It would not be enough for the "minority" to file a dissenting opinion, especially since in most jurisdictions this would not be a public record. What these members (or one or two of them) could do is file a complaint on their own behalf (members could also override a decision by the ethics officer not to pursue a tip). The question would then be, could these complainants participate in the case? When an ethics commission initiates a proceeding, it is not taking a position on the truth of any allegation. It is simply taking the position that information has come to its attention that is worth investigating to see if there might have been an ethics violation. Therefore, there is no conflict that would require withdrawal by the ethics commission from the case.

When, on the other hand, an individual commission member files a complaint on her own behalf (or on behalf of her and other members), she might appear to be asserting the truth of allegations and, therefore, be seen as biased.

"Minority" members who seek to initiate an investigation based on information that came to the commission's attention are in a position different from both of these, but much closer to that of the ethics commission as a whole. They are not asserting the truth of any allegation, and yet they are acting on their own behalf, rather than on behalf of the ethics commission.

This might seem to be an unlikely situation, but when ethics commission members are selected by officials under their jurisdiction, and have loyalties (or are seen by their colleagues on the ethics commission to have loyalties) toward the party or faction of their appointing authority, the blocking of an investigation by one or two ethics commission members can turn an ethics commission into what appears to be a very partisan body. If by filing a complaint, one or more of the "minority" members must withdraw from the matter, leaving further decisions on probable cause and the existence of a violation in the hands of an opposing party or faction, it is unlikely that the investigation would actually be

pursued. The result is that one or two commission members could have a veto on investigations.

The best solution is to require for the initiation of an investigation only a majority of members present and voting. An alternative is to allow two or three members (depending on the size of the commission) to initiate a proceeding despite a vote against it, without having to withdraw from the proceeding. But where ethics commission members are selected by politicians, this too could be seen as a partisan act. Such a rule works much better with a truly independent ethics commission (as do all rules).

One thing that should not be allowed is for complaints to be filed by an ethics commission member, or by someone who has a close relationship with an ethics commission member, so that she would be seen as acting on the member's behalf. Even though ethics commission members could withdraw from such a matter, they should not be seen by the public as making allegations against officials on their own or through others. The ethics commission should also not be put in the position of having to decide on a complaint filed by a colleague or by someone very close to a colleague.

In 2013 in New Britain, Connecticut, a party town committee chair, who was married to an ethics commission member, filed a complaint against the mayor, a member of the opposite party. Sadly, the complaint did not even state an ethics violation, and the ethics commission unanimously dismissed it (the wife withdrew from the proceeding).

A party committee chair's spouse should not sit on an ethics commission in the first place, due to the clear bias she will appear to have. And if she does, she should not be permitted to file complaints. Just think if the commission had allowed the matter to proceed? It would have looked like it was favoring its colleague and, thereby, its conduct would have undermined the public's trust in the ethics commission being unbiased.

There is, however, one situation where it would be desirable for a single ethics commission member to file a complaint. The situation is as follows. An investigation has turned up evidence of additional ethics violations or additional individuals involved with the original violations, and the ethics commission's hands are tied because it has not been given the authority to initiate its own investigation, file an ethics complaint based on a tip or a news story, or even add or consolidate allegations. The ethics commission can get around this problem by creating a formal or informal procedure by which each time evidence of additional violations or respondents is uncovered and the ethics commission approves, one member, taking turns, will automatically file a complaint. Since the filing is

automatic, there is no reason for that member to withdraw, because there is no conflict or appearance of a conflict.

This is not nearly as good as giving the ethics commission the appropriate authority to deal with this situation. But it is a way around a legislative body that is trying to tie the ethics commission's hands. It will not only allow the ethics commission to act as if it had the appropriate authority, but it may lead the legislative body to capitulate and give it the authority by law.

5. Self-Reporting

There are occasions when an official will not realize until after he has engaged in conduct that the conduct may have been in violation of an ethics provision. It is too late to ask for advice, but the official wants to know whether or not he violated the ethics provision, so that he can deal with similar situations in the future, so that his colleagues can deal with similar situations in the future, and/or to forestall the filing of a complaint against him, which could lead to a scandal. It is better that the official himself report the conduct.

Most jurisdictions do not anticipate this situation, and yet it arises frequently, and it is something that every ethics program should encourage. When there is no guidance on what to do, officials sometimes simply file a complaint against themselves. But this seems like walking into a police station and confessing to a crime and, therefore, very hard to do.

New York City's conflicts of interest code has a separate provision for this situation:

A public servant or supervisory official of such public servant may request the board to review and make a determination regarding a past or ongoing action of such public servant. Such request shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

The process for dealing with a report from an official about his own conduct is treated just like a complaint, but it is not called a complaint, because it isn't one. It would be good to give it a name. "Request for review" wouldn't be a bad term, although it sounds a bit too much like an appeal from a decision already made. "Request for determination" is too broad; most of what is brought to an ethics commission's attention is a request for a determination.

“Self-reporting” is a good a word to describe what is going on, although some may think this means that one is reporting misconduct rather than a possible violation. In fact, every complaint involves a report not of misconduct but of a possible violation, the handling of a conflict situation that may have been improper in some way. This term also has a positive aspect: an official is reporting about his own conduct, a responsible thing to do, even if the conduct itself may have been somehow improper. Using this term would fit well with using the term “report” instead of “complaint.”

6. Petition for Declaratory Ruling

San Antonio has an interesting alternative to both self-reporting and ethics commission complaints, called a petition for a declaratory ruling (§2-88). Section 2-88 of the ethics code allows any official against whom public allegations of ethics violations have been made in the media or elsewhere to file with the ethics board a sworn statement affirming his or her innocence. The ethics board may investigate the matter, make findings, and impose sanctions if the allegations turn out to be true or if other ethics violations are discovered in the investigation.

This is an excellent idea. It allows an official to use the government ethics program’s neutral and formal process to counter allegations that have been made in public, without having to wait for someone to file a complaint. It is not self-reporting, because the official is denying the allegations. And although it does not require ethics commission investigation, it makes it more likely that such an investigation will be made. This petition effectively turns public allegations of all sorts into a formal complaint that may be quickly dismissed, so that the official is quickly cleared. The result is the same as a complaint that is filed and then followed by public allegations, only it is the respondent who seeks formal consideration of the allegations.

This approach shows that there is no need for the confidentiality of ethics allegations. In fact, when ethics allegations become public, the ethics commission’s role is that much more important. Only an independent body and formal process can effectively clear an official from ethics allegations made in public.

7. Referrals

Some referrals of reports from departments or agencies in the local government need to be turned into formal complaints by an ethics commission. But some referrals consist of allegations that an ethics provision has been violated, but they are filed with a supervisor,

department head, or chair of a board or commission. Since they are already in the form of a complaint, an ethics commission should treat them as complaints, even it makes necessary amendments or asks the complainant to redo the complaint to fit the ethics commission's requirements.

New York City's conflicts of interest code has a provision that expressly deals with this situation. What is especially valuable about this provision is that it not only recognizes such a referral as a complaint, but it requires that such a report to an agency be referred to the conflicts of interest board. Too often, ethics codes only deal with referrals *from* an ethics commission, usually to criminal authorities. This (1) provides no guidance to agencies on what to do when they receive ethics complaints, and (2) allows a variety of agencies to deal with ethics complaints themselves or turn them over to various offices, such as the city attorney, auditor, inspector general, or state attorney general. This can lead to serious turf wars as well as inconsistent interpretation and administration of the ethics code. Here is the New York City provision:

Whenever an agency receives a complaint alleging a violation of this chapter or determines that a violation of this chapter may have occurred, it shall refer such matter to the board. Such referral shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

A referral to an ethics commission by a law enforcement official is most useful if done in the form of a complaint. Such a complaint can be dealt with more quickly and easily by an ethics commission. The commission need only determine whether the complaint states an ethics violation (law enforcement officials often lack a full understanding of government ethics). If an investigation has already substantiated the allegations, the ethics commission can immediately send the complaint to the respondent. Here is Miami's rule on this sort of complaint ("the Advocate" is the individual who argues in an ethics proceeding that the respondent violated an ethics provision, effectively the prosecutor):

Upon a written complaint filed by the Inspector General, the Advocate or the State Attorney which alleges a violation within the jurisdiction of the Ethics Commission the Ethics Commission shall forward a copy of the complaint to the respondent within five days after receipt of the complaint...

8. Statute of Limitations

Many ethics codes contain a clever way of minimizing ethics complaints. They prohibit the filing of a complaint within a certain time after a violation has occurred. This period of time is known as a “statute of limitations.”

The problem with applying an ordinary statute of limitations in an ethics proceeding is that ethics violations often involve secrecy. Keeping violations secret exacerbates the violation. Officials are supposed to disclose their conflicts, not keep them hidden. Officials have an obligation to act publicly, not keep their conduct secret when it benefits them. And keeping their conduct secret often involves intimidation of their subordinates, which is the worst form of ethical misconduct.

A statute of limitations rewards officials who fail to disclose their conflicts and who successfully keep their ethics violations secret. This clearly is not just.

There is an alternative that will prevent this problem. It is to have a statute of limitations that does not start to run until the conduct is discovered.

But even here, some ethics codes give the complainant very little time, as little as thirty days. This is not enough time for most people to look further into the facts, consider and take alternative steps, talk to people about jointly filing the complaint, get up the nerve to file, and then actually prepare the complaint or have someone else do it. In addition, discovering the violation does not necessarily mean that the complainant recognizes it as a violation. This may not happen for some time after. Therefore, the best practice is to allow a complaint to be filed at least one year after the date the complainant discovered the alleged violation.

If there are multiple allegations, only those that occurred within the period of limitations would be considered by the ethics commission; the others would be dismissed or, where warranted, a warning or instruction letter might be sent, especially if the official or employee is still working in government. In many cases, older violations might be worth investigating, because they may involve other officials, and that information would not be known yet. In fact, when an allegation is dismissed due to a statute of limitations, an ethics commission might ask people to come forward with information about the involvement of other officials and employees.

Some statutes of limitations based on discovery rather than misconduct refer to “reasonable discovery” or conduct that “could have been discovered through publicly available information.” The latter formulation is much better. How can an ethics

commission determine whether it is “reasonable” to expect that someone would have discovered conduct. Reasonableness should be based on something more solid, such as publicly available information. But even here, how publicly available the information was is an important consideration. Information that is searchable online is one thing. Information that could be obtained through a carefully worded public records request is another thing.

A statute of limitations rule should also make it clear when an ethics proceeding begins. Is it the date the complaint is filed or the date a self-initiated investigation is begun? Or is it the date probable cause is found and, therefore, the actual proceeding begins (this is the rule, for example, in Los Angeles)? The date the complaint is filed seems to be the best choice. Here is the City Ethics Model Code language: “A complaint must be filed within one year after the complainant discovered the alleged violation.”

B. Jurisdiction

One of the first decisions an ethics commission, or its staff, must make when a complaint has been filed or informal allegations have been made is whether the ethics commission has jurisdiction over those against whom the allegations are made, known as “respondents.” A local legislative body can greatly limit an ethics commission’s enforcement authority by placing limits on its jurisdiction over a number of different sorts of official and employee, sometimes including the legislative body’s own members.

Ethics commissions should have jurisdiction over all local government officials and employees, including those who work in agencies that consider themselves independent, such as school boards, sheriff’s offices, law departments, and authorities, including public-private authorities. If certain entities are excluded, especially local legislators, the others feel the ethics program is unfair, and this undermines their support for the ethics program. It also upsets the public, who doesn’t care one bit about agency independence or other arguments for exclusion from ethics commission jurisdiction. Government is government, and internal distinctions are meaningless to the entity that matters most: the community the government is governing.

Although most government employees do not have sufficient authority to be able to violate more than a couple of ethics provisions (and some of these violations can be dealt with as disciplinary problems), they too should be part of an ethics program, if for no other reason than the fact that they are the individuals most likely to know about and, hopefully, report ethics violations.

Those who do business with the government, or do the government's business (i.e. provide privatized services), should also be covered, along with candidates, former officials, and others. Each group that wants to be excluded is considered below, with arguments for and against their inclusion in an ethics program.

Each ethics code should make it very clear whom the ethics program has jurisdiction over. The ethics code should list, preferably right near the beginning, every possible board, department, agency, and authority in two provisions: one that includes those over which the ethics program has jurisdiction, another that includes those over which it does not have jurisdiction. The ethics commission should be given the authority to update these lists whenever circumstances change.

These two lists should be reproduced on the ethics commission website. It would be very useful, both to officials and employees of excluded agencies and to the public at large, if the online list of those over whom the ethics program does not have jurisdiction was to identify the reason why there is no jurisdiction, as well as what office or agency does have jurisdiction, if any, with a link provided to that office or agency's website.

1. Local Legislative Bodies

Local legislative bodies sometimes exclude, or try to exclude, their own members and staff from an ethics commission's jurisdiction, insisting that they have sole authority to discipline their own members. But the common, constitutional, and state laws regarding self-discipline of legislative bodies predate the creation of ethics programs, and usually these laws do not include rules equivalent to most ethics provisions, not to mention training, independent advice, disclosure, or enforcement. Self-discipline is not in any way a substitute for a government ethics program, even if conflicts are included in a legislative body's disciplinary or conduct rules.

Some council members have recently started employing a common-law legislative immunity defense, arguing that an ethics commission is precluded from regulating or even investigating anything that has to do with their legislative activity, for example participating and voting with a conflict. [This complex issue is dealt with](#) at length in the final chapter of this book.

Considering that ethics programs involve conflicts of interest, it is damaging to an ethics program, and its goals, for council members to wear conflicting hats in order to consider how their colleagues handle their conflicts. Whenever a council does not investigate, find probable cause, or penalize a member, it appears to the public that its

members are protecting one of their own. Think of Congress. When a council majority goes after a member of the minority party or of a minority faction, it turns government ethics into a partisan contest. Either way, the public's confidence in its representatives is undermined rather than strengthened by a legislative ethics process.

Three of the five members of the Jackson County, Missouri ethics commission felt so strongly about this issue that, when at the beginning of 2009 the county legislature had itself excepted from the new ethics code, they resigned from their positions. When a fourth member resigned for another reason, the fifth resigned, as well.

It's important to recognize that legislative immunity and the independence of local legislators are completely consistent with the goals of government ethics. The goal of legislative immunity from suits related to legislative activity is intended to prevent a legislator's personal interest in not being sued from conflicting with her acting in the public interest. The goal of government ethics is to prevent the legislator's personal interest in a matter from conflicting with her acting in the public interest. Because the goals are the same, there is no reason for an ethics commission not to enforce ethics matters related to voting as a legislator. [This argument is presented](#) at greater length in the section on legislative immunity.

2. Boards of Education

Boards of education present some difficult problems for a local government that wants its ethics program to have jurisdiction over all government officials in its city or county. But they also present a valuable opportunity.

One problem is that many, if not most school systems have different boundaries than cities and counties. Generally, these are regional, including all or parts of multiple cities, towns, and counties. Therefore, no single city or county ethics program naturally has jurisdiction over them.

In addition, many, if not most school systems are creatures or arms of the state rather than creatures of cities and counties (some of the major exceptions are large cities, such as New York and Chicago, where the mayor controls the school board). This means that, in some states, even school boards that do have the same boundaries as a city or county are not subject to the city or county's laws or administration.

In practice, states deal with this separation of school board and local government in many different ways, including not dealing with it at all. In Maryland, the state requires that school systems have their own ethics laws and commissions, with rules pretty much

the same as for cities and counties. New Jersey has a state school ethics commission. In Louisiana, Massachusetts, California, Ohio, and some other states, the state ethics commissions that have jurisdiction over local governments also have jurisdiction over school boards. In Florida, there are several state laws, including the state ethics code, that apply to school boards, some of which involve the state ethics commission, but school boards also have their own ethics codes. It is conceivable that a state could require that school boards choose a city or county ethics program to join, but I don't know of any state that does this.

In many states, however, a school board is not *prevented* by law from sharing an independent ethics program with one or more cities, counties, or other school boards. With respect to unionized employees, this would likely have to be reflected in union contracts. But union members are secondary. What is most important is that school board members and administrators have independent ethics oversight. The great majority of teachers' conflict situations can be dealt with by administrators. The most serious ethics issues for school systems involve jobs and contracts.

When there is an effective state ethics commission that has jurisdiction over school boards, there is no need for further oversight. When there is a state ethics program, but it is not working very well, a school board might, if permitted, create its own, superior ethics program, as so many cities and counties have done in Florida and California.

A school board that has or is considering a truly independent ethics program should consider a partnership with nearby school boards or local governments. Such a program could be more effective, because it would better be able to afford one or more experienced professionals to manage it. It would be less costly due to cost-sharing. And it would also be easier to make such a program independent of those over whom it has jurisdiction. In most cases, a joint program would be advantageous to everyone.

However, most school boards do not have, nor are they considering, the creation of a truly independent ethics program. Nor are the city and county ethics programs they would consider joining truly independent. This is where the jurisdictional "problem" that school boards present to local governments (do we try to take jurisdiction over them?) turns into a perfect opportunity for all concerned to create a truly independent program. The reason this becomes a greater possibility than otherwise is because no official will want other local legislators, or other school boards for that matter, to have authority over their handling of conflict situations. The alternative is a truly independent ethics commission. I

can't think of a better way to get to this highly desirable goal, which has the added benefit of cost savings and more professional staffing.

There are other agencies and authorities that pose jurisdictional problems (see below). But in most places, no other agency or authority has the resources to make the difference, to be able to fund at least one part-time ethics officer to provide training, independent, professional ethics advice, help with and checking of annual disclosure forms, and enforcement of ethics laws in a way that the public will find independent and fair. School boards are in the best position to do this.

Sometimes, there are state laws that expressly allow school board cooperation with other school boards or municipalities in the creation of ethics programs. Here is one from Connecticut:

Sec. 10-239k. Shared service agreements. Any two or more boards of education may, in writing, agree to establish shared service agreements between such boards of education or between such boards of education and the municipalities in which such boards of education are located.

Too often, the only talk, with respect to school board ethics, is about laws, jurisdiction, and the school board's independence rather than the ethics program's. Even when a state provides no ethics training, advice, disclosure, or enforcement, a school board will argue that it is a creature of the state, and that is that. But this is really a way of saying that the school board does not want an ethics program or does not understand how valuable such a program can be.

Such a school board should stop talking about possible restrictions state law imposes on it, and start talking about what is best for the school system and the community. After all, why would the state block a school board from creating or joining a government ethics program? If there is a law that appears to prevent this, it was most likely not intended to, and the state education department or board will likely give its permission, or the legislature will amend the law.

When a local government with a school system inside its borders, or most of one, creates or improves an ethics program, it should approach the school board and ask it to join the program, at least if there is not a state ethics commission or a state law that was clearly intended to prohibit such a joint ethics program.

The worst thing to do is simply assume that an ethics program will have jurisdiction over a school board. In many cases, no one will contest jurisdiction. But if they do, the matter is likely to turn into a bigger scandal than it would otherwise. Imagine the scenario: a citizen files a complaint against a school board member, the school board member insists that the ethics commission has no jurisdiction over him, his colleagues on the school board circle the wagons to defend its independence, and to the public it all looks like a way of evading enforcement and getting away with ethical misconduct. It is a council or county commission's duty to prevent this (and an ethics commission's duty to advise it to do so), and not simply hide its head in the sand, hoping that it won't become a problem down the road.

And school boards should cooperate. They owe exactly the same fiduciary obligations to the community as city and county officials. Therefore, they require the same independent ethics training, advice, and oversight, and provide the same disclosure.

3. Independent Offices, Authorities, and Special Districts

Independent offices and authorities often argue that their independence precludes any body having authority over their officials and employees. But this concept of independence is self-serving, especially if an ethics commission is appropriately selected by community groups rather than by the government officials from whom the office or authority insists it is independent (yes, yet another argument in favor of ethics commission independence!). No one should be independent of independent ethics training, advice, disclosure, and enforcement. What is important is that the ethics commission itself be independent, and that it have authority over all government offices and authorities, so that the ethics program does not appear to favor certain officials over others. What is important is that the public sees ethics enforcement as fair, unbiased, and comprehensive.

When independent offices and authorities raise the issue of their independence, it should be pointed out that officials who oppose ethics commission authority over them are putting their personal interest ahead of the public interest in having independent ethics oversight of all local public servants.

There are two different kinds of independent office and authority. Most act within a particular city or county. These include sewer, water, and utility districts, housing authorities, sheriff offices, and the like. The other kind is regional, not fitting clearly into one jurisdiction or the other. This includes transportation authorities and councils of governments. Regional authorities and councils generally have boards that consist of

elected officials in the region, who sit solely as representatives of their governments. These authorities and councils need to recognize that they are not independent, but exist solely for the sake of their communities and, therefore, they should request state ethics oversight. The elected officials on their board may feel they are already subject to their local ethics program's jurisdiction, but (1) it is not clear that their activities as a member of a regional board or council are covered by a local ethics code and (2) this still leaves all the non-elected officials and employees of the regional board or council outside of any ethics program. The question should not be whether a regional board or council ought to subject itself to an ethics program's jurisdiction; the question should be which program.

Some officials in independent districts and authorities are willing to fight for their right to self-regulate. In 2007, the Metropolitan Sewer District (MSD) in Louisville, whose board is appointed by the mayor, successfully sued to have its board and executive director declared outside the Louisville ethics commission's jurisdiction. In 2011, it was alleged that the MSD was doing business with two of its board members, including unbid contracts with the chair totaling almost \$600,000. The contracts would have been prohibited under the Louisville ethics code. So much for the value of an authority's independence and self-regulation of its officials' conduct.

Some states, however, have laws that prohibit elected officials from passing laws that affect other elected officials. Illinois, for example, has an internal control statute, which gives each elected official the right to run his office independently. Therefore, each elected official can choose whether or not to sign over authority to an ethics commission, even with respect to ethics advice and training.

In Pennsylvania, this is true in Second Class A counties (that is, counties that do not have home rule authority) pursuant to the Public Official and Employee Ethics Act. It was applied to ethics laws by a state supreme court decision in 2011.

It is important, however, for ethics commissions in these states to reach out to independent offices and authorities, and to the public, regarding the greater value of having independent ethics advice and enforcement than of having elected officials independent of an ethics program.

Sewer districts are only one type of special district. Special districts are local governments that are often ignored by ethics codes. There are also water, fire, electricity, housing, beach, transit, and combination districts. There are approximately 35,000 special districts in the U.S. with about \$123 billion in revenues annually, and with about \$217 billion in debt (according to "Wrestling with MUDs to Pin Down the Truth about Special

Districts” by Sara C. Bronin (*Fordham Law Review* Vol. 75, p. 3041, 2007)). They outnumber municipalities. For example, in 2007 in Connecticut, there were 179 general purpose local governments and 453 special district governments.

The basic ethics problem that many special districts have is that they are created by interested parties. According to Bronin, “Typically, developers—not the general public—determine when MUDs [municipal utility districts in Texas] are formed, how big they are, and who governs initially. Once MUDs are created, few people bother to vote in MUD board elections or take an interest in district affairs. In the absence of public participation, MUDs’ ability to influence the state law that governs them goes unchecked.”

This is not a matter of the fox watching the chicken coop. This is a matter of the fox overseeing the building and management of the chicken coop, and selecting the farmer. In states that enforce local government ethics at the state level, special districts are usually covered. But who would know enough to file a complaint? In other states, there are state rules that apply to special districts, but rarely any enforcement mechanism. And in states where ethics is left to local governments, I don’t think that many special districts have their own ethics programs, and those that do have them are not independent. Local ethics commissions need to seek jurisdiction over special districts. If the special districts won’t hear of this, the state’s local government associations should push for state legislation requiring this or creating a state-level ethics commission for all the state’s special districts.

But even then, there is still the problem that few people know anything about special districts, not to mention what goes on in them. More transparency and oversight are needed.

For more on independent offices, see [the relevant section in the final chapter](#).

4. Government Attorneys

The fourth group of people who sometimes seek to except themselves from ethics commission jurisdiction are government attorneys. A small percentage of ethics codes (which are usually written by government attorneys) expressly exclude attorneys from their jurisdiction. And even where there is no express exception for government attorneys, when complaints are filed against government attorneys, they sometimes insist that they are subject only to the state’s rules of professional conduct and can be disciplined only by their state’s lawyer disciplinary program, not by an ethics commission.

In 2003, the Rhode Island Ethics Commission refused to make an exception for an assistant town solicitor, referring to its “power to enact substantive ethics laws that apply

to all government officials and employees without regard to outside employment or regulation by other bodies.” The Rhode Island ethics commission also found that there is no separation of powers issue with the judiciary, which oversees the lawyer disciplinary program.

Lawyers are no different than other professionals who have their own professional ethics codes. Imagine a doctor or architect insisting that an ethics commission should have no jurisdiction over them because their professions too have their own disciplinary programs.

When a senior assistant city attorney in Atlanta accepted a meal from two attorneys suing the city, he insisted that his ethics were regulated by the state bar and the state supreme court. The state bar disagreed: “Only the Georgia Supreme Court — and the Bar, with powers delegated by the court — can regulate the practice of law. But lawyers still must comply with state and local laws.” Even this missed the point: government lawyers aren’t just any lawyer; they’re government officials, with duties to the public that are different from a private lawyer’s duties to clients.

Lawyer-legislators have even insisted that they are not required to file disclosure forms. In 2010, a Louisiana state senator said that the reporting requirement does not apply to lawyers who are legislators. “The practice of law is regulated by the Supreme Court.” His lawyer, who is also his law partner, said that “the ethics board is trying to inject itself into the practice of law.” What the senator did not want to disclose is the following situation: his client sought to sue the state, which apparently would have required Senate approval of funds, some of which would be paid to the senator pursuant to a contingency fee arrangement. This is not a legal conflict (the legislator, in his role as a lawyer, had only one client), but a government conflict (the legislator has fiduciary duties to both his client and the public, and these obligations conflict).

Lawyer disciplinary rules lack many of the provisions that appear in government ethics codes. And where there is overlap, government officials usually have stronger and more clear obligations than lawyers. In addition, very few legal ethics rules recognize the unique situation or obligations of government lawyers or lawyer-legislators.

The local government attorney has the most difficult ethical problems of any local government official, both in terms of legal ethics and in terms of government ethics. Many of them represent both the executive and legislative branches. They are often faced with the issue of whom to represent, the individual in the current position, the position itself, the agency, the government, or the public. This is especially true when they are asked to

either do something they feel is not right, or to provide advice regarding conduct they feel may not be proper.

In smaller towns and counties, many local government attorneys represent individuals and companies outside of government. Seeing an attorney who represents a city in zoning matters also represent someone suing the city in a tort action often raises a lot of ire among citizens. People are very sensitive about having their government's attorneys be loyal to their community. They might be asking for too much, but their concerns need to be taken into account.

And many local government attorneys also wear the hat of party loyalist, with political goals that may conflict with the public interest in having legal representation and advice be neutral, that is, without favoritism or possible (or apparent) ulterior motives.

Not only should local government attorneys be subject to local ethics codes, but they should set an example for other officials by going out of their way to deal responsibly with their conflicts and use every conflict situation they have as a learning experience for their fellow officials. Many local government attorneys do go out of their way to declare a conflict, but too often this is limited to situations where they have a conflict in terms of rules of professional conduct, not situations where they have a conflict in terms of the local ethics code.

To see the extent to which a lawyer's arrogance can go with respect to ethics jurisdiction, read [the story of a Georgia lawyer-lobbyist](#) who would not file as a lobbyist because he was a lawyer.

For more on local government attorney issues, including a more detailed look at the rules of professional conduct with respect to government ethics situations, see [the relevant section](#) in the final chapter of this book.

5. Union Members

Lawyers have their lawyer disciplinary programs, and union members have their grievance procedures. Although neither program is designed to deal with government ethics matters, their existence is sometimes enough for council members to allow lawyers and unions to be excluded from ethics enforcement.

Often, when a local government ethics code is proposed, there are objections from government employee unions. For example, when an early draft of an ethics code for Bainbridge Island, Washington in 2008 would have covered all city officials and employees, the two employee unions objected that ethics enforcement under the code would be a

unilateral change to the current collective bargaining agreements and, therefore, would violate them. Employees were, therefore, excluded from the code.

Sometimes an ethics code instead limits enforcement of the code pursuant to the terms of a collective bargaining agreement. Here is an example of language from Brookfield, Wisconsin (similar language can be found in other Wisconsin towns):

In the event an employee, covered under a collective bargaining agreement, is allegedly involved in an Ethics Code violation, the terms and conditions set forth in the applicable collective bargaining agreement shall prevail in the administration and interpretation of this Ethics Code Chapter.

New York City's rules state that if an employee is subject to a collective bargaining agreement that provides for the conduct of a disciplinary hearing by another body, the matter must be referred to that body and any hearing will be conducted in accordance with the rules of that body.

Short of complete exclusion from ethics code coverage or the precedence of collective bargaining agreements, some codes allow for specific exceptions and considerations. For example, the [Yonkers, New York ethics code](#) provides an exception from its nepotism provision for any "position subject to and pursuant to the provisions of a collective bargaining agreement or the New York State Civil Service Law." It also requires that the ethics board's procedural rules "take into account any applicable provisions of law and collective bargaining agreements."

The [Allegheny County, Pennsylvania ethics code](#) allows the ethics commission to suspend employees, but only "in compliance with existing personnel practices and collective bargaining agreements."

What these jurisdictions do not appear to recognize is that collective bargaining agreements and grievance procedures involve issues between the government and its employees. Government ethics issues are not between the government and its employees, but rather between the community and those who serve the community through the local government. Although employees are less likely to have an opportunity to use their positions to benefit themselves or others, their obligations are no different than high-level officials or board and commission members. Even if not elected, they are accountable to the public.

It appears to be rare for a collective bargaining agreement to expressly include government ethics enforcement in its grievance procedures. Government employees, and their unions, have an obligation no different than any public servant to use their power for the public interest rather than for the interest of individuals. This means that they should include government ethics program jurisdiction over their members in their bargaining or unilaterally make their employees subject to the ethics program.

Seattle's rules talk of unions that have signed an agreement that allows their members to request closed hearings before the ethics commissions. This is not a wise compromise, but it is less important for a lower-level employee's hearing to be public than it is for higher-level officials. But sometimes fairly high-level officials are union members. They should not be allowed to request a closed hearing.

6. Transition Team Members

Members of a mayoral transition team often wear the hat of a government official without actually holding an official position. Their term is short, but they make important decisions and often have access to confidential information. Many of them have business with the local government or represent people and entities that do.

For example, at the turn of 2009 in Sacramento, the head of the transition team, as well as other team members, were partners in a law firm that represented some of the city's big players. They participated in meetings with high-level city officials on topics including the council agenda, labor negotiations, a railyard site, and a gas field deal. These meetings were closed to the public. The Sacramento *Bee* wrote in an editorial, "Whose interests does the mayor think [the transition team leader] represents when he sits in on such meetings – [the mayor's], the city's or those of his firm's clients?"

One may argue that it would be a waste of an ethics program's time to train and advise individuals whose roles are so short-lived, not to mention require them to disclose and enforce ethics laws against them. On the other hand, what could be worse than for a new administration to undermine the public trust with a scandal during its honeymoon? It might be valuable for an ethics officer to meet with transition team members, asking them about their possible conflicts and describing to them ways to deal with them responsibly. In this short-term but important situation, theory about and understanding of government ethics are less important than practical advice.

Another argument for training transition team members, and especially their leaders, is that to the extent they have conflicts, they are likely to be already doing business

with the government or representing those that are. Therefore, they should have received ethics training (although in most jurisdictions, they would not). If they have received training, a short refresher that focuses on transition issues would take little time. If they have not received training, then a full training session will be useful to them in situations beyond the transition.

7. Non-Governmental Officials

Ethics commission jurisdiction should not be limited to government officials. An ethics commission should also have jurisdiction over former officials, candidates for local office, contractors, consultants and other contracting professionals, businesses seeking permits, grants, and other favors from the local government, private entities doing governmental work, and anyone who offers or gives a possibly illegal gift or who otherwise aids or induces an ethics violation.

After all, corruption in government is not solely governmental. It rarely exists without private corruption. It is true that government officials and employees have special obligations, but there is no reason not to bring those on the other side of a transaction into the ethics program, in order to prevent ethical misconduct. And there is no reason not to get community businesses on board an ethics program. Their support can make all the difference to improving a government's ethics environment, just as their connivance helps maintain an unhealthy government ethics environment.

Local government has changed over the last twenty years or so. The change often goes by the name of "privatization" or "public-private partnership." I like what George Frederickson calls it in his 2009 lecture "Searching for Virtue in the Public Life: Revisiting the Vulgar Ethics Thesis": "the modern extended state" or, even better, the "vast public sea" in which governments float. This public sea includes entities with various "shades of publicness": nonprofit and professional organizations, contractors and developers, lobbying firms, political parties, unions (public, construction, and others), and watchdog groups, as well as single-purpose jurisdictions (school, water, transit, and sewer districts and authorities), public-private organizations of all sorts, charter schools, utilities and other public monopolies, tribes, and numerous quasi-governmental agencies.

These entities are involved in the governance of our communities. They enter into contracts or take grants from our local governments, and they take managerial and service-delivery functions out of the hands of civil servants. The result, in terms of government ethics, is the removal of patronage, nepotism, embezzlement, and other sorts

of misuse of office out of what is traditionally considered government and into these other entities.

Here's another way of looking at the "vast public sea." A government ethics program should not distinguish, in its jurisdictional reach, in any way that the public would not distinguish. The public does not know or care whether the people who pick up their garbage, run their senior center, or provide their water work directly for the local government or not. These are services provided by or for the government or with the government's oversight, for the benefit of the community. Whichever way things are done, it is the local government that decides (or the state in the name of local governments, since local governments are, after all, state entities, but most people don't realize that, either).

No matter how public or private an entity is, it may be involved in a difficult conflict situation. And yet too often it is outside the jurisdiction of any government ethics program, even when it is involved in governmental business or services and receives or expends governmental funds. Being outside the jurisdiction of an ethics program does not only mean that ethics laws cannot be enforced against these entities and their officers. It also means that these officers get no ethics training, have no access to ethics advice, do not provide disclosure, and are not subject to transparency or lobbying rules. In other words, they are effectively huge loopholes in ethics laws. And the loopholes are growing bigger as the "public sea" level rises.

An ethics code should expressly describe the extent of an ethics commission's jurisdiction and, where applicable, ethics provisions should say when they apply beyond past and current officials and employees. Here are the first two subsections of the City Ethics Model Code's ethics commission jurisdiction, powers, and duties provision:

1. The Ethics Commission may only act with respect to current and former officials and employees (and those who, although acting under contract, appear to act as government officials and employees), consultants, applicants, candidates, and persons and entities that do or seek business with the city (including the owners and officers of such entities, and subcontractors and other indirect beneficiaries), are required to make applicant disclosures, give gifts to officials and employees or their relatives, induce, encourage, or aid anyone to violate any provision of this code, or are otherwise covered by the provisions of this code.
2. The termination of an official's or employee's term of office or employment with the city does not affect the jurisdiction of the Ethics Commission with respect to the requirements imposed on him or her by this code.

a. Former Officials: Many ethics codes do not apply to former officials. In these cities and counties, there can be no post-employment provisions. In addition, an official can remove himself from jurisdiction simply by leaving office. Although an ethics commission may, in some cases, want to conserve its resources with respect to a complaint filed against a former official, the current status of an ethics code violator should not be relevant to whether an ethics proceeding may be initiated or even whether the individual can be penalized.

Many feel that it is penalty enough for an official to have to resign when confronted with misconduct. And this is often true. But this should not preclude transparency. That is, it is important that the public know why the official resigned, for example, whether it was because she was accused of giving a contract to her brother, or whether it was because she actually had been giving contracts and grants out to family members and business associates for the past ten years. It is important that the public know what misconduct occurred, and who else might have been involved.

Resignation might be considered penalty enough in a settlement agreement where the official admits to certain violations. But if there is no admission, resignation should be irrelevant to the ethics process. The ethics process is not just about punishment. More important is that the public recognize that the ethics program will not allow misconduct to be kept secret, and that other officials learn from what happened and recognize that their misconduct will be made public. And it is important to recognize that, without an investigation and finding of a violation, a resignation can be followed immediately by candidacy for the same or another position in the government, or in another government. The public should know what happened, so that citizens can take this into account when they vote.

In addition, closure is very important to a community. A scandal that simply ends with the resignation of one or more officials, with no knowledge of what actually happened, not to mention no apologies, leaves a community confused, dissatisfied, divided, and with a deep mistrust in their government. It is the rare individual who will, rather than make denials, actually tell the story of what happened, of who was involved, and of how what occurred followed patterns in the ethics environment. Without the telling of the full story, it is difficult for a government organization to truly change or for the public to truly trust their government.

b. Contractors and Grant and Permit Applicants. It is valuable to give an ethics commission jurisdiction over contractors, developers, lobbyists, grantees, gift-givers, and anyone who aids or induces an ethics violation. This includes not only individuals and firms doing business with the local government, but also those hired with local government funds.

It is important for ethics provisions to apply to, and for an ethics commission to have jurisdiction over, both sides of each relationship or transaction that involves government officials and employees, so that all parties are required to deal responsibly with conflicts and no one can benefit from, and thereby try to induce, ethical misconduct. For example, giving gifts proscribed by an ethics code should have consequences for the giver as well as for the recipient. Officials have a fiduciary duty that is not shared by contractors and applicants, but the fiduciary responsibility of one party does not absolve other parties. In fact, in many cases it is only the other parties who directly benefit, for example, where gifts are made to an official's pet charity.

Bringing these individuals and entities into the ethics program, and making them responsible for their actions, greatly lessens the frequency that officials are faced with the temptation of gifts (and, therefore, bribes), and also makes it harder for officials to force those seeking business with the local government to pay in order to get a contract, permit, or grant (businesses can, for example, insist that they would lose their contracts if they were to make a gift).

The ethics code provisions that apply to contractors should be included in bid materials and in contracts. Similarly, the ethics code provisions that apply to those who apply for permits, licenses, and grants should be included with the application materials. If possible, there should be training for contractors and other applicants, or at least special information materials available online. They should be encouraged to ask for ethics advice whenever they feel there may be a conflict.

And they should be required to disclose interests and special relationships with officials and their families ("[applicant disclosure](#)"). Disclosure of the names of individuals who would benefit from what they are requesting is an important way to prevent ethical misconduct. Applicant disclosure provides a check on transactional and annual disclosure, and it focuses the applicant's attention on the issue of conflicts, causing the applicant to take responsibility and presumably discuss the matter with relevant officials and, if necessary, the ethics officer, so that any possible conflicts will be dealt with responsibly.

The owners and officers of contractors (and subcontractors) that do a sizeable amount of work for a local government, to the extent that it is hard for outsiders to differentiate these employees from government employees, should be expressly included in the ethics code and subject to its requirements. To the public, the difference between a contracted employee and a hired employee is nonexistent. With respect to the misuse of one's position, there can be just as little difference. And fiduciary duty to the community does not arise from the legal relationship between a government worker and the government, but rather from doing work for the community or receiving or spending public funds.

In special situations, where there are pervasive appearance of impropriety issues, a way to get jurisdiction over those doing business with local governments is to do what New York state did in 2008 with the wind industry: draft [a code of ethics directed at the industry](#). The code of ethics was designed to be voluntary, but within a year all the major companies had signed it. The code was to be enforced by a task force consisting of local officials, especially district attorneys, as well as a representative of the wind industry. It is hardly an ideal code, but the idea of a special code for an industry that is causing problems in a large part of the state is a good one. These problems are difficult for each local government to handle on their own, partly because so many of its officials already have a relationship with the problematic industry, whether it is wind, oil, gas, or something else.

c. Special Sorts of Contractor. There are several types of contractor which are often not under an ethics commission's jurisdiction, but should be. One group of contractors that requires oversight is those who do government work, such as charter schools and waste management firms, but are not working for the local government. If they are not subject to transparency and ethics requirements, it is easy for these entities to use public funds to benefit their owners and business associates. Self-dealing and giving contracts to one's colleagues are relatively common. For example, an owner of a contractor that did a great deal of construction work for a nonprofit charter school company in Texas was president of an umbrella group of foundations involved with these charter schools. The owner of another construction contractor for the schools had been a business manager at one of the schools immediately before forming the company. Nonprofits doing government work are not required to disclose as much as governments or to follow special conflict or procurement rules. They should be, because they receive and spend public funds, perform a governmental function, and effectively work on behalf of the government, for the community, just the same as any school or agency.

A good recommendation was made in 2010 by Florida’s Nineteenth Statewide Grand Jury in its first interim report, entitled [“A Study of Public Corruption in Florida and Recommended Solutions.”](#) It recommended, as a response to the privatization of government services, adding to the basic definition of “public servant” — which was “any officer or employee of a governmental entity” — the following:

Any officer, director, partner, manager, representative, or employee of a nongovernmental entity, private corporation, quasi-public corporation, quasi-public entity or anyone covered under chapter 119 that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of the state, county, municipal, or special district agency or entity to the extent that the individual’s conduct relates to the performance of the governmental function or provision of the governmental service.

‘Governmental function’ or ‘governmental service’ for purposes of Chapter 838 means performing a function or serving a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.

Another approach is taken by Seattle. It gives the ethics commission jurisdiction over contractors who work for the city at least 1,000 hours in a twelve-month period (essentially half-time).

With respect to transparency, the Connecticut Supreme Court has used a functional equivalence test, with four criteria, not all of which need to be present:

Whether the entity performs a governmental function

The level of government funding

The extent of government involvement in or regulation over the entity

Whether the entity was created by the government

This seems an unnecessarily complex approach, but its criteria are worthy of consideration when discussing the issue.

Ethics commissions should also provide oversight with respect to firms that do work *approved* by local governments. For example, consider a board in Tennessee that established

guidelines for derivatives and devised a curriculum for a class to teach local officials about interest-rate swaps. This board used its unregulated authority to effectively sell the services of its board members. It should have been included in a government ethics program.

And then there are contractors doing work in projects paid for with government funds, but not directly overseen by government officials, for example, sports stadiums. Sports stadiums and other public buildings are areas where costs can be far greater due to ethical misconduct.

Subcontractors are often overlooked by oversight bodies and left out of ethics rules. There is no reason to treat subcontractors any different than contractors. Often it is subcontractors who do most of the work and get most of the government funds in a project.

And finally, there are nonprofits that replace the government in doing specific sorts of work, but have no contractual relationship with the government. One example is park conservancies in New York City, which have had some issues involving conflicts, and were not overseen by the city's conflicts of interest board. Despite the lack of a formal relationship with the city government, these nonprofits manage public property and are seen by the public as governmental.

d. Consultants and Other Professionals. Consultants and other professionals often act in the place of government officials and should be treated like government officials for the purpose of an ethics program. This includes not only enforcement, but also financial disclosure, transparency, training, and advice. Left out of the ethics program, consultants and other professionals often feel they can do whatever they want, since no one is watching, and that whatever they do is legal. Often they have a special relationship with the head of the department or agency that hired them, which lessens the internal oversight and gives them the feeling that they are free to do as they please. In addition to being part of the ethics program, consultants' work and pay should be carefully overseen by an independent individual or body, such as the comptroller, not only by the official who did the hiring.

One group of consultants that caused a lot of trouble in the Oughts were financial advisers who had special relationships with firms that sold cities and counties complex and risky financial vehicles which had no place in a public portfolio. These firms often gave the consultants commissions or kickbacks. Underwriters, investment funds, and insurers must compete on an arm's-length basis to ensure local governments the best deals as well as transactions that are in the public interest rather than in the interest of the financial adviser.

One reason to have jurisdiction over consultants is that they often have the authority or the connections to benefit themselves in ways other non-officials cannot. For example, it was discovered in 2008 in New York state that hundreds of lawyers who did consulting work for local school districts had themselves listed as part-time employees and enrolled in the school districts' pension systems. Such pension deals were also made in special districts, towns, and villages. Not only lawyers were involved in this, but it was predominately lawyers. Without jurisdiction over consultants, it is more likely that such misconduct will become a norm, making it both pervasive and easier to commit.

Here's a good quote from then New York Attorney General Andrew Cuomo about the effect of such misconduct: "In many ways, this situation is the public integrity version of death by a thousand cuts. Ten thousand governments. Little scams. Chronic widespread corruption and fraud. And in the end, the taxpayers bleed millions of dollars."

Ethics jurisdiction is valuable, but insufficient to fully deal with consultants. Professional oversight is also required. In smaller cities and towns, school construction projects are often overseen by an ad hoc, volunteer school building commission, with the ethics commission brought in only when there is a complaint. Often, this is not enough to prevent self-dealing. Oversight responsibilities must be clearly delineated and the oversight personnel should be professional, even if yet other consultants are required.

There is a special sort of consultant that is usually ignored by ethics programs: the unpaid adviser who, through her position, obtains confidential information that she gives to paid clients. Officials who are advised by such an individual often know nothing about how that individual may use information for her clients' benefit (as well as, of course, her own). Therefore, the officials are not knowingly providing confidential information for anyone's financial benefit. But then again, they are not requiring that their advisers be subject to the city or county's confidential information provision (and other provisions), something they could require of their advisers.

Unpaid advisers are important to officials, especially at the local level, where there are insufficient funds to hire such individuals on a paid basis. However, it makes a big difference to the trustworthiness of advice when the adviser has nothing to gain, directly or indirectly, either from the advice or from inside information picked up as part of the advice process. Seeking and accepting advice from someone who has conflicting interests taints the official's policy-making. The official might think he can still trust the advice, but only by putting on blinders and not being concerned (1) how accepting the advice would look to others and (2) how it would look to treat this individual not as a lobbyist (because the

adviser is not, presumably, pushing any particular client's goals), but as someone whose relationships did not even need to be disclosed to the public.

It is just as important to disclose and encourage the role of unselfish advisers as it is to disclose and limit the role of selfish advisers (that is, lobbyists). The relationships of all advisers, paid or unpaid, should be disclosed, and advisers should not communicate with officials about any matter of interest to any client, family member, or business associate, even if the adviser is not being paid to represent their interests. A rule such as this can seriously change the nature of advisers, the nature of advice, and the government's ethics environment. But first, the ethics program should be given jurisdiction over such advisers.

The reason problems with unpaid advisers arise so often is that, when an official is surrounded by insiders, he is uncomfortable turning to a true outsider for advice. In any event, that's not the way the game works. When the culture of a government organization frowns on seeking truly neutral advice, as is common, there will be conflict situations, and many of them will not be handled responsibly.

The rules of the game need to be changed. And the first step in this change is to acknowledge the rules, discuss them openly, and recommend ways to change them, including ethics program jurisdiction over those involved.

For more on this topic, see [the relevant section](#) of the Procurement chapter.

e. Candidates. Local candidates should also receive ethics training and advice, and be required to deal responsibly with their conflicts. It is common that a candidate's conflicts become an issue in a political campaign. For example, in Tampa in 2010 a candidate headed a nonprofit that had a large contract with the city, and in 2009 a Houston mayoral candidate was counsel to the city's sports, transit, and port authorities, which raised a variety of potential conflicts.

Candidates should be taught and advised as soon as possible how to deal responsibly with these conflict situations, both for their own benefit and to increase public trust that their conflicts will not be an issue if they vote for the candidate. It is not enough to say that you will deal with conflicts after you are elected. A specific plan for dealing them should be made available to the public and the ethics commission.

f. Outside Auditors. Most local governments employ outside auditors to annually approve their finances. Outside auditors differ from consultants and even attorneys in that they have very specific obligations to the public (they're not called Certified *Public* Accountants for nothing). And yet outside auditors owe their contracts to the officials who hire them. If they ask too many questions, investigate too carefully, or are too critical of

what they find, they have reason to believe that their contract may be given to a competitor. Therefore, they are caught between their professional obligations, their personal relationships with officials, and their commercial interest in not rocking the boat.

When outside auditors turn a blind eye to financial irregularities, they are rarely disciplined. In my area, an accounting firm was brought before the Connecticut Board of Accountancy in 2008 relating to the auditing of four different towns and cities. Each matter was dismissed based on a finding that there was “no significant deviation from standards” and “not enough evidence in this case alone to sustain probable cause.” The phrase “in this case alone” is irresponsible, considering that all four proceedings were dismissed at the same time. A disciplinary board that is incapable of dealing with a pattern of problems is not to be taken seriously, either by the public or by auditing firms subject to its decisions.

Outside auditors play too important a role in preventing ethical and criminal misconduct in local governments to be left to the self-regulation of disciplinary boards. Local governments need to make it clear to them that they are expected not simply to follow minimal accounting standards, but to act as the eyes of the community looking into the government's books. Their obligation is to alert the community, not just its officials, to anything that appears improper, and to investigate it or recommend that it be investigated.

Perhaps an ethics commission or inspector general should be given the authority to approve such investigations, so that the city's financial office, which may be responsible for errors or improprieties, is not in a conflicted position, concerned about protecting its reputation instead of protecting the city.

From the government ethics point of view, what is most important is to prevent auditing firms from having cozy, dependent relationships with local officials. The [Sarbanes-Oxley Act of 2002](#) created valuable standards for corporate auditors, which have been applied voluntarily by many local governments. These standards include: (1) required rotation of the lead partner every five years; (2) prohibiting the performance by the auditing firm of non-audit services to audit clients; and (3) a five-year cooling off period for auditors before working for an audit client.

I would take the rotation rule a step further with respect to local governments. Most local government auditing firms are relatively small, while most of the corporate auditing firms are huge. Therefore, it is not enough to rotate the lead partner; the entire firm should be rotated. That is, each local government should change its auditor at least every five years. This ensures that auditing firms will not feel dependent on the officials they work with, and will have the confidence to rock the boat when necessary, because

they will lose their contract soon anyway. And by the time the firm gets another auditing contract with the same local government, the personnel on both sides will likely have changed a great deal. Personal relationships and auditing do not mix well.

There is also the issue of transparency. A new administration in one of the four Connecticut cities asked for all working documents relating to the relevant audits of its city. The auditing firm said that working documents were not the property of the client, but of the firm. Local governments should include in their auditing contracts that all working documents are public documents and, therefore, property of the local government. In addition, outside auditors, like internal auditors, should be made expressly subject to state transparency laws as well as local and state ethics laws (including an obligation to report possible misconduct).

g. Political Party Officers. Political party officers are another group of individuals who often play a very important role in local government, but are usually not covered by ethics codes. Sometimes a party chair is the most powerful individual in the city or county. His power consists of recruiting, selecting, and advising those who run for office, those appointed to offices, and those hired for government jobs. Without any government position, such people can control the makeup of government, the patronage system that helps keep the party in power, and even the local government's policies and actions. In other situations, the party chair is the mouthpiece for the mayor or opposition leader, taking a public position in controversies where the mayor cannot. A political party officer, or an individual who selects these officers, sometimes acts as the "boss" of a city or county "machine." In other words, party officers and their colleagues can seriously affect a government's ethics environment and the public trust.

Besides sometimes being an elected or appointed official, a party officer often wears other hats, as lawyer or lobbyist for those seeking benefits from government, as a realtor or developer helping to put together development projects, as a city or county contractor, or as an important figure in the local election process. There are many ways for a party officer to wear multiple hats and enable conduct that leads the public to believe that the local government exists for the politically involved and those who benefit financially from the government.

Some might consider the conflicts of a party officer to be an internal party problem. But many of their conflict situations can have important ramifications in the government, due to the officers' power. For example, if the party's council members are seen as

supporting a deal because the party chair has a personal interest in it, or the deal is with his sister, that's no longer a party issue. That's a government ethics issue.

The City Ethics Model Code covers party officers in three ways. §103.1 requires them to file disclosure statements; §203.2 prohibits them from sitting on an ethics commission; and §100.18 makes it a violation for anyone to “directly or indirectly, induce, encourage, or aid anyone to violate any provision of this code.” This last provision is important to have in order to bring party officers into an ethics proceeding and make them accountable for their conduct. They should also receive ethics training and be encouraged to seek ethics advice for themselves and for their colleagues, when their colleagues either don't see their conflict or are unwilling to discuss their situation with “outsiders.”

Some party organizations have ethics pledges or codes, but they are usually limited and come with no training, advice, disclosure, or enforcement.

h. Fixers. Every city and county has individuals who hold no formal position, but who bring officials together with those seeking to do business or get a job or position with the local government. They explain to the uninitiated how things work, they open doors, they navigate procedures. They are paid for their services by developers, contractors, and grantees, as well as by law firms and investment firms. They advise officials, party committees, and campaigns. In other words, they make a living off the special relationships that are central to government ethics.

Some are ward bosses or party officials, but many have no formal position. They're known as fixers, bagmen, go-betweens, power brokers, influence peddlers. They usually don't have to register as lobbyists, they usually don't do business directly with governments, and yet they can be directly or indirectly responsible for (and aware of) a great deal of ethical misconduct.

And yet they are left out of ethics programs. They don't have to disclose, they don't have to report, they aren't expected to ask for ethics advice, they don't get ethics training, and ethics laws are almost never enforced against them.

Normally, this is considered to be one of the limits of a government ethics program. But this doesn't have to be the case. No one *has* to fall through the cracks of an ethics program. All an ethics commission has to do is remind itself that ethics laws are minimum requirements. Just because fixers don't *have* to disclose doesn't mean that the ethics commission can't ask them to. Just because fixers don't *have* to take ethics training doesn't mean they can't be invited, and told that their attendance is expected. They can also be told to ask for ethics advice whenever they encounter a possible conflict, and to report

possible misconduct they encounter. And they can be called as witnesses in ethics proceedings, be the topic of hearings when an ethics commission feels they are causing trouble, and even added as respondents to ethics complaints.

In short, fixers should be told that they are part of a government's ethics program. The only reason they don't appear in ethics codes is that their role is hard to define, like a "friend." That doesn't mean that they don't have the same responsibility as the contractors, developers, lobbyists, and job seekers that they help and who pay them. After all, they are one of the most important groups of individuals referred to when an ethics code uses the word "indirectly."

What leverage does an ethics commission have with respect to fixers? An ethics commission can make it clear to the officials and restricted sources who deal with fixers that if there is a problem with a fixer outside the ethics commission's legal jurisdiction, it will be those within the commission's jurisdiction who will be held responsible. And fixers can be told that, if they do not cooperate with the ethics commission's requests, their involvement in any transaction will be an important element in accepting or initiating complaints and determining probable cause.

Take the example of Vito Lopez, who in 2012 held two political positions: member of the New York state assembly and Brooklyn's Democratic Party leader. However, his real power lay in a position he didn't actually hold, head of the Ridgewood Bushwick Senior Citizens Council (RBSCC), a nonprofit provider of social services with a \$120 million budget. According to a *New York Times* article, this nonposition gave Lopez "a plentiful reservoir of faithful voters and campaign workers," as well as jobs and people indebted to him. What is somewhat unusual is that he began with the social service agency, and went into politics to get more done and to give it and its goals more pull.

Lopez is said to have used his multiple positions to help his family and friends. As party leader, he nominated his girlfriend's brother, the sister of his campaign treasurer (who had run the RBSCC), and one of his own daughters for judicial positions.

Lopez is said to have used his multiple positions to secure vacant sites for the RBSCC, making it almost impossible for anyone else to build affordable housing. Lopez built good will for himself by having the RBSCC hold Christmas and Thanksgiving dinners and an annual, taxpayer-financed picnic for the elderly. The RBSCC newsletter ran articles praising Lopez, with headlines such as "A Living Legend." And Election Day was an RBSCC holiday, so its employees could help get people to the polls to vote for Lopez and his allies.

And yet Lopez was only a state official, not a local official.

When one wears multiple hats, one creates around oneself a web of mutual favors. It's hard to beat a combination of political power and control over jobs, housing, and other services in a community. This kind of power comes at the expense of other organizations in the community as well as organizations in neighboring communities. It makes social services dependent on political power and contacts, and turns a social service organization into a patronage machine similar to a political machine. This means incompetence, a loss of public trust, and an ethics environment based on loyalty and dependence on one individual and organization.

When one individual wears multiple hats like this, everything tends to be personal. This means that the separation between person and office, between self and community, becomes non-existent. Someone who starts out as a valuable advocate for his community ends up as someone who makes others dependent on his benevolence.

Such an individual may not hold office in the community, but he should not be outside the jurisdiction of the community's ethics program. If he is not under the ethics commission's jurisdiction, it may still hold public hearings on a damaging situation such as this, where political power is *de facto* rather than *de jure* (or, as in this case, *de jure* only at the state level). If a party leader, or other individual, wants to play political games, the local ethics commission should step in and referee the games. There is no reason to wait for criminal authorities to find sufficient evidence to arrest the individual.

8. Advisory Board Members

Jurisdictions disagree about whether advisory board and task force members should be excepted from ethics provisions. Many feel that, when a board has no authority to act or implement, the usual rules should not apply. The principal argument is that there are times when a government needs to get people with opposing interests together — such as business and union interests — in order to hash out community problems. Many of those chosen to serve on such boards are chosen because they are in positions that would conflict with their position as government officials if they had any authority. Another argument is the need for expertise.

There are problems with the creation of a blanket exception for advisory boards. One is that the recommendations of an advisory board, although not controlling, have a great deal of authority. Although an advisory board may only make recommendations to the local legislative body, since all the work has been done by the advisory board and since

the advisory board was created to reflect various parts of the community, the legislative body is likely to accept the board's recommendations.

Think of one of the most important advisory boards, a charter revision commission. It can cause substantial changes in the way a local government is run, including the creation (or failure to create) an ethics program. The fact that its proposals must be approved by the legislative body and often by the public via referendum takes nothing away from the authority of such a commission.

The second problem with a blanket exception for advisory boards is that, although an advisory board's members may be chosen to reflect a variety of views in the community, it might be stacked to favor one view over the others, and the members of the majority may be seen as using their positions to benefit themselves, or even to benefit certain officials who have a personal interest in the matter, whether it be a transportation or building project, or energy rights.

Three, it is worthless for any body that is not trusted by the public to make recommendations. Why set up a task force with conflicted members, whose conclusions will be seen as self-serving? The public may not be angry that good government group members have been chosen for an ethics advisory board, but they will be angry that developers have been chosen for a transportation advisory board. In one case, there is bias, but no personal interest; in the other case, there is both bias and personal interest.

When in 2010 the ethics commission in Fort Worth found that three members of an Air Quality Study Committee who worked for major gas drilling companies had a conflict of interest, the council overrode the commission's decision, decided to replace two ethics commission members, and proposed to create an exception for advisory boards. This was done despite the fact that the *Star-Telegram* got the following result in an informal poll: "Do you think that gas company employees should serve on city committees that oversee their industry?" 21% chose the answer, "Why not? They know the business." 79% chose the answer, "Never - a conflict of interest, plain and simple." The *Star-Telegram* wrote in an editorial, "[I]t has been pointed out that the *Star-Telegram* was represented similarly on an advisory committee a few years back when the city was considering limits on newspaper racks on sidewalks. It wasn't OK then, either. Shame on us." There was clearly a gulf between the council's view and the public's view on the conflicts of task force members.

There are three alternative ways of handling such conflicts, and one or more of them will be the most responsible way of handling the great majority of situations.

One alternative is to designate members with conflicts as advisory or *ex officio* members of the task force, that is, members who fully participate but do not write the report or get a vote. They are there to share their views and expertise, not to directly make recommendations to the legislative body.

A second alternative is to allow those with conflicts to testify and advise the task force, rather than serve on it.

A third alternative is to find advisory board members who have expertise but do not have conflicts, such as retirees, academics, and individuals who have moved on to other careers.

As soon as you recognize that there are alternatives such as these, it no longer seems necessary that advisory board and task force members will have conflicts. If there are other alternatives to excepting advisory board and task force members from conflicts of interest laws, it is irresponsible to except them.

There is, of course, the possibility of creating a body consisting of representatives of, say, unions and employers, fifty-fifty, to make joint recommendations. If they can agree, their recommendations would be very useful. But even here, there are two more alternatives.

One alternative is to have the advisory board not be a governmental body, but instead an independent body created and selected by the unions and employers, or their representative bodies.

The second alternative is that, if it were considered important that it be a government body, and that the advisory board contain members with conflicts, the advisory board could seek a waiver from the ethics commission. Unless this sort of task force is the norm, and it isn't, there is no reason to carve out a broad exception when the waiver process is available to deal with truly exceptional situations.

The waiver process is a transparent process independent of political or personal interests. It requires the parties involved to make their case in public, allowing others to either oppose the creation of such a government body, or to argue that interested individuals are not truly essential to the goals for which the body was created. If done correctly, it should cause the public to trust an exceptional body with conflicted members.

With these five alternatives available, there is no reason for a blanket exception of advisory board and task force members from conflict of interest rules.

9. Public-Private Partnerships

There are many public-private partnerships and other entities or bodies that have authority over government or government-like operations, but which are not officially part of the local or state government. When these bodies are regional, they are usually covered by state law. When they are local, the principal issue is whether the members are essentially serving their own interests or the public interest. For example, a development board controlled by developers may raise money to fix up and maintain an area of the city or county, but the board is only dealing with the properties of its members, so their conflicts should not prevent their participation on the board. However, this does not mean that the ethics code should not apply to them. The basic decisions of the board will involve existing conflicts, but this does not mean that it is acceptable conduct to create conflicts, such as the hiring of family members, nor should they be permitted to use public property for their and others' personal use, or require staff members to involve themselves in political activity. And they should not be exempted from disclosure requirements. Therefore, they should be under an ethics commission's jurisdiction, with a waiver that applies to the basic conflict that exists because they are developers (another alternative is to have a clear Rule of Necessity provision that allows the developers to participate in order for the board to function).

10. **Volunteers**

Everyone feels gratitude toward volunteers who, without fame or fortune, do a lot of the important work of local governments. Sometimes that gratitude takes the form of excepting volunteers from some or, occasionally, all ethics rules. The argument is that volunteers should not be forced to deal with ethics disclosure or proceedings against them.

The problem is that volunteers have the same duties to the public as paid officials, and along with their important work comes a great deal of authority. Volunteers are often in a position to help themselves and those with whom they have special relationships. Their conduct can also undermine the public trust. Those who truly lack authority, such as a library board, may be excepted from disclosure.

In colonial America, it was believed that property, which was required for voting, freed individuals for public service. In other words, citizenship carried with it duties within and to the community. Volunteer service was the norm, and was less a choice than a duty. When people squeal today about ethics laws applying to volunteers in local government, perhaps they should be reminded that our nation was founded by volunteers, and that the extension of the right to vote does not necessarily change the civic duties of citizenship. As

Lewis Hyde wrote in his book [*Common as Air*](#) (Farrar, Straus, 2010), “Citizens acquire virtue in the civic republic ... by willingly allowing self-interest to bow to the public good (or by recognizing that the two are one). Civic virtue is not something anyone is born with; it is acquired through civic action.”

In addition, many volunteers are not simply nice citizens donating their time. They are deeply involved in partisan politics. Some are on their way to becoming council members, mayors, and state representatives. Volunteer boards are the minor leagues of politics. It is important for volunteers to understand government ethics from the start, to get the same training, to obtain the same advice, and to be accountable just like paid officials and employees. Volunteers on boards that have no involvement in finances, land use, procurement, or grants may not be required to file annual financial disclosure statements, but there is no reason why they should not be part of an ethics program.

11. Ethics Commission Members and Staff

The one group of officials and employees over whom an ethics commission should not have jurisdiction is its own members and staff. Government officials and employees who provide legal advice or other support services should not be considered “staff” for the purpose of jurisdictional purposes, but the fact that the ethics commission may be placed in a conflicted position if a complaint is filed against such part-time helpers emphasizes how important it is for an ethics commission to have its own staff and to make as little use as possible of officials and employees under its jurisdiction.

An ethics code should expressly state who does have ethics jurisdiction over commission members and staff. In [the section above on commission conflicts](#), I recommend that an ethics commission make a mutual deal with a nearby ethics commission, or a state ethics commission.

12. Motion to Dismiss for Lack of Jurisdiction

If during the initial review of an ethics complaint (see the following section), the ethics commission or ethics officer finds that the ethics commission has jurisdiction over the respondent, some ethics codes or rules expressly allow the respondent to make a motion to dismiss the complaint for lack of jurisdiction. Sometimes, such a motion is not allowed to be made until there has been a finding of probable cause, but it would seem best that it be allowed at any time. If the respondent has a good argument, there is no reason to go ahead with an investigation.

Such a motion may be made even if it is not, as in most cases, expressly recognized by an ethics code or rules of procedure. But it is best to acknowledge the possibility with a provision allowing such a motion.

Here is language derived from Jacksonville's rules:

A respondent may file with the ethics commission a written motion to dismiss a complaint for lack of jurisdiction. The ethics commission will hear arguments of the respondent and advocate in executive session. If the commission finds that it has no jurisdiction over certain allegations in the complaint or over the respondent, it will order the complaint dismissed with respect to those allegations or that respondent.

C. Dealing with Complaints

1. Initial Review

Initial review, although the first and one of the most important stages of the enforcement process, is often ignored by ethics codes. When it is not mentioned in an ethics code, an ethics commission should have an initial review provision in its rules and regulations. Otherwise, the ethics commission (as well as the public) will feel that it must investigate every complaint and, sometimes, every informal allegation it receives. This is a waste of resources and, if the investigation becomes public, it can undermine public trust in the local government, even though no ethics violation was actually alleged against someone over whom the ethics commission has jurisdiction.

Although ethics codes often speak of the dismissal of insufficient complaints, initial review is not just a way to dismiss allegations that don't belong in the hands of an ethics commission. It is also a way to help complainants properly express their allegations so that they can file an ethics complaint.

Many insufficient complaints do not have to be formally dismissed. Instead, an ethics commission or its staff may point out omissions and errors, return rather than dismiss the complaint, and have the complainant refile the complaint. An ethics commission should recognize that many complainants do not understand government ethics or how to phrase their allegations, or they let their anger get the best of them. Understanding this, an ethics commission and its staff should be helpful to complainants, not judgmental, at least where there appears to be possible misconduct. Jacksonville's rules

expressly state this: “The Ethics Director shall provide assistance or information to persons seeking to file a Complaint, but shall not solicit or discourage the filing of a Complaint.”

The best approach is to recommend that complainants contact the ethics officer before filing, so that inappropriate allegations can be dealt with before they are filed. It is best for everyone if allegations are filed correctly with the appropriate agency.

Dismissal or Referral When No Violation Is Alleged

Most complaints that are filed with an ethics commission do not actually allege a violation of an ethics provision. Most people do not understand government ethics. Most often, they think that the “ethics” part refers to a much broader range of conduct than it really does, and do not look at the ethics code before filing a complaint (or they don’t get past the nice-sounding, but merely aspirational policy and goals language at the start of the code). They allege that an official was drinking on the job, or was rude to a citizen at a meeting, or lied about something. In other words, the official may have done something he shouldn’t have done, but not something that involved the handling of a conflict situation.

It is useful to include on an ethics complaint form and prominently on an ethics commission website a list of the laws that an ethics commission has jurisdiction over, including a list of the enforceable provisions of those laws. It is useful to insert hyperlinks into this list, so that potential complainants can go directly to the relevant provisions. Here is Palm Beach County’s list, from its regulations (in many cases, there will also be relevant charter provisions):

- a) The Ethics Commission may only consider complaints concerning the following ordinances:
 1. Code of Ethics, Article XIII §2-441 to 2-448 (Ord. 2009-051)
 2. Commission on Ethics, Article V §2-254 to 2-260 (Ord. 2009-050)
 3. Lobbyist Registration, Article VIII §2-351 to 2-357 (Ord. 2003-018/2005- 055)
 4. Post Employment, Article VI §2-141 to 2-146 (Ord. 88-30)

An ethics commission should either dismiss or refer complaints that do not allege an ethics violation (or such allegations, if there are other allegations that do allege an ethics violation) as expeditiously as possible. This can be done by the ethics officer or a staff member. Such complaints should be no more than statistics in the annual report under the

column “Complaints dismissed for failure to state an ethics violation.” Where there are many such dismissals, it would be helpful to categorize them as, say, pertaining to personal morality, personal crime, or civility. However, it is not necessary to provide details unless the commission suspects that staff is too easily dismissing complaints. Presentations about dismissals require an executive session or closed meeting, depending upon the jurisdiction’s open meeting laws.

But what does it mean to “not allege an ethics violation”? Rhode Island’s rules have good language that, at this point in the process, focuses the ethics commission on the allegations in the complaint:

The Commissioners are to examine the alleged facts within the four corners of the complaint, without making any judgment as to credibility or examination of any collateral information.

Quick dismissals of complaints do not even require notification of the respondent, as long as they are accomplished before the date the ethics code requires notification of the respondent. Effectively, they are not complaints at all, but rather communications about misconduct or individuals that are outside the ethics commission’s jurisdiction.

Complainants that do look at the ethics code often allege a violation of general language that appears in the Declaration of Policy section of the code. For example, here is language that has formed the basis for multiple complaints in Stamford, Connecticut:

Officers and employees of the City of Stamford must refrain from personal, business, financial and political activities that can reasonably be interpreted to reflect adversely on the individual’s fidelity and impartiality. . .

Often the language will speak even more generally about the official’s integrity, or about the reputation of the city or county. Complaints based on nothing but such aspirational language should be quickly dismissed on the basis that no ethics violation was alleged. The dismissal should make it clear that language in the policy section is not enforceable, and therefore cannot be the basis for a complaint.

A requirement to dismiss a complaint alleging a violation of aspirational language means that an ethics code should be very clear in separating out its aspirational language and expressly stating that it is not enforceable. The aspirational language in the [City Ethics](#)

[Model Code](#) is clearly an introduction, without a section number, and it contains an express statement that its obligations will not be enforced.

If this is not done, ethics commission members may feel they are required to enforce the aspirational provisions. This makes officials feel that ethics enforcement is the sort of unfair, gotcha! thing they fear the most. When aspirational provisions were treated as enforceable by the District of Columbia ethics commission in 2013, the respondent, a council member, correctly argued that several of these provisions were so vague that to enforce them would violate due process. See above for [more on aspirational ethics provisions](#).

A complaint need not be as precise as an action filed with a court. Even if no ethics provision is mentioned in the complaint, or if the wrong ethics provision is identified, an ethics officer or commission should find a complaint sufficient if it alleges facts that, if true, would constitute a violation of an ordinance under the ethics commission's jurisdiction. It would be useful to expressly state this in [the rules of procedure, as Miami has](#), for example, in Rule 1.5(a).

When a complaint is simply sloppy or fails to fill in all the blanks on the complaint form, it should not be dismissed. Instead, the complainant should be told of his omissions or errors, so that the complaint may be refiled.

Dismissal When the Ethics Commission Lacks Jurisdiction

Determining whether a violation has been alleged against someone over whom the ethics commission has jurisdiction should be done at the same time as the determination whether an ethics violation has been alleged. See [the section on jurisdiction above](#). In some situations, a finding of lack of jurisdiction is accompanied by referral of the allegations to an agency that does have jurisdiction (see the following subsection).

Another reason an ethics commission may lack jurisdiction is if the statute of limitations has run on conduct alleged to have occurred. However, this applies only when either (1) the ethics statute of limitations refers to the occurrence of conduct rather than its discovery ([the best practice is to have it refer to the discovery of conduct](#), because otherwise secrecy and intimidation are rewarded) or (2) the complainant states that the conduct was discovered longer ago than permitted by the statute of limitations. In the latter situation, this means that if the statute of limitation provides, as the City Ethics Model Code suggests, that a complaint must be filed within one year after the complainant discovered the alleged violation, and the complainant alleges that he discovered it more

than one year ago, the complaint may be immediately dismissed. Otherwise, the complainant's discovery of the information will be a factual matter to be determined by an investigation, when the events occurred longer ago than the ethics code's statute of limitations.

There are instances where an ethics commission or ethics officer assumes the commission has jurisdiction over an allegation or a respondent, but it actually does not. This happens most often when an ethics commission has no staff, but rather depends on a city or county attorney who has no training in government ethics. Therefore, it is important to allow respondents to file a motion to dismiss due to lack of jurisdiction (see [the section on this](#)).

Dismissal When Allegations Have Already Been Dismissed

Sometimes allegations in a complaint have already been brought to the ethics commission's attention, and the ethics commission has dismissed them, found there was no probable cause, or even found that there was no violation. In many jurisdictions, the public wouldn't know about the dismissal or finding. Even individuals who do know sometimes think their formulation of the allegations may make a difference (and in some cases they are right).

Unless new, material evidence is presented or a different violation is alleged or the violation is alleged against different individuals or entities, an ethics commission should dismiss allegations it has already dealt with.

But if dismissed allegations are confidential by law, the ethics commission is put in a difficult position. It can dismiss the new complaint, but it cannot tell the complainant why it is doing so, as it can when the reason is that no violation was stated, the ethics commission lacks jurisdiction, or the ethics commission found the stated facts to be false. When a complainant does not know why her complaint was dismissed, she is likely to go public with her grievance against the ethics commission. This undermines the public's trust in the respondent as well as in the ethics program. This is yet another reason why confidentiality can be so damaging to respondents who think it always protects them and to ethics commissions, guided by attorneys, who feel confidentiality is both fair and necessary. See the section below for more on [confidentiality in ethics proceedings](#).

This is why jurisdictions such as Jacksonville state in their ethics code or rules, "In any case where a Complaint is found legally insufficient and dismissed, a summary of the reasons for dismissing the Complaint together with the Complaint itself and all documents related thereto shall become a public record and constitute a public report."

Dismissal When the Respondent Was Following Ethics Advice or an Ethics Decision

Sometimes allegations are based on conduct that was already approved by the ethics officer or commission. And sometimes the alleged conduct is essentially the same as that approved in a related or different situation that was the subject of prior ethics advice, a waiver, or an ethics decision. In either case, the ethics commission may dismiss the matter without investigating further. In the case of similar conduct, the commission may prefer to make a finding of no probable cause rather than dismiss the complaint. It can do that without an investigation, or with a limited investigation to confirm the facts alleged in the complaint.

Even where the respondent has acted on the advice of the ethics officer or commission, it is important to check the complaint's statement of facts against the facts provided by the respondent when seeking ethics advice. This is one reason it is important to put even informal ethics advice in writing. If the statements of fact differ in any significant (that is, "material") way, the respondent should be notified of the complaint and, specifically, of the difference in the facts presented, and be asked to explain the difference, if possible. If the difference cannot be quickly reconciled, an investigation should be done, focused on the difference in the facts presented to the ethics commission by the complainant and the respondent.

There are also cases where a complaint has been dealt with by another agency or department, or by a supervisor, for example, as a personnel, criminal, or disciplinary issue. Here, the principal question is, Was the matter dealt with (or dismissed) as an ethics issue, or were other aspects of the situation dealt with? If other aspects of the situation were dealt with, the complaint should not be dismissed. If it was dealt with as an ethics issue, the agency kept a written record of advice given and/or action taken, and the resolution was consistent with the ethics commission's prior decisions and approach to such matters, then the complaint should be dismissed. However, the ethics commission or its staff should discuss with the agency, department, or supervisor the fact that the ethics commission has a monopoly on ethics issues, and that they should refer all ethics matters to the ethics commission.

There are some local governments that allow many different individuals, agencies, and departments to deal with government ethics issues. One of the many problems this creates is, how to deal with multiple proceedings relating to the same allegations. This policy, besides leading to forum shopping and inconsistent advice and enforcement, can lead to turf wars, where the most powerful or aggressive individuals and agencies —

whether the mayor, council, inspector general, personnel department, or city or county or district attorney — effectively take over the ethics process. An ethics commission should not fight this battle complaint by complaint (unless, perhaps, it has a staff and the support of the mayor, manager, or council). It should lobby hard for ethics reform that would provide it with a monopoly over ethics advice and enforcement (see [the section on monopoly](#) for more on this topic).

Referral of Allegations

Often, although an ethics complaint may not allege a violation of an ethics provision, it does allege a violation of another law. When this occurs, an ethics commission refers those allegations, or the entire complaint, to the appropriate authority.

Sometimes, the same conduct is both an ethics violation and the violation of other rules or laws, criminal laws, personnel rules, EEOC laws, labor laws or agreements, etc. Sometimes it is a disciplinary matter the ethics commission feels is best handled by the respondent's agency. And sometimes the other agency has already begun an investigation of the matter or is even in the midst of an enforcement proceeding (although the ethics commission may not know this until it refers an allegation, and sometimes not even then, when the other agency's confidentiality rules apply even to other agencies within the same government, which is a mistake, at least under these circumstances).

It is a waste of resources for there to be multiple investigations of the same or related conduct, and multiple enforcement actions, and yet this often happens. As is discussed in [the section on criminal enforcement](#), criminal authorities often push aside an ethics commission, because criminal laws are considered to be more important. In fact, some ethics codes expressly give criminal authorities precedence over an ethics commission. This is better than having a turf war, but not necessarily the best way to handle each situation, because prosecutors tend to consider ethics matters low-priority, and because they and their decisions to prosecute are considered politically motivated, which can undermine the public's trust even when an official is found to have violated a law.

The best way to solve such problems is for an ethics commission to establish relationships with the various offices with which ethics laws tend to overlap (see [the section on Cooperation](#)).

When an ethics commission decides to refer a matter, either upon initial review or upon learning more about the matter in an investigation, it should not give up full control

over the matter. It should require that the agency it refers the matter to report back to it (1) when it dismisses or refers the matter, (2) when it makes a decision whether or not to pursue an action, and (3) when it makes a decision. An ethics commission should also require that the agency report to it every six months, even if nothing occurs. The reason for this is that delay itself is an event. It is often the default way of saying that a matter is low priority, or a sign that an agency is allowing an official to dictate the pace of an enforcement proceeding, for his own benefit. An ethics commission that considers the matter high priority should talk to the agency about handling the matter itself.

New York City's conflicts of interest code provides that when a matter is referred to an agency for a disciplinary hearing pursuant to state law or a labor agreement, "the agency shall consult with the board before issuing a final decision." This keeps the ethics commission's finger in the pie.

It should be made clear in an ethics commission's regulations that, if an ethics commission chooses to defer to another agency, the proceeding effectively freezes, so that no time limits apply and, if the matter is later taken up by the ethics commission again, it will continue as if from the date of deferral.

In some cases, there is good reason for there to be multiple investigations or proceedings, because different issues are involved. For example, coercion of a subordinate may involve a disciplinary issue to be dealt with by the supervisor's agency, but the subject of the coercion — the supervisor's indirect participation (via the subordinate) in a matter where she had a conflict — can only be enforced by the ethics commission. For situations such as this, an ethics commission should be able to refer a matter and, at the same time, investigate and enforce those aspects of the matter relevant to its jurisdiction. It would be best if the investigations could be done together, or by one agency with the other's involvement, but if this is not possible, the ethics commission should not be held back simply because it was responsible enough to refer allegations for enforcement elsewhere.

Chicago's rules and regulations expressly acknowledge the possibility of multiple investigations or enforcement proceedings:

The referral of a complaint in no way affects the Board's power to initiate or continue its own investigation into the subject matter of that complaint.

Dismissal When the Alleged Violation Is Minimal

Often a complaint will allege a possible ethics violation, but the violation would be so minimal that it is a waste of time and resources to investigate and hold a hearing on the allegation. An ethics commission should be allowed to use its discretion to decide when an allegation is not worth investigating. In such a case, the alleged violation is called a de minimis violation.

Some guidance on what is de minimis is helpful to the ethics commission and its staff, but this is one area where government officials and employees do not need guidance, because allowing an ethics commission discretion to dismiss de minimis violations does not mean that such violations do not constitute ethical misconduct, only that they are not worth the bother of investigating and enforcing. They should still be considered violations. The creation of minor conflicts should still be avoided, just as small gifts from those doing business with government should not be accepted.

It is important that this discretion appear in the ethics code or regulations. There are situations that are very important to the complainant, but of little importance to someone not involved in the situation. The ethics commission needs to be able to dismiss such allegations without looking like they are going beyond their powers and letting officials off.

It is also important that (1) a de minimis provision not be used as a way to insert exceptions into an ethics code; (2) that it not be limited to one thing, such as pecuniary benefits or disclosure requirements; and (3) that de minimis not be defined too specifically, such as a gift of less than \$50 or a percentage of ownership of less than 5%. If at all, such figures should appear in the provisions where they apply, that is, in the gift or conflict provision (see the sections on these provisions for a discussion of de minimis language). A de minimis provision should apply to all aspects of ethics and should provide the ethics commission with enough discretion that it can apply to a wide range of situations.

The reference to de minimis violations in the City Ethics Model Code appears in the administration section (§213.1), because the idea of de minimis should come into play only when an ethics commission distinguishes between what is worth investigating and what is not. Whether a violation is de minimis is a consideration that government officials and employees should not themselves be making.

For more on the concept of de minimis, see [the subsection on De Minimis Benefits](#).

Dismissal When Allegations Are Determined to Be False, Frivolous, or For the Purpose of Harassment

Determining allegations to be frivolous or for the purpose of harassment should be done with great care. Someone calls almost every ethics allegation “frivolous” or “for the purpose of harassment.” Or worse. Mostly, this means no more than that the accused official or her allies believe, or want others to believe, that there was no ethics violation, that the allegations are being made for purely personal or partisan reasons.

The fact is that it is very hard to determine when allegations are truly frivolous, that is, not serious and, therefore, irresponsible, or done truly for the purposes of harassment rather than simply done by someone from an opposing party or faction. Allegations made solely for personal or partisan reasons can be a serious problem. But how without an investigation, do you determine if they were made frivolously or maliciously? Even after an investigation, how can an ethics commission be sure that the complainant simply did not have all the facts, presented them poorly, or acted out of anger and misunderstanding rather than malice?

Truth is really the issue, not motive or irresponsibility. If allegations are true and state an ethics violation, then they are clearly not frivolous, and it doesn’t matter what the complainant’s motive was. If the allegations do not state an ethics violation, then they can be easily and quickly dismissed, without a difficult consideration of frivolousness or harassment.

Factual issues, however, are more difficult to deal with. To quickly dismiss a complaint as without factual basis, an ethics officer or staff member needs to decide that the allegations are so clearly false that it’s not worth investigating them. If there has been an investigation, then it is easy to decide that there is not sufficient probable cause to continue further with the matter. If there has not been an investigation or it is far from complete, the investigation should stop and a determination made that a probable cause conference is unnecessary.

Philadelphia’s regulations speak of finding a complaint “false or frivolous” rather than simply “frivolous.” When allegations are lacking a factual basis, the question becomes who is responsible for making this determination, and then what? Philadelphia’s regulations put the ethics board’s executive director in charge, saying that he “may initiate an investigation on behalf of the Board into the circumstances surrounding the drafting and filing of the complaint, including requesting or compelling testimony from the complainant.” In other words, the ethics commission may find that false statements can be investigated and enforced as ethics violations.

One problem with making false allegations an ethics matter is that the complainant may not be otherwise subject to the ethics commission's jurisdiction. Also, if no one publicizes the filing of the complaint, the complainant will have not hurt the respondent or the ethics program, except to the extent she has wasted its resources. However, if the filing of the complaint has been publicized, then a maker of allegations lacking a factual basis might have let her personal or political antagonism against an official undermine his reputation. The cure to this is to make an announcement that the complaint was dismissed due to an allegation without factual basis. Such an announcement would redeem the respondent's reputation and make him look victimized by a mean-spirited opponent, whose reputation would be hurt. What more need be done?

The biggest problem here is that the falsity of an allegation may not be the complainant's fault. The complainant might have depended on a false report or may have misunderstood the situation or even misremembered something. Too often we assume someone's intent was to be false and unfair to someone, when in fact they were too trusting or simply incompetent. Incompetence is a far bigger problem than ill will.

It's telling that the same people who insist that 99.9% of all government officials and employees are ethical instantly accuse those who make allegations of being unethical, without considering the other possibilities, which would put the complainant among the 99.9%. We tend to assume the worst of people we consider our opponents, and our laws too often reflect this.

If every false fact, even one arising from incompetence or trusting others (recognizing that an ethics officer depends on trusting others' reports, as well), can lead to sanctions against a complainant, who is going to file a complaint? False allegations are bad, but creating a huge obstacle to making formal allegations is worse. An ethics commission that has the authority to declare allegations false, opening complainants up to ethics proceedings or private suits against them, will never know how much true misconduct they will never learn about. This is less problematic if an ethics commission can initiate investigations based on anonymous tips, but even then, the principal effect of the authority to proceed against complainants will be to replace formal complaints with anonymous tips.

There is a paradox here. High-level officials are afraid of both false attacks on their conduct and anonymous tips, and yet they are interdependent. To get rid of one, one either has to increase the other or, if local legislators refuse to give an ethics commission the authority to initiate investigations, getting rid of false attacks will essentially bring an end to ethics enforcement altogether, thereby undermining the public's trust in the ethics

program. In other words, the only way for officials to protect themselves from false formal allegations is to create an untrustworthy ethics program.

Officials must publicly acknowledge the following three facts in any discussion of how to deal with false and frivolous allegations. One, false information *will* be provided. In many cases it is the result of ignorance or incompetence; in other cases it is the result of our habit of having biases, spinning everything we say, and rarely telling the whole truth; in other cases it is the result of overzealousness; and yes, sometimes it is the result of treachery.

Two, people who feel they will be prosecuted for providing false information in a complaint or in testimony, especially when these terms are undefined, will tend not to file a complaint and not to provide much in the way of testimony other than “I don't know” or “I'm not sure.” If one applied to this book Chicago's new “zero-tolerance policy” and high penalties for “false, frivolous, or bad faith” information, I would not have written it. Not because I'm out to get anyone, but because my knowledge is limited, I have biases, I'm sometimes overzealous, and I make mistakes. Just like everyone else.

Three, serious false information penalties have a devastating effect on whistleblowing.

The solution to false and frivolous allegations is not penalizing them and turning an ethics commission into a prosecutor of whistleblowers. It is allowing ethics commissions to determine whether there is sufficient evidence of an ethics violation to hold a hearing and [allowing ethics commissions to initiate investigations](#) based on tips, so that they can determine whether there is sufficient evidence of an ethics violation to file a complaint.

A Complainant's Withdrawal of a Complaint

Sometimes, a complainant will decide that his view of the facts was wrong or that he no longer wants to pursue the charges he made. It seems reasonable to allow him to do this, to admit his mistake or change his mind, and end the proceeding. It may be the best way to prevent an injustice, that is, the harming of someone's reputation when they did nothing wrong at all.

But there is a problem with this: it is impossible for an ethics commission to know whether the complainant's decision is a responsible one or whether it is the result of intimidation by the respondent or the respondent's allies. Such intimidation is too common for an ethics program to allow it to be effective.

It is difficult to know whether there has been intimidation, or whether the complainant has been spooked by only the suggestion, by someone else, of retaliation. And what might appear as intimidation to a complainant may not appear that way to others. For example, in Kennesaw, Georgia in 2012, it was said that after an ethics complaint was filed against the city's mayor, the mayor sent two text messages to the complainant, asking for a meeting “man to man face to face.” Special counsel to the city’s ethics board referred to this as dispute resolution, adding “We haven’t gone that far in this country to say you can’t talk about your differences.” But what from the outside might appear to be a discussion might feel to the complainant, and actually be, intimidation intended to obtain withdrawal of the complaint.

Dispute resolution in a government ethics proceeding should occur between respondent and ethics commission, in the form of settlement negotiations. There is no dispute between complainant and respondent, but only between respondent and the community. Once a possible violation has been brought to the ethics commission’s attention, it is an issue for the ethics commission to determine. It is, effectively, in the hands of the public, just as with criminal enforcement. It would be irresponsible for an ethics commission to let one individual determine what is best for the community, to prevent an investigation from going forward and the story of what happened from being told.

Also, allowing a complainant to withdraw a complaint puts the complainant in the position of being able to give in to intimidation. If the rule is that a complaint, once filed, cannot be withdrawn, then it is clear that intimidation of the complainant cannot work, at least toward this goal. This protects the complainant and makes it more likely that the most serious complaints will be filed and heard.

Of course, a complainant should let the ethics commission know if he has discovered that his statement of facts was not totally correct. The ethics commission should be free to amend the complaint or take new facts into account in its investigation and its determination of whether there is probable cause to proceed. But the decision to dismiss or amend the complaint must rest solely with the ethics commission.

It is important that ethics programs do not treat complainants as parties to an ethics proceeding (see the section on [the complainant’s role](#) in a proceeding). A complainant’s action may begin a proceeding, but then the ethics program takes over, with its investigation and hearing process.

It is important that an ethics code or regulations make it clear that a complainant is not a party to an ethics proceeding. A complainant should be a witness, but a complainant does not have a role in an ethics proceeding different from any other witness, at least not formally.

Warning Letters

Dismissal alone may not be considered sufficient with respect to allegations of de minimis violations. This is a good occasion for an ethics commission to send a warning letter to an official, letting the official know that, if the allegation were true, the official violated the ethics code and should be careful not to engage in such conduct in the future, even at a de minimis level. It also may be pointed out that the official should ask for advice if such a situation arises again (a requirement to seek advice would prevent many ethics complaints where the violation is minimal; see [the section on requiring officials to seek ethics advice](#)). A warning letter is effectively unrequested ethics advice. Warning letters are used, for example, by the New York City Conflicts of Interest Board.

Warning letters can also be used where there is insufficient evidence of a violation, but where, as in the language used in California (where the state ethics commission has jurisdiction over local officials), “the subject of a complaint should be made aware of potential future responsibilities.” Warning letters can also be used when an ethics commission investigates a matter, finds evidence, but does not believe a fine or other sanction is called for.

When an official who has received a warning letter does what he was advised not to do, this should be considered an aggravating circumstance in a future ethics proceeding. The ethics commission should penalize the official, taking the warning letter into account.

Another sort of warning letter, called a “public education letter,” is employed by Massachusetts. What makes this different is that it requires the consent of the respondent, making it a form of settlement of a minor case, where the emphasis is placed on prevention and education rather than on getting the respondent to admit to a violation. Here is the language from the Massachusetts rules of procedure:

The Commission may also resolve a matter through the issuance of a public education letter which assesses no civil penalty but which publicly reviews the alleged violations of law for preventative and educational purposes. A public education letter may be authorized where the facts and alleged violations warrant a public resolution without the formality and expense of an adjudicatory proceeding

or an admission that a subject has violated [an ethics provision]. A public education letter may be issued only with the consent of the subject.

Ethics Commission Involvement in Dismissals

It is tempting to allow an ethics officer or executive director to dismiss complaints on her own, or to have ethics commission approval be nearly automatic, for example, by presenting to the commission at each meeting a list of complaints to be dismissed, and having the list be approved as a whole. Done this way, the ethics commission will be involved only when one or more members has specific concerns about a particular case.

Such an approach means that there is no incentive for ethics commission members to consider the dismissals. This is problematic for two reasons. One, some complaints, even if deserving of quick dismissal, call attention to misconduct about which the ethics commission might want to consider holding a hearing or making recommendations to the legislative body. It is important that an ethics commission get a clear and broad picture of what conduct public servants and citizens alike consider worthy of ethics complaints, even if the conduct is outside the scope of the ethics code, involves those over whom the commission does not have jurisdiction, or provides benefits that, although minimal, are troubling to some.

Two, it is important for an ethics commission to provide oversight regarding its staff. It might be that the ethics officer is too quick to dismiss, too quick, for example, to consider staff limitations over other considerations. When the ethics officer is a political appointee or a member of the city or county attorney's office, it could be that he is sometimes showing favoritism to political allies of his appointing authority or boss.

Three, it is important to consider how the public views an ethics commission that automatically dismisses numerous complaints, while investigating and holding hearings on very few. This might very well be justified, but it will look bad. Automatic dismissal makes it look worse. The least an ethics commission can do is to take dismissals seriously, and explain from time to time why such a high percentage of complaints are being dismissed.

Making Dismissals Public

Most ethics codes require that ethics complaints be kept confidential until a finding of probable cause. In many jurisdictions, even the respondent isn't told about a complaint that is immediately dismissed.

But some ethics codes require that all dismissals be in writing, contain the reason for the dismissal, and be made available to the public. One reason for making dismissals public is that, unlike findings of probable cause, they show the public how many ethics allegations against officials are not really ethics allegations or are extremely minor, false, or involve someone not under the ethics commission's jurisdiction. People can learn a lot about government ethics from the reasons for dismissals. Publicizing dismissals is educational, as is most every aspect of an ethics program.

Another reason for making dismissals public is to prevent others from filing a complaint based on the same allegations or similar allegations.

Many complaints are revealed to the public anyway, directly or indirectly. A quick public dismissal by an independent ethics commission, for reasons clearly explained, is the best way to protect the accused official and end the accusations being made in the news media and blogosphere.

In addition, people are much more apt to trust an ethics commission whose dismissals are openly explained than an ethics commission that never reveals anything about most of the complaints that come before it. This is especially important when an ethics commission's members are selected by high-level officials. When the secret dismissal of complaints leaks out to the public, people reasonably believe that the ethics commission is dismissing allegations that might harm those who appointed them, or their colleagues and allies. This impression will undermine trust in an ethics program. Keeping dismissals secret teaches the public only not to bother filing ethics complaints.

Notice to the Complainant

Out of courtesy for the complainant, it is best to require an ethics commission to provide notice to the complainant of its dismissal or referral (in whole or in part) of a complaint, and the basic reasons for the dismissal or referral. It is also best to require that, if the ethics commission decides to investigate the allegations, it provide notice to the complainant that the complaint has survived the first step in the process and that the complaint has been accepted, in whole or in part, or the allegations (or certain stated allegations) are being investigated. This should be done whether or not a jurisdiction requires notice to the respondent at this point, or after a finding of probable cause (see the section below on [notice to the respondent](#)).

If the complainant receives such notice, however, there is the chance that the information will be made public. This could be seen as a problem or, better, as another reason for transparency in ethics proceedings.

2. Complaints Filed During Election Season

A common political tactic is to file an ethics complaint against someone running for office in order to put doubt in the minds of the public, knowing that the matter is not likely to be dealt with before the election, so no one will know whether the allegations were true or not. Often the events occurred long before the election, and the allegations are held until they can have the strongest political effect.

To prevent this abuse of the ethics process for political purposes, many local governments prohibit the filing of complaints within 45 to 60 days before an election in which the respondent is running.

It's not clear that a prohibition is the best way to approach this problem. There is a better alternative: giving the ethics commission, or its staff, the option of delaying an investigation until after an election if a complaint is filed within so many days before an election. This way, if someone says he has filed an ethics complaint, and the complaint does not state a violation of the ethics code or appears to be without any basis in fact, the complaint can be immediately dismissed and the respondent quickly cleared.

If complaints are prohibited during election time, the allegations can still be made, and the complainant can say that the respondent (if a mayor or local legislator) has protected herself from ethics complaints at election time. And there is nothing the ethics commission can do. Therefore, the doubt about the respondent's conduct lingers on instead of, in many cases, being quickly put to rest.

If the complaint does state an ethics violation and appears to have some basis in fact, the ethics commission can delay its investigation until after the election, and the situation is no different than if the complaint had been automatically rejected because prohibited.

The important thing is to send a message that the ethics process is not to be used for political purposes, at least to the extent of directly affecting elections. Another way to send this message is to require that, whenever the fact of the filing is disclosed by anyone (not just the complainant), any complaint filed within 45 to 60 days before an election be automatically dismissed, on the grounds of abusing the ethics process for political purposes. This gives the complainant a choice: keep the filing confidential until after the election, so

that it will not affect the election, or make it public and have it publicly dismissed on the grounds that it was a political act rather than an act done to benefit the community.

A reasonable response to these prohibitions is that filing an ethics complaint during an election season is not an abuse of the ethics process, but rather what ethics enforcement is for: to prevent violations of ethics laws. The visibility of ethics complaints filed during an election season educates government officials and the public better than complaints filed during quieter periods, because it gets more attention.

What if, during the election season, an ethics commission receives evidence that a candidate violated the ethics code? Does it investigate and file its own complaint, or delay the investigation until after the election? When the ethics commission has jurisdiction over campaign finance matters, it is common for such evidence to become available during an election season, and for the commission to proceed with enforcement. But campaign finance issues are usually more straightforward, and less often rely on tips or complaints. Conflict issues are less likely to arise during an election season, but tips can be made during election season for the same strategic reasons as complaints are filed. Local newspapers' investigative articles may have strategic reasons, as well.

If citizens are prohibited from filing complaints during the election season, then the ethics commission should be prohibited, as well, especially since it might appear that the ethics commission was acting in a partisan manner. This would be extremely damaging.

But what if there are no prohibitions relating to election season? Should an ethics commission risk looking political by seeking to enforce the ethics code against a candidate who, as an official, did not deal responsibly with a conflict? I think that it is so important that a commission not appear political, that it should be restrained in an ordinance or regulation, or should restrain itself, from beginning a formal investigation involving a candidate during the period immediately before an election. It should only be allowed to confirm its suspicion that a complaint has no basis in fact. This applies not only to allegations against candidates, but also to allegations against officials closely allied with a candidate, including a campaign manager or officer of a candidate committee.

In 2009, a district attorney candidate in Philadelphia who was charged with a campaign finance violation sued the city's ethics board, even though he had signed a settlement agreement, for making "frivolous, misleading, and false statements" to "sabotage" his campaign, embarrass him, and "tarnish his name and reputation in the eyes of the voting public." In other words, enforcement actions against candidates can not only

undermine the public trust in an ethics commission's neutrality, but can also enrage the respondent.

But it is usually candidates and political parties that try to tarnish the reputations of other candidates. In Cedar Rapids in 2009, for example, a council candidate attacked another candidate for requesting an advisory opinion, treating it as if it were an accusation by the ethics board rather than a responsible way to deal with a possible conflict. This is about as low as it goes.

3. Responding to a Complaint

Notice to the Respondent

The respondent should be notified only if the complaint is not immediately dismissed or referred because it contained no allegation of an ethics violation made against someone under the ethics commission's jurisdiction, or any of the other reasons listed above in [the section on dismissals](#). An important reason for this is that, when an ethics complaint causes no problem for the respondent, but was filed out of ignorance of the laws, notice to the respondent could lead to retaliation against the complainant.

An exception to this would be if a complaint was made public before the decision whether to dismiss had been made. If the fact of the complaint is made public (and the ethics commission is aware of this), and the complaint itself is not, it is appropriate to send the complaint to the respondent as soon as possible, so that he knows what allegations it makes.

If the complaint is not dismissed or made public, or if the ethics commission itself drafts a complaint, most ethics codes or rules of procedure require that the complaint be sent to the respondent as soon as possible. This also goes for any amendments the ethics commission may make to a complaint.

It is common to require notice within as little as seven days of receipt of a complaint, but some codes or rules provide for as much as thirty days, which is what the City Ethics Model Code provides. Seven days may not be enough time to determine whether a complaint should be immediately dismissed. It certainly is not enough time for an ethics commission that has no staff. The ethics commission, or its committee, will need to meet in order to make this determination.

Whatever number of days is chosen should, in any event, be for guidance only. Like most time limits relating to ethics proceedings, this one rarely has stated consequences. That is, if the complaint is sent to the respondent after fourteen days, it should not be

dismissed as illegal or improper. But this should be made clear, so that respondents do not call for dismissal if the time limit is not met.

An ethics commission should do its best to follow time limits, and each time explain to the parties and, if the proceeding is not confidential or if it later becomes an issue, it should explain to the public as well why it did not act within a time limit. The fact is that many ethics commissions have limited resources, including no staff or a staff it has no control over, such as a city or county attorney. It would be very damaging if a complaint against a high-level official were dismissed because the city attorney sat on the complaint too long. In addition, ethics commissions often have trouble getting a quorum to meet for a special meeting to decide whether or not to dismiss a complaint.

There is an alternative that prevents this sort of problem. Atlanta is one city that employs this rule. Notice is based not on a number of days, but on the ethics officer's determination whether or not a complaint should be dismissed for any of the reasons listed in [the previous section of this book](#). Once the ethics officer makes this determination, which might take anywhere from five minutes to more than a month (for example, in a case where the ethics officer feels the determination should be made by the ethics commission or where the ethics officer needs to do some investigating), the ethics officer is to send the complaint to the respondent on the following business day.

It is in the ethics commission's interest to let the respondent know about the complaint as soon as possible, because the respondent's response to the complaint is often very helpful in an investigation. It also may become clear from the response that the complaint has little validity, thereby speeding up its dismissal (after the respondent's statements have been investigated, of course). Or the respondent may admit to the misconduct and either choose not to contest it or seek a quick settlement (see [the section below on settlements](#)).

However, there is another consideration to take into account. If a respondent learns of an investigation, he may try to use his influence, or even intimidate people, so that they do not tell the investigator the truth, or at least not the entire truth. The respondent may also destroy evidence, directly or through others, or retaliate against the complainant and others who he believes are responsible for the complaint. In other words, there is value to having an ethics complaint be kept confidential with respect to the respondent.

This consideration is controlling in New York City and in Philadelphia, where the respondent is not notified until the conflicts of interest board in New York, and the ethics board's executive director in Philadelphia, has made a determination that there is probable

cause to believe that a violation has occurred. This determination may be made solely on the basis of the complaint, on the basis of other information, or after a preliminary investigation has been made. In New York City, the board's notice to the respondent is not simply a copy of the complaint, but also "a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated." In Philadelphia, the notice must contain "a description of the acts and/or omissions of the respondent that form the basis for each alleged violation; [and] (ii) the applicable provisions of law that are alleged to be violated."

After reviewing the respondent's response, the New York City board makes a second determination that there is still probable cause (a good requirement) and, if the respondent has not either admitted to facts or decided to forego a hearing, it schedules a hearing. It is best not to assume that there will be a hearing, but rather to expressly state the alternatives in order to make it clear that a stipulation or settlement is available, or preferable, and that there might be a need for further investigation, including an investigation of information in the respondent's response.

In Chicago, council members are given notice within seven days after the initiation of an investigation, but other officials and employees need only be given notice prior to the conclusion of an investigation.

Here is the City Ethics Model Code provision on notifying the respondent:

The Ethics Commission must send notification of the accepted complaint, as amended, as well as any further amendment, to the respondent against whom the complaint was filed, not later than seven days after making the determination [that the complaint states an ethics violation against someone under the Ethics Commission's jurisdiction] or the preparation of a complaint or amendment [by the Ethics Commission]. A copy of the complaint, and of any amendments, must accompany such notice. The Ethics Commission must also send notification to the complainant in writing of its receipt and acceptance of the complaint, and of any amendments. Here and elsewhere, "complainant" and "respondent" might consist of more than one person or entity.

The Response to a Complaint

If the allegations in an ethics complaint are even partially true, the best thing for the respondent and for the public is for the respondent to enter into a settlement with the ethics commission admitting the allegations, agreeing to a sanction, and turning the

proceeding into an inexpensive learning experience for the respondent, for other officials, and for the public (see [the section on settlements below](#)).

Another way of putting this is that a government official is not like an ordinary citizen accused of misconduct. She may have a right to defend herself, but she also has an obligation to act in the public interest by admitting what she has done and making amends, with as little disruption, scandal, cost, and loss of public trust as possible.

Government officials are accountable for their mistakes, even if they did not realize they were making a mistake at the time. Neither accountability nor mistakes are about fault; they're about owning up to what one has done and recognizing that it was wrong. Refusing to admit one was wrong is nothing but another selfish mistake, another act of ethical misconduct that undermines the public trust in government.

There are two alternatives to admitting a mistake and entering into a settlement: not telling the truth and covering up the truth, neither of which any official would publicly argue is a responsible way to handle a valid ethics complaint. "A right to self-defense" sounds much better. But that is the right of a citizen faced with criminal charges, not of a public official faced with a conflict situation that she did not handle responsibly.

If the allegations are not true at all, the respondent should file a response clearly setting forth her view of the facts and providing documents and the names of witnesses that back up her story, so that the ethics commission may have enough information to make a decision on probable cause without a difficult, expensive investigation.

An ethics code or rules of procedure should provide a time period within which a respondent must file a response (the number of days should be a maximum, not a minimum). The City Ethics Model Code sets a period of thirty days. An extension should be allowed, for good cause. And the complainant should be allowed, but not required, to file a response to the respondent's response. A respondent should be given the same opportunity to file a response to any amendments an ethics commission makes to a complaint.

Apologies

The lack of sincere apology from members of a local government is like a dead canary in a mine: a clear sign of a toxic ethics environment where officials put themselves ahead of the good of the community, where they think their personal reputation is more important than the government's reputation. Local governments without sincere apologies are closed and without ethical leadership.

What exactly is a sincere apology? According to Aaron Lazare, in his excellent book [On Apology](#) (Oxford Univ. Press, 2004), an apology is “an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense ... and expresses regret or remorse to a second party, the aggrieved.” In government ethics, the offender is an official, and the aggrieved is the community.

An apology may also include an explanation for the offense, an expression of shame or guilt, an expression of intention not to commit the offense again, and reparations. An apology is, in other words, very similar to a settlement agreement, except that it is not proposed by an ethics commission. Here’s what a very basic apology should sound like, from Hartford, Connecticut’s mayor Eddie Perez in 2009 (unfortunately, the apology did not cover all that the mayor was accused of having done, nor was it given when it should have been given, but its language is worthy of emulation, at least edited down as it is below):

I wish to apologize to the people of Hartford. My lapse in judgment in using a city contractor to perform work on my house was inexcusable. ... I have allowed the appearance of impropriety to color how [people] may view my administration. For this, I am truly sorry and take full responsibility. ... Further, I should have ensured that the proper permits were obtained. Perception has the potential to undermine public confidence in government.

Apologizing is not only virtuous. It can elevate an official’s stature in others’ eyes, make them see her as generous and courageous. It can lessen the chances of retaliation and the escalation of battles in which nobody tends to win, and the local government always loses, in the eyes of the public. An apology can reconcile damaged relationships, leading to better relations with opponents. And for those who feel shame and guilt, and who want to be able to look their friends and family in the eye, it can alleviate some pretty serious emotional burdens.

Apology, when it includes an explanation, is also a form of transparency, of full disclosure by officials of their conduct as officials. Not only does it fulfill an official’s fiduciary duty to the public, but it also teaches by example. The less we know about officials’ misconduct, the less such conduct can be openly discussed and prevented.

Not all apologies have good results. People see through most insincere apologies. Apologies made only after much public pressure appear to be no more than attempts to save face. Saying “let’s put this behind us” is not a way for anyone to learn from mistakes.

People who do not apologize, who make pseudo-apologies, or who cover up their offenses act as if they are above criticism. They refuse to be held accountable for their actions. This is a serious problem in a democracy, where accountability is a central value. In organizations where people do not apologize and where their colleagues do not expect an apology to be given, a government ethics program, if there is one at all, will usually be highly politicized and, because contrary to organizational values, ineffective.

People often think that apologizing makes them vulnerable, especially to lawsuits. It turns out that the opposite is true. For example, doctors who apologize to patients are far less likely to be sued for malpractice than doctors who fail to apologize. People tend to be forgiving to those who quickly take responsibility for their actions, especially when they offer reasonable reparations, where appropriate.

In fact, in many states, if someone asked to retract a false statement refuses to do so (and retraction is a part of an apology for a false attack), then intentional malice is presumed in a case brought for libel. What might have been a mistake becomes intentional, a much more serious offense than an error or slip of the tongue.

The faster an official apologizes and the more authoritatively she takes responsibility, the lower the risks to her personally and the greater the likelihood that her action will become contagious, that others will feel that the right thing to do is to apologize. Or maybe even not engage in misconduct in the first place, but rather seek ethics advice in order to handle a conflict situation correctly.

A failure to apologize makes people feel powerless and cynical, and fuels their anger at government. It makes people believe that their values are different from those in government, that government cannot be trusted to hold up its side of the social contract, that those in government don't care about acting unethically and feel there should be no consequences for doing wrong. All of these feelings make people less likely to get involved in government matters.

Cover-ups and SLAPP Suits

Far worse than failing to apologize for misconduct is trying to cover it up. Cover-ups are usually worse than the misconduct. When a cover-up fails, it creates a huge scandal that can cost both government and community a great deal in terms of reputation, public trust, and money.

But cover-ups are not the only way respondents in ethics proceedings can undermine the public trust. Another way is by filing a suit or ethics complaint against the

complainant. Sometimes these suits are designed solely to intimidate the complainant into withdrawing her complaint (it is best not to permit this; see [the argument above](#)). Sometimes these suits are directed toward the ethics commission and its staff, or the city or county, in order to force a dismissal or quick settlement of an ethics complaint on the respondent's terms. (For more on these suits, see [the section below on SLAPP suits](#))

But sometimes such suits are not merely tactical. As Zygmunt Bauman wrote in his 2009 essay "What Chance of Ethics in the Globalized World of Consumers?", it is common for those who have engaged in misconduct to see themselves as wronged:

We take satisfaction in being the wronged party ... and so we must invent wrongs to feed this self-indulgence. ... [T]he other party ... is cast as the true actor in the drama. The self thereby stays wholly on the receiving side.

Motions, Including Motions to Dismiss

An ethics code or rules of procedure should expressly allow the respondent to make a motion to dismiss a complaint, or certain allegations in a complaint. If the initial review is done by a staff member, the motion is effectively an appeal to the ethics commission of the staff's decision on jurisdiction over the allegations or the respondent. If the ethics commission itself did the initial review, the motion is effectively a request for reconsideration, with arguments that the ethics commission may not have considered.

Sometimes, such a motion is not allowed to be made until there has been a finding of probable cause, but it would seem best that it be allowed at any time. If the respondent has a good argument, there is no reason to go ahead with an investigation, at least of the allegations the respondent asks to dismiss.

Here is language derived from New Orleans' rules of procedure, using the language of "summary disposition" rather than "dismissal":

A. At any time after a complaint has been filed, a respondent may file with the Ethics Commission a written request for summary disposition on any of the following grounds:

1. The Ethics Commission lacks jurisdiction over the subject matter or the respondent;
2. The allegations, if true, would not constitute a violation of the ethics code.
3. The time in which to commence a proceeding has passed;

4. The allegations have already been dismissed by the Ethics Commission;
5. The conduct described in the allegations was engaged in on the basis of advice from the Ethics Commission;
6. The affidavits and other documents filed in connection with the allegations show that there is no genuine issue of material fact and, therefore, the respondent is entitled to summary judgment on legal issues alone.

A request for summary disposition may be supported by sworn affidavits and must be accompanied by a brief. The Advocate may file opposing motions, affidavits, and brief within thirty days.

Such a motion may be made even if it is not, as in most cases, expressly recognized by an ethics provision or rule. But it is best to acknowledge the possibility, and say whether or not the ethics commission's consideration of the motion should be done in a public or closed session.

It is useful for rules of procedure to include a provision dealing with motions in general. Here, for example, is language derived from Miami's rules:

- a) All motions must be in writing unless made on the record during a hearing. A motion will fully state the actions requested, the grounds relied upon, a statement that the movant has conferred with the Advocate and all other parties of record, and whether there is any objection to the motion.
- b) A motion must be filed with the ethics commission and served on all parties or their attorneys.
- c) The chair or a designee will conduct such proceedings and make such orders as deemed necessary to dispose of the issues raised by a motion. There is no requirement to hold a hearing on the motion.
- d) The Advocate and other parties to a proceeding may, within seven days of service of a written motion, file written memoranda in opposition.

4. The Complainant's Role

The complainant is not a party to an ethics proceeding, should play no more than a minor supporting role in a proceeding, and has no special rights in a proceeding. Atlanta's bylaws define "party to an official ... proceeding" as "a respondent who is the subject of an ethics complaint or proceeding." Respondents are parties; complainants are not.

If an investigation is begun on the basis of an anonymous tip, the complainant cannot play a role at all, at least as complainant. But a tipper may be willing to cooperate with the investigation in the form of interviews, respond to a request for documents, and act as a witness at a hearing.

A complainant may respond to a respondent's response to a complaint. He may recommend changes or additions to the complaint, but these must be approved by the ethics commission. Although the complainant may attend a public hearing, and be represented by counsel, the complainant has no formal role in the hearing except, perhaps, as a witness, if called. It is ethics commission staff or a committee of the commission or a contracted attorney –not the complainant – that argues for a decision that the respondent violated an ethics provision. This is similar to what happens in a criminal proceeding.

However, if the complainant is not happy with how the investigation or a hearing or any aspect of a matter is being handled, he has a right to make his views known privately or publicly, and to recommend questions or document requests.

Some jurisdictions give the complainant a small role at a hearing, such as making an opening statement. But this is unusual and undesirable. Even those who file a completely justified complaint often do so, or are seen to have done so, for partisan or personal reasons. Therefore, their participation can unnecessarily raise the emotional tone of a hearing.

There are even some jurisdictions, such as Boise, that have the complainant present evidence and cross-examine witnesses in addition to or even instead of someone who is part of the ethics program. This is seriously wrongheaded. An ethics proceeding is not a proceeding of one individual against another. It is a proceeding by the community regarding a conflict between an official's personal obligations and his obligations to the community. A complainant has nothing to do with this, except in the role of alerting the ethics commission to a particular situation. Unless the complainant has special knowledge beyond what appears in the complaint, his role in an ethics proceeding should be no more than any other citizen.

It is common practice for respondents to publicly attack complainants, and sometimes to file ethics complaints or suits against them in court. Complainants should be protected by [whistleblower provisions](#), local or state, and the ethics commission owes complainants a duty to listen to their grievances regarding retaliation against them.

The situation where an ethics commission member files a complaint, which would most likely occur when a member wanted the commission to initiate an investigation, but

could not get a majority to support this motion, is rarely dealt with in an ethics code. Seattle's code does deal with this, but it makes the mistake of disqualifying the member "from participating in any proceedings that may arise from the complaint" (§4.16.090(A)). An ethics commission member who files a complaint should certainly not sit in judgment on the complaint, but she should be allowed to participate to the same extent as any other complainant.

There is a question, however, whether an ethics commission member should be filing complaints under any other circumstances. That is, is it the role of an ethics commission member to pursue ethics enforcement on her own? See above for [a discussion of this](#).

D. Settlements

Massachusetts calls them "disposition agreements," Philadelphia calls them "stipulations of settlement," New Orleans calls them "consent opinions" (and others call them "consent agreements" or "consent orders"), but most people refer to them simply as "settlements" or "settlement agreements." Settlements are one of the most important parts of the ethics enforcement process, and yet many ethics codes and ethics commission rules of procedure do no more than make a passing reference to them, or make no reference at all.

In effective government ethics programs, most ethics proceedings that are not quickly dismissed are settled. Therefore, settlement is, effectively, enforcement. It is not just an option, but the norm. The pattern of settlement sets policy for interpretation and enforcement of the ethics code, day after day. This is why the ethics commission, and only the ethics commission, should have the authority to settle.

At the beginning of a proceeding, advice to settle can be the best advice an official will get (a recommendation to make a public apology (the topic of [the section two before this one](#)) can be part of this advice). A settlement prevents an official from digging himself deeper and deeper into defenses, denials, and cover-ups, which are usually more harmful to the public trust than any ethics violation. Offering an official a way out of a possibly devastating situation is good for the official, for the public, and for the ethics commission, and it saves the local government an enormous amount of money, bad press and damage to its reputation, distraction from important business, and long-lasting strife.

It is difficult for a high-level official to function in the midst of a scandal. Entering into a settlement agreement as early as possible in a proceeding allows the high-level official to best fulfil her obligations to the community.

Reaching a quick, fair settlement is the most effective way an ethics commission can show the community how important it is to have a responsible, independent ethics commission with teeth. Only such a commission can reach a fair settlement that will be respected and that will bring a community relief rather than the sort of strife that scares citizens away from participating in government.

When the respondent does not agree to seek a settlement immediately after notice that a complaint has been filed, settlement negotiations often begin in the form of an attempt to identify and agree upon (in legalese “stipulate to”) which facts are disputed and which facts are not disputed. In some cases, a discussion of the facts with the respondent occurs before an investigation begins, and may allow the ethics commission to forego an investigation. In other cases, at least a preliminary investigation is required.

If there has been a finding of probable cause, the discussion will be like a pre-trial conference. In fact, some jurisdictions, such as Palm Beach County in its rules of procedure, expressly include settlement as a subject of a pre-hearing conference.

In the alternative, settlement negotiations might begin with the ethics commission staff drafting a settlement agreement and presenting it to the respondent at any point in the proceeding where the staff believes there is a chance of reaching a settlement, usually after an investigation has unearthed clear evidence of an ethics violation. The draft agreement should be sent to the respondent for acceptance, modification, or rejection.

The ethics commission also has the choice whether to accept a settlement agreement, reject it, or recommend modifications to it. Just because the staff has drafted and negotiated a settlement does not mean that it is a sure thing.

If the parties agree on the facts, but settlement negotiations fail, a hearing may be limited to a discussion of the law and the appropriate sanction. Or the ethics commission and respondent may agree to forego a hearing, and allow the ethics commission to make a decision based on pleadings. This is, in a sense, a form of settlement.

Admissions in Settlement Agreements

In Massachusetts, where the state ethics commission has jurisdiction over local officials and can impose large penalties on them, I am told that about 80% of all ethics proceedings are settled. But simply settling matters is insufficient. Settling most proceedings might make it

look like an ethics program is giving officials an easy way out. Even when a settlement requires that an official pay a fine, if it looks like he is doing this in order to be able to say he did nothing wrong, it looks like the ethics commission is being bought off. This undermines public trust in the ethics program.

In many criminal proceedings defendants enter into a plea deal, agreeing to pay a fine or restitution in return for no finding of guilt or for admission to a crime far more minor than the original charges. But ethics respondents are not criminal defendants. They are public servants with special obligations to their community. One of those obligations is letting the public know what actually happened. If the facts are allowed to be hidden, the public will reasonably believe that officials are not being held accountable, even if they pay a fine. An ethics program is expected to provide accountability.

Therefore, it is important not only that settlements are entered into, but that all settlements set forth the facts and require the official to admit to violating the ethics code, that is, admit to doing all or at least most of what has been alleged (assuming, of course, that the allegations are true). This is the rule in Massachusetts.

Officials in Massachusetts know that they have no choice but to admit and settle, or take their chances. This gives the ethics commission a great deal more leverage, and makes it easier on staff. Here is the language from the Massachusetts rules of procedure:

In lieu of an adjudicatory proceeding, the Commission may, by majority vote, resolve a matter through the issuance of a public disposition agreement, which may include the assessment of a civil penalty and other orders. In a disposition agreement, the subject must admit to the findings of fact, conclusions of law, and penalty, if any.

The Advantages of Settlement

Settlements are also important to ethics commissions because commissions have limited resources. And since a principal goal of ethics enforcement (as opposed to criminal enforcement) is to provide guidance, a public settlement agreement that includes a reasonable sanction is much more valuable than an expensive proceeding that may or may not produce a more severe sanction. The severity of a sanction is less important than the guidance a settlement or decision provides. It is also less important than an admission of an ethics violation, because an admission helps preserve the public trust.

Some states (and at least one city) make settlement the default or preferred approach. Arkansas' ethics code requires a written Offer of Settlement when probable cause is found. Texas's ethics code requires that, upon a determination that there is credible evidence, the commission "resolve and settle the complaint or motion, to the extent possible." Los Angeles delays public announcement of a finding of probable cause so that a settlement can be reached. Oregon's Administrative Rules "encourages the settlement of a case," and Ohio's extensive settlement rules shows a propensity for settlement.

The settlement process does not have to wait until probable cause is found, as many jurisdictions require. The best practice is that stated in Philadelphia's regulations: "At any time, the Executive Director may seek to settle a matter that is the subject of an investigation or enforcement proceeding."

But there is often no need to wait until an investigation has begun. Many cases have simple facts and require little or no investigation. And some officials, once they recognize the advantages of settlement, will be happy to put the matter behind them quickly and choose the public image of someone who learns from his mistakes and uses his situation as a learning experience (for himself and other officials) rather than fights to protect his reputation.

Misuse of Settlements

However, it is important to make sure that an official does not use settlement negotiations to delay an ethics proceeding from becoming public during an election or other period that is important to them.

And it is also important to prohibit an official from entering into a settlement agreement that includes an admission of wrongdoing, and then saying afterwards that he really did nothing wrong, but felt it was best to pay the fine and move on. One way to prevent this is to include a statement in the settlement agreement where the official agrees "not to make any public statements that are inconsistent with the terms of the agreement," as is done in Philadelphia.

But what happens when the official ignores this part of the agreement? When this happened in Philadelphia, the ethics board's executive director took the issue to the press and, of course, the official's attorney denied having said anything inconsistent with the agreement. The ethics board's executive director said that the official's

“mischaracterization of his admitted violations is nothing more than an attempt to mislead the public about the seriousness of his [campaign] committee’s actions.”

In such a situation, it is worthwhile to remember that fines are secondary. The most important thing about ethics enforcement is getting the message across to the public and to other officials why ethics rules are important and why enforcing them is important. When a politician acts as if he didn’t really do anything so bad, he’s questioning the validity of the ethics process and undermining the board’s attempt to educate other officials and the public.

Settlement agreements should include a clear statement of the facts, and make it clear that the settlement applies only to the facts as stated. If it turns out that the respondent did not disclose all the relevant facts, the agreement is void and the proceeding will pick up where it left off or, if necessary, return to the investigation phase. This is the rule that is used with ethics advice. It works just as well with settlements.

Obligations of Ethics Counsel

It is important, especially when an ethics commission is represented by outside counsel, that ethics commission counsel does not believe that zealous representation is acceptable and, therefore, that settlement should be limited only to situations where the commission has a weak case. Zealous representation is only relevant to criminal defense, not to ethics enforcement. Former chief counsel to the House Committee on Standards of Official Conduct, whose job it was to argue ethics cases against members of Congress, said in 2010, “The goal is to win. It is, to me, about making the case.” He also quoted, “Theirs not to reason why, theirs but to do and die.”

As a government lawyer in a government context, it's never about winning. It's about doing right, about taking into consideration such things as cost, fairness, and the effect a proceeding has on the public’s trust in government. If an ethics commission counsel believes that an official is being treated unfairly, it is his job to point this out to an ethics commission. If the facts don't add up, it is his job to point this out, not merely advocate for the investigation's conclusions or try to get an unjust settlement. If there is a lot of fuss about very little, it’s his job to settle or opt for just [a warning letter](#). If the ethics commission appears to have a very strong case, it is still better to settle than to go through an expensive, contentious hearing.

This is true of government attorneys in any context, but especially true in the ethics context. The government attorney is not representing a private client, but the public.

Fairness is more important than winning, no matter what the local newspapers may be saying. This is why criminal prosecutors are required to share all evidence, even if it hurts the government's cause. The same should hold true for government ethics attorneys.

Settlement Rules

The ethics provisions and rules of procedure in too many ethics programs make ethics proceedings appear to be no different from criminal proceedings, except that there is no mention of the equivalent of plea deals. The omission of settlement procedures and considerations can lead to much more expensive and time-consuming proceedings, which not only make an ethics program appear overly expensive, but also make officials argue against ethics enforcement on the basis of its cost. In other words, it allows officials to oppose ethics programs or, at least, weaken them and create obstacles to their functioning properly.

Generally, settlement negotiations will begin with a recommendation from the ethics officer or a request from the respondent, but not a request from the complainant (however, the complainant may be asked by the ethics commission to comment on a settlement agreement before it has been approved; this is required, for example, in Santa Fe). If the ethics officer has questions relating to policy, she may choose to consult with the ethics commission chair. If the respondent agrees to a settlement, the settlement is placed before the ethics commission and discussed in closed session.

It is worth including in an ethics code or rules of procedure that every settlement agreement must be placed on the ethics commission's website.

Here is the City Ethics Model Code provision on settlement agreements:

§213.5. Settlement Agreements

a. At any time after a complaint has been filed, the Ethics Commission may seek and enter into a settlement agreement with the respondent. The settlement agreement will include the nature of the complaint, findings of fact, conclusions of law, the Commission's reasons for entering into the agreement, an admission of violation by the respondent, and a waiver of the right to a hearing and to appeal. It will also, where relevant, include a promise by respondent not to do certain actions, the imposition of sanctions permitted by this code, remedial action to be taken, and oral or written statements to be made.

b. In determining whether a matter is appropriate for settlement, the Ethics Commission should consider the following factors, as well as other factors it

considers relevant: (i) the severity of the alleged conduct; (ii) the respondent's apparent level of knowledge and willfulness regarding the alleged conduct; (iii) whether the alleged conduct appears to be an isolated event or part of a pattern of conduct; (iv) whether the alleged conduct appears to indicate violations of criminal laws; (v) the complexity of issues or evidence, and the likely scope of an investigation and hearings; (vi) the involvement of other agencies in the investigation of the respondent's conduct; (vii) the existence of Ethics Commission precedent concerning the alleged conduct; (viii) the age of the facts alleged in the complaint; (ix) the resources and priorities of the Ethics Commission; and (x) whether the respondent self-reported the alleged conduct or sought an advisory opinion regarding it.

c. Any settlement agreement approved by at least three members of the Ethics Commission will be a public record. However, all meetings held and documents relating to the settlement negotiations will be kept confidential, unless the parties agree otherwise.

d. If a settlement agreement is breached by the respondent, the Ethics Commission may rescind the agreement and reinstitute the proceeding. However, no information obtained from the respondent in reaching the settlement, which is not otherwise discoverable, may be used in the proceeding.

Seattle has what are probably the most extensive [rules involving settlements](#) (Administrative Rule 3L; Seattle uses the term "stipulation"). Below are a couple of its special, and valuable, provisions. One provides language that must appear in every proposed settlement agreement; I would add that the respondent must admit to having violated the ethics code. The second provision deals with the situation where there are multiple respondents, not all of whom choose to settle:

5. All proposed stipulations must include the following provisions:

a. "This agreement is binding on all parties, their heirs, successors, and assigns;"

b. "This agreement shall constitute the whole agreement between the parties;"

c. "The parties agree that, if this agreement is rejected by the Commission, the respondent(s) agrees to waive any challenges to the Commission subsequently presiding over a hearing on this matter;"

d. “If the respondent(s) breaches this agreement, the Commission may impose sanctions for each violation identified by the Executive Director in the agreement.”

6. If multiple respondents are involved, and not all respondents desire settlement, the cases of the respondents wishing to settle shall be severed from the cases of the respondents not wishing to settle. Settlements in such instances should be presented to the Commission. Fact-finding in the cases of the non-settling respondents shall be conducted by the Hearing Examiner.

Settlement agreements can be found online as follows:

[Atlanta](#) (included among decisions, but designated as settlements)

[Los Angeles](#)

[New York City](#) (check the COIB box under General Agencies, and search for settlement)

[Massachusetts](#) (Included among “enforcement rulings”)

[Rhode Island](#) (included among “decisions and orders”)

Restorative Justice

There is an alternative to the settlement process, which is used in some criminal proceedings. It is known as “restorative justice.” The first requirement of the restorative justice process is that the respondent acknowledge his misconduct. If this is the case, a facilitator meets separately with the offender and any victims. If both are willing to meet face to face, without displays of animosity, and the offender can provide restitution, the case is taken out of the adversarial system and into a parallel restorative justice system.

The next step is a restorative justice conference, at which each individual speaks, one at a time and without interruption, about what occurred and its effects. When everyone is done telling his or her story, with the help of the facilitator they try to come to a consensus about how to repair the harm done.

Here is how restorative justice might work in the local government ethics context. It could be either (1) an option that the respondent would choose at some time before a public hearing, but the earlier the better, if he or she acknowledged the commission of an ethics violation (the ethics officer could accept the respondent's choice to go the restorative

justice route only when there was at least one other individual who knew enough and was willing to tell the story from a different point of view); or (2) it could be required of officials who acknowledge their ethics violation, as part of the settlement process, in appropriate circumstances, on the basis that officials and employees have a fiduciary obligation to the public to let the public know what happened.

A restorative justice conference might include the respondent, the complainant (if not anonymous), members of the respondent's agency or board, including his supervisor, colleagues, and subordinates, individuals or representatives of companies outside of government involved in the conflict situation, immediate family members of the respondent, complainant, one or more representatives of the ethics commission, representatives of community organizations, especially those involved in good government issues, and anyone else who was involved or who feels harmed by the respondent's conduct or by the allegations made against the respondent (or against them).

After having listened to all the other participants' stories, the participants would, with the help of a trained facilitator (who would provide a list of all the possible remedies, with relevant limitations and the necessary supplemental procedures, such as handing the matter over to another body or agency), state their feelings about how to repair the harm done, and then seek to come to a consensus. The remedies would include everything in an ethics commission's repertoire of remedies, including a dismissal, warning, or reprimand, a referral, reversal of a retaliatory act, or a substantial penalty, restitution, or damages payment. Participants could recommend remedies that the ethics commission could not impose (such as apology, resignation, or community service). Remedies might also include recommendations to a supervisor or a body that is able to discipline the respondent. In fact, recommended remedies would not have to be limited to the respondent. Remedies might also be recommended regarding those who were complicit in the conduct, or knew and told no one.

If the participants come to a consensus, it would be given to the ethics commission for approval. If not, the restorative justice process would be over, and the matter would continue as an ethics proceeding. The stories told at the conference would be part of the record, as would the recommended remedies.

If the matter then becomes an ordinary ethics proceeding, it would be useful for the respondent to stipulate to facts, to determine if there is any need for further investigation, document production, or a hearing. There could still be a public hearing, if either the

respondent or the ethics officer felt it was necessary. If not, the ethics commission could make its decision on the basis of the restorative justice conference.

The advantages of a restorative justice process include (1) monetary savings, both in terms of the ethics program's preparation for the hearing and in terms of the respondent's savings in legal fees; (2) having the story of what occurred told in a way that the public, including the news media, could understand far better than something resembling a trial; and (3) having the story not just be about the respondent and his conduct, but also about the role of the respondent's supervisor, colleagues, and subordinates. With restorative justice's focus on the victim, the story would also be about the harm done to individuals, companies, and the community.

The people who tell the story would not just be witnesses called by one side or another, limited to answering yes or no to questions they might find either objectionable or insufficient. Anyone involved, directly or indirectly, could add what they know and feel to the telling of the story.

Unlike the settlement process, the restorative justice process is something that can be internalized by local agencies. When someone raises an ethics issue, instead of simply asking a lawyer, a board or agency could openly discuss it, just as they would openly discuss someone's concerns about the terms of a land sale or the specifications for a contract.

The biggest advantage is that the restorative justice process could have a major effect on a local government's ethics environment and its officials' view of what government ethics is. Its success could mean that it would end up rarely being employed, because the open discussion of conflict situations had become the norm.

The disadvantage of a required restorative justice process is that it might lead to fewer admissions of misconduct and fewer settlements. Even if not required, it might come to be expected, and not have the same effect.

I do not know of any attempt to use the restorative justice approach in a government ethics context.

E. Preliminary Investigations

After receiving a complaint that alleges an ethics violation against someone subject to the ethics commission's jurisdiction, the next step, after possibly seeking a settlement or stipulation of facts, is to investigate the allegations (and, if the respondent has filed a

response, the facts included in the response). The goal of a preliminary investigation is to determine whether or not there is sufficient evidence of an ethics violation to move on to a full investigation and public hearing.

In many cases, there is very little or nothing to investigate. Where, for example, a board or council member votes on a matter that would clearly benefit her brother, the investigation may consist simply of confirming the vote and the brother's benefit, and asking about any other ways in which the official participated in the matter.

When the respondent does not disagree with the complaint's statements of fact, and is willing to stipulate to the facts, there is only the question of whether there may be other, related violations (by the respondent or others) that the complainant did not know about or did not recognize as ethics violations.

Although a stipulation of facts usually ends a *preliminary* investigation, there may be a need for further investigation after a finding of sufficient evidence to proceed to the next step.

On the other hand, the respondent might suggest a very different set of facts in his response, arguing that the "facts" stated in the complaint are, at least in part, false, incomplete, or taken out of context. The facts might include complex financial matters, or multiple witnesses may have to be questioned. In these situations, an ethics commission might require a professional investigator.

It is useful to list, in the ethics commission's rules and regulations, what an investigation consists of. Here is the Philadelphia ethics board's list:

An investigation may include, but is not limited to, field investigations and inspections, the issuance of subpoenas, the taking of sworn testimony, requests for the production of documents, interrogatories, requests for admissions, the review of public filings, and other methods of information gathering.

1. Investigators

Ethics commissions in larger cities and counties usually have multiple staff members, one or more of whom have a background in investigation. But in even the largest jurisdictions, it is not always the ethics commission that investigates. For example, in New York City ethics investigations are handled by the city's Department of Investigation, an independent agency whose commissioner is selected by the mayor. In other jurisdictions, investigations are sometimes handled by an inspector general, auditor, or ombudsman office. Sometimes

the police department is assigned, but this is inappropriate, because it confuses criminal investigation with the investigation of conflict situations. There may be times when the police can be helpful, and the ethics commission requests their participation in an investigation, but the police department should not be assigned as the investigative agency for an ethics commission.

The advantages of having investigations done by a separate agency that has experienced staff include (i) the investigations will be done more efficiently and professionally; and (ii) there will be separation between the investigator and the advocate who argues that an ethics violation occurred. This separation provides more due process and less of an appearance that the individual advocating before the ethics commission has an interest in seeing that the investigation's conclusions are shown to be accurate.

The disadvantages include (i) ethics investigations might be given short shrift by an agency that primarily handles financial and criminal investigations, both because these other investigations may appear more pressing and exciting, and because an agency's reputation is generally based on how it handles what are considered to be its most important cases, which are generally those with the clearest monetary returns; and (ii) often the investigatory agency, focused on misconduct by employees rather than elected officials, is subject to political pressures that might make it leery of investigating elected officials, especially if an election is approaching. In fact, sometimes the head of the agency is running for office herself and requires the support of other elected officials.

If an ethics commission has no staff, or a staff member that is not qualified to do a complex investigation, it is best to contract with a professional investigator. But this requires either a budget, which many ethics commissions do not have, or a special request for funds from officials who themselves or their colleagues and allies may be the subject of the investigation. Little can undermine the public trust more than a legislative or financial body rejecting a request for funds to investigate one of its members, another official or, worst of all, a mystery official whose name cannot be disclosed (the public will assume the council knows the identity of the mystery official even if its members deny having this knowledge).

This is why it is appropriate for an ethics commission to request a budget sufficient to investigate and, if necessary, hire counsel to represent the commission in an ethics proceeding or in actions brought against the ethics commission in court. Most years, the ethics commission will use little or none of this budget, but it is best that the commission

not be in the position of having to request funding, especially at a stage in a proceeding where the matter is still confidential.

In order for an investigation to begin quickly, it is best if an ethics commission, long in advance, either bid out a contract for a paid-by-the-hour investigator or interview possible investigators, determine their pay rate, and be ready to proceed with an investigation as soon as a matter comes before it. It can take a long time to go through the procurement process for an investigator, and this will delay an ethics proceeding and make it more likely that allegations will become the subject of media attention, undercutting the role of the formal ethics process.

It is important to make clear that an investigator is to be unbiased and is not to look only for evidence that tends to implicate a respondent. Miami's rules of procedure have good language on this:

An investigator shall be impartial and unbiased in the conduct of the preliminary investigation. An investigator shall collect all evidence materially related to the allegations of the complaint, whether such evidence tends to prove or disprove the allegations.

Jacksonville's rules expand this language to deal with a situation where the investigator is not impartial and unbiased. This is a situation that is most likely to arise when the investigator is a local government office, such as the city or county attorney, the comptroller or auditor, or the police department. It is less likely to occur when the investigator is an independent agency such as an inspector general or ombudsman, but even here it is possible. What is most important about the Jacksonville language is that it gives the ethics commission the right to dismiss the investigator from the case. If the investigator is not working for the ethics commission, it is important that the commission at least have this authority.

If an Investigator feels that for any reason he or she cannot be impartial or unbiased during the preliminary investigation then such Investigator shall so notify the Ethics Director and Chair of the Commission and shall immediately discontinue working in the investigation. If the Commission feels that the Investigator cannot be unbiased or impartial at any point of time during the preliminary investigation, the Commission shall terminate any further investigation by the Investigator. The Commission may also terminate any further investigation by the Investigator if at any time there is the appearance of bias or partiality.

It is also valuable to make clear exactly how an investigator should present facts to the ethics commission. The investigator could be required to simply hand over a notebook containing relevant documents and transcripts or summaries of interviews. But it is better if investigator is required to prepare a report that describes and analyzes the evidence in a way that ethics commission members can quickly understand, so that they can ask good questions of the investigator and decide how much need there is to go through all the evidence before making a probable cause determination. Usually, there will be no need. The evidence can be reviewed as part of the public hearing stage of the proceeding, if there is no settlement.

Separation of Roles

It is best, where possible, to separate the investigatory/prosecutory and adjudicative roles of an ethics commission. One way to do this is, as discussed above, to use another agency or an outside investigator to investigate. This ensures that no one on the ethics commission has any direct involvement or interest in the investigation. But a separation of the prosecutory and adjudicative roles is still an issue.

Since an ethics proceeding is not a prosecution of a criminal case, but is often approached as if it were, I prefer not to use words such as “prosecutor” or even “prosecution.” Therefore, I will refer to the individual or committee that argues that the respondent violated an ethics provision as “the advocate” and the process as “advocacy.”

An alternative to having an external investigator is for the ethics commission, if it can afford it, to have a staff member who deals with investigations and advocacy, but does not advise the commission with respect to its adjudicative function, that is, does not represent the commission at hearings or with respect to drafting decisions or recommendations. The staffs of large jurisdictions are usually divided in this way. For example, Philadelphia’s regulations split personnel as follows: “the individual members of the Board, any Hearing Officer in a particular case, and the General Counsel shall be considered to be part of the ‘adjudicative function,’ and the Executive Director and professional staff or consultants directed by the Executive Director shall be considered to be part of the ‘investigatory’ or ‘prosecutorial’ function.” It is important that the separation of roles is adequately described either in an ethics code or in an ethics commission’s rules and regulations.

When an ethics commission has only one or two staff members, one of the two sides should be under contract, usually the adjudicative side. An ethics commission with just an ethics officer should hire either an attorney to advise the commission with respect to its adjudicatory role in a hearing, or a hearing officer to manage the hearing and provide such advice.

An ethics commission that lacks the budget for a staff member or external investigator, and is therefore forced to investigate matters itself, should split into two committees or panels, one to investigate, report, and advocate, the other to determine probable cause based on the preliminary investigation, negotiate a settlement, hear the matter, and make a decision. This can be done permanently, or the division of the commission can be done separately for each matter.

Another way to separate roles is to have an ethics commission in charge of investigation and settlement, while having a separate individual or body in charge of determining whether there is probable cause or a violation. This is the approach taken in Louisiana, where the state ethics program has jurisdiction over local officials. This approach could be tailored for cities and towns by hiring someone to make determinations. But that person should not be selected because she is a former judge (this is the Louisiana approach); she should be selected because she has some expertise in government ethics. See below for more about [the Louisiana approach](#).

Milwaukee requires a special prosecutor when its ethics board has initiated a proceeding. At first glance, this appears reasonable. An ethics commission should not bring charges against a respondent, investigate the charges, and make a decision based on the charges. However, this shows a misunderstanding of ethics commission initiative of proceedings. When a commission initiates a proceeding, the complainant role ends there, as with any complainant. In fact, an ethics commission that initiates a proceeding has less interest in the allegations than an ordinary complainant, because the allegations do not originate with the commission. Commission initiation is based on an anonymous complaint, a tip that is either anonymous or not, or an investigation done by the news media. Therefore, the commission's role should be the same as in any proceeding.

The advocate should not be a government attorney, especially the city or county attorney or someone from that office. These attorneys are under the ethics program's jurisdiction, represent the very people they would be called on to advocate against, and they tend to be political appointees. Therefore, they are the last people the public will trust to advocate an ethics matter against a high-level official.

There are several reasons for this separation of roles. The most important is that it is the best way to provide due process. The separation of roles is a basic element of due process.

Even when an ethics commission has a staff member who acts as the advocate while the commission itself acts as judge and jury, there can be a due process problem, at least in terms of perception. Commission members can be seen as biased toward the advocate, who works for them, who may supply them with expertise and information, and with whom they are personally familiar. They are likely more trusted than officials' private lawyers.

But it is important to remember that an ethics proceeding is not a criminal trial. It is an administrative hearing, which requires a lower level of due process. Why should this be allowed? Because officials are not being accused of crimes. They are only being accused of not dealing responsibly with conflicts of interest, of not providing sufficient disclosure, of giving contracts to relatives, of accepting a gift they should have rejected, and things like this. They will not go to prison, they will not be fined that much, if at all, they will not lose their positions (except, possibly, indirectly), and they have every opportunity to admit their failures to take responsibility, enter into a settlement, and provide whatever restitution is appropriate.

Government officials also have much greater obligations to the public than does an ordinary citizen accused of a crime. Criminal enforcement is an issue of government vs. citizen, while ethics enforcement is an issue of government vs. government or, if you recognize an ethics commission's role as favoring the public interest and increasing the public trust, community vs. those who manage the community. Those with fiduciary obligations do not deserve the same due process in an administrative hearing as a citizen accused of a crime does in a criminal trial.

In some ways, in fact, the simplest form of the ethics process — where an ethics commission, possibly with counsel, does all the work itself — is less open to abuse than the criminal process. The relationship between police and district attorney is much cozier than the relationship between complainant and ethics commission staff, who usually have no relationship at all. In addition, the district attorney is a political animal, while ethics commission members, staff, and outside counsel are not (or, at least, should not be). Advocating that an ethics violation occurred is not done to further ethics commissioners' political futures. For an official, dealing with a neutral, nonpartisan or bipartisan ethics

commission would certainly be safer than dealing with a district attorney from the other party.

Only when an ethics matter goes to a hearing is there possibly less due process and more of an inherent conflict. One, there is no jury. But what is there? In most cases, there are people chosen by government officials who hear cases against government officials. On its face, ethics commission members' sympathies would appear to be with government officials more than juries' sympathies would be with the average criminal defendant. This poses less of a due process problem.

Two, the standard of proof is lower.

So although officials sometimes argue that ethics commissions do not provide due process, in many ways commissions provide more due process than the criminal justice system, although in other ways they provide less. But then, much less is at stake.

A second reason for the separation of roles is that, without this separation, it might appear to participants in a matter, as well as to the public, that the individuals who investigate a matter might have a personal interest in making sure that their work is rewarded by a finding of a violation. It is better that those who investigate advocate rather than decide the case. Those creating an ethics commission should be especially sensitive to any appearance of a conflict.

A third reason is that separating the roles takes some of the burden off individual members. Not everyone has to investigate, hear the case, and make determinations. By specializing, each member has to do less work, and each individual will also feel more responsibility for the job than if he were one member of a larger group.

2. Subpoenas and Cooperation

It is important that an ethics commission have the authority to administer oaths and affirmations, to subpoena witnesses, and to require the production of books and records it deems relevant and material. This authority is necessary because officials may not be willing to cooperate due to their special relationships with the respondent, or out of fear of retaliation by the respondent. If they have no choice but to cooperate, cooperation will not pose a danger to them and failure to cooperate will not deter an investigation or undermine the public's trust in the government.

Subpoena power is not something many officials want to give to an ethics commission, but it can be very difficult for an ethics commission to investigate a serious matter without the authority to subpoena and require production. An ethics commission

without subpoena power is often forced to dismiss cases, and it is far more difficult to enter into settlements, because respondents can rely on their colleagues and subordinates not to cooperate with an investigation, especially in local governments with unhealthy ethics environments.

The ethics officer or director should have the authority to issue subpoenas and subpoenas duces tecum on behalf of the ethics commission. If this is not provided by the ethics code, it should be included in the ethics commission's rules and regulations. Ditto for the authority to administer oaths and affirmations, and take testimony from anyone, in connection with an investigation. This authority should be provided to whoever may be assigned to head an investigation.

Los Angeles allows the subject of a subpoena to object to its terms and have the executive director consider the objections. The subject of the subpoena may appeal the executive director's ruling within ten days.

Even with subpoena power, it sometimes takes the intervention of a court to ensure that an ethics commission's orders are respected. One advantage of having an inspector general handle investigations is that such agencies already have subpoena power, know how to use it, and are usually treated with more respect than are ethics commissions, especially those without experienced staff, who look to attorneys like easy targets.

The lack of the power to subpoena is one of the principal characteristics of what is known as a "paper tiger," that is, an ethics commission that has authority to enforce ethics laws, but in fact is not capable of doing so.

In September 2009, the San Diego council's rules committee voted down a proposal to give the city's ethics commission subpoena power, despite the fact that a citizen initiative had required this. Three of the five rules committee members had been fined a total of \$30,000 by the ethics commission. A council member's attorney tried to make the ethics commission look power hungry and irresponsible.

The ethics commission's executive director said after this decision that the council committee "essentially decided today that it is acceptable in the city of San Diego for people to choose not to cooperate with an Ethics Commission investigation and also that it is acceptable that there are no consequences if people knowingly provide false evidence."

Eventually, the ethics commission was given subpoena power. But this shows how important officials themselves believe this power is to getting people in government to cooperate.

An ethics commission may subpoena witnesses and documents for the purpose of a preliminary investigation, but this does not mean that a proceeding has actually begun, complete with discovery. Discovery begins only upon a finding of probable cause.

It is valuable to include in an ethics code an express requirement that all local government departments, agencies, bodies, officials, and employees are required to respond fully and truthfully to all inquiries and cooperate with all requests of the ethics commission and its agents. With respect to documents and other information, it should be an ethics violation for an official or employee to deny access to information requested in the course of an ethics investigation or for a public hearing, except to the extent that such denial is required by federal, state, or local law.

You might think that, with a requirement of cooperation, it would be highly unlikely that officials and employees would not fully cooperate with an investigation, even in the absence of a subpoena. But one need look no further than the Office of Congressional Ethics which, without subpoena power, frequently fails to be able to interview congressional representatives and their staff.

Some officials will even fight subpoenas. For example, in 2011, the head of the SUNY (State University of New York) Research Foundation argued that the state ethics commission's subpoena was improper because it hadn't paid in advance for his travel expenses to the commission's office in Albany. The ethics commission office was two blocks away from his office. Without a subpoena, some officials will come up with a myriad of excuses not to cooperate, and do what they can to prevent their subordinates and colleagues from cooperating, as well.

One thing that happens when a commission does not have subpoena power is that it is more likely to turn a matter over to criminal authorities or an inspector general, that is, someone who does have subpoena powers. A matter that might have been dealt with quickly and with far less cost to government, and less scandal, ends up becoming an expensive, drawn-out criminal proceeding that is more likely to be dropped and more likely to fail if it is pursued.

It's worth noting that some states, such as Connecticut, provide local ethics commissions with subpoena power. And yet many local ethics codes do not acknowledge this power, and I have spoken with officials, including city attorneys, who argue that this power either cannot or should not be given to ethics commissions. This is why it is so important to include all relevant state laws in a local ethics code. Otherwise, they might be ignored or simply unknown.

Despite the fact that a requirement to cooperate is not sufficient, it is worthwhile to have in an ethics code in addition to providing subpoena power. Here is the City Ethics Model Code cooperation provision:

The Police Department and all city agencies, bodies, officials, and employees are required to respond fully and truthfully to all enquiries and cooperate with all requests of the Ethics Commission or its agents relating to an investigation. It is a violation of this code for any official or employee to deny access to information requested by the Ethics Commission in the course of an investigation or a public hearing, except to the extent that such denial is required by federal, state, or local law.

If an official or employee refuses to cooperate, an ethics proceeding would be a secondary form of enforcement. Serving a subpoena after a refusal to cooperate would be the primary way to ensure cooperation.

Some who refuse to cooperate will argue that documents or other information is protected by the attorney-client privilege. This is a very problematic argument, considering that the government attorney's client is the public, an ethics program's goal is to protect the public trust, and an ethics commission is part of the same governmental organization as the city or county attorney's office. See [the section on local government attorneys](#) more on this controversial topic.

When investigations are conducted by anyone other than an ethics commission, it is valuable to state in an ethics commission's rules of procedure that the ethics commission delegates its subpoena power to the investigator, whether it be a staff member, a particular board member, or an outside investigator, such as an inspector general or special counsel. Here is the language from Miami's rules of procedure:

The Commission hereby delegates to its investigators the authority to administer oaths and affirmations, delegates the authority to issue subpoenas to its chair and, in the absence or unavailability of the chair, to its vice chair, and authorizes its employees to serve any subpoena issued under the Commission's authority.

3. Ex Parte Communications

An ethics codes or an ethics commission's rules of procedure should have a provision that prohibits ex parte communication with ethics commission members, and provides guidance

to commission members with respect to handling such communications. Here is the City Ethics Model Code provision:

- (a). An Ethics Commission member may not communicate, directly or indirectly, with any party to an ethics proceeding or with any person who has a direct or indirect interest in the outcome of an ethics proceeding (other than communications necessary to procedural aspects of maintaining an orderly process, including settlement negotiations) without notice and opportunity for all parties to participate. Such communications constitute ex parte communications.
- (b). It is an ethics violation for anyone to make, or attempt to make, directly or indirectly, an ex parte communication to an Ethics Commission member.
- (c). An Ethics Commission member who receives an ex parte communication must place on the record of the matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the member received, directly or indirectly, an ex parte communication. The member must advise all parties that these documents and information have been placed on the record.
- (d). Within fourteen days after receiving notice of an ex parte communication, any party, or other person mentioned, may place a written rebuttal statement on the record.
- (e). If, before an ethics proceeding, an Ethics Commission member receives an ex parte communication that could not properly be received during the proceeding, the member must disclose the communication to the Commission and, when the proceeding commences, the documents and memo must be placed on the record of the proceeding, as set forth in subparagraph (c).
- (f). If necessary, to eliminate the effect of an ex parte communication, an Ethics Commission member who receives the communication may be asked by the Commission to withdraw. However, the Commission should not allow a party to a proceeding, or other interested person, to use an ex parte communication to remove a member from an active role in a proceeding.

Restricting ex parte communications can make the ethics process slower and more difficult for everyone. But it is important that officials not be permitted to use their offices to influence ethics commission members. Even the appearance of manipulation is disastrous to an ethics program.

In larger jurisdictions, where there is more than one staff member, and a separation of advocacy and advisory functions, an ex parte communication provision should be extended to staff performing an advocacy function with respect to any particular proceeding.

There are some serious attempts (many of them successful) to influence, even intimidate or reward, ethics commission members and staff. [A 2012 grand jury report](#) from Suffolk County, New York featured several such instances by the county executive, directly and indirectly through other officials.

The Suffolk County grand jury recommended that attempts to influence an ethics commission members should be made a felony. This is both overkill and underkill. It is overkill because it turns a misuse of office, an ethics violation, into a felony, and because it brings the criminal justice system into an ethics program, politicizing ethics enforcement. An independent ethics commission can deal with this problem itself. It is better to prevent the conduct and provide guidance to an ethics commission about how to deal with it, than it is to turn an ex parte communication into a difficult criminal case, where someone who is no danger to society, only to good government, may end up in prison.

It is underkill because, without a sting operation, it is difficult to prove beyond a reasonable doubt that an official actually did something criminal. On the other hand, it is very easy to prove in an administrative ethics proceeding that an official made an ex parte communication. Often what appears to be tough justice is really an act that makes successful prosecution difficult. This sort of justice goes against the goal of a government ethics program to make proof of an ethics violation relatively quick, inexpensive, and successful.

Although the City Ethics Model Code makes ex parte communication an ethics violation, since it is a misuse of office to benefit oneself, in most cases, disclosure will be sufficient. In many cases, ex parte communications are made out of ignorance rather than an attempt to illegally influence. But in cases such as Suffolk County's, the finding of a violation, with sanctions, would be appropriate.

4. Conclusion of Preliminary Investigation

When is a preliminary investigation over? The relatively easy way to end a preliminary investigation is for the investigator to determine that she has enough evidence to present a successful argument to the ethics commission that it should decide to move on to a full investigation and public hearing. The harder way is for an investigator to decide that she

will not have enough evidence to present such an argument and, therefore, recommend to the ethics commission that the complaint be dismissed. It is a lot harder to know when one has reached this point.

When the investigator has reached one conclusion or the other, she drafts a report to the ethics commission with a summary of the facts, along with necessary documentation, a discussion of how the facts do or do not indicate a possible ethics violation, and a recommendation for action, that is, to proceed, to dismiss for insufficient evidence (or another reason), to find probable cause and end the investigation, to find probable cause but continue to investigate or, when the investigation has gone on for a long time and the investigator has not yet found sufficient evidence of an ethics violation, continue the preliminary investigation.

A preliminary investigation report can include hearsay and investigators' opinions, for example, regarding documents and witness statements. It's important to recognize that the purpose of this stage of the ethics proceeding is not to prove an ethics violation, but rather to determine whether to move on toward making such a proof.

In the end, it is up to the ethics commission to determine when a preliminary investigation is over. It may choose not to accept the investigator's recommendations. The commission may ask the investigator to continue an investigation she thinks is done, or end an investigation she thinks should continue. The ethics commission may also determine that the preliminary investigation is over, that is, there is sufficient evidence for it to make a determination of probable cause (see the following section). It may ask that the investigation continue after a finding of probable cause, or it may decide that there is sufficient evidence to go directly to a public hearing.

It is important to remember that a finding of probable cause is less the end of an investigation, than the beginning of the proceeding. Much more evidence may be necessary to prove an ethics violation than to find that a proceeding may begin.

Often there is no need for a preliminary investigation of the allegations, because the facts are simple and can be confirmed by a call or by looking at documents enclosed with the complaint, or because sufficient facts have been stipulated to by the respondent. This does not, however, mean that there may not be a need for further investigation, because there may be other facts, other possible violations, and other possible violators. When there are enough facts to allow an ethics commission to decide that the matter should move on to the next step in the process, this determination can be made without the participation of an investigator and without the need for a written report.

In addition, in many jurisdictions the ethics commission itself handles most investigations. There, the commission or an investigatory committee of the commission needs to decide when it's time to take a vote about moving on.

5. Probable Cause

The goal of a preliminary investigation is to collect evidence to allow an ethics commission to determine whether or not to begin a proceeding by moving on to a full investigation and public hearing. A preliminary investigation does not have to be exhaustive. In some cases, there will be sufficient evidence in the complaint and the response, so that no preliminary investigation is necessary. In other cases, a couple of calls or a few documents may be sufficient. The ethics commission can then move on to a full investigation.

The most common standard of proof for moving on to the next step in the process is “probable cause.” But what is “probable cause”? This term is an unfortunate choice, because it is primarily a term in criminal law. It can be found in the Fourth Amendment of the U.S. Constitution (“no Warrants shall issue, but upon probable cause”), providing due process with respect to searches and seizures. It is the standard by which a police officer has the right to make an arrest or conduct a search. The U.S. Supreme Court in [*Illinois v. Gates*](#), 462 U.S. 213 (1983), lowered the threshold of probable cause by ruling that a “fair probability” of criminal activity being found could establish probable cause for the issuance of a search warrant. A preponderance of the evidence is not required. Preponderance of the evidence is the standard for a civil or administrative trial, not for probable cause.

“Probable cause” in the criminal context is often defined as a “reasonable belief that a crime has been committed,” but this does not mean that it is more probable than not that a criminal law has been violated or that there is a “preponderance of the evidence.” In fact, in a search warrant context, there is often very little evidence available.

In an ethics proceeding, which many consider a quasi-criminal proceeding, the term creates the appearance of due process. But it does not provide a clear guideline to anyone involved. This lack of clarity is made worse because most ethics codes that use the term do not define it either in the code or in regulations. And although “probable cause” is the most popular term, many other terms are used. And some jurisdictions don't make a probable cause determination at all. Here's what I came up with in a study I did in 2008:

Of the 17 states that have some ethics jurisdiction over local government officials, 2 do not make a probable cause determination; 6 use a “probable cause” standard; 4

use a “reasonable grounds” or “reasonable cause” standard; and the other 5 employ a variety of standards: probable cause and sufficient evidence to believe, just and sufficient cause, preponderance of the evidence, information sufficient to make a preliminary finding, and (for criminal referrals only) probable cause to believe a knowing and willful violation.

Of the 12 major cities I looked at, 4 do not make a probable cause determination; 3 use a “probable cause” standard; and the other 5 employ a variety of standards: alleging facts sufficient to constitute a violation, reasonable basis or cause for believing, cause to believe, and two partly contradictory standards in one city: believe or entertain a strong suspicion as well as evidence sufficient to cause to believe.

Clearly, there has been no consultation on this important issue, and no attempt to determine a best practice. It is not even agreed on that there is a value in defining “probable cause,” as if the term had a clear meaning in the ethics context, or as if the criminal due process meaning from the warrant context clearly applied equally to ethics proceedings. But the criminal due process meaning is not primarily evidential and does not require an investigation. It involves getting a warrant to investigate or arrest someone.

The City Ethics Model Code defines “probable cause” as “reasonable grounds that a violation has occurred.” This means that there must be some evidence of a violation, but not a preponderance of the evidence. The evidence must be sufficient to proceed from a confidential complaint to a public proceeding that will include public hearings and a more in-depth investigation, if necessary. If the term is not defined, there will be disagreement about its meaning. Some respondents will treat the lack of a definition as if it were a loophole in the law, arguing that there is not a preponderance of evidence, even when there is no such standard for a finding of probable cause (a preponderance of the evidence is the standard the City Ethics Model Code recommends for a finding of an ethics violation).

Besides the need for more clarity in determining what “probable cause” means, there is another important issue. The process that is due in an administrative proceeding to an official with a fiduciary duty not to misuse her office — who is being charged by an independent body representing the community, and who will not go to prison for misuse of this office — is not the same as is due in a criminal proceeding to a criminal defendant who has no fiduciary duty, is being charged by the government, and may go to prison. And yet, even without the same level of constitutional due process protection, it is usually more difficult to find “probable cause” that an official has violated an ethics provision than it is to

find “probable cause” that an ordinary citizen has broken a criminal law. This doesn’t make sense.

Besides the lack of clarity or a higher stated or effective standard for “probable cause” in ethics proceedings, another problem is that ethics rules sometimes require a supermajority ethics commission vote for a finding of “probable cause” or the jurisdiction’s equivalent standard. Such a supermajority can be very hard to get for reasons that include the partisan nature of appointments to most ethics commissions (one party can block a finding of probable cause which, in many jurisdictions, means that the proceeding does not become public), vacant positions on a board, and ethics commission members who either do not attend the meeting or do not vote. This problem is heightened when a supermajority (or even a majority) is defined in terms of numbers of votes or a percentage of the designated number of positions on the commission rather than in terms of a percentage of those present and voting. If only three members of a five-member commission attend a meeting, a majority defined as three votes or a majority of the five members, becomes in actuality a unanimous vote.

A preliminary investigation report should be sent to the respondent along with notice of the probable cause conference. The respondent should be permitted to file a response to the report. Some jurisdictions consider a failure to file a response a waiver of the respondent’s right to address the ethics commission at the probable cause conference. Otherwise, the respondent can spring arguments on the ethics commission at the last second, making it difficult for them to make a decision. It is best for the commission to have read both the report and the response, so that its members can prepare questions both for the respondent and for the investigator. But the respondent should not be required to attend the probable cause conference. There is nothing wrong with allowing an ethics commission to make its decision based on the report and the response, and on evidence the commission asks to see after reading the report.

The respondent should also be asked to stipulate to facts she does not dispute, so that the ethics commission’s job is easier. A respondent who might not have been willing to stipulate to facts stated in the complaint may now, after an independent investigation, be willing to stipulate. A hearing may not even be necessary, or the only issue at the hearing may be which provisions may have been violated and whether further investigation is required.

Whoever is in charge of presenting the case against the respondent (I prefer the term “advocate”) should be permitted to file a rebuttal to the response. It is best done by

the investigator, by a designated attorney on the ethics commission staff, or by outside counsel contracted for this purpose. In some jurisdictions, this role is taken by a member of the city or county attorney's office. This is problematic, because the same office represents the same official under other circumstances, and its attorneys are likely to have personal and professional relationships with high-level officials, who are the most common respondents. Not only does the attorney have a serious conflict of interest, but the public will assume that the attorney will favor the official by not presenting a good case against him. If the ethics commission dismisses the matter, the public may blame the attorney and the process that allowed the attorney to be in this position, undermining its trust in the government.

In some jurisdictions, such as Miami, instead of a rebuttal, the advocate (rather than the investigator) makes a recommendation to the ethics commission, stating the charges that will be presented, and the respondent is given an opportunity to respond to this, as well.

Whether or not to move on to a full-fledged, public ethics proceeding is determined at what is usually referred to as a "probable cause hearing" or, as Los Angeles calls it, "conference." I prefer the term "conference," because it differentiates meetings to determine probable cause from meetings to determine whether there has been an ethics violation.

A probable cause conference is usually held in a closed session, because most jurisdictions require ethics proceedings to be confidential until there is a finding of probable cause. However, this is not necessarily best for either the public, which suspects closed hearings of covering up misconduct by officials, or for high-level officials, who may be accused of having something to hide even after a complaint against one of them has been dismissed. See [the section below](#) for arguments for and against such closed sessions.

At the conference, the investigator, advocate, or advocacy committee of the ethics commission presents arguments regarding whether or not the ethics commission (or hearing panel of the ethics commission) should vote to proceed to a full investigation and/or a public hearing. The respondent may also present arguments, and the ethics commission may ask questions of the speakers. In some larger jurisdictions, such as Los Angeles, the probable cause determination is made by the executive director, and the ethics commission is not even present at the conference.

Although facts may be presented and discussed, a probable cause conference is not an evidentiary hearing. No determination or findings of facts are made. There are no

formal rules of evidence. In many jurisdictions, there are not even witnesses. The only decision is whether or not to proceed to the next step in the proceeding, to a full investigation and/or public hearing.

Without clear rules, how does an ethics commission keep a probable cause conference from becoming a full-fledged hearing, with numerous witnesses, cross-examination, the presentation of documentary evidence, and endless speeches? If *any* witnesses or additional documents are allowed to be permitted (they are not permitted, for example, in Miami, whose rules clearly state, “No testimony or other evidence will be accepted at the hearing”), it is hard to write hard-and-fast rules to keep them out. The only solution is give discretion either to the ethics commission, or to the ethics officer or executive director, to allow limitations of time, number, and relevance to be placed on presentations made during the conference. For example, here is language from the Los Angeles ethics commission’s rules of procedure:

at the discretion of the Executive Director, witnesses may be allowed to attend and participate in part or all of the probable cause conference. In making this determination, the Executive Director shall consider the relevancy of the proposed testimony, whether the witness has a substantial interest in the proceedings, and whether fairness requires that the witness be allowed to participate.

If the ethics commission decides not to proceed, it will dismiss the complaint on the grounds of no probable cause (or the jurisdiction’s equivalent standard), notifying both the respondent and the complainant. In jurisdictions that require confidentiality until a finding of probable cause, this dismissal will not be made public unless the respondent chooses to make it public. The ethics commission should ask the respondent to do so, although sometimes the finding is withheld pending an attempt to settle the matter.

It is worth considering an express statement, as in Rhode Island’s procedural regulations, that a complaint dismissed for lack of probable cause may not be entertained again by the commission unless new facts are discovered which materially change the likelihood that there was an ethics violation. This is better than merely saying that such a dismissal is made “with prejudice.”

If the ethics commission decides to proceed, it should list the ethics violations that will be involved and the facts upon which the finding of probable cause was made. However, if further investigation uncovers evidence of other, related ethics violations, these may be added to the complaint, upon notice to the respondent.

It is important to include a statement of the facts, because it is desirable for the respondent to admit to the facts so that settlement may proceed on this basis or so that the public hearing is limited to discussion of the law and other issues, which saves all parties a great deal of time and money. In some jurisdictions, the finding of probable cause constitutes the document on which the proceedings continue to the hearing stage, particularly if no further investigation is required. If there is further investigation, there should be a second investigation report.

6. Time Limitations

One way that elected officials can undermine ethics enforcement is to place strict time limitations on investigations. For example, in 2009 an ethics reform bill in Alabama set a 30-day limit on investigations. If by that time the understaffed state ethics commission, which has jurisdiction over local officials, has not found evidence sufficient to find probable cause, the complaint would be dismissed. The day a *Birmingham News* editorial took the legislature to task for so strict and damaging a limit, the limit was changed to six months.

The Alabama legislature is not alone. West Virginia has a 45-day, apparently non-extendable limit on investigations. But most jurisdictions with limits offer the possibility of an extension. Seattle has a 30-day limit, but it can be extended indefinitely for good cause. Denver's rules say that an investigation should typically last no more than 30 days. Arkansas has a 60-day limit for a preliminary report to the commission, at which point the commission can request further, unlimited investigation time. Detroit has a 91-day limit on investigations, with a 28-day extension where there are extraordinary circumstances. There is a longer, 182-day limit on investigations initiated by an ethics board member.

Oregon has a 180-day limit, plus 30 days more if the commission allows. Rhode Island has a 180-day limit, plus two 60-day extensions for good cause. Chicago has a one-year limit, but the time does not run as long as an investigation is suspended.

Most jurisdictions have no stated limit at all.

There are three issues here. One is the time limit itself. Two is the ability to extend the limit (which includes who may extend and under what circumstances). And three is what happens if the investigation has not been completed during the time limit.

a. Time Limit. A time limit ensures that an investigation does not go on forever. While an investigation is going on, especially if it has been made public, a cloud can hang

over the respondent, even if there is little or no evidence of an ethics violation. An endless investigation is also a way to effectively push allegations under the rug.

On the other hand, most ethics commissions have no staff, and those that do usually are understaffed. It is often necessary to hire an outside investigator, which itself can take a month or more (ethics commissions can hardly pay top dollar to a big investigation firm). Ethics staff deal with training, advice, disclosures, proceedings, and investigations all at the same time. Even state and large municipal commission staffs that have in-house investigators or use other agencies for their investigations rarely have enough investigators, and big, difficult cases usually hog their attention. On top of this, ethics commissions and investigatory agencies are susceptible to budget cuts and hiring freezes, which can leave them without an investigator.

In addition, there are many ways in which an investigation can be blocked or delayed. Officials can fail to cooperate; witnesses can be intimidated or for other reasons (including their Fifth Amendment right to remain silent) refuse to talk with the investigator; respondents, their allies, and their counsel can reschedule their interviews; respondents can file motions and start settlement negotiations; and people can fight subpoenas, file suits, and seek temporary restraining orders. No time limit can take into account these attempts to block or delay an ethics investigation, except by allowing extensions or the suspension of time limits for a variety of events. Nor can a time limit take into account the discovery of new information that opens up an investigation, adding more allegations and/or respondents.

Ethics commission problems can also delay investigations and findings of probable cause. For example, ethics commission members can resign, and not be replaced, so that there is no quorum to discuss an investigation or meet to consider probable cause (sometimes there isn't a quorum's worth of members to begin with). Even with all or nearly all of its members, ethics commissions can find it hard to get a quorum, especially during the summer. An investigator can do a poor job, requiring the ethics commission to hire someone else. There are many legitimate reasons why an investigation can take far longer than it normally would.

It is good to have a time limit for a preliminary investigation, so that an ethics commission at least has a guideline (but not a hard-and-fast rule) and a respondent has a reasonable idea how long an investigation normally takes. The exact number of days that is reasonable depends on the process an ethics commission uses and the sufficiency and availability of its staffing. When an ethics commission has to hire an investigator each time a

complaint is filed, it will need more time than a commission that has an investigator on staff or on call. When an ethics commission has to do an investigation itself, it may need a great deal of time, because just meeting frequently to discuss the investigation can be difficult. But some investigations will take an hour or so. For these easy matters, the time limit is irrelevant. 180 days is a reasonable limit for most ethics commissions.

When considering a time limit, it is important to recognize that an ethics commission is often not in control of the time an investigation takes. In fact, the respondent official is often more in control, because there are so many ways a respondent can, directly or indirectly, delay an investigation. The creation of a hard-and-fast time limit for investigations is a way for high-level officials to give themselves a legal way out of an ethics proceeding. Combined with confidentiality, such a time limit is extremely damaging to an ethics program's ability to enforce an ethics code, thereby undermining the public's trust in the ethics program and in the government.

b. Extensions. Time limits, especially shorter ones, should allow for extensions. It is good to require an ethics commission to explain why its investigation is taking so long. If it keeps arguing that it has insufficient personnel, then this is a good indication that the legislative body should provide funds for more staff or allow the commission to hire outside investigators. If it keeps arguing that respondents are delaying investigations, then this issue should be taken up with the local legislative body. If it keeps arguing that it lacks a sufficient membership to reach quorums, this emphasizes how important it is to quickly fill open positions on the ethics commission.

Ethics commissions should only be required to show cause, not, as in jurisdictions such as Stamford, Connecticut, that there are "extraordinary circumstances." Delays, for whatever reason, are often very ordinary circumstances.

One especially important reason for an extension is that during an investigation, an ethics commission often discovers new information that requires an amendment to the complaint. This can lead to a broader investigation than was originally contemplated, involving more respondents and more conduct. The new information may not be discovered until late in an investigation, requiring a substantial extension.

Here is the City Ethics Model Code's time extension provision, which applies across the board, not only to investigations:

Extensions of time to any of the time limitations specified in this section may be granted by the Ethics Commission, for cause, which must be stated in granting the

extension. If no meeting can be held before such time limit runs out, the chair may extend the limit until the following meeting.

a. The Ethics Commission must give written notice of any extension(s) of time to the respondent and the complainant.

b. No extensions may be given for time periods required for notification.

It is important that the chair be allowed to extend a time limit, because often it is an ethics commission's inability to meet that is the problem, or at least a contributing factor. It can't be stressed too often how important it is to always assume that an ethics commission will, at times, have problems meeting, due primarily to too few members or vacation time.

The District of Columbia rules provide a second extension provision, which is worth considering:

The Board may ... upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect.

c. Consequences. There can be three consequences of, or ways of dealing with, a failure to complete an investigation within the time limit, when extensions are not unlimited: either (1) a probable cause determination must be made upon limited evidence, (2) the complaint is automatically dismissed, or (3) the time limit is ignored and the investigation simply continues.

With respect to the first approach, it can be hard for an ethics commission to find probable cause with limited evidence. This approach therefore favors the respondent, especially respondents discovered during the investigation. If an investigation broadens, a strict time limit will cause ethics commissions to file separate complaints so that, officially, they can start new investigations, creating a mess of cases where one larger case would be more efficient.

The second approach, automatic dismissal, might mean that the public would never even learn about a legitimate complaint, and nothing would be done about the misconduct. The worst thing that could happen is for a complaint to be automatically dismissed because the respondent, or his supporters, blocked or delayed the investigation. If the respondent knows that a complaint will be dismissed if an investigation goes beyond a certain time

limit, this gives him an incentive to file a suit or ask his colleagues not to cooperate, or even to undermine the ethics commission's ability to pursue the investigation by withholding funds or failing to fill open seats on the ethics commission. It is important to recognize that an automatic dismissal rule will cause a respondent's attorney to do everything possible to delay an investigation. Delay is an attorney's default action, so they are very good at it. They don't need to be encouraged by time limit rules that could let their client off without having to do anything more.

With an automatic dismissal rule, the question will come up whether the complainant can merely file the complaint again and start the investigation all over. There is usually no double jeopardy prohibition with respect to ethics proceedings. But, especially considering the possibility that the complainant has been intimidated or that she might reasonably not want to go through the whole thing again, it is preferable that the investigation simply continue until a probable cause determination can be made.

The third approach effectively allows for unlimited extensions. It is preferable to have a process for extension, so that the commission and respondents are given useful guidance.

There is a fourth alternative, especially if an ethics code does not allow extensions for cause. The failure to complete an investigation on time, for good cause, could lead to a presumption of probable cause, without an actual finding of probable cause. This is an approach that would not provide the respondent and his supporters with an incentive to delay the investigation. I can't imagine any local legislative body passing such a rule, but the ethics commission could put such a rule in its rules and regulations. It would be an excellent way to ensure the full cooperation of the respondent and other officials.

It is important that an ethics commission not lose jurisdiction of a case for reasons over which it had little or no control. It is also important to remember that time limits are one of the ways in which an ethics code that appears to be serious about enforcement can actually undermine enforcement via what appear, to non-lawyers, to be reasonable provisions. As long as delay is a principal legal tactic, and volunteer boards have trouble obtaining information, meeting, and making decisions, time and extension limits should not be strict. If they are made too strict, an ethics commission has an obligation to the public to do what it can (1) to prevent respondents from blocking ethics proceedings by abusing rules, and (2) to make any such blocking efforts public, if legally possible.

But it should also be mentioned that, if an ethics commission has been selected by officials and appears to be politically motivated, a long investigation can look like an

attempt to keep valid allegations secret or keep unfounded allegations against an official alive into election season. This is why an ethics commission should always have open discussions about delays, providing public reasons for any extension, allowing members to provide dissenting opinions, and allowing the public to comment. Strict confidentiality rules prevent all of these ways of gaining the public's trust in the ethics program. That is why they are so damaging.

7. Paper Tigers

The term “paper tiger” refers to an ethics commission that has authority to enforce ethics laws, but in fact is not capable of doing so. The principal characteristics of a “paper tiger” include not only strict time limits on investigations and hearings, but also the inability of an ethics commission to subpoena or require cooperation, the lack of direct enforcement power (the ability only to investigate and possibly recommend), the lack of a sufficient budget, supermajority voting requirements (which make it difficult to find probable cause, not to mention a violation), a high standard of proof, and the failure to replace departed members, making a quorum difficult or impossible to achieve.

At first, paper tigers give the appearance that the public interest is being protected, but once they are seen for what they are, people feel conned and the goal of public trust is undermined. Nothing enrages editorial page editors more than a paper tiger. It shouts to the public that a city or county's ethics program is a fraud.

F. Expanding a Proceeding, or Taking an Alternate Approach

1. Expanding a Proceeding or Starting Another

Sometimes an investigation uncovers evidence either of ethics violations that were not included in the complaint or tip, or of the involvement of others in the ethics violations that were included in the complaint or tip. What should the investigator do when either occurs?

If evidence of another possible respondent, involved in the same misconduct, is discovered in an investigation, the investigator should inform the ethics officer or ethics commission, who should add that individual to the complaint and give that individual notice as and when required by the ethics code or regulations or, if the investigation was initiated by the ethics commission itself, pursued as part of the same preliminary

investigation. This includes someone who participated in the misconduct, for example, as the giver of a gift or an intermediary (someone providing a job to an official's child as a favor to the actual giver of the gift); someone [who aided or abetted the misconduct](#); and, in jurisdictions that [require officials to report ethical misconduct](#), an official who knew and failed to report. It can even include beneficiaries of misconduct.

The same actions should be taken if, instead of another respondent, what is discovered is another possible ethics violation that is materially related to those already alleged or being investigated. If an unrelated ethics violation is discovered, the ethics commission should initiate a separate investigation and draft a separate complaint.

Sometimes multiple complaints or tips are related, either in terms of the conduct or in terms of the respondents. The power to consolidate related proceedings can create huge cost savings, in addition to allowing the ethics commission to deal with related conduct and respondents all at once, whether one official's pattern of misconduct or separate individuals involved in the same conduct.

Miami's rules of procedure has good language regarding how to deal with evidence relating to additional violations or respondents: "From that point in the proceedings until final disposition of the complaint, such facts shall be treated as if they were initially alleged in the complaint at issue."

The possibility of acting on evidence of further ethics violations and respondents uncovered in an investigation shows how important it is for an ethics commission to have [the authority to initiate investigations and amend complaints](#). Without this, the ethics commission is forced to sit on its hands when it learns of ethical misconduct not only through an anonymous tip, but also through its own investigation. It thereby becomes an accomplice, placing ethics commission members in a very uncomfortable position. It also means that an ethics commission cannot set an example of reporting instances of ethical misconduct.

It is possible for a single ethics commission member to file a complaint based on the new evidence, but this usually requires that member to withdraw from the matter, not because she has any relationship to the matter, but because she had the courage to take it upon herself to free her colleagues from the guilt associated with being an unwilling accomplice-after-the-fact to misconduct.

The ethics commission can get around this problem by creating a formal or informal procedure by which, each time evidence of additional violations or respondents is uncovered and the ethics commission approves, one member, taking turns, will

automatically file a complaint. Since the filing is automatic, there is no reason for that member to withdraw, because there is no conflict or appearance of a conflict. In other words, although it is wrong to prohibit an ethics commission from initiating its own investigation, it is possible to get around such a prohibition.

2. Beyond the Criminal Paradigm

The fact that bribery is the essential act of individual corruption makes criminal law the paradigm for ethics enforcement. In other words, the ethics process embraces the idea that individual behavior is what matters most and that, therefore, ethics enforcement is limited to active individual misconduct. With this focus on individuals, the cause for ethical misconduct appears to be an individual's lack of integrity (what would be called "criminality" in the world of criminal enforcement). Thus, the general view is that ethics enforcement involves bad apples, not bad barrels.

The problem is that this paradigm is not accurate with respect to government ethics. Outside of government, individuals have no special obligations, other than to comply with laws. For example, most individuals do not have an obligation to turn in people who are plotting or have violated the law. And those who commit crimes keep their crimes to themselves, unless they are a gang or mafia member. In addition, most individuals are not part of an organization with a culture that affects how they act, at least criminally.

In government, individuals always are part of an organization with a culture that affects how they act with respect to their conflicts, and their colleagues and subordinates often support or allow their misconduct. In addition, public servants have special obligations that go well beyond complying with laws.

Why? Because people depend on, and are forced to trust, local government officials and employees with their lives, their homes, their children, and their money. Officials are the people who raise taxes from the community and decide how to spend them. Government leaders are either elected to represent the community, or appointed by those who are elected. They determine the community's services, who gets them, and how they are delivered. They educate the community's children, run the community's recreation and senior centers, handle the community's garbage and recycling, run the community's social services. They provide the community's security against crime and fire. And they determine how the community develops.

They do this not as isolated individuals but as groups of people working together to make policy and deliver services. In most instances, one individual's irresponsible handling

of a conflict situation also involves other officials and employees. Therefore, government ethics is an institutional rather than individual issue. In social psychology terms, the causes of officials' behavior tend to be *situational* rather than *dispositional*. In fact, in an unhealthy ethics environment, where following the unwritten rules is effectively required, anyone operating on his own will get in trouble. In an unhealthy ethics environment, there is little ethical misconduct that consists of an individual acting on his own.

Treating only the individual via the criminal enforcement paradigm, in isolation from the situation in which the individual acted, leads to talk of bad apples and bad character (and vice versa). This individual orientation separates "good people" from "bad people," and thereby takes "good people" off the hook, freeing them from their role in creating, sustaining, and conceding to the conditions that contribute to others' active misconduct.

As Chip and Dan Heath wrote in their book [*Switch*](#) (Crown, 2010), "What looks like a person problem is often a situation problem." The tendency of Americans especially to see things as a person problem can be seen everywhere in our culture. A person who is given a huge bucket of popcorn, and eats it, acts in a gluttonous manner, but it is not useful to call him a glutton. Someone who is late for an appointment drives crazily, but is not necessarily a crazy driver. If you try to change the person rather than the situation, you are likely to fail.

The Heaths use Lee Ross's term for our tendency to ignore situational forces: "the Fundamental Attribution Error." They wrote, "The error lies in our inclination to attribute people's behavior to the way they are rather than to the situation they are in."

Every institution – department, agency, government – has an ethics environment, that is, a culture where there are unwritten rules, where certain conduct is allowed, accepted, or expected. The environment may depend on fellowship, shared spoils, or intimidation and fear (or all three), but it is rarely the work of a single individual. It takes a strong individual to buck this sort of culture. A government ethics program that deals solely with the individual, ignoring the ethics environment in which individuals act or fail to act, provides no support or protection to those who want to buck the culture. And it gives the majority of people, who simply go along and keep quiet, no reason to do anything at all.

Government ethics programs need to recognize the powerful effect an ethics environment has on individual conduct and the roles people play in ethical misconduct that benefits someone else, at least directly. The fact is that government officials and employees

who do nothing usually act to benefit themselves or, at least, to prevent harm to themselves, which is the flip side of the same record. Ethics programs need to treat individual instances of misconduct as part of a pattern of institutional misconduct, because they usually, although not always, are. And treating the pattern rather than the instance will do far more to prevent further misconduct.

For example, when a complaint is filed against a council member who helped get a grant for her brother's organization, an ethics commission should consider looking into misconduct relating to grant-making by other council members or their staff. It should also consider looking into the conduct of those who are supposed to provide grant oversight or those who failed to make provision for oversight. And, like a civil grand jury, it should consider looking into how the rule allowing council members to make grants creates temptations that many council members cannot resist. It is not enough to fine the single council member and let her committee chairmanship be stripped from her by people who knew all along what she was doing and may have done similar things themselves.

This approach was taken by the New York State Commission on Judicial Conduct in 2012. [The commission's report](#) on a particular judge, regarding nepotism in hiring, went beyond the judge's conduct to look at common practices among judges with respect to hiring for administrative positions. What the commission found was that vacancies for administrative jobs typically had been posted not in advertisements or on the court website, as is otherwise the process, but only in internal rooms at the courthouse that are not accessible to the public. This unwritten rule seriously favored the relatives and friends of those already employed by the court system. This had been the common practice for decades before charges were brought against this one particular judge.

In addition, some judges took hiring out of the hands of the Clerk of Court and put it into the hands of the judge's executive assistant. This also meant that no hiring panel would be involved.

The commission also looked at best practices. It found that at least one appellate division adopted a detailed written hiring protocol (a formal process, which is what every office should have) that required job openings to be announced via the Office of Court Administration website, and required the formation of a committee to interview and recommend candidates.

The commission made detailed recommendations that went beyond the allegations against the respondent, including a policy of withdrawal from participation of employees

with relationships to job candidates, and a nepotism rule relating to supervisors and subordinates.

Here's another way of looking at the difference between taking an individual or group approach. In his book [*The Lucifer Effect*](#) (Random House, 2007), Philip Zimbardo recommends taking a public health rather than medical approach to ethical misconduct. The medical approach is individualistic, treating the patient. The public health approach identifies diseases and tries to prevent them from spreading. If patients keep catching the disease of ethical misconduct from their environment, treating them one at a time does little for the ethics environment. It is a short-sighted and short-term solution.

Just as we need to recognize that we are all vulnerable to diseases, ethics programs need to recognize everyone's vulnerability to situational forces and the ethics commission's need to deal not only with individual conduct, but also with the situational forces themselves. The approach is similar to a flu epidemic, where public health professionals try to stop the spread of the flu at the same time that individuals are treated individually. Only by recognizing the power of situational forces to infect us can we avoid, prevent, challenge, and change them and, thereby, prevent ethical misconduct.

In order to expand a proceeding, it is important that an ethics commission be given the authority to [initiate investigations on its own](#), investigate beyond the facts set forth in a complaint, amend complaints to include other officials and related ethics violations, and consolidate complaints filed against the same or different parties when they relate to the same actions or events or raise common questions of fact or law. The District of Columbia's rules, for one, expressly permit this.

3. Ways to Investigate and Respond to Situational Forces

Situational forces are those things, such as unwritten rules, expectations of loyalty and secrecy, and intimidation tactics, that place pressure on individual employees and officials to either engage in ethical misconduct, help others engage in or hide ethical misconduct, or fail to report ethical misconduct they know about. Situational forces are strongest in, and in fact characterize an unhealthy ethics environment.

The way to deal with situational forces that is most consistent with the usual role of an ethics commission is to take them into account in the discussion about the sanctions to be imposed on a violator. Depending on the particular circumstances, situational forces could be considered as mitigating circumstances to lessen the sanctions or, for those putting pressure on subordinates, thereby creating the situational forces, as aggravating

circumstances to increase the sanctions , within the applicable limits. See below for [a list of mitigating and aggravating circumstances](#).

But to do this, these situational forces must be investigated. One cannot simply take a complainant or respondent's word that they exist. As appropriate, an ethics commission should include as part of its investigation questions regarding the relevant unwritten rules and the pressures placed on officials and employees, the roles various individuals played in the relevant situation, who acted, who approved, who failed to disapprove or report. What efforts were made to conceal the misconduct? Did anyone encourage, aid, or induce the respondent, or did the respondent act in any way to intimidate or co-opt anyone else?

There are other ways to deal with situational forces. For example, with respect to unwritten rules, where one act of misconduct seems to be part of a pattern in the government, an ethics commission could take a non-enforcement approach. Say that a staff member reports misconduct to an ethics commission and says that the conduct, which is not clearly in violation of the ethics code, is endemic and acceptable to most officials (and those who don't find it acceptable are afraid to say a word against it, because that would instantly put them outside of the group and possibly end their political or government career). Instead of investigating and trying to catch one or more officials involved in this misconduct, which may not even be actionable, it might be best to investigate the allegations outside the enforcement process. That is, an ethics commission can act as a civil grand jury, investigating conduct, reporting on it, and making recommendations for ways to change the conduct, and situational forces that facilitate it. The recommendations may or may not include new ethics rules. They may also include procurement rules, land use rules, grant-related rules, and rules relating to slush funds, council rules, and the like.

In some situations, especially when an ethics commission has limited resources, the best approach may be to try handing such a matter over to a civil or, if there appears to be criminal behavior, a criminal grand jury. In the alternative, it might be appropriate for an inspector general, auditor, or controller to investigate. For example, when in 2010 a construction director for the Los Angeles Unified School District was charged with nine felony counts of conflict of interest for allegedly hiring people he employed in his own business to work for the district, and then getting a kickback from salaries paid to these employees when they worked on school district construction projects, the Los Angeles controller began an investigation into school district construction practices, assuming that this was not an isolated incident. It is when such investigations are not conducted that an

ethics commission needs to do what it can to investigate not only a particular complaint, but practices in the agency or office.

What is important, and what is lacking in most ethics enforcement, is considering the possibility that a problem may be institutional and recognizing that the handling of institutional problems is within the province of an ethics commission's duties. This is a big step to take, because authority regarding institutional problems is rarely set forth in an ethics code, but it is the responsible thing to do. Where there is no rule in the ethics code, an ethics commission can draft a rule for its rules of procedure.

Another alternative, especially where investigation would be difficult due to a lack of resources, is to call for a discussion of the issue before the ethics commission. An open discussion of the conduct, treating it not as an ethics violation, but rather as conduct that might be injurious to the public trust, will bring the conduct out into the open, and allow the ethics commission and others to counter officials' justifications for the behavior. It would get the public involved. And it would make it clear to the local government that all conduct that is not in violation of the ethics code is not necessarily appropriate or defensible. In other words, government ethics and law are not one and the same.

Often, an individual brought before an ethics commission in an enforcement proceeding feels that an injustice has been done. He knows that he hasn't done anything wrong, at least within the ethics environment he works in. And he knows that others have gotten away with what *they've* done, that he's been unfortunate, possibly singled out by political opponents or allowed to "take the fall" for his colleagues. And yet he can't point fingers, except perhaps against his political opponents, who might not be culpable at all (except in the tactical employment of an ethics complaint). Pointing fingers at one's colleagues isn't how the game is played, even though it is the unwritten rules of the game that got this individual in trouble in the first place.

For example, a developer, often seen as a government ethics culprit, often sees himself as the middleman between a landowner and the government. The landowner tells the developer to do whatever is necessary to speed up the process so that he can get his money out of the deal. The developer makes use of the unwritten rules to speed up the process, with officials happy to oblige. To focus only on the officials, or on the developer, is unfair. It's like focusing on the lawyer, and ignoring the client (as it is, usually there is a lawyer pulling the government strings for the developer, and the lawyer's conduct is almost never questioned). Of course, the developer could have said no, but only at a risk to

his business. Ditto for his lawyer. This is how the selfishness of many people enables ethical misconduct.

And then there are those unwritten rules, which everyone on the inside accepts. It's those rules, and that "everyone," that an ethics commission must deal with in order to get to the root of the problem.

If the topic of discussion were the local government's ethics environment rather than one official's misconduct, the official might not be so defensive. In such a discussion, the official's conduct might be considered in light of the situational forces and the unwritten rules, rather than only in terms of guilt and innocence. If it could be admitted that the conduct occurred, that people knew about it and accepted it, and why, then something might be done about the forces behind the conduct, that is, about the ethics environment rather than the "isolated" instance of misconduct.

4. Complicity and Knowledge

Another alternative is for the ethics commission or its staff to expand the investigation by adding names and allegations to the complaint where appropriate. This is where it becomes very helpful for an ethics code to have a complicity and knowledge provision (see [the section on this provision](#) for more information). Here is the City Ethics Model Code complicity and knowledge provision:

No one may, directly or indirectly, induce, encourage, or aid anyone to violate any provision of this code. If an official or employee suspects that someone has violated this code, he or she is required to report it to the relevant individual, either the employee's supervisor, the board on which the official sits or before which the official or employee is appearing or will soon appear, or the Ethics Commission if the violation is past or if it is not immediately relevant to a decision, to discussion, or to actions or transactions. Anyone who reports a violation in good faith will be protected by the provisions of §110.

Co-opting is the worst way a supervisor or elected official can impose her will on a government employee. Inducing or encouraging someone to act in violation of an ethics code is a common practice, because those who violate a law are highly unlikely to report someone else who has violated the law. And yet co-opting is not considered ethical misconduct in the great majority of jurisdictions.

Criminal laws make aiding and inducing a violation, but not most ethics laws. And yet it is the same or, in one way, worse. When others help ethical misconduct occur, it usually means that the violation is not irresponsible, as most ethics violations are, but rather intended, as most criminal violations are. Although intent does not have to be proven in an ethics proceeding, it certainly makes the violation worse in the eyes of most people (and often means more serious sanctions). And yet those who induce an official or employee to violate an ethics provision are usually not held responsible for this act.

Officials who are complicit in an ethics violation should be brought into an ethics proceeding. Even staff members should be held responsible for aiding in their supervisor's violation. It is their duty to resist helping or, if they feel they cannot without retaliation, let the ethics commission know what happened, anonymously or not.

Even without a complicity provision, it is possible for an ethics commission to argue that complicity in a violation is no different than a violation. This can be done through a rule of procedure or as an interpretation of ethics code language. Either way, they can add complicit officials to a complaint. The officials might argue that this is illegal, but even if they were to win this argument, the officials' misconduct would become public. But it is preferable to have a complicity and knowledge provision.

With a complicity and knowledge provision, it is much easier to expand an investigation to consider institutional corruption and situational forces in the government's ethics environment. This provides the public with a truer picture of ethical misconduct and, equally important, lets individual officials and employees better understand the effects of their department or agency's ethics environment on their behavior. It also helps them better understand the duties they have to the public not only to deal responsibly with their own conflicts, but also to help change the environment so that others will deal responsibly with their conflicts. They will learn from such an investigation that what has been lacking is not integrity, but rather the open discussion of ethics issues, especially of where a public servant's loyalty should be placed.

A good complement to a complicity provision is a rule like Miami's that expressly provides for expanding an investigation to include (1) other possible ethics violations committed by the respondent, or (2) additional respondents. In fact, it creates a duty to do this. Here is the rule:

1.10 - Investigation of Facts and Parties Materially Related to Complaint

The Ethics Commission has the duty to investigate all facts and parties materially related to the complaint at Issue.

- 1) Facts materially related to the complaint include facts which tend to show:
 - a) a separate violation of an ordinance under the Ethics Commission jurisdiction by a respondent other than as alleged in the complaint and consisting of separate instances of the same or similar conduct by respondent as alleged in the complaint; or
 - b) a separate violation of an ordinance under the Ethics Commission's jurisdiction by the respondent from that alleged in the complaint which arises out of or in connection with the allegations in the complaint.
- 2) Where facts materially related to the complaint are discovered by the investigator during the course of the investigation, the Executive Director shall order an investigation of them and the investigator shall include them in the investigative report. The Advocate may recommend and the Ethics Commission may order a public hearing as to those violations of an ordinance under its jurisdiction. From that point in the proceedings until formal disposition of the complaint, such facts shall be treated as if they were initially alleged in the complaint at issue.
- 3) A party materially related to the complaint means:
 - a) Any other public officer or employee within the same agency as the respondent who has engaged in the same conduct as that alleged against the respondent in the complaint at issue; or
 - b) Any other public officer or employee who has participated with the respondent in the alleged violations as a coconspirator or an aider and abettor.

I don't approve of the criminal language at the end of this provision, but the duty to expand an investigation is a good thing. Unfortunately, the Miami rules do not include a duty to expand the proceeding to include different respondents. As soon as the ethics commission decides to investigate a different person, it is required to start a separate investigation and proceeding. If the conduct is related, there is no reason to start a separate proceeding. It is better to add the new respondents to the original complaint and deal with the situation as one situation involving multiple individuals, just as would happen if the original complaint had multiple respondents.

In addition, there is no reason to limit additional parties to officials and employees. The other parties might include those doing business with the government, consultants and

advisers, gift givers, lobbyists, friends and family members, campaign managers, and the like. To the extent an ethics commission has jurisdiction over them (and it should), they should be brought into an ethics proceeding when they have been complicit in misconduct.

5. Loyalty

Another way of approaching this issue is to recognize that the most important enabler of ethical misconduct is loyalty to one's colleagues rather than to the public. Loyalty takes many forms, but the principal form is secrecy and silence.

The tendency of organizations to keep things secret is central to the need for government transparency laws. The tendency of individuals in organizations to keep silent about misconduct in their midst is why ethics programs require hotlines as well as the open discussion of ethical issues, one of which is loyalty itself. If loyalty to colleagues rather than to the public was a frequent topic of discussion at agency and board meetings, it would be far easier for individuals to understand the effects of loyalty and other pressures in their environment, to think critically about these pressures, and to act mindfully.

In an environment where individuals understand these pressures, it is more difficult for anyone to engage in ethical misconduct, because they would have to do it all on their own, without their staff, peers, supervisors, and counsel knowing anything about it. Few people work this way, and those who do would have a great deal more trouble justifying their behavior to themselves. When others know, and approve, or at least do not object, it's easy to justify your behavior to yourself, and even to others.

In short, treating ethics violations as institutional problems, when this is appropriate, undermines the situational forces that lead to and permit ethical misconduct, and it has a beneficial effect on a unhealthy ethics environment. In a healthy ethics environment, those who engage in ethics violations really are bad apples.

When discussing the issue of loyalty, it is important to recognize that loyalty is completely appropriate in an autocracy, where one individual possesses the power, whether a king or a dictator. In such a form of government, one should be loyal to one's sovereign and to those the sovereign appoints.

But in a democracy, the people are sovereign, and those who are elected are there only as representatives of the community. Those they appoint similarly owe their loyalty to the people who elected their appointing authority, to the community they serve. Loyalty to one's superiors and colleagues has no place in a democracy.

This may seem to go without saying. But it needs to be said again and again. If it went without saying, every government ethics code would contain the second sentence of this provision, and yet few require officials and employees to report a suspected ethics violation. Nor do local legislative bodies consider responsibility for misconduct to go beyond isolated individuals, that is, they do not consider the culture and conduct of boards, departments, and agencies, or of those who lead and guide them.

Without a complicity and knowledge provision, and the authority to make investigations or file or amend complaints, an ethics commission is limited to dealing with individual misconduct, which is the least important misconduct in local government. The ability to deal with institutional misconduct and situational forces is essential to making lasting changes in the ethics environment of government departments and agencies, and the government organization itself.

For more on misplaced loyalty, see [the section on the topic](#) in the final chapter of this book.

6. Institutional Conflicts

Some conflicts are not limited to any individual, but exist at the level of the department, agency, or government as a whole. One egregious example of such an institutional conflict involves drug-related asset forfeitures, on which many police departments, and even local governments, in Texas and elsewhere have become dependent. Not only does such dependency lead to abuses in how the money is spent (sometimes on contracts to police officer-owned businesses, with the specious justification that no tax dollars were spent), but it can also skew the priorities of law enforcement toward the drug trade and lead to abuses in the enforcement of drug laws, since local agencies and governments have such a strong incentive to track down drug assets or to push for the guilt of those whose assets have been taken. Even if this were never done, the appearance of impropriety is powerful, and the trust of people in their police and district attorneys is undermined.

An ethics commission can investigate this situation and make recommendations for dealing with it responsibly, for example, by placing drug money in a special fund that cannot be used by anyone involved in the forfeiture process.

An even worse institutional conflict is having prisons be a major revenue generator for sheriffs which, through the sheriffs' association's lobbying efforts, led to Louisiana having the highest incarceration rate in the country. The result of this conflict was prisoners being unjustly imprisoned and treated as commodities, traded like baseball cards

as a sign of “collegiality,” [a practice finally brought into the light by a New Orleans *Times-Picayune* investigative series](#) in 2012.

In 2012, the New York State Commission on Judicial Conduct published a report on hiring practices, [discussed above](#).

7. Those With Relationships to the Respondent

The respondent's family, colleagues, subordinates, and others close to the respondent may be interviewed as part of an investigation, but unless they become respondents, they are usually left out of ethics proceedings, even though they may have been complicit in or victims of the respondents' ethical misconduct. They may have been asked to stand silently by the respondent, or even to hide information or make misrepresentations. They might have strong feelings about what occurred and how the respondent dealt with the conflict situation. They should be told that, even if there are no allegations against them and their testimony may not be essential to making a case against the respondents, they may speak at a public hearing about what occurred and their role in it.

G. Confidentiality and Transparency

“Hiding [ethics] complaints from the public view ... will not make them go away. It's better for the public to learn who is crying wolf — along with those who have discovered a fox in the henhouse — than to shield such things under the cloak of secrecy and the notion of protecting reputations.”

—[2012 editorial in the Bainbridge Island \(WA\) *Review*](#), in response to a call by a council member to make ethics board proceedings more confidential.

The confidentiality of ethics proceedings is one of the most problematic issues in government ethics, but discussions about it tend to be unusually poor. The usual rule is that an ethics proceeding is confidential until probable cause is found. Only at that point may an ethics commission go public with the matter, by announcing its finding of probable cause and making the complaint public.

Although this sounds reasonable and straightforward, there are some complex issues involved, including First Amendment free speech rights. Questions that should arise

include (1) who is obligated to keep an ethics matter confidential? (2) what information, if anything, can or cannot be made public (and when should it be made public)? and (3) what are legal, fair, and effective ways of enforcing a confidentiality provision?

There are also three considerations to take into account. I will deal with the considerations first.

It is important to consider the fact that transparency is one of the three areas of government ethics (the three are conflicts of interest, campaign finance, and transparency). Transparency is also a central goal of a government ethics program, because it increases both public trust and public participation (without information, it is very hard for the public to participate in any effective manner).

Ethics commission members, like any government official, would rather do their work outside of the public eye. Transparency laws exist because people have more trust in bodies that act in the public eye, and are more suspicious of those who hold closed meetings. The last thing an ethics commission should want is to have the public be suspicious of it. And yet most of them spent a great deal of time in closed session, without even having a discussion about the issue.

Considering that transparency is a central element of government ethics, it should be the default position. Any departure from transparency should require serious evidence of injustice, of undermining the public trust, and of doing harm to the ethics process. Here is what President Obama wrote to the head of all federal government departments and agencies soon after taking office in 2009:

In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.... In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

One must also consider the alternative to confidentiality in an ethics program: what is sometimes a long period of time during which ethics allegations are sensationalized in the news media and on blogs, undermining public trust and the effectiveness of accused officials without any input from the ethics commission or its staff. The ethics commission's repeated response to questions, "We are not permitted to comment on this matter," can be damaging to the public trust, which is of utmost importance to an ethics program.

The fact least mentioned in discussions about confidentiality is that, in most cases, the respondent's name has been disclosed outside of the ethics process. To the public, it looks like the ethics process is protecting the respondent, in other words, that the process is intended to protect officials rather than the public. Whenever an ethics commission fails to sanction an official, this confirms the public's suspicions and makes the ethics programs look like a sham.

And finally, one must consider the fact that no one other than public officials and lawyers believes that officials' ethical misconduct should be kept secret in order to protect their personal reputation and what they often call their "privacy." Privacy relates to private conduct, not to official misconduct. Government ethics programs deal only with official misconduct, also known as the misuse of office. Harm to an individual's reputation is an important issue, but it is not the only issue, nor should it be assumed that confidentiality in an ethics proceeding is the best way to protect an official's reputation.

It is notable that this issue is almost always discussed in terms of confidentiality rather than in terms of transparency or secrecy, because (1) framing the issue in terms of confidentiality favors officials' preference for keeping their personal affairs secret even when they conflict with their public duties, and (2) this is the way government attorneys think (and government attorneys draft most ethics codes): attorney-client confidentiality is a very important issue for attorneys. The success of this framing of the issue as one of "confidentiality" shows how valuable it is to set the terms of discussion. It could just as easily be a discussion about "transparency" (a positive concept that is an alternative to the positive concept of confidentiality) or about "secrecy" (a negative concept that is the way confidentiality as applied to government officials is commonly viewed by the public).

1. Arguments Pro and Con

a. Protection of Officials. What are the arguments in favor of confidentiality in ethics enforcement? The primary one is that confidentiality protects government officials and employees from false allegations. Making an ethics proceeding confidential until there is a finding of probable cause protects an official's reputation from spurious claims. There is no reason for anyone to ever know about these allegations.

But the fact is that these allegations can be made outside of a formal ethics proceeding, whether or not an ethics complaint has been filed and whether or not there is even an ethics program. In this Internet era, frivolous, tactical, malicious, and anonymous ethics attacks will occur, no matter what the ethics code says. Leaks will occur, and no one

will know who made them, because they will take the form of anonymous posts and protected statements to journalists.

In fact, sometimes leaks are beneficial to accused officials, because there is so much false information out there that will hurt an official more seriously than the leaked truth.

Leaks can lead to their own scandals. This happened with New York state's ethics commission (JCOPE) in 2012. Leaks (followed by denials) became as big an issue as allegations of ethics violations. The controversy led one commission member to resign, saying, "JCOPE needs disinfectant sunshine because confidentiality may have become a cloak for possible willful illegality." However, he could say nothing more, because he was sworn to secrecy.

In any event, the First Amendment allows a complainant to make the same allegations in public that she makes in an ethics complaint. Even if the complainant does not make the allegations public, someone else might do so. After all, the complainant is rarely the only person who knows about an official's misconduct. And those interviewed as part of an investigation may talk about what they know, and there is nothing an ethics commission can do.

Shouldn't the respondent be the one to decide what is in his or her best interest? After all, the respondent need only waive the right to confidentiality, and the whole proceeding is public. There are two problems with this. One is that officials often don't understand the ethics enforcement process, do not know what is in their best interest, and are told by attorneys to hold on to their right to confidentiality. More important, the ethics enforcement process is not supposed to be controlled by the respondent. It is supposed to be controlled by the ethics commission, standing in for the public and acting so as to maintain the public's trust in the local government. A respondent should no more determine the secrecy of a proceeding than the breadth of an investigation or the application of the rules of procedure.

A formal ethics proceeding is considered to be a valuable alternative to informal attacks on an official about ethical misconduct. If spurious claims are made in an article or blog, all an official can do is make a denial. Or sue for defamation, if the claims are not anonymous. When such claims are included in an ethics complaint, they can be dismissed by an ethics commission, which is much better for accused officials than any denial, especially if the ethics commission is truly independent.

But the only way that the public can know about the dismissal is (1) if the ethics code provides that dismissals be made public or (2) if an official who has refused to allow a

complaint or investigation to be made public suddenly changes his mind and makes the dismissal public. The latter situation makes it appear that officials use their control over confidentiality for their own personal purposes, when the goal of a government ethics program is for officials to use their authority for public purposes alone.

In other words, confidentiality in an ethics code, which can be waived by officials, is less a policy than a tactic that officials can employ for their personal interest. The public interest is to have ethics enforcement be transparent from the start.

There are unforeseen consequences of confidentiality that can be very damaging to an official against whom a complaint has been brought. Consider the situation where an ethics commission has already decided a matter, by dismissal or a finding of no probable cause, or has approved the official's conduct via ethics advice. The ethics commission has to dismiss allegations that have already been decided or deal with conduct the commission has approved. However, if the dismissal, the finding of no probable cause, or the ethics advice are confidential, as is common, the ethics commission cannot, by law, tell the complainant why it is dismissing her allegations. The complainant will think the ethics commission is protecting the official, and is likely to go public with her grievance against both the official and the ethics commission. At this point, the official may waive confidentiality, but the damage has already been done, and both the official and the ethics commission are placed on the defensive.

This sort of situation undermines the public's trust in the respondent as well as in the ethics program. The respondent might think he was protected by confidentiality, but the only way he and the ethics commission can be protected is if the respondent chooses to waive confidentiality. Why not just do without confidentiality in the first place, so that people learn to trust the ethics program, and the officials who allowed its work to go on in the light of day?

b. Protection of Complainants. Another argument for confidentiality early in the ethics process is that it protects a complainant who has made mistaken allegations. Such allegations might lead to a defamation suit if an ethics proceeding were open. This ignores the fact that a respondent has the choice of making a complaint public, and once it is public, a defamation suit can be filed. If these allegations are truly false, it will help the respondent's case when they are dismissed by the ethics commission.

An ethics complainant is usually protected by a whistleblower provision that prohibits such suits from being filed, at least based on allegations that appear only in the complaint. And since, in a defamation suit, a respondent has the burden of proving malice,

it is highly unlikely that such a suit would be filed against a complainant making mistaken allegations, except as a form of retaliation. It is better to protect a complainant with whistleblower protection than with secrecy.

c. Protecting Reputation for Integrity. Since both of these arguments in favor of ethics proceeding confidentiality involve reputation, it is important to consider the role of reputation in government ethics. There is an assumption that ethics allegations against a local government official are attacks on and detrimental to the official's reputation for integrity. But is this assumption true, or is it due to a misunderstanding of the word "ethics"?

What I find so often is that, faced with ethics allegations, officials insist they are people of integrity. But every day, thousands of "people of integrity" do not deal responsibly with conflicts. And "people of little or no integrity"? Is it only they who fail to deal responsibly with conflict situations?

And who are these people of little or no integrity? Whenever someone insists she is a person of integrity, this differentiates her people of little or no integrity. But no one identifies herself as a person of little or no integrity. So why should anyone believe what anyone says about her integrity?

The fact is, just about all of us do dishonest or sneaky things sometimes. And all of us handle decisions irresponsibly, refuse to ask people for help, show poor judgment, etc.

And yet no one admits to lacking integrity or having poor judgment. Which shows either that we are poor judges of ourselves, or that we lack integrity.

In short, anyone who, in response to an ethics allegation against them, insists that she is a person of integrity, rather than that she handled the relevant conflict situation responsibly, or that it isn't true that her brother owns that company, is not handling the allegations responsibly. She is showing both poor judgment and a lack of integrity. More important, she is turning a proceeding about public obligations into a personal matter involving something that is irrelevant to the situation. This undermines both the purpose of a government ethics program (to get officials to deal responsibly with their conflict situations) and the public trust. Adding on a demand for confidentiality due to this mistaken emphasis on personal reputation only makes the situation worse.

In his book [*The Righteous Mind*](#) (Pantheon, 2012), Jonathan Haidt has some interesting things to say about reputation.

Why did we evolve an inner lawyer [to justify our emotional responses], rather than an inner judge or scientist? Wouldn't it have been most adaptive for our ancestors to figure out the truth . . . rather than using all that brainpower just to find evidence in support of what they wanted to believe? That depends on which you think is more important for our ancestors' survival: truth or reputation. Suppose the gods were to flip a coin on the day of your birth. Heads, you will be a supremely honest and fair person throughout your life, but everyone around you will believe you're a scoundrel. Tails, you will cheat and lie whenever it suits your needs, yet everyone around you will believe you're a paragon of virtue. Which outcome would you prefer?

Haidt draws from this a principle for designing an ethical society: "make sure that everyone's reputation is on the line all the time, so that bad behavior will always bring bad consequences." Another way Haidt puts this is, "Design institutions in which real human beings, always concerned about their reputations, will behave more ethically."

This is an argument for tough ethics enforcement. But it assumes that ethics is more about *bad* behavior than it is about *wrong* behavior. It accepts the government's official's gut reaction to defend his reputation as a good person, which is what causes so many of the problems in government ethics. In government, the best thing is an ethics environment where gut reactions will be about acting responsibly (thereby creating a good reputation for oneself and for the government as a whole out of right behavior) rather than about the skewed emotions that try to create a good reputation out of wrong behavior, via the pretzel logic of legal justifications and even more damaging denials, accusations, and cover-ups.

To the extent it would be considered detrimental to the official's personal reputation to be accused of not dealing responsibly with a conflict, does an official have a right to put her reputation for responsible decision-making above (1) the public's need to believe that those who manage their community place the community's interests ahead of their personal interests, and (2) dealing with conflict situations openly and responsibly in a formal ethics process?

In answering these questions, it is important to note that the reputation we are talking about is solely an official's reputation as a public servant, not an official's reputation as an individual. Someone who has a reputation for being a very good, loyal member of a family or owner of a company can have a problem putting the public ahead of her family or

business. An ethics allegation can actually enhance the official's reputation as loyal to her family or company, while lowering her reputation as an official loyal to the public.

Like integrity, reputation is not a simple thing. An ethics proceedings, if handled responsibly, can actually enhance an official's reputation as an official. Faced with valid allegations, an official can immediately admit to having acted in error, and do whatever is required to cure or make compensation for the conduct. Faced with invalid allegations, an official can make a simple denial, while thanking the complainant for making the allegations through the proper channels. The official can say that she has faith in the ethics process and not only will she cooperate with the ethics commission, but that she asks everyone to cooperate, ensuring that there will be no retaliation against any witness or other individual who cooperates with the ethics commission. When the complaint is dismissed, the official will look good.

Officials, especially high-level officials, have an obligation not to confuse people with respect to what an ethics program is, but rather to teach them that it is not about personal integrity or reputation, but about public servants dealing responsibly with their conflicts in order to preserve the government's reputation. If these officials were to use allegations against them as a teaching opportunity rather than treating it as a criminal defense situation, the public would learn that it isn't ethics complaints that involve personal integrity, but the manner in which officials respond to ethics complaints.

d. Encouraging Delay and More Secrecy. Making transparency dependent on a finding of probable cause encourages a respondent who is focused on protecting his reputation to delay or even end the proceeding without anyone ever knowing about it. In jurisdictions where a complainant is permitted to retract a complaint, a respondent may be able, through threats of retaliation (which can be very hard to prove), to prevent a valid complaint from coming to light. Or a respondent may use his power to get witnesses not to cooperate. Or a respondent may file a suit against the ethics commission to enjoin a proceeding. The respondent can ask that such a court proceeding be as confidential as the ethics proceeding.

Another way a respondent can use confidentiality to encourage delay, especially during an election year, is by stretching out early settlement negotiations or, if there are no rules against it, bargaining for a confidential settlement, so that the matter is never made public. If an ethics commission is permitted to do this, and a respondent threatens a long, expensive fight, the commission may feel obliged to keep valid allegations secret.

In short, partial confidentiality can lead to complete secrecy.

In addition, confidentiality in ethics enforcement can be stretched by officials into disclosure and other areas where it does not belong. When, in 2011, the mayor of White Plains, New York was being investigated by the city's ethics board regarding whether he had received a gift by paying a less than fair-market rent to a developer he had tried to help with government permits, he wrote in his annual financial disclosure statement that he had not received any gifts, followed by an asterisk that led to this statement at the bottom of the page: "This answer cannot be fully answered at this time due to the confidentiality provisions of the city's Ethics Code."

e. Encouraging Resignation. When an ethics code limits an ethics commission's jurisdiction to current officials, and an official knows that an investigation report will look very bad for him, the official can simply resign in order to prevent the report from being published. Many may feel that being forced to resign is a more than sufficient penalty for an ethics violation, but enforcement is not only, or even primarily, about penalties. It is also about education, of both officials and the public. Jurisdiction and confidentiality provisions should not be allowed to hinder public knowledge of ethics violations.

In 2010, the Office of Congressional Ethics issued a report on Rep. Nathan Deal after he resigned from Congress. The Office was not supposed to issue the report under such circumstances, as the House ethics committee no longer had jurisdiction over Deal. But the Office felt that the resignation should not stand in the way of the public knowing the results of its investigation. An ethics commission that loses jurisdiction over an official due to his resignation should consider issuing a report on its investigation.

f. Guidance. When considering the extent of confidentiality in the ethics enforcement process, it is important to remember that the principal goal of the ethics process is to provide guidance to officials and employees with respect to dealing responsibly with their conflicts. If allegations are dismissed or settlements made in secrecy, no one will learn from the situations that arise. Citizens and government employees will not learn how to differentiate a valid from an invalid allegation. Officials will not discover that in one situation they may participate, while in another similar situation they may not.

In ethics proceedings, too much emphasis is put on the respondent, as if it was a criminal trial of an ordinary citizen rather than another way to educate the community about how to deal responsibly with conflict situations. Officials who put their personal reputations ahead of the openness and effectiveness of the ethics enforcement process are preventing the local government's ethics program from attaining its goals.

2. Constitutionality

It's time to discuss the three questions raised at the beginning of this section: (1) who is obligated to keep an ethics matter confidential? (2) what information, if anything, can or cannot be made public? and (3) what are legal, fair, and effective ways of enforcing a confidentiality provision?

In most jurisdictions, either everyone is obligated to keep an ethics matter confidential (that is, nothing is said about who is obligated), or just the ethics commission and its staff are obligated. When only the commission is held to confidentiality, there are no First Amendment problems, because they know about this restriction when they accept a place on the commission or a job from the commission. But when ordinary citizens, whether complainants, witnesses, or others are obligated to keep a matter confidential, there can be First Amendment problems.

The federal Second Circuit court, in [Kamasinski v. Judicial Review Council](#), 44 F.3d 106, 110 (2d Cir., 1994), a judicial ethics case, decided that, due to First Amendment speech rights, laws can only keep ethics proceedings themselves confidential, not the underlying facts or allegations. In effect, a citizen can put all the information in an ethics complaint online, but cannot say that it has anything to do with an ethics complaint or that an investigation is going on.

But the majority of opinions disagree with this position. For example, in May 2009 [the Kansas Attorney General decided](#) that the state ethics commission's fine for violation of the ethics code's confidentiality provision was unconstitutional. And in July 2010 the Third Circuit, in [Stilp v. Contino](#), 613 F.3d 405 (3d Cir., 2010), decided that an ethics complainant could not be penalized for announcing the filing of the complaint in a press release. Here is the court's reasoning:

[T]here is no meaningful difference between publicizing allegations of unethical conduct on the eve of an election and doing so while also disclosing that an Ethics Act complaint was filed with the Commission. Either way, publicizing the allegation might conceivably affect the election.

I believe this reasoning is wrong. There is a meaningful difference between filing a complaint and merely making allegations. The difference is made clear by the fact that the news media treats the filing of an ethics complaint as more legitimate than a mere accusation. Reporters may be wrong in giving a complaint this extra legitimacy, but it is a

fact that cannot be ignored. And this fact does make a difference in how many people know of the allegations.

In addition, the Third Circuit feels that only negligible or remote harm is done by disclosing the fact that a complaint was filed, but if this were true, why would so many people publicize the filing of their complaints? And why would ethics complaints be filed for partisan purposes? Those who file and publicize complaints clearly believe that publicizing the filing will cause harm, and they also believe that if they didn't file the complaint, the news media would ignore their allegations unless they were themselves high-level officials, party officers, or the like. The court was wrong to ignore these realities.

But the *Stilp* view is currently the majority view. Here are four decision that take essentially the same position as the *Stilp* opinion:

[*Baugh v. Judicial Inquiry & Review Comm'n*](#), 907 F.2d 440 (4th Cir. 1990); *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 852 (D.R.I. 1989); *Doe v. Gonzales*, 723 F. Supp. 690 (S.D.Fla. 1988); and *Roe v. Akamine*, No. 91-00252 DAE (U.S. Dist. Ct. of Hawaii., Sept. 26, 1991), where the state ethics commission stipulated that its confidentiality provision was unconstitutional and unenforceable.

I believe it's best not to have a possibly unconstitutional confidentiality provision in an ethics code. A better alternative is to have a provision that requires complainants to allow the ethics commission to have, say, ten days to announce to the press the filing of a complaint, so that the commission may first determine if the complaint even alleges an ethics violation against someone under its jurisdiction. During that ten-day period, the complainant may not publicize or aid others in publicizing the filing of the complaint. This allows the ethics commission to announce the filing in a responsible, neutral fashion (see below for [recommendations on how to do this](#)), rather than allowing the complainant to do so in what is often a partisan or otherwise antagonistic manner. I think this reasonable limitation would survive strict scrutiny in a First Amendment case.

3. Enforcing a Confidentiality Provision

This leaves the third question: what are legal, fair, and effective ways of enforcing a confidentiality provision? The Third Circuit in *Stilp*, and others, have said that fines are unconstitutional. But what about dismissal of a complaint? There are jurisdictions that

require dismissal of an ethics complaint if the complainant says publicly that the complaint was filed. At first blush, this seems reasonable. But if it's a legitimate complaint, this looks like throwing out the baby with the bathwater. The misconduct has nothing to do with the validity of the complaint. If valid allegations have been brought to the ethics commission's attention, it would be wrong for the commission to dismiss them for any reason. Once a complaint has been filed, it is in the hands of the public. Its contents are no different than an anonymous tip. Even if an ethics code required dismissal of the complaint itself, the commission would still be obligated to investigate the allegations.

In addition, there is an easy way around such a provision. The complainant could simply leak the information to the press rather than announcing it himself. An ethics commission would be hard pressed to prove that the leak came from the complainant. Allowing direct statement by the complainant is preferable to encouraging leaks.

A complainant who primarily wanted to hurt an official's reputation will have already done the damage. The dismissal would be due not to the falsity of the allegations, which would make the complainant look bad, but to the complainant's exercise of what he will insist is his First Amendment free speech right, which is a good thing. The result is that only the ethics program, and the officials who passed the ethics code, will look bad, for penalizing this exercise of a basic right. Secrecy and penalizing the exercise of free speech are not what an ethics program should be known for.

In any event, after dismissal the complainant is still free to file another complaint with the same allegations, but not tell anyone this time. The result would be that, publicly, the ethics process will look bad and, meanwhile, a secret ethics process will go forward. If probable cause is found and the ethics commission finally goes public, it will look like all the ethics commission wanted was to keep the matter under wraps. If no probable cause is found, no one will know that the allegations were actually false (unless the respondent chooses this time to waive confidentiality).

A fine is preferable to dismissal, because legitimate allegations would go forward. But it's unlikely that a fine would be found constitutional, at least outside of the Second Circuit (New York, Connecticut, and Vermont).

Sanctioning an ethics commission member or a staff member for "leaking" information about a complaint can also be problematic. When this happened in 2009 in Philadelphia, the sanction was a sizeable fine. The ethics board's executive director was asked a direct question by a reporter about an investigation. Since he had already denied the imposition of a particular fine, a "no comment" alone to a question about an

investigation might be taken as a confirmation of the investigation. So he added to his on-the-record “no comment” an off-the-record confirmation, and told the reporter that they were in the midst of settlement negotiations. His goal was to keep the investigation from being made public in the midst of negotiations. He made a snap judgment that I think was correct, but after telling both the respondent and his board about what he had done, he was fined \$500 for a breach of confidentiality.

In 2010 in Torrington, Connecticut, two council members called for the resignation of the ethics board chair after he publicly disclosed that the board had dismissed a particular complaint against the council members. And yet the fact that the complaint was dismissed was beneficial to the other council members, who might find themselves in the same situation someday, and only showed that the respondents had done nothing wrong.

It is wrong that officials who would be appalled at being asked to resign due to an ethics violation insist on resignation as a sanction for an ethics commission member, especially when there is an argument that what he did was more helpful than harmful. Before discussing the appropriate sanction, officials should be clear about who was harmed and to what degree. Could anyone really argue that it is harmful for the public to know that the ethics board allowed council members with teacher spouses to vote on the school budget? At the worst, this might become a topic for public discussion, and it might turn out that the public does not agree with the ethics board’s decision.

An ethics commission leak can be used as a bludgeon with which to attack the commission, even when the information is already available to the public. This happened in New York State in 2012. It even led one state ethics commission member to announce that, without confidentiality, the ethics commission should be “shut down.” The Albany *Time-Union* correctly responded in an editorial, “How is the public to trust a system it can barely see? ... If the body that's empowered to ensure integrity in state government is beyond public scrutiny, it's rather hard to have faith in its integrity.”

Confidentiality, like free speech, is not an absolute value. In most instances, it is wrong for ethics commission staff to comment on ongoing investigations. But there are times when it is important to disclose information in order to prevent other (that is, false or damaging) information from being published. And often the information is already available to the public. When you fine a staff member for breaching a rule even when it is done for a good reason, you take away his discretion and you give confidentiality too much weight. Confidentiality should always be one consideration, not a value that overrides all other values.

It is best that, with respect to government ethics programs, confidentiality be treated as a sometimes responsible, sometimes necessary, but essentially undesirable value. The first step is to call it by its real name – secrecy – so that it is not confused with attorney-client confidentiality. “Secrecy” makes it more clear that it is generally not in the public interest and, therefore, there must be strong reasons for keeping things secret in any particular instance. Secrecy should never be the default value or requirement; transparency should.

4. A Responsible Approach to Transparency

Here is how an ethics program can approach transparency issues so that transparency *is* the default value.

First, in consideration for the First Amendment and in recognition that confidentiality is not an absolute, rules regarding confidentiality, if any, should be aspirational rather than enforceable. An ethics code should recommend that no one talk about a complaint until the preliminary investigation has been completed and the ethics commission has determined whether probable cause exists. And it should, in a comment, explain why this is. But there should be no sanctions.

When confidentiality becomes an issue within an ethics program, it should be treated as a disciplinary matter, not an ethics matter. After all, there is no conflict between the public interest in transparency and the personal interest of an ethics commission member who has disclosed information about an ethics proceeding. The only question is whether it was appropriate under the particular circumstances. It is valuable to discuss these matters, so that everyone involved better understands the value of both transparency and confidentiality in the ethics enforcement process.

The ethics commission should make clear from the start to all parties and witnesses that the ethics process is the responsible way to handle allegations regarding conflicts. The ethics commission should inform the complainant immediately that the right to file a complaint is accompanied by obligations. If the complainant considers the ethics process to be fair and responsible for him, then he should do what he can to help make it fair and responsible for the respondent. It is not fair or responsible to employ the press and blogosphere in addition to the ethics process. Therefore, the complainant should let the ethics process deal with the matter exclusively. It is also hypocritical to accuse an official of putting her personal interests ahead of the public interest while letting one’s own

impatience or vengefulness undermine the formal ethics process. It is legitimate to criticize the way the process is working, but irresponsible to undermine it from the very start.

The ethics commission should also make it clear in its cover letter to the respondent, as well as in its press releases, that this is not a criminal proceeding, that its goal is not to question the respondent's motives or character, and that if the respondent feels she had no conflict or that she dealt responsibly with it, the proceeding will clear the issue up. In any event, the process will provide a learning experience for her, for other local government officials, and for the public. And it will hopefully be resolved not in hearings, but either via dismissal or in a settlement. It's important to say all this up front, so that the respondent understands the process and would feel ridiculous going public with talk of innocence and integrity.

When someone makes the proceeding public (or if the ethics process is to be fully transparent), the ethics commission should quickly make an announcement that includes a clear statement that the filing of a complaint does not reflect the validity of its allegations, that ethical misconduct involves the responsible handling of conflicts and is not necessarily a reflection on the respondent's character, and that people should wait until the ethics commission has investigated the complaint before drawing any conclusions. Of course, if the complaint is, like most, quickly dismissed for a failure to state an ethics violation against someone under the ethics commission's jurisdiction, the announcement will simply state this fact. This will do nothing to harm the official's reputation.

If the complaint is not dismissed, and the respondent's response successfully shows how false the complaint was, a second announcement will soon vindicate the official by saying that the complaint was dismissed because its allegations did not appear to be valid.

If the ethics commission begins a preliminary investigation without a complaint, there is a more serious argument to be made for confidentiality. An anonymous tip, or even a newspaper article, is hardly the same as a signed complaint and, therefore, may not be considered worthy of a public announcement. In this case, it would be better to wait until a finding of probable cause based on a preliminary investigation. If the tip or article does not turn out to have had any validity, then there is arguably no reason for the public to know about it. But if the investigation becomes public, one way or another, then a preliminary announcement will be warranted.

Of course, here, as in every proceeding, the respondent is free to make the matter public, that is, to waive any right to confidentiality. If this is not tied to an insistence by the respondent that he will clear his name, this should reflect well on the respondent.

Even if the respondent chooses to keep the particular matter under wraps, there is an argument to be made for publicizing at least the fact that, over the year, tips have been made to or articles discussed by the ethics commission, so that the public can know if its ethics commission is ignoring tips or failing to take initiative. If an ethics commission receives, say, 35 tips in a year, investigates three, and files no complaints, it becomes an issue whether the commission is overly protecting officials. To make public only the fact that, say, an ethics commission filed three complaints on its own initiative says nothing about how many tips it found wanting or ignored. Therefore, it is good practice for an ethics commission, in its annual report, to let the public know how many tips it received, how many other allegations its members discussed in closed meetings, how many of these it investigated or referred to other agencies, and why, in general terms, it chose not to investigate or find probable cause. For a variety of ways to present this information, see [Atlanta's hotline report](#).

It is important to make it very clear from the start when materials relating to an ethics proceeding do become public records (for example, upon a finding of probable cause). If this is not done in an ethics code, an ethics commission should do it in its rules and regulations. A list of events that trigger an end to confidentiality should be provided, and there should also be a list of which sorts of documents may still be exempt from disclosure under the state's public records law, even if the respondent waives confidentiality.

5. Closed Meetings to Discuss Complaints and Probable Cause

The great majority of jurisdictions require or allow ethics commissions to discuss complaints and probable cause (and other matters, as well, such as advisory opinions) in a closed meeting. Some states make an explicit exception for ethics proceedings, either in a sunshine statute or through regulations or opinions by the attorney general, the sunshine regulator, or a court. In other states, an ethics proceeding is considered to be the sort of quasi-judicial proceeding covered by a more general exception. But in other states, courts have found that there must be an express statutory exception (see, for example, [Center for Independent Media v. Independent Ethics Commission of the State of Colorado](#) (Denver District Court, Aug. 31, 2009)).

Like any governmental body, ethics commissions prefer not to discuss many sorts of matters in public, both to protect the parties involved and because it is uncomfortable to discuss many matters in public. In addition, because counsel is present during most such discussions, commissions and their lawyers or staff members (who are usually lawyers themselves) often feel (mistakenly, I think) that such discussions are privileged, that is, that they must be discussed in a closed meeting (see [the discussion of the attorney-client privilege](#) in the government context).

The problem is that one person's thoughtfulness or discomfort is another person's secrecy and cover-up. Appearances and transparency are very important to government ethics. So this creates a serious quandary for ethics commissions, or at least it should. As it is, most ethics commissions follow the law or lawyers' customs brought in from other fields, rather than debating and balancing the considerations in the government ethics context.

If there is a state freedom of information commission or the equivalent, it is important to see if it has a formal opinion regarding the openness of local ethics commission meetings. If there is no such body, one should check court cases or contact other ethics commissions in the state, especially those with their own staff or counsel, to find out what is legal and what is not.

However, even where closed ethics commission meetings are legal, they are usually not required, especially where there is not an absolute confidentiality provision. It is important to consider, for each matter, whether the need for confidentiality is outweighed by the need to act in the public eye. For example, if a matter is being discussed publicly in the press or online, especially when there is a serious controversy or scandal, it is better that it not be dealt with behind closed doors, unless an open discussion would likely be more damaging than secrecy. Secrecy in this situation is damaging to an ethics commission's credibility and may be harmful to the respondent if she is seen as colluding with the commission to keep misconduct secret. Secrecy also can lead to bad press, since the news media is a strong supporter of transparency (the news media's interest in transparency coincides with the public's interest in transparency; without transparency and without the news media's ability to let a community know what is happening with its government, it is very difficult for citizens to participate in government effectively).

Even when an ethics commission decides to close certain of its meetings (for example, to discuss a possible settlement), it is important to remember that there are subject limits and procedures that must be closely followed (these differ from state to state). For example, there usually must be a public record of what is going to be discussed in a closed meeting (such as the case number and a generic description of the complaint or request for an advisory opinion) and sometimes a record of what was actually discussed. If the procedures are not closely followed (which is often the case), what is actually discussed may become a public record after all, if someone bothers to file a complaint with whatever body enforced open meeting laws.

Since transparency is an important element of government ethics, an ethics commission should always err on the side of open meetings and following all the transparency rules, or even going beyond them where it seems appropriate. It should create an example for other local bodies and agencies.

H. Hearings

Ethics hearings are a relatively rare occurrence in most jurisdictions, as they should be. There are so many reasons a proceeding does not make it to the hearing stage:

The respondent admits to the allegations.

The complaint is dismissed for failure to state a violation against someone over whom the ethics commission has jurisdiction, a statute of limitations has run, and other reasons.

The respondent resigns in a jurisdiction where resignation takes an official out of the ethics program's jurisdiction.

The ethics officer or commission determines that the violation, if it occurred, is too minor to pursue.

The complaint is referred to another agency or to the respondent's supervisor.

Another agency's investigation takes precedence, barring an ethics investigation.

The respondent intimidates or files suit against the complainant or the ethics commission, and the complaint is withdrawn or dismissed.

The respondent admits to the facts and allows the legal issues to be determined on the basis of written pleadings, without a hearing.

The investigation is hampered and the time limit for an investigation is reached.

The complaint is dismissed because there is no probable cause that its allegations are true.

The ethics commission cannot get a quorum to make a decision on probable cause.

Probable cause is found but, after further investigation, the ethics commission decides to dismiss the proceeding.

A settlement is reached.

A court enjoins the proceeding.

Too often, ethics commissions and respondents alike assume that a legitimate complaint is going to go to a hearing. This assumption is damaging, and shows a lack of understanding of the government ethics enforcement process. It is best not to hold hearings, if possible. They can be very expensive, especially in jurisdictions where the local government is required to pay the respondent's legal expenses if the respondent is not found to have violated an ethics provision (see [the section on this below](#)). The spectacle of a high-level official forced to defend himself against what, to his colleagues, appears to be a partisan accusation or an accusation of conduct that "everyone does," can turn officials against an ethics program.

Even more important, hearings can undermine the public trust by the spectacle of a high-level official and his attorney trying, from the public's point of view, to justify on legal grounds conduct that clearly appears inappropriate. Since the goal of an ethics program is to increase the public trust, this is a result that, even if justice is done, can provide only a pyrrhic victory.

Holding a full evidentiary hearing (as opposed to an oral presentation of legal issues) is usually a sign of an intransigent respondent or ethics commission. Someone is digging in his heels or trying to make a point. Someone believes this is the last chance to survive or simply doesn't get it.

Some jurisdictions make it clear how wrong it is to assume that a hearing will automatically follow a finding of probable cause. They do this by requiring the respondent

to ask for a hearing. If the respondent does not ask for a hearing, the matter will either be settled or decided on the basis of the investigation report, the respondent's response, and pleadings regarding legal issues. If a respondent's legal fees are not going to be paid by the government, or if the respondent chooses to save the government (and herself) the poor publicity that often accompanies a public hearing, doing without a hearing is often in everyone's best interest.

It is rare that complete hearing procedures appear in an ethics code. All or most of them usually appear in Regulations or Rules of Procedure. It is important for an ethics commission not to put off drafting until it has a case before it drafts procedures, because then it looks like it is tailoring its procedures to the case at hand, which smacks of unfairness.

1. Full Investigation

Before considering how to run a hearing, it is important to look at an intermediate step between a finding of probable cause and giving notice of a public hearing. This step is often ignored by ethics codes and rules of procedure. But there are many cases in which a preliminary investigation provides sufficient evidence for a finding of probable cause, and yet it is necessary to continue investigating in order to provide sufficient evidence for a finding of an ethics violation.

To go to a public hearing with insufficient information to make a case against an official is unfair to the official, who should not have to go through this if the investigator and ethics commission do not believe they have sufficient evidence; and unfair to the public, because ethical misconduct may go unpenalized and because the public will have to pay the costs of a hearing that was not likely to end in a finding of an ethics violation (in many jurisdictions, if there is no finding of a violation, the public pays the official's legal fees as well as the ethics commission's costs).

The rules for a full investigation should be substantially similar to those for a preliminary investigation, except that a full investigation should not conclude until whoever is making the case (the "advocate") feels there is sufficient evidence of an ethics violation to meet the standard of proof. The advocate should have an important say in the matter of when to conclude the investigation and whether to go ahead with a public hearing, seek a settlement, or dismiss the complaint.

It may turn out that, after there has been more investigation of allegations, the advocate may come to the conclusion that there is not sufficient evidence of an ethics violation to continue the investigation or move to a public hearing. To deal with such a case, there should be a rule allowing the advocate to make a motion to dismiss. Here is language based on Miami's rule:

After probable cause is found, and after further investigation or discovery, if the Advocate concludes that there is insufficient evidence to proceed to public hearing in good faith, he or she may make a motion to the Ethics Commission to dismiss the proceeding. Such a motion must state the grounds upon which it is made.

2. Pre-Hearing Procedures

If the ethics commission decides to proceed to the next step in the enforcement process (that is, find probable cause), it should list the allegations that will be made against the respondent and the facts that support these allegations. In some jurisdictions, a finding of probable cause constitutes the document on which the proceedings continue to the hearing stage, particularly if no further investigation is required. However, if there is further investigation, and it uncovers evidence of other, related ethics violations, these may be added to the list of allegations upon notice to the respondent.

It is important to include in a finding of probable cause a statement of the facts and evidence (basically, a description of relationships and conduct), because it is desirable for the respondent to admit to some or all of the facts so that settlement may proceed on this basis, or so that the hearing may be limited to discussion of the law and other issues, which saves all parties the time and money tied to discovery, preparing witnesses, and the like.

A finding of probable cause should be sent to the complainant and the respondent. Findings of probable cause should be made public, although sometimes the finding is withheld for a short period of time while settlement of the matter is being sought.

Jurisdictions differ on exactly how to handle the next step. In some jurisdictions, the finding of probable cause is also the document upon which the hearing is held. In others, a separate document is drafted, referred to as a "complaint," "petition," or "notice of proceeding," which sets forth the conduct, and evidence thereof, that, if proved, would

constitute one or more ethics violations (the violations should be stated in the language of the relevant ethics provisions).

The document should also let the respondent know when his answer is due, and other relevant procedural information, including information about stipulation and settlement. The time allotted to the respondent for responding to the document that accompanies or follows a finding of probable cause is usually between 14 and 30 days, but this should be extended if there are settlement negotiations. It is good to leave the ethics commission some discretion, for example, when there might be special circumstances that require a shorter or longer period for responding.

The next step is for the respondent to either file an answer (which may be much the same document as the response to the investigation report) or enter into a settlement. In the answer, the respondent should respond to each allegation, admitting or denying it wholly or in part. The respondent may also identify mitigating circumstances that he feels merit either lesser sanctions or none at all.

If the respondent fails to file an answer or, in an answer, fails to respond to a particular allegation, should this constitute an admission? New York City's rules treat a failure to answer as an admission:

If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charge in the petition, such allegation or charge shall be deemed admitted.

Notice of a hearing should be given at least two weeks in advance. It is best to schedule the date of a hearing as soon as possible after the ethics commission has determined whether further investigation is not required. This provides the official with good notice, and it also makes it more likely that the matter will be resolved sooner rather than later. It is best for the public trust not to have an ethics matter hanging over the heads of one or more officials.

Some jurisdictions require or allow a pre-hearing conference. There are two kinds of pre-hearing conference. In one, the respondent meets with the advocate to identify the

facts and legal issues that remain in dispute, to clarify issues, and to discuss settlement. This is a good opportunity to obtain a stipulation of facts and agreement on the law, which will greatly simplify and cut the costs of a hearing. It is also a good opportunity to see how close the parties may be. After this discussion, a settlement is likely to appear the most reasonable next step. This kind of pre-hearing conference is a safe place for open discussion. Any statement made at such a conference may not be placed into evidence in the proceeding.

At the other kind of pre-hearing conference, the hearing officer or hearing board chair, and the counsel to the hearing board, meet with the advocate and the respondent to prepare for the hearing by stipulating to facts and interpretations of the law, exchanging witness lists and documents, discussing the issuance of subpoenas, discussing the hearing schedule, going over the hearing procedures and, in the case of the hearing officer or board chair, ruling on the identity and number of witnesses, on the proffer of evidence, on subpoenas, on scheduling matters, and on who may or may not participate in the hearing.

When this second kind of pre-hearing conference is being held, the parties should be permitted to call a recess and hold the first kind of pre-hearing conference between themselves. It should also be expressly stated that, at the second kind of pre-hearing conference, stipulations reached in the first kind of pre-hearing conference are to be respected by the hearing board and ethics commission.

The first kind of pre-hearing conference is not a public meeting, and it is not to be recorded. The second kind of pre-hearing conference is also usually not recorded or open to the public, since it is purely procedural in nature.

Although an ethics hearing is relatively informal, it is important for all parties to be able to prepare for it. Therefore, it is valuable to provide a rule regarding notice of witnesses that may be called at the hearing. Here is language based on Miami's rule:

Unless otherwise agreed as a result of a pre-hearing conference, the Advocate and the respondent(s) must exchange the names and addresses of witnesses at least ten days prior to the hearing, with a copy to be provided to the chair or designee. Names and addresses of witnesses discovered subsequently must be disclosed to the other parties and to the chair/designee as soon as possible. Failure to disclose a witness in a timely manner may result in the exclusion of the witness's testimony.

Other jurisdictions also require, or allow an ethics commission to require, an exchange of documents that may be put into evidence at a hearing.

New Orleans allows its ethics board to require what it calls “pre-hearing notices” from all parties. Here is what these notices require:

1. A brief but comprehensive statement of the party’s contentions, including a list of the legal authorities to be relied upon at the hearing in support of the party’s legal position.
2. A detailed itemization of all pertinent facts established by stipulations and admissions.
3. A detailed itemization of the contested issues of fact.
4. A detailed itemization of the contested issues of law.
5. A list and brief description of all exhibits to be offered in evidence by a party, identified by the exhibit number to be used at the hearing and accompanied by the following:
 - (a) Stipulations as to the exhibit’s authenticity or admissibility, noted on the exhibit list;
 - (b) Copies of all documents to be offered in evidence, attached to the notice.
6. A list of witnesses a party may call and a short statement as to the nature of their testimony.
7. A statement as to any other matter not included in any of the previous headings which may be relevant to a prompt and expeditious disposition of the case.

Little is said about discovery in most ethics commission rules of procedure. It is assumed that discovery will be done according to administrative rules of evidence. But it can be useful to provide in the rules of procedure at least a skeletal idea of what discovery consists of, and what limits are placed, or may be placed, on discovery. Limits are especially important, because discovery can be used for the principal purpose of making it expensive to reach a finding and, therefore, force a dismissal or settlement. Since ethics commissions generally have limited staff and budgets, it does not take too much discovery to push an ethics commission into a dismissal or settlement that favors the respondent.

Philadelphia's rules require an exchange of witness lists, and allow the ethics commission to require an exchange of documents. The rules limit discovery to these exchanges, with subpoenas requiring the production of documents. It does not provide for depositions or interrogatories. However, the rules allow the parties to "voluntarily agree between themselves to other forms of discovery."

Rhode Island, on the other hand, leaves it up to the ethics commission to approve requests for further discovery, "for good cause shown." [San Diego's rules](#) have the most extensive discovery provisions.

3. Hearing Personnel

[As discussed above](#), if possible it is best to separate an ethics program's investigation/advocacy roles from its hearing/determination roles. Where possible, this is done either by forming committees or panels of ethics commission members to handle the separate roles, or by having the staff handle investigation and prosecution while the commission as a whole (or a committee) hears and makes determinations.

Another alternative is to hire or select a hearing officer, have one on call, or have a relationship with an administrative or retired judges group so that, if a proceeding makes it to the hearing stage, a hearing officer may be requested to preside. San Diego provides this as an alternative to the ethics commission, and uses either an administrative law judge provided by a state agency, or a volunteer qualified for the position (the commission keeps a list of qualified volunteers). New York City provides this as one of three choices the ethics board may make: to have the board hear a matter, to have a board member hear the matter, or to have the chief administrative law judge assign an administrative law judge to hear the matter.

It is a good policy to allow one ethics commission member or, at least, less than a quorum to hear a case, so that hearings can be held when the commission is very busy or when it has insufficient members available, due to the failure to fill places or due to illness, vacations, and the like. In any event, it is worth allowing the designation of one member to resolve matters relating to pre-hearing disclosures and submissions.

It might be helpful to have a professional presiding over a hearing, so that it can run smoothly and without the need for legal counsel, but it is important to recognize that ethics

hearings are administrative hearings with relatively loose rules of evidence and presentation. They are relatively informal proceedings that, with the presence of an ordinary judge, could become far more formal, long, and expensive. Therefore, it is important that if a judge is hired for the job, it be an administrative law judge.

However, even having an administrative law judge rather than the commission make determinations undermines the commission's powers. It is no accident that when the Louisiana legislature took ethics determinations out of the hands of the state ethics board and gave it to a panel of three administrative law judges, the legislature also raised the burden of proof, lowered the time limit within which ethics allegations may be brought after misconduct occurs (that is, shortened the statute of limitations), and ended the ethics board's jurisdiction over legislators for any conduct related to legislative activities. In other words, taking away the ethics board's power to make determinations was not an attempt to improve determinations, but part of an attempt to (1) undermine the board's ability to enforce the state ethics code, which also applies to local officials, and (2) make it more difficult to reach a finding of an ethics violation.

How well has the panel of judges system worked in Louisiana? After the legislature took seven months to fill the seats on a new ethics board, a panel of judges threw out seven conflict of interest charges because too much time had elapsed since the charges were filed. And a panel of judges dismissed a proceeding against a sheriff who brought DWI charges against people, requiring them to buy a device that only his business partner's company sold. In other words, the panel has been far more unwilling to enforce the ethics code than the ethics board (which brought the charges in both instances) was. It is officials rather than the public who have benefited from the use of judges.

Although the assumption might be that judges would be equally or even more independent than an ethics commission, some judges are (or were before retirement) elected, and even unelected and retired judges are often active in partisan politics or perceived as politically connected. In addition, they are not usually trained in government ethics, and tend to be overly legalistic when it comes to interpreting ethics provisions. Thus, the qualities even an administrative judge brings to running a hearing might be undermined by the quality and the public's perception of their decisions. It is best, when administrative judges are employed in an ethics proceeding, that they only preside, leaving the decision-making to the ethics commission.

The best role for a professional hearing officer or examiner is to run the hearing, make evidentiary determinations, and provide counsel to the ethics commission members when their counsel is presenting the case against the respondent.

Another alternative, used in Seattle for example, is to allow the ethics commission to hire a hearing examiner, who is charged solely with fact-finding. The hearing examiner makes findings of facts, while the ethics commission applies the law to the facts. In most cases, where the facts are relatively straightforward, there would be no need for a hearing examiner. But in complex cases, this separation could be useful.

When the ethics commission, or a hearing committee of the commission, hears a case (I will refer to this body as a “hearing board”), it is valuable to have a rule that makes it clear whether or not a member who does not attend the entire hearing may deliberate and vote on motions relating to whether or not there is an ethics violation. One consideration is whether there is a transcript or, better, an audio or video record of the hearing. A member who can see what she missed should certainly be able to fully participate in the case. This is also true of a member who is able to hear what she missed. But if she can only read a transcript the oral testimony and statements, it is more difficult to make determinations about reliability and other aspects of testimony that allow for interpretation of it.

Another advantage of video or audio records of a proceeding is that they are usually available immediately, while it can take some time to wait for a written transcript. If a member of the hearing board missed an hour of a hearing, the board members can be asked to wait an hour before they deliberate. If a member missed the morning of a multi-day hearing, this can be made up that evening or in the days between sessions of the hearing, requiring neither patience from fellow hearing board members nor an extra meeting. However, on many occasions, a hearing board may want to give time to considering various issues and, therefore, deliberate about its decision at a separate meeting.

Any rule that is made should, therefore, not be hard and fast, but take into account these considerations. Here is some language that does this:

An Ethics Commission member sitting on a hearing board who misses any substantial portion of the hearing must watch or listen to a video or audio record of what he or she missed before participating in deliberation or voting in the proceeding. The other members of the hearing board may decide whether the

proceeding may be delayed to allow this, or whether to proceed with deliberation and voting without that member. If there will only be a written transcript, the other members may decide whether this would be sufficient and whether to delay deliberation and voting until a reasonable time after the written transcript has been prepared. If a member alerts the hearing board of a possible future inability to attend, the hearing board should decide then rather than after the hearing, so that the member can balance his or her obligations and decide whether to attend.

See the [Ex Parte Communications subsection](#) of the Preliminary Investigations section for how to deal with ex parte communications in the remainder of an ethics proceeding, as well.

The Advocate

Since an ethics proceeding is not a prosecution of a criminal case, but is often approached as if it were, I prefer not to use words such as “prosecutor” or even “prosecution.” Therefore, I will refer to the individual or committee which argues that the respondent violated an ethics provision as “the advocate” and the process as “advocacy.”

If the ethics officer or staff member is acting as the advocate, then who will provide legal representation to the ethics commission and, if there is no hearing officer, provide live counsel regarding hearing procedures? When there is a large staff, different staff members may fill these roles, for example by having general counsel provide legal representation while an enforcement officer acts as the advocate.

But when there is only one lawyer on staff, another lawyer has to be brought in. That lawyer could come from the city or county attorney’s office but, as [I argue elsewhere](#), conflict issues arise when someone who commonly represents officials is asked to represent a board that is hearing a case against one of those officials. It is, therefore, better for the ethics commission to be permitted to hire outside counsel to provide it with legal representation. The best practice is (1) give the ethics commission rather than the city or county attorney’s office the discretion to decide who represents it, and (2) provide the ethics commission with a sufficient budget to cover this expenditure or require the legislative body to approve a request for funds to cover this expenditure.

This latter requirement is very important. It is seriously damaging to the public trust when a legislative or other body that approves special requests for funds rejects such a

request in a situation where one of its members or a political colleague of its majority is the respondent in the ethics proceeding. This possibility should be recognized in advance and dealt with in the formation or improvement of an ethics program.

The only alternative is for an ethics commission to seek pro bono counsel, an option that is expressly included in Atlanta's rules. But an ethics commission, which represents the community, should not be required to beg. The community should support its reasonable needs.

One important question relating to the bringing of a case is, What happens when the advocate tells the ethics commission that there is insufficient evidence to make a case and recommends that, therefore, the matter be settled or dismissed, and the ethics commission wants to go ahead with the hearing? The District of Columbia's rules deal with this situation. They allow the ethics board to order the director to present the matter. This is consistent with the fact that staff, or an outside attorney hired for the purpose, is answerable (or, at least, should be answerable) to an ethics commission.

A complainant should have no role at a hearing, other than as a witness if she is called. Some jurisdictions give the complainant a small role, such as making an opening statement. But this is unusual and undesirable. Even those who file a completely justified complaint often do so for partisan or personal reasons. Therefore, their participation can necessarily raise the emotional nature of a hearing.

Seattle allows the complainant, and any other person, to "submit documentary evidence and/or written factual or legal statements" prior to the hearing. This is fine. But Seattle also allows a complainant to request permission to be heard at a hearing. It is hard to deny such a request, since there is no way of knowing how this permission will be abused or what damage a complainant's statement may cause. It is better not to allow a complainant to make a statement at a hearing. A complainant can always send evidence to the commission or file a brief.

Some jurisdictions, such as Tampa, give the complainant a role in a hearing equal to the respondent. And other jurisdictions, such as Boise, have the complainant present evidence and cross-examine witnesses in addition to or even instead of someone who is part of the ethics program.

This is seriously wrongheaded. An ethics proceeding is not a proceeding of one individual against another. It is a proceeding by the community that involves a conflict

between an official's personal obligations and his obligations to the community. Unless the complainant has special knowledge, his role in an ethics proceeding should be no more than any citizen. If he has a grievance regarding the ethics program's handling of his complaint, then he should be able to express it. But even here, any citizen has the right to privately or publicly differ with the way an ethics program handles a matter.

The worst thing is to place the burden of advocacy on a complainant. This is a perfect way to ensure that very few ethics complaints are filed, because how many people, especially the government employees who have most knowledge of ethical misconduct, are willing to expend the time and expense necessary to make a case against a respondent? It is enough to ask complainants to report evidence of misconduct. Any more is essentially an attempt to ensure that such reports are not made (I don't know of a single jurisdiction that requires the complainant to act as advocate and also allows the ethics commission to initiate proceedings based on tips).

4. Hearing Procedures

In drafting hearing procedures, it is best to keep in mind that ethics proceedings are supposed to be relatively informal, with relaxed, administrative rules of evidence (including hearsay) and fewer rules, as well as lower standards of proof and sanctions, than most enforcement proceedings. The rules of procedure should encourage focused presentations rather than the endless reiteration of minor details, burdensome discovery and production of documents, and unnecessary witnesses and questioning. To do this, the ethics commission, or other hearing board or individual, must be given the authority to limit the admission of documents into evidence (to the extent possible, this should be done in advance of the hearing) and to limit the number of witnesses and the length of questioning and of opening and closing statements.

Here are the simple guidelines in the City Ethics Model Code for hearing procedures, which are to be fleshed out in regulations or rules of procedure:

[O]ral evidence will be taken under oath; documentary evidence may be received in the form of copies or excerpts, if the original is not readily available and, upon request, parties and the Ethics Commission will be given the opportunity to compare the copy to the original; the state's administrative rules of evidence, rather

than strict rules of judicial evidence, will be followed, to allow a liberal introduction of testimony and documentary evidence; and the respondent has the right:

- (1) To be represented by counsel.
- (2) To present oral or written documentary evidence which is not irrelevant, immaterial, or unduly repetitious.
- (3) To examine and cross-examine witnesses required for a full and true disclosure of the facts.

It is worth noting, as Miami's rules do, that hearsay evidence, while permitted, may be used to supplement or explain other evidence, but is not sufficient in and of itself to support a finding. Also, testimony as to a respondent's character should not be permitted, because a respondent's character is not at issue.

When the hearing board excludes evidence from being presented, as it may, the respondent should be allowed to dictate into the record, as a proffer, the facts it was seeking to prove had the excluded evidence been admitted. This proffer may be considered in the event of appeal.

It can be useful to provide a more detailed description of how to deal with disputed evidence. Here is the description from Chicago's rules of procedure:

Disputed evidence shall be taken or received, the objections notwithstanding, and may be relied upon if it is relevant and of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Philadelphia's rules expressly refer to a hearing board's ability to "take notice of relevant laws, official regulations and transcripts of prior administrative enforcement proceedings; and of judicially cognizable facts, facts of common public knowledge, and physical, technical or scientific facts within the Board's specialized knowledge."

It is useful to summarize the order of presentation at a hearing. Here, for example, is the order from Chicago's rules of procedure:

Subject to modification at the discretion of the presiding officer, the order of proceedings shall be as follows: (i) the presiding officer shall determine whether the party under investigation has been afforded proper notice; (ii) opening statements;

(iii) presentation of the case; (iv) presentation of the defense by the party under investigation; (v) presentation of rebuttal evidence; (vi) closing arguments, with the party under investigation going first

Some jurisdictions make the presentation of rebuttal evidence at the discretion of the hearing board.

It should be made clear that the hearing board may ask questions of witnesses, respondents, and counsel who make statements, motions, or objections. The process for making decisions about objections, and about restrictions on documents, testimony, and statements, should also be made clear. The best approach is to allow the hearing board chair to make such decisions without deliberation and a vote, unless another member of the board requests deliberation and a vote. No vote should be requested without deliberation in which a different view, and the reasons for this difference, are expressed.

It is inappropriate at a hearing to make a motion to dismiss or any other motion that has the same effect. At this point in a proceeding, the only result should be a finding that an ethics violation has been found or has not been found.

Finally, it can be useful to describe what exactly a record of the hearing should include. This may be understood by most involved, but there can be disagreements about it, especially if there is an appeal. And the possibility of appeal is the most important reason to require and describe a record. Here is Chicago's list:

A record of the proceedings shall be made which includes: (i) a copy of notice of the hearing; (ii) all prehearing orders; (iii) all written submissions to the Board; (iv) a transcript of the testimony at the hearing; (v) all documents and exhibits presented at the hearing; and (vi) the findings and determination of the Board

It should be clearly stated whether a transcript is required (or, if an audio or video record is made, whether this is sufficient, and whether it is required), and whether it will be paid for by the ethics commission or, if the ethics commission is not given a sufficient budget to cover such expenses, by the city or county. Since the principal purpose of a transcript is to be part of the record on appeal (assuming there is a less expensive audio or video version for the hearing board to consult), some jurisdictions provide a transcript only on request of the respondent, and at the respondent's request.

Although a hearing is open to the public, it is not a public meeting in the sense that the public may participate, any more than the public can participate in a trial. Whoever is in charge of an ethics proceeding should be given the authority to keep order, including the exclusion of people from the hearing and, if necessary, limiting the number of people in attendance when there is limited space. However, it is important to try and gauge how popular the hearing will be and find a suitable room, if possible. Placing an ethics hearing of a high-level official in a small room that is sufficient for ordinary ethics commission meetings is a good way to make the public, including the media, believe that the commission is trying to exclude them.

Similarly, even when ethics commission meetings are not normally broadcast, an ethics commission should try to broadcast a hearing it expects to be of interest to the public. A member or staff member should be assigned as early as possible to make this happen.

It is also worth saying in the rules of procedure that both the record and the findings and decision must be made public as soon as practicable. The only reason for delaying a finding of probable cause — that there are settlement negotiations pending — does not apply here. But it can take some time between the end of the hearing and the drafting and approval of a decision. Usually, staff or counsel will draft a decision, the chair of the commission or hearing committee will review it and make recommendations for changes, and then the draft will be sent to all who heard the case. In some cases, the hearing board or ethics commission (when a hearing officer has presided) will have to meet once, or even twice, to discuss the draft and approve a final version of the decision.

Once there is a final decision and a record, there is no reason to delay placing them on the ethics commission's website, and sending them to the parties and interested members of the media, as soon as they are available in writing.

Finally, it is important to make very clear in advance whether an official who is a respondent may be represented at the hearing by the city or county attorney's office, by counsel designated by and paid for by the government, by private counsel to be paid for by the government, or by private counsel to be paid for by the respondent. In addition, it should be determined in advance if there are any conditions on payment, for example, that legal fees will be paid only if the official is found not to have violated an ethics provision

and only to the extent they are found to be reasonable (and who makes this determination). For more on this complex and controversial topic, see [the section below on legal fees](#).

It is worth considering how to handle requests for continuances. They should not be given automatically, as they can then be used to delay proceedings until a time that is politically better for the respondent. It is never better for the public to delay ethics proceedings. Another issue to consider is how a continuance may affect the period in which an ethics commission must come to a decision, or the possibility that, where an ethics commission has no jurisdiction over former officials or employees (a worst practice), delay might force the dismissal of the proceeding. Here is language based on Rhode Island's rule:

Except in emergency cases or by agreement of counsel, any continuance shall be requested in writing stating the reasons therefore and received by the Commission at least five days prior to the hearing. The Commission may require oral argument on a motion for continuance. The period of the continuance extends any time period in which the Commission may be otherwise required to act, and the Commission retains jurisdiction if it had it on the day the motion was filed.

Rhode Island goes so far as to require respondent's counsel to show proof of actual engagement in a court.

What should be done if a respondent fails to attend a hearing, without seeking a continuance? This would appear to be an unlikely event, but it is worth considering, because otherwise the failure to appear could throw a serious wrench into the process. Chicago's rules of procedure allow the ethics board to find the respondent in default, proceed with the hearing, and make a determination whether or not the respondent is in violation of an ethics provision. This seems reasonable. The ethics board should try to get in touch with the respondent, but if it cannot, it is reasonable, in this era of easy communication, to assume that the respondent has chosen not to appear. The Chicago rules are, in any event, kind enough to allow the respondent to petition for a setting aside of the decision on the basis that he had good cause not to appear at the hearing and not to request a continuance or even notify the board. The cause for this would have to be very good.

As long as there are no criminal sanctions for ethical misconduct ([see an argument against this](#), below), it would not seem appropriate to allow a respondent to take the Fifth

Amendment, because there is no chance of self-incrimination. The advocate should, however, steer clear of questions that may involve quid pro quo arrangements, because if there is a hint of a possible crime, the respondent may take the Fifth. There is no need to prove elements of a crime but, since the line between ethical misconduct and crime is often ignored or not understood, and since many lawyers called on to advocate and defend ethics cases have a background in criminal prosecution, it is not hard to cross this line, at least in the minds of the lawyers involved. It is important for an advocate to remind the ethics commission that there is no need to prove a quid pro quo arrangement, intent, or any other element of a crime, so that they do not fault the advocate's case for failing to show these elements or ask questions that may lead a respondent to take the Fifth.

5. Standard of Proof

Whereas “probable cause” is the most common way of expressing what is needed for an ethics commission to move on to the hearing stage (although the actual standard of proof varies widely; [see above](#)), there is no common term for the standard of proof needed to find a violation. In fact, most jurisdictions do not expressly provide a standard of proof at all. Ethics commissions simply determine whether there was or was not a violation.

Here are the results of a study I did in 2008:

Of 17 states that have jurisdiction over local government officials, I could not find any standard of proof for findings of violation in 11, and in 3 others findings of violation are made elsewhere than in the ethics structure. That means that only 3 of these states have clearly stated standards of proof: Pennsylvania's “clear and convincing proof” (which appears in regulations, not in the statute), West Virginia's “beyond a reasonable doubt” (under Sanctions rather than Final Decision), and Rhode Island's proof of a “knowing and willful violation” by “a preponderance of the evidence.”

As for the 12 major cities I looked at, 5 do not state a standard of proof; 4 use a “preponderance of the evidence” standard; 2 use a “clear and convincing evidence” standard; and one uses a “supported by at least some evidence that is admissible” standard.

The best-run ethics programs, such as those in New York City, Los Angeles, San Diego, and Chicago, do provide a standard, and that standard is a “preponderance of the evidence.” Some might think, well, these are big cities. But a standard of proof has nothing to do with the size of the city. The fact that the best ethics programs agree on one standard gives preponderance a great deal of credibility. Why do they agree on this? Because it is the standard of proof in civil and administrative proceedings. It is the norm. The fact that so many elected officials do not want the norm applied to them is very troubling.

The standard of proof became a heated public issue in Louisiana in 2008, when the proposed preponderance standard was successfully amended by a state senator to a “clear and convincing evidence” standard, which is somewhere between preponderance and the criminal standard, “beyond a reasonable doubt.” The ethics board administrator, the Public Affairs Research Council, and other good government groups felt that this stronger standard would weaken the enforceability of the state’s ethics reforms, but they lost the argument.

A lot depends on the definition of a standard that appears to be higher than “preponderance of the evidence.” For example, in Norwalk, Connecticut “clear and convincing evidence” is defined as follows (this is an unusually detailed definition of a standard of proof): “Sufficient evidence to support the allegation that the respondent has violated the Code of Ethics, when such evidence is considered fairly and impartially, and induces a reasonable belief in the minds of the ethics hearing board members that the allegations are true. Such evidence must indicate to the ethics hearing board members that the probability that the respondent has committed the alleged violation is substantially greater than the probability he or she has not.”

A higher standard of proof might seem valuable to protect officials, but it creates several problems. It makes enforcement very difficult, thereby requiring much more time and resources from commissions in both their investigations and their hearings. Underfunded commissions cannot usually afford to spend extra time and resources, so they dismiss many more complaints, even those they believe make valid allegations. A higher standard of proof makes it much more difficult to settle cases with an admission, because officials know that the commission will not be able to afford to make a case against them, and they also usually know that their legal fees will be paid for by the local government if

no violation is found. This means even more cases that will have to be dismissed due to lack of time and resources.

The result is that the enforcement part of a local ethics program does not fulfil the ethics program's emphasis on providing guidance: dismissed cases are usually kept confidential. Nor does the enforcement process increase the public's trust in their government or in the ethics program. Nor does it prevent ethical misconduct. Too high a standard of proof makes ethics enforcement either very expensive or toothless, when it should be inexpensive and effective.

6. Intent

Although several times in this book I have discussed the issue of intent, it has usually been to distinguish ethics laws from criminal laws. One of the distinguishing aspects of government ethics is the fact that it does not deal with or require a showing of intent, willfulness, knowledge, or motive (note: sometimes the adverb "corruptly" is used in ethics codes as an equivalent for "wrongful intent"). This is yet another reason why the criminal enforcement paradigm is not a very good fit for government ethics.

But because the criminal paradigm is often accepted without considering the ways in which it is inappropriate, not every jurisdiction recognizes this about government ethics. Some jurisdictions' ethics provisions do require a showing of intent or willfulness.

Even where the idea of intent or willfulness does not appear in ethics provisions themselves, it does sometimes show up in sanction provisions. In Atlanta, for example, even a reprimand can be made only for an intentional violation. In El Paso, a letter of notification is sent if a violation was clearly unintentional, a letter of admonition if it *may* have been unintentional, and a letter of reprimand if it *was* intentional or in disregard of the code.

There is a compromise position, such as Nevada had before 2009. Nevada Revised Statutes Sect. 281A.170 defined "willful violation" as where "the public officer or employee knew *or reasonably should have known* that his conduct violated this chapter." But in 2009, the legislature struck the phrase "reasonably should have known" and replaced it with acting "intentionally and knowingly." This means that a local or state official can say he or she didn't know about the rule or the possible conflict, or just acted negligently, and not be penalized for violating the state's ethics code. As the Las Vegas *Sun* said at the time,

“Ignorance of the law is no excuse for breaking it, the old legal saw goes. But that is not the case when it comes to Nevada’s ethics laws.”

In New Castle County, Delaware, there is a “knowing and willful” requirement and criminal sanctions, but at least this is complemented by a rebuttable presumption of a knowing or willful violation of the basic conflict provision “if the action benefits the County official or employee, his or her spouse, or his or her dependent children.” This presumption does not, however, apply when the benefits are to another family member, an official’s business, business associate, or anyone else.

Where an ethics commission’s sanctions are criminal, then it makes sense to require a showing of intent (see below for [a discussion of criminal sanctions](#) in a government ethics context). But there is no reason to require a difficult showing of intent except when dealing with serious sanctions, such as removal from office, and even then intent or the lack of intent should only be one of many possible mitigating and aggravating circumstances.

To anyone who sees government ethics as about being good or bad, it seems wrong not to require intent. If you do something unintentionally, then you are not bad. Everyone knows that. It seems wasteful of time and effort, or downright unfair, to enforce laws with respect to situations where the respondent says that he made an inadvertent error, nothing was stolen, and no public funds were misused. Inadvertent errors, such people believe, should not be investigated and fined; they should be forgiven. People are only human.

However, government ethics is not about being bad or having a malicious intent. And it's not about stealing and misusing public funds. These are primarily criminal issues. What is most important in government ethics are relationships, obligations, the appearance of impropriety, and the responsible, professional handling of conflict situations, none of which involves intent.

In any event, a focus on intentions is not realistic. It is hard to know others’ intentions, and even harder to prove them. It’s even hard for us to know our own intentions, and this is not an idea created by twentieth-century pop psychology. The philosopher Immanuel Kant (1724-1804) believed that we never know what our true motives are, because we are highly skilled at self-deception. We like to think that we are acting out of good motives. Kant felt that it doesn’t matter why we act as we do, because what is important is to follow essential principles and act out of duty. This certainly applies

to government officials. It is much easier for someone who believes he has good intentions to do wrong than it is for someone who questions his intentions. But the best thing for a government official is to put one's intentions and motivations aside, and focus on duty, more specifically on the duty to preserve the public trust by not handling conflict situations in a way that does not appear to be self-serving or otherwise improper. The responsible thing is to recognize that, when a contractor gives a procurement officer's wife a job, it will look to the community like a misuse of office. The fact that the procurement officer felt his wife was the best person for the job, and therefore did not consider the job a gift, is a serious failure to consider how the job would look to the rest of the community.

Requiring proof of intent does two very damaging things. One, it undermines the public's trust. What the public sees is this: An official helps to give a grant to a family member, helps get a permit for a business associate, or helps get a contract for her husband. When confronted with these facts, the official says she didn't realize that the family member was working for the organization that got the grant, that she didn't know the business associate represented the development company getting the permit, that she didn't realize that the contract was not being competitively bid. But how can anyone know whether the official is telling the truth? The appearance is of an official who not only misused her office, but also lied in order to protect herself.

The second thing about requiring proof of intent is that it makes an ethics investigation and proceeding far more expensive and far less likely to lead to a settlement or a finding of an ethics violation. Effectively, it turns an administrative proceeding into a criminal proceeding, even though no criminal sanctions are involved. With far more limited resources than the criminal justice system, this means that there will be little enforcement of ethics laws and, therefore, little concern about getting caught. This makes an unhealthy ethics environment far more likely.

The confusion surrounding intent is a result of the fact that ethics enforcement takes a form similar to criminal enforcement. The local government "prosecutes" an individual, who is accused of violations of the law. There is an investigation and something like a trial. Citizens sit on something like a jury, and they determine the official guilty or not guilty of violating an ethics law.

Enforcement of government ethics laws focuses too much on individual corruption, and too little on institutional corruption. As Dennis Thompson wrote in his book [*Ethics in*](#)

Congress (Brookings Inst., 1995), “The function of personal ethics is to make people morally better ... Legislative ethics serves to guide the actions of individuals, but only in their institutional roles and only insofar as necessary for the good of the institution. Legislative ethics uses personal ethics only as a means—not even the most important means—to the end of institutional integrity.”

In other words, government ethics is not about people intentionally being bad or doing bad things, it is about people harming their government by acting in ways that undermine public trust in their government, such as failing to be transparent, irresponsibly handling conflicts of interest, and breaking campaign finance rules.

Even when an official did not intend to violate an ethics provision, he did not intentionally do what was required to deal with his conflict responsibly, such as seek ethics advice or withdraw from the matter. He was negligent, irresponsible, and thoughtless when it came to his fiduciary duty to the public. This is more than enough to merit enforcement.

It is important that ethics commission members remind themselves, again and again, that it is only the individual official’s institutional role and responsibilities that matter. It is good to feel compassion for individuals who make mistakes. But the place for this compassion is not in determining whether to investigate, find probable cause, or find that a violation occurred. Government ethics enforcement has two places to show this compassion: (1) in the consideration of mitigating circumstances in reaching a settlement or setting the amount of a fine, and (2) in staff advice to officials and candidates to help them fulfil their responsibilities.

Ethics commission members also need to remind themselves that the goal of government ethics enforcement is not to protect individual officials. It is to protect the government institution, the democratic process, and the public. None of these is served by limiting enforcement to intentional misconduct.

7. Deliberation

When it comes to making a determination, it is common for ethics commission members who sit on the hearing board to want to go into a closed session. Members often do not fully understand what was said and do not want to embarrass themselves by showing their ignorance. They will also want to ask questions of counsel. Juries get to go into the jury

room to deliberate, and they can't even talk with counsel. Why shouldn't ethics commission members?

The difference is that an ethics commission is a public body and, according to open meetings laws, public bodies are required to deliberate and make decisions in public.

What a hearing board can deal with in a closed session are legal questions. It may go into a closed session to ask questions of its counsel, so that it fully understands the law, the procedures, and the legal implications of alternative decisions. But it is important to remember that just because the lawyer is present, that doesn't mean that the ethics commission can discuss anything and be protected by the attorney-client exception that appears in the state's open meetings act. Discussion under such an exception is generally limited to legal advice.

In fact, counsel should not be part of a hearing board's deliberations. Counsel's role is only to provide legal advice, not to provide any other sort of advice or to provide opinions about anything other than narrowly legal and procedural issues. To ensure that this is not done, it might be wise to say this expressly, as Rhode Island's rules do: "Legal Counsel to the Commission may not participate in the deliberations of the Commission. Counsel shall respond to questions of law posed by Commission members."

Only legal issues, not factual or policy issues, may be discussed in closed session, even if it is expected that the hearing board's decision may be appealed or even that it may be sued on the basis of its decision.

If the respondent is not allowed to be present at a closed session, then only the hearing board's counsel may attend. No staff member, not the advocate or an investigator, no one else may attend. And no vote may be taken.

Each state's open meetings law is different, but this is generally the rule as it has been interpreted by state courts. Whatever the state law, it is best to have an ethics commission rule consistent with and clearly expressing the state law, so that the hearing board does not do the wrong thing. It cannot be assumed that the hearing board, or even its counsel, will have read an FOI commission's opinions or case law on the topic.

The hearing board need not deliberate immediately after a hearing ends. It may decide to take time to review documents, as well as the transcript or an oral or video record of the proceeding, and to consider legal issues, mitigating and aggravating circumstances, and the range of possible sanctions. This is especially true if one or more

members was not able to be present for the entire hearing process, or when a one-day hearing, or the final session of a multi-day hearing, ends late.

The hearing board need not wait until the next regularly scheduled ethics commission meeting to deliberate and make its decision. A decision should be made as soon as practicable and responsible, so that the matter does not hang over the respondent any longer than necessary.

A ten-day time limit on deliberation, as some jurisdictions have, is too short. This is not a jury trial, with all its formalities and limitations, and its control over the jurors' time.

8. Finding a Violation

The simplest way a legislative body can undermine the enforcement part of an ethics program is to require a supermajority vote for findings of probable cause or of an ethics violation.

Most ethics commissions are bipartisan, with no more than a simple majority from one party or, better but more rare, with no party in the majority, requiring at least one unaffiliated voter or someone registered with a minor party to be on the commission. Requiring a supermajority, that is, a two-thirds or three-quarters vote, allows either party to block, or be seen to be blocking, a finding of a violation.

Thus, whenever an ethics commission or hearing board finds that there is no violation, especially when the respondent's party is alone in voting Nay, the public will think it is all but impossible for there to be ethics enforcement in their city or county, against appointees of either party. This is a good way not only to undermine ethics enforcement, but the entire ethics program. And the public's trust. All with one little paragraph in an ethics code or regulation.

To prevent this, the finding of a violation should require only a majority vote of the *members participating* in the entire hearing. I say this because there may be times when a member has not been present at all parts of a hearing (although a hearing should take place in one session, it may go over into another session or even more), and the hearing has not been sufficiently or properly recorded (and a member is allowed to vote on the basis of a video, audio, or written transcript of the hearing). If a majority of *members* is required, and two members, or even one, failed to attend the hearing or had to withdraw due to a conflict (and this is common), then a supermajority vote would be required.

A limitation of having an ethics hearing board rather than the entire commission hear a matter is that this hearing board is unlikely to have more than three members; if one cannot vote, a unanimous vote is required. On the other hand, since those who cannot attend a hearing can be left off the hearing board, it is more likely that all three members will attend and will not have to withdraw.

The commission's decision should be written, and it should specify the code provision(s) violated and provide a factual and, if necessary, legal explanation supporting each violation. If no violation is found, the decision should provide findings of fact and the reasons for dismissal. It is important that all hearing board members participating in the deliberations read and approve the draft of the decision. The decision is not final until it has been approved and, after approval, it is signed by the hearing board chair.

When determining the appropriate sanction ([see below](#)), the following mitigating and aggravating circumstances should be considered (and it is best if they are expressly included in the ordinance or regulations to provide clear guidelines for the ethics commission):

The nature and severity of the respondent's misconduct

The duration of the misconduct

The position and responsibilities of the respondent

The amount of any financial or other loss to the city as a result of the misconduct

The value of anything received or sought

The efforts taken by the respondent to either disclose and correct the misconduct, or to conceal it from, or otherwise deceive or mislead, other officials, the commission, or the public

Whether the respondent in any way coerced or intimidated subordinates or colleagues into participating in or failing to report the misconduct

The costs incurred in enforcement

Whether or not the respondent sought advice from the ethics commission or ethics officer (or a government attorney if neither is available), and what that advice was (failure to follow advice is a serious aggravating circumstance)

Whether the violation appears to have been inadvertent, negligent, or deliberate

Whether the incident appears to have been singular or part of a pattern

Whether a violation is a first violation, or the respondent has been found to have violated the provision, or other provisions, before

Whether the conduct appears to have been induced, encouraged, or aided by a superior, colleague, or someone outside of government

Whether the respondent cooperated with the commission both in terms of his own conduct and in terms of the conduct of others

Whether the respondent had prior notice or reason to believe, due to the handling of similar situations, that the conduct was prohibited

9. Debriefing

At the end of an ethics proceeding, there is usually an “I told you I was innocent” when a matter is dismissed, personal attacks and sometimes demands for resignation when an official is found in violation and, when a matter is settled, often nothing more than the settlement agreement itself. Sometimes there is an apology or a resignation. Often we hear the words, “Let’s put this behind us,” which touches something deep inside us. Almost never is the overall situation discussed or analyzed, and rarely is the entire story told.

An alternative to just moving on to the next matter is for an ethics commission to have a debriefing. It is a very useful process for everyone involved.

Debriefing is a process that asks participants in a matter (including ethics commission members and staff) to discuss the matter openly and honestly in a way that is hard to do in a litigious proceeding, where there are a large number of concerns, formalities, and posturing, and where some participants may say nothing at all. In a debriefing, participants tell their stories, express their reactions and their emotions, ask questions, and make observations and criticisms about the situation and the process that may be useful to the ethics commission and to other officials and employees. Debriefing allows an official or employee to talk about her agency or the government’s ethics environment, if this was not adequately discussed in the proceeding, including the unwritten rules and the pressures she feels are placed upon her to go along, be loyal, etc. A debriefing is a way to explore the ethical choices that were available to the participants, and

how they and their colleagues could have handled them differently. It is also a good forum in which to apologize.

Without a debriefing, there is a tendency for the respondent to put the whole thing out of his mind and not to talk to anyone about it. In a debriefing, there can be recognition, a coming to terms with what occurred, an easing of tensions between the people involved. The parties, the ethics commission and its staff, the news media, and the public can all learn a great deal from a debriefing. A debriefing is valuable even if it is done in closed session, to ensure that the participants feel comfortable enough to talk openly.

There can even be valuable revelations. For example, one of the most abusive “guards” in the Stanford Prison Experiment run by Stanley Zimbardo, the author of [*The Lucifer Effect*](#) (Random House, 2007), from which I took the idea of a debriefing, said, “It surprised me that no one said anything to stop me. No one said, ‘Jeez, you can’t say those things to me.’” When no one says anything, people keep acting the way they’re allowed to act. Nothing empowers someone, in the worst sense, as much as silence, especially silence due to fear. That sort of revelation, coming out an ethics proceeding, can be extremely helpful to officials and employees throughout a local government.

Officials who were not accused of ethics violations, but had knowledge of what was going on, might also be included in the debriefing. One of the “guards” in the Stanford Prison Experiment who was considered a “good guard,” because he was nice to the prisoners, said in the debriefing that when prisoners thanked him for being nice, “I knew inside I was a shit. ... I failed myself. I let cruelty happen and did nothing except feel guilty and be a nice guy. I honestly didn’t think I could do anything. I didn’t even try. I did what most people do.”

Lawrence Kohlberg has noted that such discussions are “the primary, perhaps the only way to increase an individual’s level of moral development.” They are also the best way to increase a government organization’s level of moral development (see [a discussion of this](#)).

10. Workshops

[*Corrupt Cities: A Practical Guide to Cure and Prevention*](#), a book by Robert Klitgaard, Ronald Maclean-Abaroa, and H. Lindsey Parris (Institute for Contemporary Studies, 2000), sets out a process that goes beyond debriefing: the workshop on corruption. A local

government begins with a workshop that includes high-level officials, business executives, leaders of civic organizations, and an outside facilitator. The ideal number of participants in each workshop is 20 to 25. The best format is a retreat of a day or two, if possible, or two hours a day for five days in a row.

The workshop begins with a case study from another local government where there has been a successful anti-corruption campaign. “Participants see that the problems can be analyzed coolly and dealt with effectively . . . The mere fact that both successful analysis and successful action occurred stills their skepticism and stimulates their creativity. . . . [This helps] participants realize that corruption is not (just or primarily) a problem of evil people but of corrupt systems. . . . To members of corrupt organizations, this insight often proves therapeutic.”

Once emotions are taken out of the participants' view of corruption, they are ready to begin to discuss their own situation. The same approach is taken. “After some time, people turn out to be remarkably forthcoming about the corruption that exists, how it works, and how it might be prevented — even when their analyses belie an intimate knowledge that can only be incriminating. In systematically corrupt settings, many politicians and officials hold complicated, mixed feelings about corruption. They may sincerely loathe it and wish to eradicate it, while at the same time participating in it or allowing it to occur.”

What the authors have found is that, when officials and employees are permitted to discuss corruption in their organization analytically and without fear of reprisal, they not only describe it better than anyone else ever could, but they also are able to come up with a plan for change.

11. Judicial Review

Most ethics codes allow respondents to appeal from an ethics commission's decision, if that decision is final, that is, if the ethics commission's decision has authority and is not merely a recommendation, as many ethics commission decisions sadly are. The most important issues relating to such an appeal are (1) which body the appeal may be made to, and (2) at what point in the proceeding may the respondent appeal. (See [the discussion of appealing ethics advice](#), which is not considered in this section.)

A finding of probable cause should not be appealable. This finding is only an acknowledgment that there is sufficient evidence to have a full investigation and a hearing. It simply gets the proceeding going; it is not the end of anything, but rather the beginning. Allowing appeals from probable cause findings is simply a way of delaying ethics enforcement and making it more expensive.

Allowing respondents to appeal an ethics commission's decision to the local legislative body or one of its committees (as is done, for example, in Chicago with respect to aldermen found in violation) effectively turns every ethics commission decision into a recommendation, placing the power to enforce an ethics code into the hands of officials rather than an independent citizen body. This seriously undermines an ethics program by making the ethics commission toothless, placing a conflict at the center of ethics enforcement by having final decisions made by those under its jurisdiction, and politicizing the ethics process.

The best practice is to allow respondents to appeal an ethics commission's decision to the relevant state court. Only an aggrieved respondent, or someone, such as a contractor, who has been found to be complicit in a respondent's misconduct, may file such an appeal. Under no circumstances may a complainant file an appeal.

A court's review should not be *de novo*, that is, a reconsideration of the facts. *De novo* review simply gives an official the opportunity to substantially delay the matter and hope for a better, or more timely (for him) resolution. It also substantially reduces the chance of a settlement and greatly increases the cost to a government, in money and resources, of an ethics proceeding.

It is valuable to expressly state in an ethics commission's rules that an appeal of an ethics commission decision does not stay that decision, unless the ethics commission, or the court to which the decision is appealed, agrees to stay it.

Here is the City Ethics Model Code judicial review provision:

Any person or entity aggrieved by a decision of the Ethics Commission, but not a complainant, may seek judicial review and relief from a court pursuant to ----- of [state law]. The party appealing must immediately serve notice of the appeal on the Ethics Commission.

Comment: Judicial review is not on a *de novo* basis.

It's valuable also to include in rules of procedure the state rules that apply to such an appeal, and the time and place in which such an appeal must be filed.

It's not a bad idea to allow a respondent to request a new hearing or a modification of a decision. There may be an occasion where an ethics commission or counsel has made a mistake, which can be easily fixed without the necessity of judicial review. Here is the San Diego rule for this:

Request for New Hearing or Modification of Decision.

(a) A request for a new hearing or modification of a decision of the Commission may only be made by the Executive Director or designee or the Respondent and/or counsel within fourteen days of the date on which the decision is mailed.

(b) Such request shall be in writing and shall state the reasons for the requested new hearing or modification of the decision. Any such request shall be handled as a priority matter by the Commission. No oral arguments shall be heard unless requested by the Commission.

(c) In order for the Commission to order a new hearing or modification of the decision, it shall be necessary that a majority of the members who attended all hearings, but in no case fewer than three of said members, shall so vote.

(d) The Respondent, and Complainant, if any, shall be notified of the Commission's action regarding the request for a new hearing or modification of the decision.

Should citizens be permitted to appeal ethics commission decisions that they feel do not protect the public interest and the integrity of their government? This may seem to protect the public against an ethics commission that was biased toward officials, at the public's expense. It may seriously increase the cost of an ethics program, but it is unlikely that citizens, or civic organizations on their behalf, would spend the money necessary to appeal a decision unless they felt there was a serious injustice or they had a cause of their own, unrelated to government ethics. That is, the most likely situation for a citizen appeal is the one to beware: political parties and people standing in for high-level officials using the appeal process for political reasons. All in all, it's not a good idea to allow appeals from anyone who is not directly and individually aggrieved.

12. Oversight of Sanctions Process

It is a best practice for an ethics commission, or its hearing board, to determine and impose sanctions on respondents found to have violated an ethics provision (see [the section on Sanctions](#) below). However, in many cities and counties, an ethics commission can only find a violation and recommend sanctions. It cannot impose sanctions. This is done by either the local legislative body, the chief executive, or the respondent's supervisor.

Once the matter is out of the ethics commission's hands, it is common for the ethics commission to be passive, to treat its toothlessness as if this meant it had not authority at all.

It is important for an ethics commission to remember that the purpose of a government ethics program is to get officials to deal responsibly with their conflicts and to maintain the public trust. This purpose applies not only to each matter with which it deals, but also more generally. The best way to put this is that an ethics commission should provide oversight over the entire ethics program, including officials' role in making decisions about the ethics commission's findings and recommendations regarding sanctions.

Therefore, if an official or body of officials ignores its findings and recommendations, or imposes a sanction substantially weaker than what the ethics commission recommended, it is not inappropriate for the ethics commission to let the official or body of officials know that it is damaging to the public trust when officials act in such a way that it appears that they are favoring their colleagues, appointees, or subordinates over the public interest in having officials recognize that there are consequences to ethical misconduct, so that they are less likely to engage in ethical misconduct.

The ethics commission should remind these officials that they are acting as part of the ethics program, and they need to not only put aside personal and political biases, but to make it appear to the public that they are doing so. And, as part of the ethics program, they need to recognize that enforcement is part of an ethics program's focus on guidance and prevention and that, therefore, they need to get on board and do nothing that will undermine the ethics program's efforts in this area.

If the ethics commission receives no satisfactory response, it should consider taking its concerns public. This could be done in the form of a statement of dissent to the officials'

enforcement decision. Or it could take the form of a recommendation that officials be taken out of the enforcement process, since they have used their authority to undermine the public's trust in them, the ethics program, and the government overall.

Bias is not, however, a problem only when it *favors* officials and employees. An ethics commission should also speak out when an official or body of officials goes too far, imposing a sanction inappropriate to the violation, for example, firing an employee for misuse of government property or removing a council member from committee leadership or assignments for anything short of a serious instance of misconduct.

Going too far may be done for one of several reasons. The officials may not have a clear understanding of government ethics, and may be treating a minor ethics violation as a criminal violation or instance of serious corruption, rather than as an opportunity to educate officials and the public about how to deal responsibly with conflicts. The officials may sincerely be zealous about ridding their government of corruption. The officials may be putting their own reputation first, wanting to be seen as unwilling to accept any sort of corrupt behavior by making an example of an official or employee, even if the sanction is greater than what the misconduct deserves. Or the officials may be using an ethics violation as an excuse to destroy an opponent's career for personal or partisan purposes.

It is worth considering a rule that expressly permits, or even requires, an ethics commission to publicly protest after, say, 60 or 90 days, when the officials charged with enforcement do not act at all. A rule may even give the ethics commission the authority to make an enforcement decision itself if the officials fail to do so.

I. Sanctions

“[L]ack of effective enforcement authority renders a conflicts of interest board a toothless tiger that raises expectations it cannot meet and increases public cynicism; no one takes a conflicts board seriously unless it possesses real enforcement power. Time and again, it has been shown that a conflicts of interest board without enforcement power will fail, or at least it will be marginalized and ignored.”

—Mark Davies, “A Practical Approach to Establishing and Maintaining a Values-Based Conflict of Interest Compliance System”

The extent to which an ethics commission has the authority to enforce an ethics code against local officials and employees is popularly referred to as “having teeth.” A toothless ethics commission is one whose enforcement powers are limited to investigating or making non-binding recommendations to the local legislative body, the city or county manager or school superintendent, and/or department or agency heads or the respondent’s direct supervisor.

With respect to elected officials, a toothless ethics commission means that elected officials enforce ethics laws against elected officials and their staff. It also means that enforcement is politicized.

In many cases, neither the public nor the ethics commission knows whether or how the recommendations were handled. It is common that city and county attorneys insist that public employees have a right to privacy regarding sanctions, a right that, they say, overrides the principle of accountability and the public’s right to a transparent ethics program. Put differently, these attorneys effectively argue that an official or employee who puts her personal interest ahead of the public interest can put her personal interest ahead of the public interest once again by insisting on her right to privacy.

An ethics commission with a full set of teeth can not only reprimand or censure officials and employees, but can choose among other sanctions, such as fines, restitution, an order to cease and desist, suspension or removal, and suits for damages, civil forfeiture, and injunctive relief. There are not too many ethics commissions with a full set of teeth, but this best practice is becoming increasingly more common.

It is possible for an ethics commission that is very well settled and respected to make recommendations that are nearly always accepted. This is true of the New York City Conflicts of Interest Board, with respect to the city council. But there are few ethics commissions with the status of this board. Therefore, this is not an example that ethics commissions should follow, even if it works for the oldest, largest, most respected local ethics commission in the country.

Most sanctions are at the discretion of the ethics commission, taking into account [the above list](#) of mitigating and aggravating circumstances. There are, however, some relatively automatic sanctions that apply when a violation is found, such as fines for the late filing of a financial disclosure form, debarment, and the avoidance of a contract. The ethics

commission may have some leeway, or it may have to weigh in other considerations, but such sanctions are essentially set by the ethics code or by rule or regulation.

Sanctions serve four purposes. The most important purpose is education. Nothing sends the message that behavior is wrong, that conflict situations need to be dealt with responsibly, better than the imposition of a fine or the loss of a contract or the right to compete for future contracts.

A second purpose is preserving the public's trust in the ethics program. The finding of a violation confirms that particular conduct is improper. But a finding of a violation without a sanction seems like nothing more than a slap on the hand. Such a finding is often ignored by officials and belittled by the news media. When citizens do something wrong, there are sanctions. When public officials are involved, with their special obligations, sanctions are even more important. When conduct is declared to be wrong, but there are no consequences, it seems like the ethics program is giving preferential treatment to the respondent.

The amount of a fine is less important than the fact that there is a concrete penalty. This tells other officials, and the public, that ethics violations are serious things with consequences, and officials will not receive any favor.

A third purpose served by sanctions is restitution, that is, making right what was done wrong. Some ethics violations cost taxpayers money. This money should be returned to the government. Some ethics violations benefit an official. These benefits should be returned or, if it is something like a job, given up.

A fourth purpose served by sanctions (too often considered the principal purpose) is punishment. A contractor who violates an ethics provision in order to get a contract is punished by losing the contract and/or being debarred from bidding for a contract for the next so many years. An official who accepts an illegal gift may be required to recompense the city for double the value of the gift, half restitution, half punishment. A council member who works hard to get his brother's building project approved may either lose his committee positions or even be removed from office (these two sanctions usually require approval by the legislative body). And the building permit may be revoked.

A reprimand is the right sanction for a minor violation, but it is often better not to waste resources on such violations, and instead send a [warning letter](#) without even doing an investigation. After an investigation and hearings, a reprimand seems like too minor a

sanction. But there are times when, after all the evidence has been seen and the arguments made, especially when there are mitigating circumstances, it might be the best sanction. However, if it is chosen over other sanctions, it should be carefully explained so that the public can understand the ethics commission's choice. Otherwise, the public is likely to see a reprimand as a way of protecting the respondent.

1. Apology, Compensatory Action, Resignation

It is important when talking about sanctions to recognize that the most valuable sanctions are those officials impose on themselves. It might seem very idealistic to believe that officials will sanction themselves, but this happens far more frequently than most people realize. And yet because the drafters of ethics codes think in terms of punishment, not education or restitution, self-imposed sanctions are almost never mentioned. Here is the first in City Ethics Model Code's list of possible sanctions:

Violation of any provision of this code should raise conscientious questions for the official or employee concerned as to whether a sincere apology, compensatory action, or resignation is appropriate to promote the best interests of the city and to prevent the cost – in time, money, and emotion – of an investigation and hearings.

An official should not compound dealing irresponsibly with a conflict by again putting her personal interest ahead of the public interest by denying, obfuscating, or covering up what she knows to be true. An apology that includes sincere remorse and a willingness to pay a fine or make reasonable reparations restores respect and dignity, brings peace to personal and partisan rancor, and assures the public that its officials understand that they must be seen to act, as officials, not for themselves or their family and business associates, but solely for the public.

There is no better resolution to an ethics matter than having an official helpfully take the law in her own hands by publicly admitting that she has done something wrong and either immediately making restitution or agreeing to enter into a settlement with the ethics commission. Of course, the official should only admit to allegations she believes are true. Where there is not total agreement with the facts as stated in a complaint, the official

should stipulate to the facts she does agree with, so that the ethics commission need only investigate the facts about which there is disagreement.

The official who fights an ethics complaint tooth and nail, insisting that he is a good man who would never do such a thing, effectively misrepresents the ethics process to his fellow officials and the public by making it appear to be about good and bad, about integrity and pride, about guilt and innocence, rather than about the responsible handling of conflicts. In addition, he costs the local government thousands of dollars and turns what could have been a minor, instructive matter into a scandal that takes the government's and the public's attention away from more important issues, and undermines the public's trust in its government as well as the official's ability to govern.

On the other hand, the official who swiftly resolves the matter, admitting to having failed to handle a conflict responsibly, apologizing for his conduct, and paying a fine or making restitution where possible accurately portrays the ethics process, costs the government nothing, shares a valuable learning experience with his colleagues and the public, and adds no insult to injury.

Of course, because it is possible that the official's swift resolution may be partly a ploy to get off easy, an ethics commission should determine whether the official's chosen sanction is sufficient and whether there is a need to investigate further. The commission may ask the official to consider further sanctions, if they seem appropriate, or it may request the official's cooperation in investigating and finding a swift resolution to related matters, including other officials' conduct and other allegations made against the official. For example, if the official helped a contractor get a no-bid contract after the contractor had hired her niece, the official might agree to talk with the contractor about entering into a joint settlement, which might include voiding the contract, bidding it out, and debarment of the contractor for a certain number of years.

The ethics commission might also ask the official and the contractor to tell it who suggested hiring the niece and in what context. Whether conduct is effectively bribery or pay to play is not relevant to whether there is a violation, but the story of what actually happened is relevant to letting the public know what is really going on in its government. Officials tend to blame others for trying to tempt or influence them, and others tend to blame officials for misusing the power of their positions to get what they want from those doing business with government, but rarely is it clear which actually happened, either in

general or in specific instances. It does make a difference in how we view our officials and the corruption that exists in local governments. It makes a difference with respect to mitigating or aggravating circumstances. And it makes a difference with respect to what steps are taken to prevent further misconduct.

Resignation is appropriate only under certain circumstances. Most ethics violations can be dealt with by sincerely apologizing right up front and, where relevant, making restitution or paying a fine. Often demands are made for an official's resignation due to an ethics violation, but this is usually based on a misunderstanding of government ethics. However, there are cases that so undermine the public's trust in an official — especially after an official has made denials and tried to cover up what occurred — that resignation is the only responsible course of action. In other words, not dealing responsibly with ethics allegations is usually worse than the misconduct itself, turning a relatively minor matter into one where resignation is the only way to make amends.

But sometimes the misconduct, or the appearance, is itself damaging enough to the public trust for the resignation of a high-level official to be appropriate. This is especially true when the community has been so damaged by misconduct that the official cannot correct it. This is true, for example, of a situation where an official pushes for a no-bid contract, or gets specifications in a bid that prevent competitors from bidding, and this costs the city hundreds of thousands of dollars.

Resignation may also be appropriate when there is a pattern of misconduct that becomes public. It is one thing to correct one instance of misconduct, another to correct years of misconduct, even if each ethics violation itself would not require resignation. Such patterns include taking sizeable gifts from contractors or lobbyists, participating with conflicts, getting business associates a string of contracts, getting relatives jobs with the government and with those doing business with government, or running a business on the side.

Co-opting or coercing multiple subordinates into ethical misconduct is also something that might be so offensive as to require resignation. Although too often the focus in government ethics is on financial conflicts and the misuse of funds, the misuse and mistreatment of subordinates is far worse. One official's isolated misconduct can damage trust in government, but the same official's involvement of others also damages the

government's ethics environment as well as morale. And no price can be placed on the effects of intimidation and co-opting into misconduct.

2. Reprimand and Censure

The most common forms of sanction that ethics commissions are allowed to impose are reprimands and censures (some jurisdictions have something else called “admonition” and some just send “[warning letters](#)” to those who commit relatively minor violations). These sanctions constitute little more than a finding of a violation, and they communicate nothing more to officials or the public, no matter how the definitions of these sanctions are worded. Since officials and the public are the most important players in government ethics, sanctions that mean nothing to them are effectively meaningless, although the finding of a violation can be an embarrassment, especially if the official has been vociferously insisting on her innocence.

Where do these terms “reprimand” and “censure” come from, and how do they differ? U.S. House rules provide that “reprimand” is appropriate for serious violations, “censure” is appropriate for more serious violations, and expulsion is appropriate for the most serious violations. There is no reprimand in the Senate, only censure.

A reprimand in the House may be given privately or in the form of a letter. A censure is made in public and leads to the loss of committee chair assignments.

Some bar association disciplinary programs define the terms. Here are the definitions from the North Carolina State Bar:

Admonition – a written form of discipline imposed in cases in which a lawyer has committed a minor violation of the Rules of Professional Conduct.

Reprimand – a written form of discipline more serious than an admonition issued in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct, causing harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

Censure – a written form of discipline more serious than a reprimand issued in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to

a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the respondent's license.

In short, when these terms are defined, which is rare, they are defined mostly in relative terms. With the exception of the possible loss of committee chair assignments, there is no concrete sanction, nothing that distinguishes an admonition, reprimand, or censure from a mere finding of a lesser or more serious ethics violation.

The limitations of these terms is greatest when they are the only sanctions at an ethics commission's disposal, which is sometimes the case. It makes it look like the ethics commission can sanction officials, without providing a penalty that means anything to anyone.

3. Fines

Many ethics commissions have the power to fine officials and employees who violate an ethics provision. In most jurisdictions, there is a relatively low limit on fines that may be imposed. Small fines are important symbolically, but they do little more than make an ethics violation concrete. A small fine means most where an ethics commission can do more than impose fines. When only small fines may be imposed, a small fine could mean anything from a minor to an extremely serious violation has occurred.

Some jurisdictions have specific fines for specific violations. For example, the failure to attend an ethics training class may require a \$50 fine. A set fine may also be based on time, for example, a failure to file an annual disclosure form on time may be fined at \$10 a day. Set fines are most common in the area of campaign finance, where filing forms is the principal requirements. In government ethics, set fines are most common with respect to annual disclosure.

It is best if set fines are guidelines rather than requirements, so that an ethics commission or its staff may take into account mitigating as well as aggravating circumstances. Fairness, and the appearance of fairness, is very important to the success of a government ethics program. For example, an official may have missed a training class due to an illness (mitigating), or although an official may have filed a disclosure form just two days late, it had numerous omissions (aggravating). The former would require no fine at all, and double the set fine might be appropriate for the latter (more if the omissions were

not corrected for a long time and only after a newspaper article brought them to light). Another important consideration is whether the official sought advice and, if so, whether the official followed the advice.

Ethics codes, or regulations, should also distinguish between first and further offenses (Miami and Atlanta are two examples of cities that do this). Past offenses should be taken into account as an aggravating circumstance.

The size of a fine should be appropriate to the misconduct. It should not be so large as to make the official look like a victim. A pattern of overly large fines makes officials fight harder and spend more money to prevent a violation being found against them. Large fines also make appeals more likely, adding even more cost and effort to the ethics process. And they are harder to collect. But if fines tend to be too small, there is little incentive for officials to settle. As with so much in the world, the mama bear – a moderate, appropriate fine – is best.

The fining process works best in Massachusetts, where in the majority of cases officials enter into disposition agreements, that is, settlements, and accept sizeable penalties, in the thousands of dollars, without the need for hearings, suits, or appeals.

In many jurisdictions a dollar limit is placed on fines. Sometimes, as in Connecticut, the state places an overly stringent limit on fines (\$250; C.G.S. §7-148(b)(120)(A)). This is not specifically related to ethics fines, but rather applies to any fines where no other state law applies.

But usually it is the local ethics code itself that places a limit on fines. Seattle, Los Angeles, and Honolulu have a \$5,000 limit, but each also allows, in the alternative, for a different form of treble damages. New York City has a \$25,000 limit. The limit in Atlanta is only \$1,000, as it is in Chicago for most violations, although some violations have a bottom and top limit, either \$1,000 to \$5,000 or, for lobbying violations, \$500 to \$2,000. In Miami, a first offense means a \$500 fine, with \$1,000 for subsequent offenses. These figures double if the violation is found to be intentional.

Low limits exist to protect officials. They are a sign that the local legislative body does not really want to give the ethics commission much authority, but has most likely been forced, due to a scandal, to provide it with at least baby teeth.

The fines most frequently imposed relate to the filing of annual disclosure and campaign finance forms. Such fines are usually imposed not by an ethics commission via an

ethics proceeding, but by a staff member or counsel. When the decision is made by anyone but the ethics commission, the official or candidate who is fined should have the right to appeal the fine to the ethics commission. However, there should be no hearing, unless the ethics commission chooses to hold one in unusual circumstances. Normally, only written arguments and documents should be permitted. And the standard of review should be whether the staff member or counsel acted unreasonably, arbitrarily, or capriciously.

One problem with fines is collecting them. The hardest ones to collect are late filing fines, which grow every day, sometimes into the hundreds of thousands of dollars. This is certainly a good reason to put a top limit on late filing fines. State legislators in South Carolina tried to limit them to \$5,000, but the governor vetoed the bill.

Another solution is to, at some point, prohibit elected officials from running for office if they don't pay their fines. Or an ethics code could require a settlement meeting after, say, three months past the time the original fine is imposed. But what if the official doesn't show up or is not willing to negotiate a reasonable fine?

Atlanta has a rule that allows its ethics board to "recommend to the appointing authority the removal from office of any board member, hearing officer, or NPU [neighborhood planning unit] officer who is found delinquent for failing to comply with the city's financial disclosure requirements."

One would think ethics commissions could take the fines right out of an official's salary, but few have this power, and most board and commission members are volunteers. In any event, wage garnishing discriminates against current officials and employees, in favor of losing candidates, those who have left public service, and those, such as lobbyists, contractors, and permittees, who were not in public service when they violated the ethics code.

Many ethics commissions can file judgments in the county where offenders live or file liens against their properties, but this is expensive and rarely done. An alternative is to allow the ethics commission to seek a finding of civil contempt against an official who fails to pay a fine.

One would think that large outstanding fines would be used against a candidate for office, but it is easy for the candidate to claim that the ethics commission lost his report or disclosure form, and that, therefore, the fine was unjust. Citizens often identify with a candidate who says the government was the wrongdoer, not him.

It's important not to put a statute of limitations on fines, because officials can just wait them out. This makes it hard for collection agencies to get anywhere.

Another problem with large fines is that elected officials or their supporters sometimes start a legal defense fund to pay them off. Legal defense funds are a perfect vehicle for pay to play, hardly the best solution to a government ethics problem (see [the section on legal defense funds](#)).

Perhaps the best approach, when there is frequent refusal to pay ethics fines, is to require ethics training where officials, lobbyists, candidates, and committee chairs are told about our political system and their role in it, and the responsibilities that come with that role. If they want power and the freedom to speak their minds, they have to recognize that these things come with obligations, including the obligation to file disclosure forms when they are due, so that their constituents can know what conflicts they might have, and to pay fines when they fail to fulfil their obligations. If officials do not file on time, citizens will feel that their officials are (or were) hiding their conflicts and, possibly, ethics violations. This is damaging to trust in the government, and is not just about the officials.

An ethics commission's publicity regarding the paying of fines, in the form of press releases, letters to the editor, and a large banner on the ethics commission website, should not be about the fines themselves, but rather about the value of disclosure and the obligations of public servants.

4. Damages

Damages are an important kind of sanction imposed in the criminal enforcement of government official misconduct. They are also relevant to government ethics enforcement. Here is the City Ethics Model Code damages provision:

Any person or entity that violates any provision of this code is liable in damages to the local government for any losses or increased costs incurred by the local government as a result of the violation. Such damages may be imposed in addition to any other sanction authorized by this code or by law, other than a civil forfeiture pursuant to subsection 5 of this section.

One reason damages are left out of many ethics codes is that, unlike embezzlement cases, for example, most ethics violations do not lead to quantifiable damages. For instance, voting on a zoning change for a company your spouse works for does not clearly lead to a monetary loss to the government. Although the zoning change could affect the value of neighboring property, which could lower property taxes collected, it is not necessarily the conflict that created the loss of property taxes.

However, if someone successfully pushes through a no-bid contract to a company her spouse works for, and if it can be shown that the city could have saved \$100,000 through bidding it out, this amount could be considered damages.

Similarly, if a contractor was involved in an ethics violation that led to the avoidance of its contract, there would be damages to the local government involved in the temporary loss of goods and services and/or the extra cost of entering into an emergency contract.

In the alternative, a contractor in such a situation could be given the choice of avoidance of the contract or the payment of damages. Or the local government could make this choice. Here is a provision derived from one in Windsor, Colorado that provides for double damages:

Any contract that was the subject of any official action of the Town in which there was or is an interest prohibited by the Code of Ethics shall be voidable at the option of the Ethics Commission, if legally permitted. Where the Ethics Commission determines that the public interest may best be served by not voiding such contract, it may be enforced and an action or proceeding may be brought against any Town official or employee, or contractor or subcontractor, in violation of the provisions of the Code of Ethics for damages in an amount not to exceed twice the damages suffered by the Town or twice the profit or gain realized by the Town official or employee, or contractor or subcontractor, whichever is greater.

Another form of damages arises from an ethics proceeding itself: the cost of hiring an investigator, counsel, and the like. Rarely are these costs charged to respondents, even though respondents usually try to have their costs paid by the local government. Seattle allows its ethics commission to require reimbursement for costs, including reasonable investigative costs, but only up to the limit on fines. A hard-fighting respondent who is found to have violated an ethics provision could be given a larger fine on this basis. Or an

ethics commission could be allowed to sue a respondent for costs and attorney fees. Even if this is not expressly allowed by an ethics code, an ethics commission should considering filing such a suit, especially when an intransigent respondent has gone out of his way to run up costs instead of discussing a settlement.

In most ethics proceedings, damages will not be an issue. And when they are, they are best dealt with through settlement negotiations. But allowing damages to be imposed or sued for gives an ethics commission leverage to settle some cases and makes it more dangerous, in such cases, for a respondent to sue an ethics commission, because the ethics commission has clear authority to counter-sue for damages, possibly even for double or treble damages.

Seattle places a \$10,000 limit on total damages, but this applies only to what the city has not managed to recover outside of an ethics proceeding.

Los Angeles allows the ethics commission, city attorney, or any city resident to file a civil action against an ethics violator, for the greater of \$5,000 or three times “the amount the person failed to report properly or unlawfully contributed, expended, gave or received” (most of these verbs refer to campaign finance violations). But a city resident must let the ethics commission know of his intention to file, and give the ethics commission the opportunity to choose to file the action instead. If the city resident wins the suit, he would only get half the award, with the other half to go to the city.

5. Civil Forfeiture

More relevant to most ethics proceedings is civil forfeiture, also known as disgorgement of gains or restitution, which requires someone who violates an ethics provision to forfeit to the local government any financial benefit the violator, or someone aided by the violator, received. Even when it is determined that no more than a small fine is required because, for example, the misconduct was merely negligent, it is important to require that any benefits of ethical misconduct be returned. The public certainly doesn't want to see officials keep ill-gotten gains. As with damages, the forfeiture could be a multiple of the benefit received. Here is the City Ethics Model Code provision for civil forfeiture:

Any person or entity that violates any provision of this code is subject to a civil forfeiture to the local government of a sum equal to twice the value of any financial

benefit he, she, or it received, or caused others to receive, as a result of the conduct that constituted the violation. A civil forfeiture may be imposed in addition to any other sanction authorized by this code or by law, other than a civil fine pursuant to subsection 3 or damages pursuant to subsection 4 of this section.

One important issue is whether forfeiture should be used as a sanction exclusive of damages and fines, or in addition to them. If forfeiture involves a multiple of the benefit received, it would not be appropriate to add on a fine. Where damages are large, it might be best to seek only damages. However, it is easier to require civil forfeiture than to seek damages in court, especially since it is usually easier to determine benefit than it is to determine damages.

Some ethics codes require forfeiture only where it can be proven that the violation was done intentionally or at least knowingly. But intention and even knowledge can be very difficult and expensive to prove. I think it is better to take into account the intention and knowledge of the respondent as mitigating circumstances when considering the amount of damages or forfeiture than when allowing or disallowing forfeiture at all.

It is important that the proceeds of civil forfeiture be given to the local government, not used to fund the ethics program. One of the most serious areas of ethical misconduct by police departments is using civil forfeiture for the department's or its members' own use. This creates perverse and dangerous incentives that can undermine an agency's ethics environment.

In Seattle, civil forfeiture is provided as an alternative to a fine. Here is the language:

a monetary fine of up to five thousand dollars (\$5,000) per violation or three (3) times the economic value of any thing sought or received in violation of Chapter 4.16, whichever is greater.

6. Disciplinary Action

Another important form of sanction is disciplinary action. A disciplinary action provision gives an ethics commission authority to make decisions regarding officials and some employees.

Union members usually cannot be disciplined except via procedures approved in union contracts, and it is appropriate that most employees be disciplined by the city or county manager, by their supervisor, by the human resources department, or by an oversight board, based on an ethics commission's findings and recommendations (civil service rules also have to be taken into account). But it is appropriate for an ethics commission to discipline elected and appointed officials, as well as department and agency heads and many professionals.

Discipline includes reprimand and censure, which are [discussed above](#). But it also includes suspension and removal. Who would want to give this sort of power to an independent body, over whom no one has any control, not even voters?

Think of the alternative. An ethics commission finds a violation and then turns the matter over to the local legislative body or to the city or county manager. Or the commission makes recommendations to the legislative body or manager, or to the appointing authority. With an employee, it makes sense that the manager discipline employees, but it does not make the same sort of sense for legislators to discipline each other, or other elected officials, whom they ran with or against, or another elected official's political appointees. Whatever is decided (especially if there is no sanction), it will look like a political decision and will, therefore, undermine the public's trust in the ethics process. This is not a good thing.

From the respondent's point of view, it might seem scary to trust your future to people you don't know. But that's what we do in our criminal enforcement system. The alternative is to trust one's future to politicians who might be from another party or faction or, with an election near, may want to do everything they can to make it look like they're not putting their party ahead of the public, at the respondent's expense, of course.

The fact is that there are some ethics violations that are so serious that the only way to gain the public's trust is to remove the respondent from office, assuming the respondent won't resign. If an ethics commission has the authority to remove an official from office, it is far more likely that such a respondent will either resign before he is removed, or enter into a settlement agreement that includes resignation as part of a compromise relating to a possible fine, forfeiture, or damages. Resignation is preferable to removal, but when an ethics commission has little authority, it is far less likely that an official will resign.

Some jurisdictions have what are sometimes referred to as “death penalty” provisions, whereby an ethics violator is automatically disqualified from holding office or working for the government. Such a provision takes two forms: a civil form where the requirement is express, or a criminal form, where because ethics violations are criminal and no criminal can hold office, an ethics violator cannot hold office.

Neither form of disqualification provision is reasonable. Removal and disqualification should be extreme sanctions for very serious violations. They should never be automatic. When they are, officials will not only fight for their lives when caught, but will put enormous energy into cover-ups, including the intimidation of officials and employees who know what happened. Extreme sanctions lead to extreme misconduct. They are not ethical or effective sanctions.

Concern about an ethics commission having too much power can be dealt with by requiring a supermajority vote for removal and by requiring evidence of fraudulent or malicious intent before someone can be removed from office by an ethics commission.

In jurisdictions where an ethics commission can do no more than make recommendations, it is important that the ethics code expressly require that the legislative body or manager make a determination on the recommendations and that the determination be made public. Otherwise, it is possible that recommendations will simply disappear into a committee and be forgotten, voted on in executive session or, in the case of a manager, be treated as a human resources matter that is an exception to transparency rules, that is, remains secret. On the other hand, there have been many instances where an ethics commission has recommended removal of an official, and the legislative body has jumped at the opportunity to get rid of a troublesome colleague or a political opponent of the majority party upon another, non-political body’s recommendation.

When politicians give an ethics commission the authority to remove officials from office, it makes a strong commitment to a non-politicized ethics process.

But removal should be limited to very serious offenses and should not be required for any kind of violation. One of the worst examples of ethics enforcement occurred in Toronto in 2012. There, conflict of interest complaints are dealt with by the court system. For council members, including the mayor, the judge’s hands are tightly bound. The law reads:

[W]here the judge determines that a member or a former member while he or she was a member has contravened subsection 5 (1), (2) or (3), the judge,

(a) shall, in the case of a member, declare the seat of the member vacant

The mayor was found to have raised \$3,150 in donations to his private charity. For this, he was forced out of office.

7. Injunctive Relief

Sometimes, ethical misconduct is ongoing rather than something that simply occurred once in the past. Ongoing misconduct can be harmful and, therefore, an ethics commission should not be required to wait until the ethics process has run its course before it is permitted to prevent further misconduct. This is especially true when the respondent has good reason to delay the process as much as possible, because he is benefiting from it or has not yet received the benefits.

In such situations, an ethics commission needs to be able to seek an injunction against future misconduct. Such injunctive relief is usually obtained through the courts, although an ethics commission can ask a respondent to cease certain conduct, emphasizing that, as a government official or employee, the respondent has an obligation not to force the local government to spend money on an unnecessary court proceeding. The ethics commission can also let the respondent know that it will likely include the cost of the court proceeding in the sanctions it imposes or in any settlement it reaches with the respondent.

Another situation in which injunctive relief is required is when an ethics commission finds that a disclosure statement has not been filed or was insufficiently filed. In either instance, the ethics commission should be expressly permitted to order the filing or amending of the deficient disclosure statement.

8. Avoidance

One of the most important sanctions available to an ethics commission is the ability to void transactions, contracts, grants, licenses, and permits resulting from an ethics violation. Avoidance is the best way to ensure that those seeking special benefits from a local government have an interest in protecting the public from the irresponsible handling of officials' conflict situations. No one can better police government ethics than those who

have a lot to lose from their own and others' ethical misconduct. If outsiders seeking benefits from a government have nothing to lose, there is no incentive for them not to tempt officials, give in to pay-to-play demands, report misconduct, or even cooperate with the government with respect to conflicts and ethics proceedings.

There are two approaches to avoidance. The ethics code may either make avoidance automatic or it may allow the ethics commission to impose avoidance as a sanction. Where avoidance is automatic, the ethics commission or the local legislative body may be given the authority to waive the avoidance, in whole or in part. It is important to be able to provide a waiver when avoiding a contract or transaction could cause damage to the local government or the community. But the waiver, like any waiver, should be discussed and voted on fully in public and with clearly stated reasons. This is the approach taken by the City Ethics Model Code.

Some ethics codes, such as Houston's, limit avoidance to contracts. Others give the ethics commission, the council, or the city or county attorney the authority to determine that it is in the public interest not to void a contract and, instead, sue the conflicted official for up to double damages ([see above](#)).

For more on avoidance, see [the avoidance section](#) in the Procurement chapter.

9. Disclosure-Related Enforcement

There are three aspects of enforcement relating to the filing of annual disclosure statements: late filing, insufficient filing, and false information. The first two aspects are usually enforced by an ethics commission imposing civil fines on the violator. The third aspect can be enforced civilly by an ethics commission, or criminally by a district attorney charging the violator with perjury.

Perjury is not something that is normally dealt with in an ethics code, but it is a process that is available, as long as the disclosure statement requires a signature (or electronic signature or its equivalent) and contains a statement that it is made under penalty of perjury. The problem is that using perjury laws to enforce disclosure problems requires going outside the ethics process. This raises all the issues discussed below in [the section on criminal enforcement](#).

Think of criminal enforcement of false information on an annual disclosure statement the other way around: would courts allow perjury by a local government official

in a court proceeding to be handled by a local ethics commission and advocated by an ethics officer? If courts insist on themselves dealing with perjury by witnesses, why shouldn't ethics commissions insist on dealing with perjury in documents filed with an ethics commission pursuant to ethics laws that are not intended to be enforced by courts?

Disclosure, along with training, advice, and enforcement, is one of the four essential elements of an ethics program. It is bad enough when the enforcement of ethics provisions is taken out of the ethics commission's hands and given to those who enforce criminal laws. But the disclosure requirement plays a different sort of role than ethics provisions. Disclosure is a purely preventative part of an ethics program, along with training and advice. Handing enforcement of the disclosure requirement to criminal authorities completely changes the nature of this requirement. It also makes it more likely that high-level officials will get rid of the disclosure requirement, have it not apply to them, or ignore it altogether (yes, this has happened). If one doesn't file, one can't be accused of perjury.

Rarely is criminalizing disclosure requirements a policy decision. It usually occurs accidentally, because lawyers believe every filing should be a sworn statement, and do not think of the consequences.

It is easy to prevent criminal enforcement of disclosure requirements: don't require that officials swear to what they report. Instead, deal with disclosure through rules regarding late, insufficient, and false disclosure.

The hard part of enforcing disclosure requirements is reviewing disclosure statements. Ethics commissions, even if they have an ethics officer, rarely have the staffing, or the funds to hire someone part-time, necessary to review disclosure statements and ask questions or otherwise investigate when information seems to be missing. The review process can be very time-consuming, and require an experienced eye to guess when things may not be right.

Late filings are the easiest to deal with, as long as the ethics officer is organized. One would think that late filings would be the most common problem with disclosure statements, but actually omissions are even more frequent, and false information is more frequent than one would expect. Why? In 2012, Baltimore's ethics board had a law student intern look at disclosure statements that the board had not been reviewing itself. The intern found that officials and employees did not understand some of the basic terms on the

disclosure statement form, such as “interest.” Many said, for example, that they received no interest from their home, not understanding that they were being asked about properties in which they held an interest.

The intern found that more than half of the mostly high-level city officials and employees required to fill out financial disclosure forms filled them out incorrectly or not at all.

Thus, the best way to cut down on omissions and false information on disclosure statements is to work with officials and employees to ensure that the language used in the statement forms can be understood by those who have to fill them out. Keep lawyers as far away from this process as possible. A clear form easily understood by laypeople will take much less of an ethics commission’s time and ensure that there will be few accusations of false and incomplete information that are really the result of misreading the directions.

Of course, an ethics commission can leave the work to citizens, the news media, bloggers, good government groups, and political parties. A commission can choose to investigate only when someone files a complaint, calls in a tip, or writes an article about questionable disclosure statements. But more is expected of an ethics program, and it is common for the news media and blogosphere to expect an ethics commission to take some initiative when it comes to disclosure statements. In fact, it was a newspaper’s criticism of the Baltimore ethics board’s failure to review disclosure statements that led to the intern’s important revelations. Ethics commissions should not have to depend on others to do their work.

Even when those who file late or insufficient disclosures are fined, this can be seen as a worthwhile risk to take in order to keep important information hidden, or at least hidden before an election. That is why more is needed than ordinary sanctions.

In an unhealthy ethics environment, failing to provide adequate and timely disclosure is smiled upon. In fact, the most common reason for officials not to file disclosure statements on time is that the high-level officials fail to do so. If the mayor and city manager don’t file, why should anyone else feel they ought to? In a healthy ethics environment, failing to provide adequate and timely disclosure is seen as an attempt to hide important information from one's colleagues, opponents, and the public. In such an environment, instead of respecting the clever gaming of rules, high-level officials set an example, make department heads and board chairs responsible for the filing of those under

their leadership, speak out privately and publicly against failures to file, and remove responsibility from those who do not feel responsible to the public, by taking away their committee assignments, party positions, party support and, if their conduct is egregious, the positions of their appointees.

It is important to recognize that gaming the system is a failure to acknowledge one of the most basic facts of government ethics: that its rules are minimum guidelines, that loopholes and clever arguments are not appropriate.

10. Other Sanctions

Contract-Related Sanctions

Avoidance of contracts and debarment are two sanctions that relate to contractors. See the Procurement chapter for [a discussion of these sanctions](#).

Pension Forfeiture

Some jurisdictions allow or require officials found in violation of certain ethics violations to forfeit their pensions. This sanction, commonly intended for convicted criminals, is usually found in a state statute and is usually handled by a state official rather than locally. See [the section on pension forfeiture](#) for more about this sanction.

Cancellation, Rescission, and Reconsideration

Seattle's ethics commission may recommend to the mayor and the "appropriate agency" that they ask the city attorney to bring an action to cancel or rescind the result of any action taken by the violator, but only if the commission has found that (1) the violation has substantially influenced the city action, and (2) interests of the city require cancellation or rescission. When an advisory committee member is found to have violated an ethics provision, the ethics commission may "recommend to the advisory committee that any finding or recommendation of the committee that has been substantially influenced by the violation be rescinded or reconsidered."

Joint and Several Liability

If two or more individuals are responsible for one violation, Los Angeles makes them jointly and severally liable. It might seem better if each individual's role in a violation were

considered a separate violation, and he was held solely liable for any fines, damages, costs, or restitution that arose. That is what the situation would be, I think, if nothing were said. Joint and several liability could, however, make it more likely that a respondent might seek to bring in other officials involved in the matter, so that they could share his costs and damages. And this is an important goal of government ethics enforcement, [as discussed above](#).

11. Job Prospects

Ethics enforcement does not stop the day an ethics commission makes a decision. Ethics violations affect the respondent's future, especially his job prospects.

Violations should not all be treated in the same way by those who make decisions relating to an ethics violator's future jobs. Officials to whom an ethics violator applies for a job, as well as voters who have to choose whether or not to vote for a past ethics violator, should differentiate between those who act responsibly in the face of true ethics allegations by quickly reaching a settlement and acknowledging their misconduct, and those who fight true allegations at a great cost to the community in both money and trust.

It is important to recognize that ethics enforcement is not criminal enforcement, where citizens have the right to remain silent and make the best case possible. Ethics enforcement involves officials who have special obligations to the public, including the obligation to report misconduct and the obligation not to spend taxpayer funds unnecessarily, simply for the purpose of not taking responsibility for their conduct. An official's right to due process does not affect his obligations to the community to do what is best for it, even in an ethics enforcement proceeding.

The worst case, one that should certainly have an effect on job prospects, is when an official not only refuses to cooperate in an ethics proceeding, but tries to cover up his misconduct by, for example, asking his colleagues, and telling his subordinates, not to talk about their communications.

12. A Problem with Sanctions

Ann Tenbrunsel, co-author of the book [Blind Spots: Why We Fail to Do What's Right and What to Do about It](#) (Princeton Univ. Press, 2011), has suggested that systems that penalize tend to decrease trust, mutuality, creativity, and self-esteem. When faced with sanctions, she

says, officials tend to make decisions not about what is fair or appropriate, but rather about the best way to act in compliance with the language of the law. In other words, what should be a decision that considers the public's trust in their government and the responsible way to deal with a conflict situation can, for some when faced with rules and sanctions, appear instead as a legal decision. This is especially true when officials are lawyers, and when lawyers rather than government ethics professionals provide ethics training and act as ethics advisers.

The best way to prevent this is to deal with the problem directly in ethics training. Present ethics laws not as obstacles or rules to memorize, but rather as the minimum expected of professional individuals who have a fiduciary duty to the public. Talk about what more can be done than appears in the ethics code, in order to fulfil an official's obligation to deal responsibly with conflicts. And emphasize the importance of seeking advice or withdrawing when one has a special relationship, directly or indirectly, with anyone involved in a matter. For officials who recognize this, the existence of sanctions should not be an issue, not to mention a problem. Enforcement is only for officials not responsible enough to ask for advice when they're not sure what to do or to settle a matter when they have failed to ask for advice.

13. Responding to Sanctions

The way officials respond to government ethics sanctions is important to an ethics program. By this point, the official has failed to seek ethics advice, failed to admit to or apologize for his misconduct, and failed to settle the matter. He has allowed the government to pay for an investigation and a hearing. He has been found to have violated one or more ethics provisions and been sanctioned or, if the ethics commission has no teeth, a recommendation of a sanction has gone to the local legislative body.

By now, a lot of insult has been added to the original injury to the public trust in the local government. But at least the ethics process has come to its conclusion and shown that it works. It is time for the official to think of the ethics process and the public trust rather than about himself. It is time, at last, to make a heartfelt apology, to quickly do what the sanction requires of him, and to let the public know that he understands the wrongness of what he did, as inadvertent as it may have been.

The worst thing the official can do is attack the decision, call it a sham and a waste of taxpayer money, to say that what he did was best for the community, that he is a man of integrity, that he is forced to appeal or file suit in order to defend his honor. This sort of response, which is all too common, is self-serving, immature, and destructive of the public trust. It adds further injury to injury.

14. Where Do Penalties Go?

Where should fines, damages, restitution, and the fruit of other financial penalties go? It would be helpful if they went to the ethics program, which is likely to be underfunded. However, this creates a nasty conflict between the ethics commission's desire to be fair and its desire to, say, hire another staff member. This is like what happens [when police are allowed to keep drug-related asset forfeitures](#). It creates poor incentives and an appearance of impropriety.

Therefore, it is best if the fruits of ethics penalties go into the city or county's general funds. It is worth making this clear in advance, so there is no ugly struggle over the dough.

15. Awards and Other Forms of Recognition

There are so many kinds of sanction, and so little talk of how to reward those who encourage the open discussion of ethics issues, report ethical misconduct, or choose not to indulge in it themselves when those around them do. Perhaps ethics commissions should not only have "teeth," but also "lips" to give a metaphorical smooch to those with the courage to stand up to intimidation, resist temptation, and recognize that their first loyalty is to the public. A metaphorical smooch would also be in order for those who quickly admit to their misconduct and help the ethics commission, and therefore the public, understand the origins of such misconduct in the unwritten rules of the local government's ethics environment. And those agencies and boards whose members all file their annual disclosure statements on time and attend ethics training should also be publicly praised.

Awards are a great ongoing way to show everyone what positive ethical conduct, in a government ethics context, looks like. As with advisory opinions, awards can provide guidelines for responsible behavior.

Awards show the positive side of government ethics. Too much of what is written in the government ethics field is about enforcement, about failures to comply and the sanctions people get for it. It's important to praise responsible conduct.

The easiest sort of award to give out is for doing something that is easy to quantify. For example, the Atlanta ethics board gives awards to departments and boards for their success in filing annual disclosure statements. An award such as this provides an incentive for department and board officials to encourage or even require the filling out of disclosure statements. Such incentives can be more effective than sanctions.

It's good to be able to have clear quantitative criteria for awards, because officials will know exactly what to strive for. But less defined awards can also be helpful. Such awards, however, require nominations and explanations why a department, board, or individual should get an award for, say, responsible handling of conflict situations, open discussion of ethics matters, or acts of moral courage with respect to ethics issues.

There are three important issues to consider in creating an ethics award. The first is defining the criteria for giving the award. Without clear criteria, most of the nominations are likely to have nothing to do with government ethics. A typical nomination will be for someone who took a strong position for or against a project, who showed fortitude and concern for the public interest, and gave up a great deal of her time as a volunteer.

The criteria should be carefully defined so that the incentive is to deal responsibly with conflict situations, not to be courageous and public-spirited. The criteria should make it just as easy for a department or board to get an award, as it is for what people generally think of as ethical, that is, an individual. This will help get the message across that government ethics is about being professional, about a group handling ethics issues, because it is not an easy thing for individuals to see how others will view their conduct and motives.

The criteria for Jacksonville's Ethics Commission Annual Award for Excellence in Ethics are as follows: "This award will be presented to a member of the community whose works provide an example of superior ethical practices, who labors to advance the culture of ethics and who provides inspiration to others to the ongoing journey of ethical practices." Such an annual award cannot have clear criteria and does not differentiate between government ethics and acting ethically. I don't think government ethics programs

should get in the business of rewarding ethical behavior outside the government ethics context, because it creates confusion regarding what government ethics is.

The second issue is the most interesting one, and perhaps the most important, too. People and groups that act responsibly or even courageously in one situation may in the future act in ways that undermine people's view of them as ethical. Or they may have acted in the past in ways that would make it hard for an ethics commission to give them an ethics award. Even with awards that are not related to ethics, such as entry into a sports hall of fame, past ethical misconduct can make it hard to give the award, and later ethical misconduct can lead to calls to take it back. With an ethics award, giving an award to someone or to a group that has acted unethically, or having an award winner act unethically in the future, could undermine respect for the award.

But this is because we think of awards as going to individuals, and we think of individuals as being good or bad (or bad because they've done one bad thing). It might be three individuals working together, on research or producing a film, but it is individuals whose names are on the award (occasionally an organization does get a Nobel Peace Prize).

However, it's the conduct that matters, not the individual. The director of a great film shouldn't have to give it back after he directs two bombs. A council member who handles a difficult conflict situation in an admirably responsible manner may go on to beat his wife, cheat on his taxes, or take a bribe. Or he might already have done one of these, or all three. That doesn't take anything away from the conduct. It only shows (1) that people aren't purely good or bad, but both, and (2) that government ethics isn't really about being good or bad, but about acting responsibly or not.

The fact is that people act well and badly in different situations. A politician who shows moral courage in opposition may show little when in power. A citizen who fights to prevent development in her neighborhood may push for development elsewhere if it helps her employer. That doesn't mean the moral courage was not worthy of emulation, only that people's personal interests often get in the way.

The solution is to award the conduct. Yes, an individual, department, or board's name will be attached to it, but the criteria should emphasize the conduct, making it clear that it can be an isolated act or a pattern of conduct. After all, the incentive is to get people and bodies to handle conflict situations and ethics issues more responsibly. A board that has

ignored them, and suddenly starts discussing members' conflicts at the beginning of every new agenda item, is doing just what an award should be designed to get officials to do.

The third issue builds on the second. How often should ethics awards be given out, and to how many people and groups? One choice is to have an annual award ceremony, with either one award chosen from hopefully numerous nominations, or multiple awards in different categories (e.g., responsible handling of a conflict, act of moral courage, open discussion of ethics issues, disclosure, reporting ethical misconduct).

But another choice is to treat awards the same as sanctions, that is, give them out in response to nominations, the way sanctions are given out in response to complaints. And as with complaints, the ethics commission should be allowed to file its own nominations, when it hears about especially responsible conduct with respect to ethics matters, does a little investigation, and effectively finds probable cause of conduct that merits an award. Awards could be given out for disclosing and withdrawing when many individuals would not, giving up a business or clients where there is an ongoing conflict, resigning from a board when conflicts make your membership seem improper, identifying and preventing a colleague's ethical misconduct, especially when the colleague is from the same party or faction. These awards can be discussed at one ethics commission meeting and handed out at the next if the honoree does not attend the discussion.

It is important to give awards not only to officials and employees (including departments, agencies, and boards), but also to consultants, contractors, developers, lobbyists, attorneys, and ordinary citizens. At the end of an ethics proceeding or after a settlement or dismissal, awards might even be given out to both the complainant and the respondent, if they have acted exemplary in the proceeding, even if the respondent turns out to have violated the code or the complainant was wrong about an allegation. What is important is how they conducted themselves, not whether they were right.

Government leaders (and voters) should take such awards when considering raises and promotions to government employees, and the election of officials.

This approach may not mean a dinner and award ceremony (which few ethics commissions could afford anyway), but it will mean more (and more positive) headlines, and the treatment of all conduct, responsible or irresponsible, on an ongoing basis. It's also a good excuse for an ethics commission to meet regularly even when there are no complaints or requests for formal advice. Ethics commissions should meet regularly

anyway, but it's often hard to find a solid reason for doing so (see [the checklist of things ethics commission can do](#) when there are no complaints or requests for advice). Discussing and giving out ethics awards are as good a reason as there can be.

This approach also deals with an especially aggravating problem. Officials in local governments with a poor ethics program often argue that their government is ethical because no one is filing complaints. Besides the fact that ethics complaints are usually confidential, so how does anyone know they aren't all being dismissed, there are many reasons complaints aren't filed, including lack of training, lack of knowledge about the ethics program, fear of retaliation, and a lack of belief that anything will be done because the ethics commission is a political body or has no authority.

If ethics awards are given out whenever they are deserved, the ethics commission can respond that things aren't so good, because there is no one to give ethics awards to.

The other great thing about ethics awards is that, while officials can prevent an ethics commission from having teeth, it cannot prevent an ethics commission from having lips. Ethics awards can be not only a more positive way for an ethics commission to use its authority, but in many cases the *only* way to have any authority. A creative ethics commission can hold a lot of valuable discussions and send a lot of valuable messages to the government and the public by handing out awards.

Ethics awards do not have to be given out by ethics commissions. They can also be given out by good government organizations, chambers of commerce, or other organizations or individuals. However, it is unlikely that these awards would focus on conflicts of interest.

There are also rewards. For example, a reward offered by two Irish environmentalists provided enough evidence to get a commission to investigate and draft [a huge report](#) uncovering corruption in the local land use process. The environmentalists had grown frustrated with land use corruption and had realized that their policy goals had no chance of being attained as long as the process was corrupt.

J. Criminal Enforcement

A local ethics code should deal with criminal enforcement in one simple, short provision, such as this from the City Ethics Model Code (§215.4):

The Ethics Commission may refer possible criminal violations to the appropriate prosecutor. Nothing contained in this code may be construed to restrict the authority of any prosecutor to prosecute any violation of any law.

However, some local ethics codes, as well as several state ethics codes that apply to local officials, make some or all ethics violations criminal violations.

Unless there is a state requirement that there can be no fine without a misdemeanor, and the ethics commission is allowed to determine that a violation was a misdemeanor, this is a big mistake. It shows a basic misunderstanding of the role of government ethics. A principal goal of government ethics is to stop ethical misconduct before it becomes criminal misconduct. If ethical misconduct is already a crime, this goal is lost, and it is impossible to draw a line between ethics and crime.

There are many differences between government ethics and criminal enforcement that make criminal enforcement of ethics inappropriate and damaging to government ethics:

1. In government ethics, the appearance of impropriety is as much a problem as impropriety itself. This is not true in criminal enforcement, where appearance is of little meaning.
2. A government ethics code provides minimum requirements for individuals who have special obligations to the public. A criminal code provides maximum rules for individuals who have no special obligations.
3. A government ethics professional is creative in helping officials find ways to deal responsibly with a conflict. A defense attorney is creative in finding ways to get around criminal laws.
4. Criminal enforcement requires proof beyond a reasonable doubt and usually also requires proof of motive, intent, or knowledge. This level of proof in turn requires a large apparatus of police, detectives, the FBI, grand juries, technical support, district and federal attorneys, etc. Criminal enforcement also has greater evidentiary and due process requirements. This costs a great deal of money, time, and personnel. Government ethics enforcement

requires a preponderance of the evidence, administrative rules, and no more than a volunteer ethics commission with, hopefully, some staff support.

5. Criminal enforcement of official misconduct usually requires the tapping of phones and the wiring of individuals, and often involves sting operations, where officials are tempted to commit crimes. Government ethics enforcement does not require this sort of evidence, and therefore there is no tapping or wiring or sting operations.
6. Government ethics is based on training, advice, disclosure, and discussion of ethics issues. Criminal enforcement provides no training, advice, and requires neither disclosure nor discussion. Ethics advice is not given much weight in criminal proceedings.

In addition, criminal enforcement of ethics violations usually takes enforcement out of the hands of an independent ethics commission and places it in the hands of political actors such as the city or county attorney or the district or state's attorney. And whereas ethics enforcement is a high priority for an ethics commission, for a prosecutor ethics enforcement is a low priority. Therefore, in the criminal justice system ethics cases are more likely not to be brought; when brought, they are more likely to be dismissed, because there is insufficient evidence to prove a violation beyond a reasonable doubt; when not dismissed, they are more likely to be settled, because the cost of litigating is great relative to the severity of the misconduct; and when not settled, prosecutorial decisions are more likely to be made for partisan or self-aggrandizing purposes. Criminal enforcement of bribery and similar charges is often undermined by the perception that it was done for partisan purposes. [The Jersey Sting of 2009](#) is a good example.

Criminal enforcement of ethics violations costs a great deal more and usually takes a lot longer. Time matters to the public perception. As Chuck Totto, the executive director of the Honolulu ethics commission said, "We've seen too many cases where the public is flabbergasted that it takes two years to bring the case to trial and the culprits receive probation with a suspended sentence. In one case, the city employee received a promotion during the pendency of the criminal case."

Another problem is that the prospect of being convicted of a crime puts a government official against a wall. So she fights much harder than she would against the

prospect of an ethics violation and fine, and the fight is harmful to the public trust. A good example of this occurred in 2009 in Baltimore. An ethics complaint was filed against the mayor for conduct from the time she was on the council. Conviction would have meant removal from her office, so she fought the charges with every weapon she could. And the district attorney, from the other party, fought just as hard. Although the D.A. managed to get a conviction on just one minor criminal count, that was enough to force the mayor out of office. And the whole affair was enough to place a huge cloud over her, distracting from her management of the city.

It is likely that the matter would have been settled with an independent ethics commission, with much less disruption to the government's operation. In fact, a well-managed independent ethics commission with authority should have dealt with her earlier ethics problems in such a way that the later ones would never have happened. District attorneys don't provide the sort of training, advice, and educational enforcement an ethics commission does. To switch suddenly from one goal to another (with the enforcement goal far more public) drives a wedge deep into an ethics program, harming officials as much as it does the public trust.

One other small difference is that an official cannot take the Fifth Amendment and refuse to answer a question involving ethics allegations, but if there are criminal sanctions, then it would seem that an official could take the Fifth, because there would be a possibility of self-incrimination.

Criminal laws should be as distinct as possible from ethics laws. That is, bribery can be a crime, but not giving or receiving gifts. Fraud and embezzlement can be crimes, because ethics does not include these areas. Perjury by officials can be a crime when it happens in court, but not when it involves ethics disclosure or an ethics proceeding (see [the discussion of this issue above](#)).

Keeping ethics and crime distinct makes it easier for an ethics commission to identify allegations as criminal allegations, and turn them over to criminal authorities. This is an important role for an ethics commission, especially when it has a hotline, because many calls relate to criminal matters that citizens (and some officials) believe are ethics matters when officials are involved.

It is important for ethics practitioners, important for officials and employees, and important for the public and the press to know the boundaries of the ethics process, who is

responsible for what, and that there is no getting around a rule or process by looking elsewhere. When you open the door to other processes, you create the sort of confusion that government ethics should be trying hard to prevent.

Where there is confusion, those who have clever lawyers will easily find a way to wriggle out of the hands of the ethics commission whenever it benefits their client, and to take advantage of an ethics commission's weaknesses whenever that benefits their client. Forum shopping should be prevented wherever possible.

Another problem with criminal enforcement is that the trend recently has been toward mandatory sanctions. For example, Arizona's ethics law requires forfeiture of office or employment upon conviction on an ethics charge. Not only does this make an official fight like hell for her job, but it makes it hard to reach a settlement whereby an official admits having violated an ethics provision, something that is common in ethics proceedings. What happens instead is that the official pays some sort of fine or restitution, but gets to say she did nothing wrong. Settlements should be about sanctions, not about ethics violations (see [the section on settlements](#))

Why is there so much criminal enforcement of government ethics? There's no better way than criminal sanctions for elected officials to show a public ignorant about government ethics that they mean business. Punishment is an easier sell than a good, independent government ethics program. What elected officials don't tell the public is that criminal enforcement makes it harder to enforce ethics provisions, or that it will cost the public a lot more, or that criminal enforcement provides no training, no advice, and no disclosure. That's a lot to give up in return for the possibility of prison (and should officials guilty of ethical misconduct really ever go to prison?).

Sometimes there are possible ethics and criminal violations in the same matter. Ethics and criminal authorities handle this situation in a variety of ways. The norm appears to be that ethics commissions, by law or choice, give way to criminal authorities if both have proceedings against the same individual. But the reason behind this appears to be that ethics is somehow junior to crime, of less importance. But importance is not necessarily the issue. Often it is very difficult for a prosecutor to, say, prove bribery, while it is easy to show that an illegal gift was made and accepted. There are, therefore, many situations where it is best to pursue an ethics complaint rather than an indictment for the same conduct.

In other situations, the ethical misconduct has nothing to do with the criminal misconduct and, therefore, both should be pursued simultaneously. It is better for an ethics commission to coordinate with criminal authorities in such instances, so that there is as little duplication as possible and the best decisions can be made as the proceeding(s) progress. It is certainly not best for an ethics commission's hands to be tied from the very start.

Not all jurisdictions have ethics give way to crime. In Austin, for example, corrective personnel action doesn't wait on the criminal process, but this is not an option when elected officials are involved. In Nevada, a public official sometimes settles with the ethics commission and avoids criminal prosecution, but where ethics violations occur during criminal activity, the cases are prosecuted by a district attorney. In Honolulu, in most cases, criminal authorities prefer that the ethics commission conducts its administrative proceeding while they pursue their case. And the criminal authorities refer to the ethics commission those cases involving ethical misconduct that they choose not to prosecute, allowing the ethics commission to review the investigation to see if a case should be pursued. This is a good idea.

Criminal enforcement of ethics laws can be harmful even when a criminal law helps an ethics commission better investigate allegations. A provision in the Missouri ethics code, which applies to local officials, creates a crime I'd never seen before: obstruction of an ethics investigation. The provision is just below. While reading it, think how much better it would be if, as in an ethics proceeding, you didn't have to show evidence, for example, that someone believed a false statement to be true, or that withholding information was done in exchange for a pecuniary benefit, which are effectively the crimes of perjury and bribery. Shouldn't obstructing, concealing, and withholding be violations in their own right?

1. A person commits the crime of obstruction of an ethics investigation if such person, for the purpose of obstructing or preventing an ethics investigation, knowingly commits any of the following acts:

(1) Confers or agrees to confer anything of pecuniary benefit to any person in direct exchange for that person's concealing or withholding any information concerning any violation of sections 105.450 to 105.496 and chapter 130;

(2) Accepting or agreeing to accept anything of pecuniary benefit in direct exchange for concealing or withholding any information concerning any violation of sections 105.450 to 105.496 or chapter 130;

(3) Utters or submits a false statement that the person does not believe to be true to any member or employee of the Missouri ethics commission or to any official investigating any violation of sections 105.450 to 105.496 or chapter 130; or

(4) Submits any writing or other documentation that is inaccurate and that the person does not believe to be true to any member or employee of the Missouri ethics commission or to any official investigating any violation of sections 105.450 to 105.496 or chapter 130.

2. It is a defense to a prosecution under subdivisions (3) and (4) of subsection 1 of this section that the person retracted the false statement, writing, or other documentation, but this defense shall not apply if the retraction was made after:

(1) The falsity of the statement, writing, or other documentation was exposed; or

(2) Any member or employee of the Missouri ethics commission or any official investigating any violation of sections 105.450 to 105.496 or chapter 130 took substantial action in reliance on the statement, writing, or other documentation.

3. The defendant shall have the burden of injecting the issue of retraction under this section.

4. Obstruction of an ethics investigation under this section is a class A misdemeanor.

Far preferable is Chicago's solution, which is to allow the ethics board to fine someone who has obstructed an investigation (§2-156-465(b)(6); this provision, passed in August 2012, was inappropriately placed in the Sanctions section of the ethics code).

Since the criminal enforcement of ethics laws is problematic in so many ways, I will not even discuss how it is done. I will do no more than point your way to a few of the criminal laws, and suggest that if your jurisdiction requires or even allows the criminal enforcement of government ethics violations, especially by criminal authorities, you work hard to strike this in favor of administrative enforcement by an ethics commission.

In Houston, certain ethics laws are enforced criminally by the city attorney; others are enforced by the inspector general or district attorney. In Ohio, the ethics commission (which has jurisdiction over local officials) reports its findings to “the appropriate prosecuting authority.” If nothing is done to prosecute the matter within 90 days, the commission may (it is not required to) make this fact public. This is a weak form of a good rule that should exist whenever a matter is turned over to another agency, and that agency, whether the local legislative body, district attorney, auditor, or inspector general, does nothing.

In California, where the state Political Reform Act affects local officials, but enforcement is by the city, county, or district attorney, there is a choice between a civil and criminal proceeding. In cases where there is knowledge or intent, ethics enforcement is often criminal, and DAs sometimes seek a prison sentence. California cities and counties may choose to create their own ethics commissions, and many have.

In New York state, there is a crime for receiving reward for official misconduct. In 2010, in the case of [People v. Gordon](#), 72 AD3d 841 (App. Div. 2d Dept, 2010), a state appellate court determined that this crime may be predicated on violation of the state's ethics code. In other words, a violation of the code is “official misconduct,” because the code imposes a mandatory rather than advisory duty of conduct on state legislators.

K. Federal Enforcement

Although federal ethics laws do not apply to local government officials, there are federal criminal laws that are effectively ethics laws. They are ways for the federal government to investigate ethical misconduct when local and state authorities fail to do so, sometimes for political reasons, sometimes because they lack an ethics code or program, or lack the necessary personnel and resources to investigate and enforce. These laws include what is known as honest services fraud, bribery laws, a gift statute, and the Hatch Act.

1. Honest Services Fraud

One argument rarely made for effective government ethics programs is that they will prevent government officials from being prosecuted by the federal government for “honest services fraud.” Unfortunately, that argument is no longer true.

Honest services fraud was to bribery what manslaughter is to murder. By this I mean that many officials accused of bribery pleaded down to honest services fraud, a lesser, but still serious crime (the maximum sentence is 20 years). Here's the statutory definition of honest services fraud (18 U.S.C. §1346, part of the mail and wire fraud statute):

For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.

Fraud is depriving someone of something by lying. That something was originally limited to tangible things, especially money and property. Through court decisions, honest services fraud extended what could be deprived to include intangible things. Then this sort of fraud was codified.

Honest services fraud recognized that government officials have a fiduciary duty to citizens, and that citizens have a right to officials' honest services fulfilling this duty. Thus, lying on an annual disclosure form could lead to a conviction for honest services fraud (as well as perjury), as could the failure to disclose a conflict, even if there is no law requiring disclosure of the conflict. At the center of each honest services fraud case, as varied as they are, was a lie or a secret, and usually personal, although not necessarily financial, gain.

But due to the U.S. Supreme Court's decision in [Skilling v. U.S.](#), 130 S. Ct. 2896, 561 U.S. ____ (June 24, 2010), the crime of honest services fraud has been greatly limited in its application, at least with respect to corporate officials (Skilling was president of Enron). It apparently can be used only for bribery and other tangible (that is, monetary) crimes.

This means that there is no FBI to come and save the day when local ethics programs do not exist or are ineffective. This places pressure on local governments to write clear, complete ethics codes, since the federal government will not be able to fill in where there are holes or go after local officials who might otherwise claim legislative immunity.

Local and state government ethics agencies must be given sufficient independence and enforcement powers to do what the federal government did. Ethical misconduct need not be criminalized. But government officials have to agree not be involved in the ethics process in any way, and they must be willing to waive any legislative immunity they might have (see [the section on legislative immunity](#)).

2. Kickbacks

The one good thing about the *Skilling* decision is that it said the honest services fraud statute could still be applied not only to bribery, but also to kickbacks. Kickbacks are a common feature of an unhealthy ethics environment, but very hard to prove. They are usually beyond the investigative capabilities of a local ethics commission. A kickback can be proven only if someone “squeals” and has hard evidence, if phones have been tapped or someone has been wired with a microphone, or if there is a successful sting operation.

Bribery can sometimes be handled by an ethics commission as a gift, but a kickback is usually not as public or easy to find. Rarely is a kickback done in the form of construction on an official’s home or a trip to a conference that just happens to be taking place at a golf club in Scotland. Kickbacks are usually the reward for officials who create, or allow the creation of, a sizeable difference between the amount paid to a contractor under a no-bid or insufficiently bid contract and what the contractor would have received had the contract been properly bid out. Whenever government contracts are not bid out or the specifications unreasonably limit which companies can bid, you can be pretty certain that someone is getting a kickback.

Kickbacks can also be made by a developer who has been given a permit or a grantee that has been given a grant.

3. Criminal Gift Statute

As an alternative to prosecution for bribery, there is a federal gift statute that allows federal prosecution of those who give gifts to local officials in amounts greater than \$5,000. Proof of bribery is not necessary, but evidence needs to be shown that the gift was given “corruptly” and “with intent to influence or reward.” This is somewhere between a gift provision in an ethics code and a bribery provision in a criminal code. The local government must have received federal funding, but this is true of most local governments, especially the larger ones. 18 U.S.C §666(a)(2) reads as follows:

- (a) Whoever, if the circumstance described in subsection (b) of this section exists ...
- (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or

Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The decision in [U.S. v Boender](#), 2011 WL 3634163 (C.A.7 (Ill.) 8/19/2011), is a fairly typical case. A developer who wanted a Chicago alderman to support his rezoning application had a contractor paint the alderman's house and replace a number of his windows. There was no proof of bribery, which would be required under 18 U.S.C. §201(b), but the court found "that the government was not required to establish a specific quid pro quo of money in exchange for a legislative act."

This is a good statute to know about in jurisdictions where there is no independent ethics program or where the gift provision requires a quid pro quo. It is also a good statute to know about when drafting an ethics code, because when officials push for the gift provision to require a quid pro quo, someone should say that the federal government can prosecute for less than this and, therefore, the ethics code should require even less evidence.

An ethics code gift provision should set a higher standard than criminal laws (with lower sanctions and lower costs) and prevent bribery (which is extremely hard to prove) as well as the appearance of influence and pay to play by prohibiting the giving of gifts to officials above a very low amount, without the need to prove intent or show evidence of a specific quid pro quo, corrupt intent, influence, or reward.

4. The Hatch Act

Finally, there is the Hatch Act, which is poorly understood and rarely enforced. But an ethics commission should make officials and employees aware of this statute. [The Hatch Act of 1939](#) (Title 5, Subchapter III), as amended in December 2012, prohibits local government employees, whose salaries are funded in whole by the U.S. or a federal

agency, from running for office in a partisan election. The act's other two prohibitions are that local officials:

Cannot use official authority or influence to interfere with or affect the results of an election or nomination

Cannot directly or indirectly coerce contributions from subordinates in support of a political party or candidate

The purposes of the Hatch Act include preventing the use of federal funds to affect elections, ending patronage, and avoiding the appearance of corruption. The rule applies only to partisan elections, which at least limits its applicability in local elections to a minority of cities and towns, although it is applicable to most counties.

5. Conflicts Relating to Federal Grants

Federal agencies have strict conflict rules relating to the use of federal funds. For example, the Department of Housing and Community Development withholds grants if it finds that any of the local officials who determined to whom the grant would go have a relationship with the winning grantee. Similarly, the Department of Housing and Urban Development (HUD) requires anyone locally involved with making HUD grants to follow its rules or request from HUD a conflict waiver. The failure to follow federal conflict rules can cost a local government, and its grantees, millions of dollars in lost funding and lost housing.

The same sort of rules are applied by many state agencies. It is not safe to assume that enforcement will be lax. You never know when a losing grant applicant will report a conflict, or a journalist will write about a housing authority board member's relationship with a winning contractor.

It's best not to wait for this to happen. Officials who make such grants and are involved with such contracts need to be trained and encouraged to seek advice whenever they have a special relationship with any grant or contract applicant. This is one of the ways in which an ethics program can more than pay its way.

L. Legal Fees

Because most local government ethics codes do not deal with the issue of who pays a respondent's legal fees, these fees often turn into a big political controversy after the fact, leaving a bad taste in citizens' mouths, especially if they are forced to foot the bill. For this reason, it should be clear from the start whether the government pays, under what circumstances, and how much. In establishing a reimbursement rule, it is important to take into account both fairness to the respondent and the fact that respondents often run up unnecessarily large legal fees that can sink an ethics program.

1. The Role of Attorney for the Respondent

Before considering this issue, it's worth noting what the role is of an attorney for the respondent in an ethics proceeding. In the beginning stages, before an investigation begins, there is little to do. Many, if not most, ethics complaints are dismissed at this stage.

If the complaint is not dismissed immediately for a failure to allege an ethics code violation, an attorney may help the official write a response to the complaint and may stipulate to facts. If the complaint is not dismissed at this point, there is an investigation, in which the attorney only need be present when her client is interviewed. Perhaps, the attorney will try to negotiate a settlement, which can include payment of legal fees.

At this stage, legal fees should be minimal. There should be no legal questions, no discovery, no hearings. The only other role an attorney might play is delaying or hampering the investigation. If the respondent wants the matter to be public, or it has gone public in some other manner, attorneys also sometimes play the role of public relations manager, defending the official's reputation and the like.

The way an attorney can seriously run up the fees is by filing actions in retaliation, including ethics complaints and judicial actions. In most cases, these are superfluous to the ethics proceeding and are brought by the official as a private citizen, not as an official, that is, not with the support or involvement of the city or county, or of the official's board or agency. Therefore, there should be no reimbursement of any fees relating to these proceedings, and a respondent's attorney should keep separate time records for these matters.

An attorney's role expands when there is true disagreement regarding the facts and regarding the application of ethics code provisions to the particular situation and, therefore, the attorney fails to reach a settlement, probable cause is found, and the ethics

proceeding moves to the public hearing stage. However, the knowledge that legal fees will be paid by the government makes it more likely that a settlement is not reached.

Ethics hearings, and the discovery that precedes them, can use up a lot of legal fees. However, they require much less lawyering than court hearings, because the evidentiary and procedural rules are much more relaxed, and there is much less discovery. Ethics proceedings are administrative hearings, that is, litigation lite, and the fees should reflect this.

It is important to recognize that an ethics proceeding, if handled properly by both the respondent and the ethics commission, is not a life-and-death matter. Fines are usually limited or unavailable, there is rarely a chance of jail time or a criminal record, and rarely is there suspension or removal from office. When a jurisdiction criminalizes ethics, it should recognize that this might greatly increase requests for legal fees and take this into account in its reimbursement provision. But in the great majority of jurisdictions, even when cases make it to the hearing stage, the result is usually just a reprimand or a small fine. Anyone who believes he might have to pay the legal fees would settle the case, keep a tight control over the fees, or argue it himself. This should be expected of any official whose legal fees are paid by the government, since he has a fiduciary duty not to waste taxpayer money.

An official might insist that his reputation cannot be given a value, but if one handles an ethics complaint responsibly, there should be no serious harm to one's reputation (see the tips above on [how to handle an ethics complaint responsibly](#)). If one simply denies everything and fights back as hard as possible, that is a personal decision that has nothing to do with one's official responsibilities. An official, as an official, has an obligation to keep reimbursable legal fees as low as possible.

2. Considerations

Any provision for legal fees should, like the City Ethics Model Code's, contain the word "reasonable" before "legal fees." "Reasonable" applies to both the charge per hour and the services provided. It is reasonable to charge the going rate of the area for representation. It is reasonable for an attorney to draft a response to a complaint, to accompany the respondent to any interview with an investigator, to negotiate a settlement, and to prepare for and attend any ethics commission meeting or hearing related to the matter.

Charging a higher rate, defending the respondent's reputation, filing actions for the respondent as a private citizen that are not approved by the government, and other extraneous or superfluous activity should be considered unreasonable activities giving rise to unreasonable fees. Activities directly related to defense of the respondent should be considered in light of what is reasonable under the circumstances, taking into account the complexity of the matter, the possible sanctions, and settlement offers. The burden should be on the official to prove that the expenditures were reasonable.

Another consideration is, under what circumstances will legal fees be paid at all. The City Ethics Model Code requires the local government to pay a respondent's reasonable legal fees only "if the Ethics Commission makes a finding of no probable cause." This protects officials from having to pay to defend themselves against complaints that have no validity and yet are not immediately dismissed, that is, where the ethics commission finds that there is insufficient evidence of a violation to go a full investigation and hearing. These cases should necessitate little in the way of legal fees. However, a vindictive respondent can run up large legal bills in retaliation or to delay or hinder a preliminary investigation. These fees should not be reimbursed.

If an ethics complaint is dismissed because it does not state an ethics violation against someone under the ethics commission's jurisdiction, a good argument could be made that legal fees should be paid to the respondent, but since this is the first step in a proceeding, there should be hardly any legal fees at all. In fact, it is a best practice not to even alert a respondent about a complaint that is quickly dismissed. When respondents are given immediate notice of the filing of a complaint, they should be alerted at that time that there is a strong possibility that the complaint will be dismissed without the need for any action by the respondent. The respondent need not be in a rush to file a response, as long as there are not overly short time requirements. Therefore, there should be no reasonable legal fees.

Some jurisdictions, either in the form of laws or regulations, or on the basis of historical precedent, provide for the payment of legal fees in every case. This shows a misunderstanding of government ethics. It effectively uses public money to reward an official who misused his office for his or others' private benefit.

It is more common to provide for the payment of legal fees only when it is found that there was no ethics violation. It seems fair to pay the legal fees of an official who is not

found to have violated an ethics provision, who has been the unfortunate victim of allegations that could not be proven.

If this is the choice, it is important that the language read “when it is found that there is no ethics violation” rather than “when no ethics violation is found.” Between these two phrases there is a world of difference (see [the list of ways in which a proceeding can end without a final decision](#)). This gap is important to the question of fairness, which is the reason for reimbursement in the first place. Many of the possible ways of disposing of a case do not involve any determination whether or not the respondent has violated an ethics provision. Therefore, there is no way to know whether or not it is fair to reimburse the respondent for legal fees.

If the rule is that legal fees are paid when “no ethics violation is found,” an official who has violated the code get his legal fees paid under a wide variety of circumstances, many of them under his control. Such a rule therefore gives the respondent an incentive to prevent a finding by the ethics commission. Knowing that his legal fees will be paid, the respondent can drag the proceeding out, knowing that the ethics commission, on the other hand, has limited resources and cannot afford to hold out for a finding of a violation if substantial obstacles are placed in its path. In such a case, the official can have his cake and eat it, too.

Using the phrase “when it is found that there is no ethics violation,” the respondent gets his legal fees paid only when a proceeding ends in a finding by the ethics commission that no ethics provision was violated. This approach provides no incentive to a respondent to manipulate an ethics proceeding for his benefit at the community’s expense.

But the best practice is to have legal fees paid only when there is a finding of no probable cause.

3. Indemnification Laws

Most states, and many local governments, have general indemnification laws that include the payment of legal fees to local government officials who have been sued in their official capacity. However, these are intended to apply to negligence and civil rights suits filed against the local government and against particular officials and employees. They do not apply to judicial suits by the local government against its own officials and employees, nor should they apply to ethics proceedings which, although they usually begin with a

complaint, are internal administrative proceedings that, upon a finding of probable cause, are brought by the local government against its own officials and employees. In this respect, ethics proceedings are more like criminal actions than civil actions, only more internal.

Even with respect to civil suits against officials, indemnification is usually limited to cases where the official was acting in his official capacity or in the discharge of his duties. Since it is an official's duty to deal responsibly with a conflict and to follow what is required by ethics provisions, seek ethics advice when there is uncertainty, and follow that advice, it would be the very unusual case where an official was acting in the discharge of his duties and yet was in violation of an ethics provision. But, of course, this presumes that the official actually did what he was accused of doing.

4. Who Decides

If a local government chooses to pay a respondent's legal fees either after a finding of no probable cause or after a finding of no violation (or both), who should decide the amount of fees to be paid to the respondent?

The ethics commission is in the best position to make such a determination, in that it has been involved in the investigation and other aspects of the matter, best knows the facts, and best understands the ethics enforcement process. In addition, its members do not have a personal or political relationship with the respondent or an interest in keeping down the local government's costs (as long as legal fees do not come from its budget).

However, in some matters the ethics commission will have filed the complaint itself, or amended the complaint by adding additional allegations. Therefore, it, or some of its members, if this is done by a committee, may be seen to have a conflict. In such a case, it should be explained when the determination about legal fees is made that the complaint was filed on the basis of information given to the commission, not because the commission itself decided to go after the respondent.

Who else could make the determination? The local government has a basic conflict, in that any official(s) who participates in such a decision will likely have a personal and possibly a political relationship with the respondent. This is true even of the city or county attorney, who might be in a good position to understand the issues involved. It is also important to the public that local government officials are not seen showering their

colleagues with large legal fees at the public's expense, going beyond what the public would consider "reasonable" legal fees. It also would not look good for officials from one party to be seen as withholding legal fees from a respondent from another party.

If there is another independent office in a city or county, such as an ombudsman, auditor, or inspector general, that office would also be an acceptable choice for determining legal fees. But the official making the decision should get special training from the ethics officer regarding the ethics enforcement process and what may constitute "reasonable" legal fees in this context.

5. Insurance

Like so many problems, the question of who pays legal fees for ethics respondents, and how much, sometimes boils down to insurance coverage. But ethics proceedings are not likely to be covered by insurance policies, because they are in the hands of a local government board, not in the hands of a court. If the complainant is an official, the case involves one local official complaining to a board of local officials about another local official. What insurer would want to cover that?

Where ethics-related legal bills are covered by insurance, officials, especially those faced with nothing but a reprimand or limited fine, could run up huge bills fighting for their reputation, unless the insurance policy had limits. And this would increase the government's future insurance costs, so that the public would pay in the end.

A local government might want to make its decision on whether to cover a respondent's legal fees, and to what extent, in conjunction with making changes to its insurance policy. I would think it best that insurance would cover "reasonable" legal fees only upon a finding of no probable cause, and that there be a limit on such fees.

6. Payment by and to Complainants

In a case where a complaint is dismissed, an alternative to local government payment for the legal fees of the respondent is to require the complainant to pay these fees. This is a good way to prevent complaints from being filed. No matter how certain a complainant is about the facts, he has no control over how the code is interpreted, how the proceeding ends, or the size of the legal fees. Too many things are outside a complainant's control for

anyone to file a complaint knowing that it might end up costing him many thousands of dollars.

Generally, a complainant is required to pay legal fees only if one or more allegations is found to be without any foundation in fact. This is sometimes in addition to criminal sanctions for making a false statement in a complaint.

The best approach, where there is not already a state law with civil or criminal sanctions, is to allow the respondent to sue the complainant for legal fees and damages, the approach taken in City Ethics Model Code §213.13.

If an allegation in a complaint is made under this section with the knowledge that it is without foundation in fact, the respondent has a cause of action against the complainant for damages caused by the complaint. If the respondent prevails in such an action, the court may award the respondent the costs of the action and reasonable legal fees.

It is important to severely limit the situations where a complainant could be required to pay a respondent's legal fees, because the last thing an ethics program should do is make it hard for complaints to be filed, even complaints where the complainant is not certain about all the facts. Often complainants do not have access to much information, but have a reasonable belief that a conflict was not handled responsibly. Such a complainant may have few facts and little understanding of government ethics. And yet the complaint may be a valid one.

In such situations, an investigation is needed to find out what happened, and often an investigation leads to amending a complaint or even adding or better stating allegations. In a jurisdiction that allows anonymous tips and the filing of complaints by the ethics commission, there is far less need for complainants to file complaints with limited knowledge. They can simply provide this limited information to the ethics commission, and let it take the ball from there. This is the best practice. But many people will still want to file the complaint themselves and will be mistaken or have insufficient knowledge and, therefore, one or more allegations will be dismissed, but not due to any malice on the part of the complainant.

Where a legislative body feels strongly about making complainants pay for factually false allegations, it should allow the ethics commission to accept tips, anonymous or not,

and then file its own complaint if it found evidence of a violation. This would help prevent the kind of false or frivolous allegations that officials hate so much. An ethics commission that received a poorly presented complaint could suggest that the complainant withdraw the complaint and turn it in to a tip, if there seemed to be a possibility of a violation. This would prevent false allegations while not preventing valid complaints.

Complainants' Legal Fees

One thing I find fascinating about the arguments regarding legal fees in ethics proceedings is that people focus only on harm to the respondent. The only time complainants are mentioned is when they make false allegations. Rarely does anyone argue for a local government to pay the complainant's legal fees, or for a city or county attorney to represent the complainant, even if the complainant is a government official or employee, which is often the case.

It's important to recognize that complainants are whistleblowers presumably acting in the public interest. They often spend time and money investigating and writing a complaint, sometimes with the help of counsel, they are often named in suits, they are interviewed and questioned in hearings just as respondents are (and often bring counsel to represent them), and they often take a serious risk filing a complaint.

Most respondents whose cases go beyond the first stage of dismissal, on the other hand, have put personal interests ahead of the public interest and are not willing to immediately admit to what they have done, apologize, and settle the matter so that it costs the community nothing.

Looked at this way, the whole issue of legal fees appears to be not about fairness to officials, but rather about protecting high-level officials, who constitute most respondents, rather than lower-level officials, who are more commonly complainants.

Therefore, if fairness is the goal, any reimbursement of the legal fees of respondents should be matched by reimbursement of the legal fees of complainants, at least when there is a finding of probable cause.

The one protection most complainants get is in a whistleblower protection provision, which protects them from retaliation. The City Ethics Model Code whistleblower provision (§110.2) provides for legal fees in a suit by a whistleblower who

has been threatened, dismissed, etc. But these fees are not generally paid by the local government. Instead, they are paid by the respondent.

See [the whistleblower protection section below](#) for an argument about compensating complainants for legal fees in SLAPP suits filed against them for the purpose of retaliation.

7. Government Attorney Representation of Respondents

Another approach is to allow respondents (and, if they are also officials or employees, complainants) in ethics proceedings to be represented by the city or county attorney's office. This is less expensive for the local government, but it raises other problems, including conflicts. First of all, in many cases it would require the government to represent an official's personal interest against the public interest that the government attorney is pledged to protect. This puts the government attorney in a seriously conflicted position. I don't think it is right to ask this of anyone.

Second, if the government attorney's office advised the official on the matter, and the official either followed the advice and engaged in the conduct, or did not follow the advice and this got him into trouble, how can the government attorney represent that official? In the first case, the attorney has a personal interest in the determination (whether his advice was correct), and in the second case, the attorney's same personal interest might lead him not to fairly represent the official who ignored his advice.

Third, in many cases the city or county attorney's office represents the ethics commission. Besides the conflict this poses, would it be fair to have the only person in the office with ethics expertise represent the respondent, while the ethics commission has to try to find a new attorney with equivalent expertise (and possibly apply for funds to pay the attorney)? The alternative is to give the respondent inadequate government counsel.

Fourth, if the government attorney is an active member of a party, and the respondent is a member of the other party, the attorney may be seen not to be providing sufficient representation. She may even be seen as showing favoritism to a complainant from her own party. In fact, a respondent from the other party might feel compelled to hire his own counsel, to get effective representation. This would undermine the fairness that is the basis for providing representation in the first place.

Finally, in some jurisdictions, the city or county attorney is charged with bringing criminal charges for ethics violations, which certainly prevents them from representing the official being charged.

One solution is to allow the ethics commission to have its own counsel, so that the city or county attorney is free to represent the respondent, at least where the office did not provide advice related to the matter. It is, in any event, best for an independent ethics commission to have independent counsel, often the ethics officer.

But the other problems with government attorney representation remain. And problems could arise if multiple officials are named in the complaint or added to the complaint by the ethics commission. These officials might have different interests and may want to take different approaches, for example, one might want to settle while the other might want to fight to the end. Or one might actually have violated an ethics provision while the other has not.

The fact is that ethics proceedings are not like the other proceedings where officials are sued, because in those proceedings the city is also sued, the city is insured, and the only issue involving representation is whether the official or employee was acting in his official capacity. The usual rules of representing officials do not apply in ethics proceedings.

When a city or county attorney is required to represent an official, there is another question: where to stop? How zealously should the official's case be fought, and who should decide, at each stage, whether to take the matter further? What should be the considerations that allow settlement, appeal, suits, and the like?

The *Carrigan* case, which went to the U.S. Supreme Court in 2011, provides a cautionary tale. A council member, unhappy with the ruling against him by the state ethics commission, took the case through the state court system and then to the U.S. Supreme Court. He was not so much appealing the decision as attempting to get the relevant ethics provision declared unconstitutional (see [the discussion of this aspect of the case](#)). The city attorney fought the case up to the point of the certiorari petition to the U.S. Supreme Court (after this, Carrigan was represented by pro bono counsel). Could having a state ethics provision declared unconstitutional truly be considered an important objective of a small city? Was it obliged to do this for a council member? If so, how far was it obliged to go? Was it appropriate for this decision to be made by Carrigan's colleagues? The

considerations on both sides should be debated in public, and the appearance of each decision to represent the council member should be openly discussed.

8. Alternative Dispute Resolution

Maricopa County, Arizona, historically a spider's-nest of a local government, has a "Talk First, Sue Later" rule that requires officials, when engaged in disputes with other officials, to try alternative dispute resolution methods before filing a suit. And if they file a suit, their department or agency must cover their own legal fees; no money may come from the county's general fund. Such a rule would mean that no legal fees would be awarded to respondents for retaliation suits against complainants who are officials or employees.

9. Hearing Fees

While some jurisdictions do provide rules governing the payment of legal fees, few provide rules governing hearing and witness fees. Here is language from the New Orleans rules:

If a witness is subpoenaed by a respondent, the Board may order the witness fees and mileage to be paid by respondent. The Board may, before issuing a subpoena, require the party requesting the subpoena to deposit with the Board a sum sufficient to cover the mileage costs and witness fees pending a final determination of costs by the Board.

The Board may order the costs of any public hearing, or any portion of such costs, including the costs of recording and transcribing testimony, to be paid by the respondent depending on the outcome of the hearing, cooperation of the respondent in the process, the severity and duration of the violation, and any other matters determined necessary by the Board.

In a jurisdiction where an ethics commission may hold a hearing even if the respondent has not requested one, it may be considered inappropriate to charge the respondent hearing, witness, or transcription fees.

XI. Obtaining Information: Hotlines and Whistleblower Protection

It is important to this chapter to go back to the beginning and consider the principal purpose of a local government ethics program: increasing the public's trust in its local government so that citizens will participate in the government, in ways that include voting, sitting on boards and commissions, attending meetings, and speaking their minds about matters and issues of concern to the community. In short, government ethics programs seek to increase trust in order to enable citizens' voices. Without public trust and participation, our form of democracy does not work effectively.

Therefore, a government ethics program must do all it can to enable citizens to participate and use their voices to prevent and enforce against ethical misconduct. To enable citizens, it is crucial to recognize the reasonable fears that prevent citizens, and especially citizens who work for the local government, from speaking out about ethical misconduct.

To do this, an ethics commission must be able to protect those who provide information, file complaints, and testify regarding ethics violations, and to act on information from individuals who, despite protections, reasonably fear retaliation.

A. Ethics Commission Initiative

Even ethics commissions with a staff tend to be passive bodies that depend on information to come to them. Information comes to them in several forms. Formally, it comes in the form of annual disclosure statements, transactional and applicant disclosures, requests for advice and waivers, and complaints. But it also comes informally, in the form of reports in the news media and in the form of tips, anonymous or not.

For the purpose of enforcement, many ethics commissions have to essentially ignore all this information (except formal complaints), because they are not permitted to initiate investigations on their own. The only enforcement they can do without a formal complaint involves the failure to file complete disclosure statements. There are many ethics commissions that do little other than this.

In 2010, Cheryl Forchilli, chair of the Florida Commission on Ethics (which has jurisdiction over local government officials), came up with a wonderful simile to show how serious a problem it is for an ethics commission not to have the authority to initiate investigations:

If a sports car barreling down the interstate at 120 miles an hour passes a Florida Highway Patrol officer, we expect that officer to flip on the lights, stop the speeder, and make our roads safer. Wouldn't the public be angry if the Legislature passed a law that forced the officer to stay parked by the side of the road, patiently waiting for a concerned citizen to pull up, sign a sworn statement describing the speeder's actions, and ask the officer to please look into it?

An ethics commission cannot effectively enforce an ethics code unless it has the power to initiate investigations. Let me put this another way. A local legislative body that creates an ethics commission that does not have the power to initiate investigations does not want the ethics commission to effectively enforce the ethics code. It is no different than creating an ethics commission and giving it no staff, no budget to hire counsel, and no training. These are all ways to look like you're concerned about ethical misconduct without actually doing anything about it.

Local government officials across the country worry aloud that giving ethics commissions the power to initiate investigations will lead to "witch hunts." This term is as telling as it is inappropriate. Witch hunts were directed by community leaders against citizens, rather than by citizens against community leaders. It is disingenuous for community leaders to identify with powerless women who were unjustly victimized, or with supposed communists hunted down by national leaders in the 1950s, where this term was also appropriately used.

The fact is that government employees are the individuals who know the most about ethical misconduct in their government. And they have the most to lose by reporting it. Even with whistleblower protection, the people who know best what is happening in a city or county government are often afraid to come forward or get involved in controversial, protracted proceedings. There are often huge pressures on them to keep quiet. Officials often depend on this fear and reluctance when they engage in ethical misconduct.

When government employees are allowed to provide information about ethical misconduct in a way that cannot be traced back to them, they are far more likely to do so. Knowing this, government officials will be less likely to engage in ethical misconduct. In other words, allowing people to report ethical misconduct without having to file formal complaints is one of the most effective ways of preventing it. But this cannot be done in jurisdictions where ethics commissions are not permitted to initiate their own investigations.

Newspaper reports and blog posts sometimes contain information that is worthy of investigating, as well. The news media and community watchdogs can be very helpful in supplying useful information to ethics commissions, and if ethics commissions are able to investigate further, it will be more likely that papers and bloggers will do preliminary investigations. The more notice that is paid to ethical misconduct by the local press and watchdogs, the more concerned officials will be to seek advice and follow the rules. Thus, ethics commission initiative creates a virtuous circle.

The goal of ethics commission initiative is not catching officials or making them look bad. The goal is the prevention of ethical misconduct by overcoming fear, demands for personal loyalty, and other obstacles to the improvement of a local government's ethics environment (see [the final chapter](#), which focuses on these obstacles).

See [the section on ethics commission complaints](#) to see how to institute ethics commission initiation of investigations.

B. Hotlines

The most common means for the reporting of ethical misconduct is not the formal ethics complaint, but the hotline. This is a special phone line that only the ethics officer, ethics commission staff member, or ethics commission chair has access to. Often, a hotline covers more than just ethics-related reports, allowing reports of waste, fraud, and other misconduct. When this is the case, there is usually cooperation with an inspector general or auditor. When another office is in charge of the hotline, it should quickly forward ethics-related reports to the ethics commission. When this is not required, as with the executive inspector general in Chicago, it can cause serious jurisdictional and other sorts of problems.

Without a hotline, it is difficult to require officials and employees to report possible misconduct (see [the section on the requirement to report](#)). Creating a hotline makes it much easier to fulfill one's duty to report violations, without requiring a great deal of moral courage, which is a spare commodity. And it protects officials accused of misconduct, because nothing will become public until the ethics commission feels satisfied, after a preliminary investigation, about the truth and relevance of what was reported. An anonymous tip is far better than someone filing a frivolous complaint and publicizing it, putting doubt in the public's eyes before the ethics commission even has a chance to consider it, not to mention investigate it. A tipper is less likely to act for partisan or personal reasons.

[Jacksonville has an excellent hotline program](#) overseen by the city's ethics officer. The webpage for the hotline has a link to an 11-page [Hotline Procedures Manual](#), which is a good place to look for ideas. It also includes a link to Florida's whistleblower protection law. The hotline number is clearly presented on [the ethics office's homepage](#).

Kansas City/Wyandotte County, Kansas has [a good webpage for its ethics hotline](#), which is overseen by its Ethics Administrator. The page has directions for all forms of inquiries and complaints.

But not only big cities and counties have hotlines. For example, Coronado, California (pop. 25,000) instituted one in 2010. The only problem with it is that [the webpage](#) doesn't say who answers the hotline and what happens with the information. Since it appears on the city manager's section of the website, one wonders whether city employees feel comfortable calling the hotline.

Many jurisdictions contract out their hotline to a company that specializes in hotline management. Tulsa is one of the larger cities to do this. It does a good job on [its hotline webpage](#) to describe the kinds of conduct to report, but it says nothing about who will investigate the information provided or what else might happen. Atlanta contracts out its [Integrity Line](#), as well.

See [Atlanta's excellent report on its hotline](#). One thing that is clear from this report and what ethics officers have told me is that the great majority of ethics hotline calls do not involve allegations of ethics violations. They involve all sorts of misconduct, and most tips are referred to departments, agencies, human resources, the inspector general or auditor, and criminal authorities. But hotlines are still very useful for ethics, preventing many

irrelevant complaints from being filed and making the ethics program visible to and respected by the public. It also helps ethics staff to form relationships with officials and employees throughout the local government, which can be very valuable during ethics investigations. This is one reason to keep the hotline in-house.

Hotlines also provide ethics commissions with a great deal of information about patterns of conduct that may be legal, but create an appearance of impropriety sufficient to lead people to call a hotline. Hotline calls are a valuable way for an ethics commission to learn about patterns of conduct, discuss them, hold a hearing about them, and decide whether to investigate them, make recommendations for new laws to deal with them, or turn the information over to civil or criminal authorities for investigation and possible enforcement. In other words, hotlines are an ethics commission's window into institutional corruption, into the norms of the local government's ethics environment, the unwritten rules, patterns of conduct, and intimidation tactics.

One problem with hotlines is that those with information may not trust the ethics officer to pursue a tip, and will feel helpless because they may never know what the ethics officer or commission did or why. To put people more at ease, it is valuable to include on the ethics commission website's discussion of anonymous tips the fact that a tipper can follow up with calls to the ethics officer to see how the matter is proceeding. The discussion should make it clear that the ethics officer will be making a record of the information given, and the date of the call. The tipper may simply identify himself as the person who called about the matter on such-and-such a date, and the ethics officer can keep him informed. Knowing this will make many potential tippers feel less helpless and, therefore, more likely to contact the ethics officer with important information.

A hotline is not a luxury for big cities and counties. It is a valuable tool that can make a big difference in a local government's ethics environment. It is impossible to have a comprehensive ethics program without a hotline.

C. Whistleblower Protection

Although heroes to many ordinary people, whistleblowers are often considered by leaders of their organizations as snitches, egotistical malcontents, or crusaders seeking fame. However, according to James S. Bowman, in his essay "A Whistle-Blowing in the Public

Service: An Overview of the Issues” (1980; included in Willa Bruce ed., *Classics of Administrative Ethics* (Westview Press, 2001)), government whistleblowers are usually middle managers with no record of political activism or animosity toward government. They are conscientious, not radical. Bowman calls whistleblowing a conservative act that “seeks to restore, not change, a pre-existing condition.”

But in reporting misconduct, the whistleblower is usually violating the organizational values of obedience, loyalty to the team, and sanctity of the organization. The whistleblower is also enraging the individual(s) he charges. It should never be underestimated how much officials who participate in ethical misconduct will do to keep that conduct under wraps. There is no more powerful conflict than that between the public interest in enforcing ethics and criminal laws and an official’s personal interest in not being charged with an ethics or criminal violation. The retaliation that occurs or is threatened is one of the worst kinds of ethical misconduct. And the fear of retaliation is the principal thing that prevents the reporting of ethical misconduct and, therefore, its enforcement and prevention.

Local government employees who make anonymous tips on a hotline are still not assured that action will not be taken against them in retaliation, since those accused of misconduct will sometimes be able to guess who “spilled the beans.” And where anonymous tips are not allowed, employees have reason to be afraid to file a formal complaint and often to even raise an issue regarding the misconduct of officials and of high-level employees. Doing your duty by reporting misconduct can destroy your career not only in your own city or county, but elsewhere as well.

Therefore, without whistleblower protection (especially where there is no hotline), the people who best know what is going on in any local government will be unlikely to come forward with reports of misconduct. It is difficult enough to betray the strong feelings of loyalty that exist in most workplaces. It is almost impossible to speak out when it endangers your job and pension, when it threatens your family and your career. This requires a great deal of [moral courage](#).

When whistleblowers are protected and have a relatively safe way of reporting misconduct, officials will know their violations might be reported and, therefore, will be more likely to act consistent with the ethics code. Another way of putting this is that

officials' personal interest in protecting themselves will be closer to the public interest in their dealing responsibly with their conflict situations.

Many states have whistleblower protection provisions, but these are often weak or not clearly applicable to ethics tips and complaints. Also, they are often limited to reinstatement of a whistleblower, and provide no process for enforcing against retaliation. If a local government does choose to depend on an applicable state statute, that statute should be included in its entirety in the ethics code, so that it can be easily located by anyone who considers reporting misconduct. But just because there is a state statute does not mean that a local government cannot improve on it by placing a stronger provision in its ethics code.

Here is the City Ethics Model Code whistleblower protection provision:

1. Neither the city/county nor any person, including officials and employees, may take or threaten to take, directly or indirectly, official or personal action, including but not limited to discharge, discipline, personal attack, harassment, intimidation, or change in job, salary, or responsibilities, against any official, employee, or other person (or against any member of their family) because that person, or a person acting on his or her behalf, (a) reports, verbally or in writing, or files a complaint with the Ethics Commission regarding an alleged violation of this code, or (b) is requested by the Ethics Commission to participate in an investigation, hearing, or inquiry, or is involved in a court action relating either to the alleged violation or to evidence presented or given as part of an Ethics Commission investigation or hearing. A violation of this section is a violation of this code.

2. Anyone who alleges a violation of subsection 1 may bring a civil action for appropriate injunctive relief, or actual damages, or both within ninety days after the occurrence of the alleged violation. A court may order reinstatement of the plaintiff, or the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the plaintiff all or a portion of the costs of litigation, including reasonable attorney fees and witness fees. The initiation of such litigation is not a violation of the confidentiality provisions in §100.8 or §213.9.

A whistleblower protection provision should protect not only government employees and officials, but also consultants and employees of contractors, developers, and

others. The provision should cover acts not only by individuals, but also by the local government, because officials usually insist they were acting on behalf of the government, even when they were actually retaliating for personal reasons. The provision should cover not only action but also threat of action, and it should cover both direct action and threats and the action and threats of others done on behalf of officials or others. For example, if an official convinces (or tries to convince) another official's outside employer to fire her, this is an act of retaliation even if the government itself was not involved.

Another form of indirect action that should be expressly included in a whistleblower provision is action involving an employee or official's immediate family members. It can be very difficult to retaliate directly against an employee protected by a whistleblower provision and union rules, but very easy to retaliate against her husband or son, who works outside of government.

The biggest problem is the word "because." It can be hard to prove that the action was done because of an employee's involvement in an ethics matter. Therefore, the burden should be placed on the official to show that the whistleblower's involvement in the ethics matter was not even a contributory factor.

It's important to include in a whistleblower provision retaliation not only against those who report misconduct, but also against those who testify to investigators or at a hearing or inquiry. Once an investigation begins, the pressure on government employees not to cooperate can be very strong. They need to be assured that there will be no retaliation if they testify.

Santa Fe expressly states in its whistleblower provision (§1-7.7.L) that, "The outcome of the original ethics complaint shall not be deemed relevant to the complaint of retaliation itself." Otherwise, officials may argue that retaliation is acceptable because the complaint was dismissed.

Some whistleblower provision include an exception for those who make accusations that are not only false, which can be done by mistake, but can be proven to be malicious ([see below](#) for what it means to be malicious). Even in such instances, action should be taken carefully, officially, after public hearing (even when there are confidentiality rules), and with due process. No matter how malicious one believes a whistleblower to be, many people will feel the whistleblower has been acting selflessly (but mistakenly) and that how

the whistleblower is treated says far more about the ethics environment of the government than about the whistleblower.

San Diego provides pre-whistleblower protection, as well. That is, it prohibits action by officials to “discourage, restrain, or interfere with any other person for the purpose of preventing such person from acting in good faith to report” misconduct to the appropriate authority (§27.3573(a)). This is a good idea. Intimidation occurs both before, during, and after an ethics complaint is filed or a hotline call is made.

In a jurisdiction that does not have a pre-whistleblower protection provision, intimidation of subordinates can also be dealt with through an ordinary conflict provision, especially one, like the City Ethics Model Code’s, that uses the language of misuse of office and benefits. There is little doubt that an official who attempts to intimidate a subordinate into not reporting his misconduct (formally or informally) is misusing his position for the purpose of not being sanctioned and not losing his reputation, which are very valuable benefits.

It is a bad idea to add other sorts of conditional language. For example, in 2012 Chicago added a whistleblower provision, but limited its protection to retaliation for the disclosure of evidence that poses “substantial and specific danger to public health or safety.” This language makes it easy to deny protection to a whistleblower. Language like this will only cause those with information about possible ethical misconduct not to report it, out of fear that what they are reporting will not be considered a substantial danger to public health or whatever other conditional terminology is used.

One form of action that cannot be prohibited by a whistleblower protection provision is a suit, for defamation, emotional distress, loss of employment, or other alleged harm done by reporting misconduct. An official can make life very difficult, and expensive, for a complainant by filing what is known as a SLAPP suit (SLAPP stands for Strategic Lawsuit Against Public Participation). Wikipedia defines SLAPP suits as suits “intended to intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.” The goal is not to win the suit, but to prevent speech or action, in this case, to prevent the complaint from going forward. The threat of litigation will similarly prevent an individual from filing a complaint in the first place. A few officials, especially those who are lawyers, file suits (usually defamation suits) frequently as a form of intimidation not only against complainants, but against anyone who

might speak out against them. But a threat of a defamation suit is usually enough. (For more information, see [the section on SLAPP suits](#) in the final chapter.)

Less frequent, but sometimes a serious problem, is the situation where an official retaliates against a complainant, tipster, or witness by having the individual arrested.

There is a way to prevent SLAPP suits from having such a damaging effect on an ethics program. When the subject of legal fees comes up in drafting an ethics code, or ethics reforms (see [the section on legal fees](#)), it would be appropriate to include in this discussion legal fees for a complainant who has been sued with respect to an ethics proceeding. If a court finds the complainant's allegations were false and malicious, it might be appropriate for the complainant to pay the fees in the suit. But if an ethics commission found probable cause, the city or county should not only pay the complainant's legal fees, but join any related suit as a party. Knowing that this would happen would cause an official to think twice before filing a SLAPP suit against a legitimate ethics complainant, and would allow someone who has had a SLAPP suit filed against him go ahead and file a complaint anyway or not try to get the complaint dismissed in order to get the SLAPP suit dismissed. By taking away the power of a SLAPP suit, while having no effect on legitimate suits, such a rule on legal fees would go a long way toward preventing the filing of SLAPP suits that relate to government ethics matters.

The fact that retaliation against an ethics whistleblower is such a serious offense makes it important that ethics commissions have some serious sanctions in its quiver. But since most ethics commissions have little or no power to penalize, it is important that whistleblower protection not be limited by having retaliation constitute an ethics violation. Whistleblowers must also be expressly allowed to file a suit against the retaliator to prevent, reverse, or otherwise remedy the effects of the retaliation.

Whistleblowing is necessary because in most local governments there are no formal or even informal channels for criticizing the handling of conflict situations or reporting misconduct without the fear of retaliation. Common solutions, such as suggestion boxes and open-door policies, not only are insufficient, but in unhealthy or even moderate ethics environments they can be perceived as traps. Whistleblowing can be prevented only when there is trust in officials and a belief that they welcome criticism and reports of misconduct, and will reward those who criticize and report rather than retaliate or accept others' retaliation against them. Employees need to know they are safe to openly criticize and

discuss sensitive issues, especially the conduct of officials and superiors. In such a healthy, mature ethics environment, there is rarely a need to go beyond a report to one's supervisor or a discussion among board members. A healthy ethics environment takes a great deal of the burden off the ethics commission, allowing it to focus on training and advice rather than enforcement.

It is important to recognize that there is one provision in many ethics codes that is itself used to retaliate against whistleblowers. Many ethics codes contain a confidential information provision, which makes it a violation to disclose confidential information (the best practice is to prohibit only the use of confidential information for the financial benefit of oneself or others).

When misconduct (ethical or other kinds of misconduct) is reported, the report often includes information that is arguably confidential. If no show of a financial benefit is required, the whistleblower can be charged with an ethics violation for having disclosed confidential information, even if it was disclosed only to an ethics officer or commission ([this occurred in San Diego](#), for example).

And even if a show of a financial benefit *is* required, it may be argued that the employee disclosed the information in order to get the protection of the whistleblower provision, that is, in order to prevent himself from being fired. Preventing oneself from being fired could arguably be considered a financial benefit to an employee, but this sort of benefit is clearly not what the ethics provision was intended to apply to. An ethics commission should dismiss such an allegation.

A variation on this is for a respondent to charge, in an ethics complaint against the complainant, that an employee who filed a complaint was conflicted because, as a Stamford, Connecticut ethics respondent alleged in 2010, "in filing a complaint he sought to preserve his employment with the city and therefore influence [the respondent] 'for his own financial gain.'" The respondent's complaint was rightly dismissed.

D. Official Protection

The flip side of whistleblower protection is official protection, that is, the various ways of penalizing people whose reports of ethics violations include erroneous information.

One form of official protection is included right in many whistleblower protection provisions: taking away a whistleblower's protection if the allegations made by the whistleblower are found to be false and malicious. This is essentially a defamation standard. The important word "malicious" requires the official to prove that the whistleblower or complainant intended to harm the official by making false allegations. But the malicious standard is not as daunting as it first seems, when one considers that someone who argues he was falsely defamed can ask that the allegedly false statement be retracted and, if it is not, even if it is only because the reporting employee may have got his facts wrong or misunderstood the situation, the failure to retract is accepted as evidence of maliciousness.

The best form of official protection is seeking ethics advice when an official is not sure how to handle a conflict situation. All conversations about official protection should begin with ethics advice.

The second best form of official protection is having the local government pay reasonable legal fees, only with respect to an ethics proceeding, if the ethics commission finds that there was no probable cause. This is the protection provided in City Ethics Model Code Section 213.14 (see [the section on legal fees](#) for more about this).

A third acceptable form of official protection is to provide an official with a cause of action against a complainant if an allegation was made with the knowledge that it was without foundation in fact. It is not enough that false statements appeared in a complaint, because often a complainant expresses himself poorly in a complaint and unknowingly makes false statements. Or he makes statements he believes to be true, but turn out not to be. It is also inappropriate that there be a cause of action for a "frivolous" complaint, because this term is vague and it usually includes complaints that do not state a violation of the ethics code because the complainant is thinking "ethics," not "conflicts". "Frivolous" complaints are usually the result of ignorance, not malice.

A fourth form of official protection is to create a specific cause of action for costs and legal fees for a respondent, which would allow a court to award these damages. Such a cause of action might make officials' defamation and SLAPP suits appear inappropriate and unnecessary. But such a cause of action takes the ethics commission out of the proceeding, allowing an official to sue even before an investigation is done, thereby causing many complainants to ask to withdraw their complaints in order to protect themselves from the costs of a suit. Therefore, such a suit can have the same effect as a SLAPP suit. A well-

meaning employee should not have to face the prospect of a suit and damages for doing his government and community a service, just so that officials can feel protected. As I said at [the start of this section](#), they can adequately protect themselves by seeking ethics advice when they are not sure how to handle a conflict situation.

When the topic of official protection is raised in the drafting or amending of an ethics code, as it often is by officials who fear a “witch hunt,” it should be pointed out that the alternative to ethics complaints is accusations on blogs and in the news media, both through letters to the editor and in articles. Creating a forum where allegations regarding conflicts can be handled formally, professionally, and neutrally, as well as providing neutral, timely, professional ethics advice and training, provides an official a great deal of protection. Ethics proceedings are rarely complex, sanctions are usually limited, most ethics allegations are quickly dismissed and, where they are not, the usual result is a settlement rather than a public hearing.

Officials generally do not need protection against legal fees. The cost of defending against an ethics complaint should be relatively small, especially if probable cause is not found. Sometimes respondents do run up big legal bills, even before a probable cause finding, but this is usually done out of over-reaction, the belief that the fees will be paid by the government, and/or to file suits against complainants either in retaliation or in an attempt to stop an ethics proceeding for reasons that have nothing to do with the truth of the allegations. Dealing responsibly with ethics allegations is as much an obligation of a government official as dealing responsibly with conflicts. Any protection of officials should not cover the irresponsible handling of allegations against them.

Officials are protected by the ordinary course of an ethics proceeding. When a false ethics complaint is dismissed, as it almost always is, this vindicates the respondent and destroys the complainant’s reputation, not the respondent’s. What more protection does an official really need? More protection generally means retaliation.

XII. Ethics Reform

Many people reading through this book will be playing or wanting to play a role in furthering ethics reform in their local government, whether as members of an ethics commission, an ethics task force, or a charter revision commission, members or staff of a good government or other citizen organization, citizens, or government officials or employees. Anyone seeking ethics reform will find this chapter among the most valuable in this book.

Ethics reform is difficult. The costs of ethical misconduct and the benefits of preventing it are (1) unclear and (2) spread throughout the community. Therefore, there is no clear interest group for ethics reform beyond good government groups, unless things get so bad that local businesses are concerned that the city or county's poor reputation will hurt business. Anti-tax groups respond to costs spread throughout the community, but those numbers are more clear. They sometimes favor ethics reform, but their concept of reform usually goes far beyond conflicts of interest.

And yet there is ethics reform. It happens in many ways. It happens through the perseverance of good government groups or via a local citizen group or coalition initiative. It happens through the election of one or more candidates who place ethics reform high on their list of priorities. It happens upon the recommendation of an ethics commission (the District of Columbia ethics board made extensive reform recommendations in 2013) or of a grand jury, an inspector general, auditor, or comptroller, a city or county attorney, an attorney general, a special task force (Chicago's mayor appointed one late in 2011, and most of its recommendations became law in 2012 and 2013; a task force appointed by Phoenix's mayor made reform recommendations in 2013), or any individual or body that investigates misconduct and makes such recommendations.

Ethics reform happens because the mayor pushes for it (San Antonio's mayor got the process rolling in 2013). It happens because the state requires or recommends that local governments pass an ethics code, providing language or minimum requirements. It happens as part of the drafting of a city or county charter, a change in form of government (as happened in 2011 in Cuyahoga County, OH), or a city-county consolidation process (as

happened in 1997 in Kansas City/Wyandotte County, Kansas). Or it happens because the local legislative body, all on its own, decides it's time.

The drafting of an ethics code, charter amendments, executive orders, or an ethics pledge can be done by the legislative body, by the mayor's office, by the city or county attorney's office, by a charter revision commission, by a special ethics advisory committee or task force, by the ethics commission, or by one or more good government groups.

Ethics reform can take place at the city level, the county level, the regional level, or the state level, or involve multiple levels.

What this book does is provide the information necessary to not only seek ethics reform, but to do it in an informed manner, with all the best practices, alternatives, language, and arguments at reformers' fingertips.

A. Scandals

Although there are many ways to create or improve a local government ethics program, there is only one principal spark: a scandal involving a local official. A scandal is the best way to get an ethics program started or to make improvements to an existing program, but it is usually the worst way to get an effective, comprehensive ethics program, which is what really matters.

One reason is that the majority of scandals that lead to government ethics reform have little or nothing to do with conflicts of interest. They involve everything from a sex scandal to embezzlement. Often they involve crimes such as bribery and kickbacks. Only sometimes do they involve giving a contract to a family member or taking a gift from a developer.

In Luzerne County, Pennsylvania it took a horrible scandal involving judges unjustly sending juveniles to a detention center in which they held a financial interest. In Bell, California it took the revelation that the top officials were paying themselves huge salaries.

More often, it takes a series of ethics and/or criminal scandals, as in Palm Beach County, Florida and Washington, D.C.

Sometimes a minor scandal will give a challenger for mayor or council the opportunity to run on an ethics platform. But even if the challenger is elected, a minor scandal is not usually enough to turn the platform into reality.

Sometimes a big scandal at the state or local level can lead to local government ethics reform movements throughout the state or the area. This happened, for example, in Illinois after the scandal involving Governor Rod Blagojevich in 2008. It also happened in Rockdale County, Georgia in 2011, after a big scandal in neighboring Gwinnett County.

There are two major problems with using scandals to create or reform local government ethics programs. One is that reformers, inside and outside government, have little or no control over scandals. Unless they have special information that they can turn over to the authorities, they can't create scandals. And even if they have special information, they can't ensure that an investigations will be made or that, if one is made, it will be successful. Scandals are a gift to ethics reform. However, they cannot be part of a reform strategy. The biggest problem is that there usually is no reform movement prepared to accept the gift of a scandal, so the response to the scandal is politicized and focused on limited changes before reformers can get informed on the topic and involved in a meaningful way.

Minor scandals are usually not enough. Even where bloggers do their best to disclose ethics problems in their local government, where there is no enforcement, only accusations, their work rarely leads to ethics reform. Or it can take a long time. Also, bloggers are usually much better about uncovering misconduct than they are about recommending an effective government ethics program.

The second problem is that scandals usually lead to two sorts of ethics reform, neither of which is optimal. Sometimes they lead to limited reforms that respond, or appear to respond, to the particular scandal. If it has to do with a family member, a nepotism provision is added or strengthened. If it has to do with a contract, the rules for bidding out contracts are tightened. If it has to do with over-sized campaign contributions, a contribution limit might be instituted. The fire is put out, and that is all. And since one party or faction is usually involved in the scandal, the ethics reform takes on a highly partisan hue, which does not bode well for its future, that is, for when the other party or faction takes power a few years down the road.

Take the ethics reform bill proposed in Utah in 2009. First, here's a list of Utah's ethics scandals in 2008:

A former state representative was accused of attempted bribery.

A state representative was accused of threatening public employees and lobbyists.

A state senator's actions on behalf of specific companies were questioned.

Another state senator's letter to a judge on behalf of a friend temporarily cost him the chairmanship of the Judicial Confirmation Committee.

It will come as no surprise that the limited ethics reform bill had a no bribery provision, a no threatening of employees and lobbyists provision, a may not request a state entity contract with a specific company provision, and a no intervention in legal proceedings provision. It isn't that these are poor ideas. It's just that they do only what the state legislature felt absolutely obliged to do to make it look like they cared about what was happening in the legislature. In fact, a lot more was most likely going on that remained legal but not ethical, and nothing was done to prohibit it. And no comprehensive ethics program was created.

Here is what Massachusetts state representative Jennifer Callahan wrote in 2009 following scandal-driven ethics reform:

Ethics reform has never been about addressing singular incidents, it has always been about changing the culture of how we work on behalf of the people. Legislative leaders have claimed that the best components of all ethics reform bills have been incorporated into this package. Yet, in secret meetings, behind closed doors, the best and most meaningful elements were stripped away or left out.

Change that arises from scandal points to a problem (often a problem irrelevant to government ethics), but not to an effective solution. When negative emotions are involved, the solution, according to Martin Seligman (quoted in Chip and Dan Heath, [Switch](#) (Crown, 2010), p. 121), is essentially removing a stone from one's shoe, not fixing the shoe itself. The response to negative emotions lacks creativity, flexibility, or ingenuity. So the results are not usually effective or well thought out.

Negative emotions can also be harmful to ethics reform after the reforms have been accomplished. Ethics programs that are created to prevent further scandals usually focus on enforcement. And it is enforcement that most strongly elicits the negative emotions

(mostly fear of being the subject of false allegations) that lead officials to undermine an ethics program.

Negative emotions are not the way to improve a government ethics program. This can be done only by tamping down emotions and focusing on the positive feelings of pride and professionalism, that is, feelings associated with one's identity. A picture needs to be painted of the public respecting its officials and seeing them as heroic professionals willing to give up benefits to themselves and those most important to them. This identity is not only valuable in the community, but can also be valuable when seeking state or federal office later on in one's political career. But this isn't easy to do without leadership from within the government.

The other sort of ethics reform that comes out of a scandal is the drafting of an ethics code where there wasn't one before. This is good, but too often the goal of the code is to look like something is being done, "getting tough" on misconduct. The focus is on ethics provisions and enforcement, not on an ethics program. Ethics training is rudimentary at best, ethics advice comes from the city or county attorney if it's even mentioned, there is little or no disclosure, and the ethics commission, if one is created, has no independence or authority.

A scandal often turns government ethics into a political issue that is dealt with rapidly rather than well. When this is the case, its principal purpose is to show that one side is better at protecting the public than the other, while actually trying to skewer the other side. Politicians insist that it's better to have something quickly rather than the perfect code (rarely do they speak in terms of ethics programs). The code can be improved in the future, they say. The new code is often drafted not by good government groups, ethics professionals, or a special advisory committee with expertise and no personal interest in the results, but rather by high-level officials, their staffs, and the city or county attorney's office, that is, by individuals who have no expertise, who will be subject to the rules and the ethics commission they create, and who are focused on particular problems rather than the creation of a good, comprehensive ethics program.

But if one has been in favor of ethics reform all along, it's hard to look a gift scandal in the mouth. Unfortunately, it can also be hard to get heard above the din of politics, the quick, partial solutions that are thrown out, and the accusations that reformers are unreasonable in their demands and that their recommendations would cost the public an

enormous amount of money, which would be ill spent. Reformers can try to slow the process down by insisting on a task force to make recommendations, a task force that includes reformers like themselves (see [the section on task forces](#) below).

The best thing is to start ethics reform efforts while there is no scandal. As a Greenwich, Connecticut League of Women Voters member said, “The league feels that the best time to look at ethics is when there aren't any scandals so we can all look at them with cool heads.” Even if the effort does not work in the short run, the personnel, the expertise, and the recommendations will be there when a scandal hits. This should be the principal long-term goal of ethics reformers. Patience is a great virtue in this endeavor.

For those seeking ethics reform without the benefit of a scandal, it is important to acknowledge that relatively high public trust is not evidence that a government's ethics environment is good. It could be that ethical misconduct has been kept secret in a very internally loyal organization that provides good public services. Or many people may know about the misconduct, but do not see it as corruption, but rather how government operates or what is owing to a new group that has taken power.

It is also important to acknowledge that an improved ethics program may, in the short run, through disclosure and enforcement proceedings, undermine public trust, even though it leads eventually to a healthy ethics environment. People should be prepared for this to happen, or it might lead to strong opposition to the ethics program early in its existence.

B. Origin Stories

A good way to see the wide range of options in attaining effective ethics reform is to look at the origin stories behind some of today's better ethics programs.

1. Atlanta

According to Harvey K. Newman and Jeremy Greenup's [Ethics Case Study](#) (2009), before the 2001 mayoral election, ten Atlanta officials and contractors (including the chief operating officer and the chief administrative officer) were convicted of corruption-related crimes, and the feds were investigating the then mayor (he was later convicted of tax

evasion relating to the taking of bribes and kickbacks from contractors given no-bid contracts).

Shirley Franklin was elected mayor with the slogan, “I’ll make you proud.” She promised to appoint an ethics task force to recommend changes in the city’s ethics code, and she did this less than a month after winning the election.

The task force worked quickly. It filed a report within three months, recommending the creation of an independent ethics commission with teeth. Four of the commission’s five members would be selected by community organizations (in the end, all members were). The task force also recommended the hiring of an ethics officer to provide ethics training and to assist the commission.

It was fortunate that half the council was new and committed to preventing more corruption. There was still much council criticism of the recommendations, but in the end the ethics program was actually stronger than what had been proposed by the task force.

A principal reason for this was that, while the council was debating the recommendations, the mayor issued an executive order which applied only to city employees. The executive order jumped the gun by requiring the appointment of an ethics officer (temporarily an assistant city attorney), the establishment of a hotline, and a total gift ban. This upped the ante for the council, effectively daring them to pass weaker provisions to apply to the council and its staff.

The result was that the ethics commission was given the authority to hire the ethics officer and was also given the authority to impose fines, although only up to \$1,000.

The mayor added some ideas, including “report cards” on departmental and elected official compliance with ethics provisions, as well as a formal review of ethics policy every five years. When the council weakened the gift ban by a vote of 11 to 2, the mayor vetoed the amendment, and the veto held by one vote. The prevention of backsliding is nearly as important as passing reforms in the first place (see [the section on backsliding](#)).

This origin story has a lot of the most important factors required for true ethics reform: a scandal, committed leadership, and an independent body making recommendations and taking its job seriously.

2. Philadelphia

As in Atlanta, there was a big scandal in Philadelphia. An FBI investigation uncovered a corruption scheme led by Ron White, a mayoral fundraiser and friend. The investigation came out during the 2003 mayoral election. The city treasurer was convicted on 27 charges of corruption, followed by further prosecutions of friends and advisers to the mayor.

The Philadelphia ethics reform took place in three parts. The first part, in August 2004, consisted of two mayoral executive orders establishing an ethics commission with staff to oversee training, advice, and financial disclosure. It had no enforcement authority, and it was part of the office of the mayor, who had been re-elected in 2003.

The second part, in December 2005, consisted of laws passed by the council. One of the laws, to establish an independent ethics commission, required a charter amendment. This amendment was approved by voters in May 2006.

Michael Nutter, the council member primarily responsible for the 2005 ethics reforms, became mayor and, in September 2008, created a Task Force on Ethics and Campaign Finance, seven of whose nine members were appointed by community organizations. The purpose of the task force was to recommend further improvements to the city's ethics program. It filed [its first, comprehensive report](#) in December 2009.

Through all these stages, a local good government organization called the [Committee of Seventy](#) put constant pressure, including numerous reports and testimony, on the mayor and council to continue to improve the city's ethics program.

3. Palm Beach County, Florida

Three county commissioners and two council members from the county's largest city pled guilty to using their offices to enrich themselves. *Time* magazine called the county "the new capital of Florida corruption."

The first response was the creation of a grand jury to make recommendations for changes to provide oversight, transparency, and accountability in the county government. Here are its five principal recommendations, from [its May 2009 report](#):

1. Strengthen state criminal statutes and county ordinances to address conflict of interest, gratuity and theft of honest services by public servants;
2. Fully fund an effective independent "watchdog" entity to monitor the activities of the county government;

3. Increase transparency, accountability and oversight of county matters involving land transactions;
4. Eliminate bond underwriting by rotation and adopt the Government Finance Officers Association (GFOA) recommended practices; and
5. Eliminate the current system of commissioner-based discretionary funding of county recreation and infrastructure projects.

The first response to these recommendations was talk about not being able to afford these ethics reforms, questions about agency independence, and stalling from some county commissioners.

A coalition of business groups, Leadership Palm Beach County (affiliated with the county's chambers of commerce), the Palm Beach County Business Forum, the Palm Beach County Economic Council, and the Voters Coalition, formed the Palm Beach Ethics Initiative to push ethics reform. It wrote [an ethics pledge](#), and got dozens of local officials to sign it. A committee was formed to study best practices in ethics, survey opinion leaders, and hold a community-wide forum on ethics in June 2008 (the forum became an annual discussion of ethics reform). The announced goal of these programs was to change the culture of ethics in the county.

The county commission passed an ethics code in December 2009, creating both an independent ethics commission selected by community organizations, and an inspector general, both funded by a fee on county contracts.

The biggest complication was having the ethics program apply to independent agencies and the cities and towns in the county. This required a referendum, which passed in November 2010 (it was approved by 72% of those voting). The citizens of every town and city in the county voted to have the ethics program apply to their municipality. A new ethics code applying to all local governments in the county was drafted in 2011, and the county began entering into interlocal agreements with the local governments (see [the section on regional and county ethics commissions](#) for more on interlocal agreements).

As can be seen in both Philadelphia and Palm Beach County, good government organizations can often provide the necessary leadership for ethics reform when the government itself does not provide it. Task forces, pledges, surveys, forums, reports,

testimony, all these are useful means to both attain ethics reform and to keep the process going after the first laws are passed.

It's important to remember that ethics reform does not end with the passage of laws. The laws can be improved and applied to more agencies and local governments; the ethics program's budget needs to be protected and, with additional laws, increased; and backsliding needs to be anticipated and prevented, including such things as budget cuts, failure to appoint ethics commission members, interference by officials and government attorneys, suits attacking the ethics commission's jurisdiction, and amendments to the laws. It is the rare ethics commission that does not find itself at war with the local legislative body, at least over application and enforcement of the ethics code and over funding.

C. Forms of Reform

Ethics reform can take several different forms. The ethics code is the form most people think of, but an ethics code can take several forms itself: a new ethics code in the form of an ordinance; amendments to an existing ethics code; a mandated or recommended state model (with or without additions or subtractions); a charter amendment; a referendum; or one or more executive orders. These forms can be combined, and the order in which they are instituted can vary. A mayor can start the ball rolling with an executive order or two, followed by an ordinance, ending with a charter amendment. Or a charter revision commission, or a referendum movement, can start the ball rolling with a charter amendment that requires the legislative body to pass an ethics ordinance.

Another popular form of ethics reform is the ethics pledge. This can be used, as it was in Palm Beach County, to get a lot of officials to show support for ethics reform. Or it can be the end result, which means that no ethics program is created.

Too much emphasis is placed on laws and pledges. The real focus should not be on ethics provisions, but rather on ethics programs. Ethics programs consist not of laws, but of resources: ethics commission members, staff, a website, training and advice. Too many people believe that ethics guidelines are enough to change an unhealthy ethics environment. They are not. It's not just that the possibility of enforcement is necessary to keep everyone honest. It's that a few guidelines are not enough to ensure that officials and

employees understand government ethics and make the best decisions when conflict situations arise. What is needed is training, the availability of independent, professional advice, and the three forms of disclosure. Too many ethics codes provide for none of these, or they provide for some, but do not provide the necessary resources to accomplish them. For example, a training requirement is added, but not the necessary funding, so that training means just a wasted hour lecture from someone in the city attorney's office.

Ethics reform can include changes to other laws as well, such as the procurement and land-use ordinances and procedures, council discretionary budget rules, and grant-making procedures.

1. Bottom Up or Start at the Top?

There are two ways to approach the reform of an ethics program. One is to add a few things that currently seem important. This is starting at the bottom and working your way up.

The other approach is to start at the top, considering the ethics program as a whole, with all the possible provisions and aspects of an ethics program that appear, say, in this book. Then work your way down, that is, decide which provisions are inappropriate to the particular government, which aspects of an ethics program the government cannot afford, and which provisions are already covered well at the state level or are not permitted by state law.

When the Chicago Ethics Reform Task Force asked me in 2012 what I thought was the single most important thing the task force should do, my answer was to approach ethics reform from the top down. Needless to say, it took a bottom up or piecemeal approach. The work that the task force did is praiseworthy, but [their recommendations were disappointing](#).

The start-at-the-top approach might mean more work, but it is the professional way to consider best practices and seek to create the best, most comprehensive ethics program one can afford (just as a local government decides to build the best school curriculum or waste treatment plant it can afford). This approach requires that every aspect of an ethics program be openly discussed, so that there is official explanation and public input on all the basic ethics provisions, and all the administrative and enforcement mechanisms, whether

they are accepted or rejected. Otherwise, many of the most important reforms are never mentioned and never discussed.

If a special committee is given the job of recommending ethics reforms, it should take this approach and be required not only to recommend provisions, but also to explain to the public and the local legislative body why it chose not to recommend other approaches and aspects of a comprehensive ethics program. Or it can recommend a full range of reforms, carefully prioritize them, and clearly explain that it realizes not all the reforms will be immediately implemented, but at least the others will be there to consider the next time there is interest in improving the ethics program.

In contrast, a bottom-up approach is a lazy, unprofessional, short-sighted way to tackle ethics reform. Only a few piecemeal changes are discussed. There is no vision of what a government ethics program should look like, no clear goals, and nothing that will teach officials, the public, or the media about government ethics. Sadly, the bottom-up approach is the far more common approach.

The start-at-top-approach also shows how much one aspect of an ethics program depends upon another. For example, it is of little value to recommend that an ethics commission be permitted to settle ethics proceedings if the ethics commission does not have the authority to enforce ethics provisions. The reason is that there is little incentive to settle with a body that has no authority.

Another example. The goal of depoliticizing the ethics process includes not only the independence of the ethics commission and its staff from anyone under its jurisdiction, but also taking council members out of administrative responsibilities, including land use matters, procurement, permits and licensing, areas fraught with the sort of pay-to-play opportunities for elected officials that lead to so much ethical misconduct.

And transparency cannot be brought to just one piece of the ethics process. A determination to bring transparency to government ethics requires not only making advisory opinions and ethics proceeding documents available to the public (and to officials), but also requires more transparency in the areas where ethics violations most frequently occur, such as land use and procurement, and more transparency within the government, so that, for example, documents cannot be hidden simply by going through a government attorney. Transparency can also be furthered by requiring applicants to disclose their special relationships with officials and employees.

Another example would be the creation of a hotline, which goes hand-in-hand with whistleblower protection and can be made more valuable by requiring government officials and employees to report possible ethical misconduct they are aware of.

Another advantage of the start-at-the-top approach is that, after creating a reject pile that includes a lot of good things that the local government would like to do, but feels it cannot afford, the local government may come to realize that it can get many of these things by cooperating with neighboring local governments, or pooling the resources of all the local governments in the county. This would save every town time and money, and give each of them not only the best possible ethics program, but also one that is independent of each local government, that is, one that citizens can trust and that officials and employees will use without concerns about politics.

A decision to take the start-at-the-top approach is the most important decision in ethics reform. No government should be allowed to get away without a serious, public consideration of this approach.

2. Executive Orders

Executive orders are a good way to get ethics reform going, but they should be used only for this purpose. One principal reason is that they can be applied only to employees, not to elected officials, many board and commission members, or independent agencies. An ethics program that does not apply to everyone, especially those with the most power to benefit themselves and those with whom they have special relationships, is not a program that will obtain or maintain the public's trust in government.

Another reason is that executive orders are usually more show than substance. They are piecemeal. They do not set up consistent, effective, and independent training, advice, disclosure, or enforcement. They often provide no enforcement mechanism for the new rules they make, or provide no funds for enforcement where the mechanism already exists. And they usually leave out, or are unable to include, the most important ethics reforms.

The impetus for executive orders tends to be (1) to make a splash when a new mayor takes office and (2) to help a mayor get re-elected after a scandal. This is not the best way of going about ethics reform, even though it can have some value. For example, in 2008, after three years of showing little interest in local government ethics, New Jersey Governor Jon Corzine suddenly made some valuable executive orders, for example,

prohibiting local government contractors from making campaign contributions. But it would have been better for him to have worked to get these rules passed by the state legislature.

Another problem with executive orders is that they are hard to find online (they are almost never included on an ethics commission's website), and there is no training program attached. Therefore, they do not even act as guidelines. They make a splash, but there are rarely ripples.

Often, an ethics commission lacks the authority to interpret or enforce executive orders. In fact, when an executive order overlaps in any way with an ethics provision, it can confuse officials and make it harder to enforce the ethics code.

And sometimes an executive order gives the mayor too much power over an ethics program. For example, a 2009 executive order by the mayor of Memphis had a new chief ethics officer report the result of an investigation to the mayor rather than to the city's ethics board. Similarly, a touted ethics program started by the city manager of Venice, Florida made him the city's ethics compliance officer. After he left his position, the ethics program died. No program should give a local government's chief executive officer power over it nor should it be dependent on any one official.

Even when an executive order sets up an ethics program independent of the mayor, it can be of little value. For example, Fort Wayne, Indiana, as of 2010, had an ethics program based on a 2001 executive order. The resulting ethics board didn't meet. Even the mayor didn't file an annual financial disclosure form until alerted by a newspaper, there was no ethics webpage, and only one indirect link to the executive order. It was a program on paper only.

One of the best uses of an executive order is to do something that specifically affects the mayor or other CEO. For example, in 2011 Chicago's new mayor, Rahm Emanuel, prohibited city employees from making campaign contributions to the mayor. Were this rule passed by the city council, it would look like an attempt to hamstring a mayor it didn't like. When a mayor does this, it sends the message that he is making a serious change in the relationship between mayor and employees. This should have an effect on all relationships between officials and subordinates throughout the government.

An interesting use of the executive order occurred in New Castle County, Delaware in 2011. The newly-elected county executive, whose wife is a land-use attorney

and the county's bond counsel, quickly made an executive order requiring his staff to exclude him from any matters that come before the government involving his wife's law firm, and giving his authority in these matters to the county attorney. In other words, he used an executive order to create a firewall between himself and his wife's work (see [the section on firewalls](#)).

The county executive was responsible enough to also bring the matter to the county ethics commission for advice. The commission said the executive order was only a "second-best solution," that the executive order should be expanded beyond specific issues in which the wife's firm is involved to include policy decisions that could benefit his wife or her firm in any way. The executive made these changes.

However, others felt that even this was not enough, and eventually the wife resigned from her law firm.

3. Ordinances

Sometimes, ethics reform begins with one or more members of the local legislative body drafting a bill, beginning a discussion about the need for a better ethics program or code, or recommending a citizen task force to make recommendations for ethics reform. This often happens after a scandal, before an election, or when newly elected officials act to fulfil a campaign promise.

Unfortunately, such draft ordinances are commonly piecemeal, unless there has been no ethics code at all. And they often get delayed in committee by those demanding stricter rules and those insisting that the rules are illegal, unconstitutional, or would prevent the local government from attracting the best officials. It is rare for any official to publicly oppose ethics reform, other than by saying that you cannot legislate ethics (not relevant) or the government has been ethical without such an ordinance (how does anyone know?).

Occasionally, on the other hand, a council majority will try to rush an ethics ordinance through, without input from citizens, good government organizations, or the local ethics commission. This happened in 2009 in Corpus Christi, when a lame-duck council called an "ethics emergency" to pass amendments to the city's ethics code to prevent council members, senior officials, and immediate family from entering into contracts with the city. The new council immediately suspended the amendments.

4. Ethics Pledges

The best way to use an ethics pledge is the way it was done in Palm Beach County, Florida: as a way for a citizen coalition to get officials to show their support for ethics reform. Such a pledge should include a promise to pass certain specified ethics laws or, better, create a specified ethics program, and fund it sufficiently.

When an ethics pledge is itself considered ethics reform, this is problematic in several ways. One problem is that ethics pledges tend to come out of the character ethics movement, which is more focused on personal integrity and a wide range of conduct than on conflicts. Therefore, ethics pledges usually blur the boundaries of government ethics, adding such areas as civility, personal conduct, honesty, and discrimination. Their goal is not to have officials deal responsibly as officials with their personal obligations, but to have officials be personally good. With such a pledge, every political and professional issue becomes an ethical issue. This raises the emotional tenor of government, without providing any real benefit.

A related problem is that ethics pledges are very difficult to enforce. Honesty is the hardest thing to enforce; one can argue forever over whether an official lied, spoke a half-truth, carefully selected some facts rather than others, exaggerated, didn't quite say what he meant to say, or was misunderstood.

Civility is equally difficult to enforce ([see above](#) for a discussion of this). And sometimes incivility is called for, for example when a chair refuses to recognize a member or unfairly cuts her off.

Even providing professional advice with respect to ethics pledges can be difficult, since some pledge provisions are vague and personal (e.g., this one from the Luzerne County, Pennsylvania ethics pledge: "I pledge to follow the highest ethical standards in my personal life, workplace, school and community organizations."), and others deal with extremely complex areas of law, such as discrimination, which no ethics commission should be asked to master.

An editorial in the *Standard Speaker* about the Luzerne County ethics pledge put the matter well:

The “Ethics Pledge” movement . . . seems too slight a remedy for what ails the county. The restoration of our public institutions will require an engaged voting public, concrete initiatives by elected officials to pass new ethics rules and safeguards, continued scrutiny by the media and willingness among citizens and public officials alike to blow the whistle on wrongdoing.

An ethics pledge can be both too little and too much, that is, it does too little and yet covers too wide a territory. It should be employed as a limited, short-term tactic, not as a goal.

Atlanta uses the ethics pledge effectively, in a completely different way. It requires all new and departing officials and employees to sign an ethics pledge. This focuses individuals’ attention on government ethics at important points in their career. The language of Atlanta’s pledges (there are [different ones](#) for employees, elected officials, and volunteer officials) helps draw attention by personalizing the ethics code. Here is a sample provision:

I will use public property, vehicles, equipment, labor, and services only for official city business and not request or allow its use for the private advantage of any individual or private entity.

Such ethics pledges focus on the most common issues in simple, clear language. For departing officials and employees, the ethics pledge is a reminder about the city’s revolving door provisions. Many people think ethics laws end when they leave public service. It is important to remind people that this isn’t so.

Another good use for the ethics pledge is by a slate of opposition candidates, who promise specific ethics reforms if they are elected. And in local governments with poor ethics programs, or none at all, some party committees require their nominees to sign an ethics pledge, vowing to follow certain guidelines the local government does not require.

With respect to citizen organizations requesting ethics pledges of officials and candidates, as in Palm Beach County, voters should be asked not to vote for anyone who didn’t sign the pledge. What if none of the candidates in one’s district sign the pledge? There is an alternative: ask voters not to vote for that position, but to go to the polls. One unpledged candidate will win, of course, but try arguing you have a mandate to block

ethics reform when only 10% of the people who went to the polls voted for you. The winner will know that, come next election, there will be other candidates taking the pledge, and so his days are numbered unless he gets with it.

One warning: make sure the pledge isn't limited to sponsoring a bill or voting for it when it comes to the floor, because ethics bills often get stuck in committee, or are so watered down when they make it to the floor that they are of little value. Even pledging a vote in committee is meaningless when you know the legislative leaders won't let the bills come to the floor. The pledge should include voting out any legislative leaders who refuse to bring quality ethics proposals to the floor of the legislative body.

5. State Mandates and Models

State mandates and models are probably the most frequent cause of local ethics reform. And perhaps the worst. State mandates and models lack the emotion and interest that scandals bring. And yet they also usually lack most of the elements of an ethics program, including advice, training, disclosure, and enforcement. They usually consist of legal provisions alone, as if ethics and law were one and the same. They are usually the lowest common denominator, ethics reform lite. Sometimes very lite.

The big complaint you hear from local government leaders about state mandates and models is that they are unfunded. And yet the same local leaders prefer unfunded state ethics mandates to letting the state administer local government ethics, at no cost to cities and counties. But they don't want state ethics mandates that will require anything that costs money. This is one of the principal reasons state mandates and models are so weak. They are compromises with local government associations that require no expenditures, that is, no training, no staff to provide advice, little or no disclosure, and at most toothless enforcement.

The other big complaint you hear from local government leaders is "One size does not fit all." They insist that an ethics code for a big city will not work for a small town, and that the state should therefore require only that local governments have an ethics code, not specific provisions.

This simply isn't true, at least if all that's being discussed is the provisions rather than the administration. There is no reason why town officials should not handle their

conflicts just as responsibly as city officials, and no reason why town officials should take gifts from restricted sources, take jobs with town contractors, or hire their nieces.

There is one provision that is more necessary to towns than to cities: the waiver provision. The reason is that there are more conflicts and fewer people and companies available in towns. But since cities should also have a waiver provision, this need for giving more waivers should not be an issue with respect to a state mandate or model, except to have a waiver provision included. A waiver provision can solve a lot of problems related to the size of a local government.

With respect to provisions, the real difference in terms of size is that larger cities and counties might want to have lobbying, campaign finance, and procurement provisions. However, these would not be part of a state ethics mandate or model anyway.

Size does matter with respect to administration, but there are simple solutions to the problems arising from this. A small town cannot afford to have a full-time ethics officer and may not want to set up a hotline (although its cost is nil). But there is no reason that it cannot have someone under contract to provide advice and training. A town's officials need training as much as a city's. Nor is there any reason a town couldn't share an ethics officer (and a hotline, for that matter) with neighboring towns. A little bit of imagination and cooperation can make serious state ethics program requirements an attractive possibility rather than something to reject out of hand.

In 2003, three University of Kentucky professors, Richard C. Fording, Penny M. Miller, and Dana J. Patton, looked at what happened in Kentucky when the state mandated that Kentucky local governments pass ethics codes. The result was an article entitled ["Reform or Resistance? Local Government Responses to State-Mandated Ethics Reform in Kentucky."](#)

The article examines why different local governments developed codes with different levels of stringency. That they developed codes at all was due to the fact that state funds would be suspended if they didn't, a good way to ensure compliance (compliance was 99.5%). But raw compliance does not mean actual compliance, because there was no oversight regarding the content of the compliance.

Four types of ethics provision were required, but these were not spelled out in much detail: standards of conduct, financial disclosure, nepotism, and enforcement.

What's fascinating about this study (besides the fact that size was not considered a factor) is all the ways local governments managed to water down their ethics reform. One way was to limit application. 80% of counties and 28% of cities limited application of their ethics codes to elected officials. Some employed a nearly impossible burden of proof, such as “clear and convincing evidence” that gifts were intended to influence officials. Some codes explicitly permitted the acceptance of gifts from those doing business with the government. And some went so far as to say that there are no ethical requirements at all.

As for financial disclosure, one city required disclosure only of sources of income greater than \$1 million a year. The mayor of a town that put the limit at \$250,000 said, “The state said you have to give them a number, so that's what we give them.”

Nepotism was explicitly prohibited by only 55% of cities. Other cities and counties chipped away at this prohibition by allowing one or more family members.

Enforcement is the easiest to get around. One popular method in Kentucky, as elsewhere, was to provide for an ethics commission, but not actually form one. Another way was to form one, but have it never meet. Most likely, elected officials controlled ethics commission selection nearly everywhere.

The authors were especially interested in why some cities and counties actually did do meaningful ethics reform, despite the state’s lack of interest in the program and despite resistance from many local officials.

The authors felt that the differences in ethics reform came from three types of variable:

1. The values of the local political culture.
2. The local socioeconomic environment.
3. The accountability of local elected officials (level of political participation, degree of electoral competition, local media presence).

By “values,” they meant primarily citizen tolerance for ethical misconduct. Traditionalistic cultures, those that seek to maintain the status quo, tend more toward acceptance of personal gain by people in politics. Individualistic cultures are less tolerant of this. Moralistic cultures (reportedly not very prevalent in Kentucky) are intolerant of private gain in public life.

One interesting fact is that nearly every city wrote at least one strong provision, as the authors defined it (not so strong as far as I'm concerned). It wasn't all or nothing, at least in the cities and towns (they left counties out of the study).

The paper's conclusion was that socioeconomic and educational factors did not explain the differences in the stringency level of ethics codes. But the local political culture did. Cities where political competition was high, where there was a strong local media presence, and the culture had values supportive of ethics reform were far more likely to pass strong ethics provisions.

State mandates and models come in many forms. Some, like Connecticut's model code of 1995, written by an ethics adviser to the governor, are decent models that actually provide for an ethics program, but no local government was required to do anything. The Connecticut model had only a limited effect on local government ethics reform.

In 2003, the Illinois legislature passed a bill requiring all local governments to adopt regulations governing political activities and the solicitation and acceptance of gifts of public officers and employees that are "no less restrictive" than those contained in the bill. The attorney general drafted a [model ethics ordinance and implementation guide](#).

This model has few substantive provisions, but it provides for an ethics adviser and an ethics commission with enforcement authority. Unfortunately, the ethics advisers selected by the local governments tend to be either a local government attorney, a city manager, or a local government legislator. And there is no training requirement.

There are serious weaknesses with the enforcement mechanism. The three-person ethics commission is selected by elected officials, intent has to be proven, and the commission cannot initiate an investigation.

In 2009, the Michigan attorney general released a ["toolbox"](#) with which local governments *may* prepare a local ethics policy. It consists of a Model Ethics Ordinance (somewhat based on Illinois', but without advice or much enforcement), forms, links to relevant state statutes, and a guide to the state's Open Meetings Act.

There are two types of recommended ethics board: the local legislative body or a passive, powerless, politicized, puny board that is not designed to do the two most important things in government ethics: advise and train. There is an "ethics ombudsman," but this is an official who does not provide advice.

The recommended ethics provisions were only satisfactory. A bill to require an ethics board did not make it through the state legislature.

Also in 2009, the [North Carolina legislature passed a bill](#) requiring all local governments to sit down and decide what sort of ethics code they want. But only for their governing boards and boards of education.

The best thing about the requirement is that all the local legislators (but not their staffs) have to take two hours of ethics training. However, the training will likely have nothing to do with the particular city or county's ethics program, and it may be provided by anyone without, apparently, any specific requirements (they just have to be "qualified," but not approved by anyone).

The big problem with the North Carolina mandate, besides its limitation to local legislators, is that the guidelines are so vague:

The resolution or policy required by subsection (a) of this section shall address at least all of the following:

- (1) The need to obey all applicable laws regarding official actions taken as a board member.
- (2) The need to uphold the integrity and independence of the board member's office.
- (3) The need to avoid impropriety in the exercise of the board member's official duties.
- (4) The need to faithfully perform the duties of the office.
- (5) The need to conduct the affairs of the governing board in an open and public manner, including complying with all applicable laws governing open meetings and public records.

The first guideline goes without saying and has nothing to do with government ethics. What does it mean to "uphold the integrity and independence" of a board member's office? What does it mean to "faithfully perform the duties of the office?" In what way should a local ethics code go beyond existing open meetings and public records laws?

If you're going to require local governments to consider an ethics policy, it's important to give them some solid guidance. There is nothing here about advice, disclosure, enforcement, or administration.

The result, of course, appears to be that most North Carolina local governments have chosen to limit their ethics codes to aspirational conduct policies relating to the local legislative body only. Some have expanded the policies to all officials, and some have provided for enforcement by the legislative body and/or the city or county manager. But a mandate such as this can seriously undermine reform efforts seeking to create an effective, comprehensive ethics program. "We have an ethics policy," officials will say, "just like what the state required."

Georgia has a model ethics ordinance that came not from the state, but from the state's municipal association. The 1999 code is the central part of the [GMA's Certified City of Ethics program](#). A municipality is required to do two things in order to qualify. First, it must adopt a resolution establishing five ethical principles for the conduct of city officials.

Serve others, not ourselves

Use resources with efficiency and economy

Treat all people fairly

Use the power of our position for the well-being of our constituents

Create an environment of honesty, openness, and integrity

Second, cities must adopt an ethics ordinance that defines terms, enumerates permissible and impermissible activities, and includes due process provisions for respondents and punishment provisions for violators. There is a ["sample" ethics ordinance](#) (click "I Agree" and go to p. 50 of the document) that, refreshingly, provides alternatives to many administrative provisions. However, local governments are not required to follow it. This sample does not provide for advice, annual disclosure, or training (but the GMA itself does have ethics training classes). Ethics boards make enforcement recommendations to the legislative body, and the most serious sanction available is censure.

Attempts by the state government to require local ethics programs have not been supported by GMA, and have failed. 200 cities have been certified as Cities of Ethics. Every city has to be recertified every four years.

In New York State, the state Comptroller drafted [a model local ethics code](#) in 2010, which is intended to allow local governments to better meet the state mandate to have an ethics code (GML §806). The model code has some good features but, as usual, the good is in the substantive provisions, not in the administrative or enforcement provisions. The model code does not appear to have made much of a splash.

In 2012, Maryland required that all local ethics code come into compliance with one of two similar model codes by 2011. A major problem is that the law provides no guidance or reasons for its requirements. Training is ignored, and advice is barely mentioned. To the extent it is, no room is left for informal advice, and the possibility of an ethics officer is ignored. Ethics commissions are required to be created, but only by CEOs and, possibly, local legislative bodies. But nothing is required of these commissions, nor do they have authority to initiate investigations or to subpoena materials or witnesses.

On the other hand, by requiring that the rules applying to state officials be applied to local officials, the state law requires too much financial disclosure. And every time the state law is changed, local governments have to jump. When changes are proposed at the state level, ethics reforms at the local level can be brought to a halt by officials who ask that the council wait to see what happens at the state level before proceeding. That can really take the momentum out of ethics reform, because most state ethics bills never make it out of committee, but come before the committee year after year.

The best way to establish quality local ethics programs is not to require minimal provisions, but to create a quality model code, with intelligent explanations for each provision, as a default code that will become law by the end of the following year unless a local government chooses to make changes to it. Most local governments will do nothing and accept the default code. Those that choose to consider changes will be required to have public input and an open discussion of each provision that will be changed.

The state model should have extra provisions for larger cities and counties, so that there is guidance for those that can afford more than a good, basic program. The state model can also encourage local governments to join together to hire a shared full-time ethics officer, and even to have a joint ethics commission independent from each local government. If the state makes this easy, it is far more likely to be done.

Mandates and models are a good idea, but they are valuable only if their goal is a quality ethics program. Otherwise, they often act as obstacles to the creation of a quality ethics program.

Sometimes a state mandate can be specific to certain cities and counties. Such a mandate occurs as part of a deal involving budgetary support (when a local government is in economic trouble) or criminal charges. For example, in 2011 Atlantic City passed a pay-to-play ordinance at the request of New Jersey's Department of Community Affairs (DCA), as part of deal that included economic assistance. The DCA also insisted that the city not approve professional service contracts or hire or promote employees without the DCA's blessing.

Even a good state program is not likely to work unless there is oversight, including sanctions for those who do not comply, such as holding back funds and making very public the failure of any local government to establish an ethics program.

6. Charter Amendments

Although ethics ordinances are the norm, there are many cases where ethics reform has taken the form of a charter amendment. The amendment can be the work of a charter revision commission, it can be the work of citizen organizations bringing a referendum or initiative to a vote, or it can be the work of the local legislative body.

The best thing is to have a charter amendment merely require the creation of an ethics commission, with limited detail (most or all of it administrative in nature), allowing the legislative body or ethics task force leeway in drafting an ordinance. Sometimes, however, the ethics code, or a large part of it, is included right in the charter amendment.

A charter amendment can be necessary, advantageous, or both. In Philadelphia, for example, it was necessary. A 2006 charter amendment, requiring the creation of an ethics board, was approved by voters, but it was not the result of a citizen initiative. It began with an ordinance, which required a charter amendment because it created a new board (the former ethics board had been part of the mayor's office). Here is the charter amendment:

The Board of Ethics shall administer and enforce all provisions of this Charter and ordinances pertaining to ethical matters, which for purposes of this Chapter shall include conflicts of interest, financial disclosure, standards of governmental

conduct, campaign finance matters, prohibited political activities, and such additional related matters as the Council may from time to time assign to the Board. The Board shall handle all inquiries and complaints surrounding ethical matters and, notwithstanding the provisions of Section 4-400(a) and Section 8-410 of this charter, the Board shall render advisory opinions; provided that, with respect to opinions regarding State law, the Law Department, at the option of an employee requesting advice, shall have concurrent authority to render advisory opinions. The Board shall have the power to conduct investigations and convene hearings. The Board shall conduct its enforcement activities either by bringing enforcement actions in the Court of Common Pleas or, if authorized by Council by ordinance, administratively adjudicating alleged violations and imposing civil penalties and other remedies for violations. The Board shall prepare and disseminate a Code of Ethics Manual for use by all City officers and employees and conduct educational and training programs for all City officers and employees.

In addition, and subject to the provisions of this charter, the Board of Ethics shall exercise such other powers and duties vested in and imposed upon it by ordinance.

In Jacksonville in 2011, a charter amendment was the finishing touch to a long reform effort led by the city's ethics officer (and City Ethics president) Carla Miller. Putting the ethics program into the charter was advantageous rather than necessary. A charter amendment would give the ethics commission independence, protect it from backsliding on the part of the council, and allow the ethics program to cover all the city's independent agencies, something the council could not do on its own.

The charter was amended by the council in a unanimous vote, but only after many months of debate and hesitation. The ethics reforms were supported by many community groups, from business and good government organizations to a local Tea Party association.

In Broward County, Florida, the goal of the charter amendment was to provide for independent drafting of an ethics code. After numerous scandals involving local officials, the charter was amended in 2008, by a charter review commission and a referendum, to require the creation of an "ethics commission" whose sole job would be to draft an ethics code. The charter language does not allow the county commission (whose past members had been involved in some of the scandals) to change the ethics commission's proposed code. If the county commission failed to adopt the proposed code, the code would

automatically go before the voters for approval at a specified general election. The result was an excellent, but limited code.

However, the drafters of the ethics code were concerned that, since the code was just an ordinance, it could easily be weakened by the county commission after it was passed. So they cleverly embedded the following language in their code:

The Board of County Commissioners may at any time strengthen or supplement the restrictions and protections provided under this Code, but the restrictions and protections hereof may be weakened or removed, in whole or in part, only by citizen initiative as referenced in Section 7.01 of the Broward County Charter.

In something referred to as a “glitch amendment,” the county commission attempted to both strike this clause and weaken the code. The gambit didn’t work, but the attempt shows how much opposition there can be among elected officials to an ethics program that is not under their control.

Other charter amendments to create ethics commissions include Baltimore’s in 1963 and Miami-Dade County’s 1996 citizen initiative, which added an ethics commission to enforce an ethics code that was being ignored.

One problem with charter amendments is that, in many states, the local legislative body has to approve the amendment in order for it to get on the ballot. For example, in Lincoln, Nebraska in 2008, after the charter revision committee voted 14-0 for an ethics proposal, the council voted 4-3 against it, keeping it off the ballot. Then the council passed a weaker ordinance. It is important for charter revision committees to educate the public so that it is harder for local legislative bodies to undermine their work and, thereby, undermine the public trust.

Success in ethics reform through citizen or charter revision initiative can make it extremely difficult to fix the problems an ethics commission and others find in the code. The ethics commission can solve some of the problems through interpretations, rules and regulations, advisory opinions, and decisions in ethics proceedings. Sometimes, legislation can correct other mistakes. But sometimes an ethics program is stuck with poorly written language, and has to make the best of it. This is the biggest downside of ethics reform through charter revision, especially if there is too much detail in the charter amendment,

the ethics commission is given too few powers, or an open-ended clause, like that at the end of Philadelphia’s charter amendment, is not included.

It is understandable to want to put as much as possible in a charter or constitution, so that it is secure. But security has its price. Therefore, the best way to go about constitutionalizing an ethics code is to put only the most essential provisions in the charter, leaving the rest in the hands of a task force that will draft a conflicts of interest ordinance, so that its provisions can be improved as the ethics program matures.

Here is a sample charter amendment that will accomplish this goal and, as in Broward County, protect the reform from being undermined by the local legislative body:

Charter Section _____. Task Force

A. An Ethics Task Force (“Task Force”) will be created, whose sole purpose is to draft a Conflicts of Interest Code for the City/County of _____ (“Code”). The Task Force will present the Code to the [legislative body] for consideration no later than at the first [legislative body] meeting in February _____. If the [legislative body] fails to adopt the Code within ninety days of its receipt of the Code, the Code will be presented to the electors of _____ for consideration at the November _____ general election. If approved by the electors of _____, the Code will become part of the _____ Code of Ordinances, replacing the current Chapter _____. The Code must be consistent with all provisions in Section _____ of this Charter.

B. Membership.

The Task Force will be comprised of seven residents of _____, to be selected by a committee of five community organizations to be chosen by the president/chair of the [legislative body] from the following list [samples only]:

- _____ League of Women Voters
- _____ Bar Association
- _____ CPA Association
- _____ Clergy Association
- _____ Medical Association
- _____ NAACP
- Dean, Local Law School or Government Institute

The selected Task Force members will be appointed by the Mayor/Executive. No member of the Task Force may be, or have been within the three years prior to appointment, a City/County official or employee, or a consultant or contractor of the city; an officer in a political party or political committee; a candidate or an active member of the campaign of a candidate for any City/County office; or a city/county lobbyist, or the spouse of any of these. A Task Force member or staff member may not make campaign contributions nor participate in any way in the campaign of a candidate for any City/County office. The Task Force will be given a budget sufficient to hire experts to advise it.

C. Term and Vacancies.

Task Force members will serve until the Code has either been adopted by the [legislative body] or adopted or rejected by the electors of _____ in a referendum.

D. Meetings.

The Task Force will hold its first meeting as soon as practicable after its appointment. The Task Force will meet as needed and will hold no fewer than eight (8) meetings. All meetings of the Task Force must be held in public. All votes will be by majority of those present.

E. Chair and Vice-Chair.

At the first meeting of the Task Force, the members will vote for a temporary Chair and Vice-Chair. At its third meeting, the members will vote for a Chair and Vice-Chair, who will serve for the duration of the Task Force's existence unless they are replaced by a Task Force vote.

Charter Section _____. Conflicts of Interest Board

A. Independence.

(1) The _____ Conflicts of Interest Board ("the Board") will be independent, to assure that no interference or influence external to the Board affects, or is seen to affect, the objectivity of the Board.

(2) Consistent with its budget, the Board will have the power to employ its own personnel as deemed necessary for the efficient and effective administration of the Board.

(3) The Board's seven members will be selected by the Conflicts of Interest Board Selection Committee ("Selection Committee"). The selection process of the Selection Committee and the Task Force will be the same, and with the same or additional member limitations, as described in Section ____ (B) of this Charter, except that there will be two additional alternate members. Members of the Task Force may become members of the Board.

(4) The Board will have a guaranteed budget.

B. Functions, Authority, and Powers.

(1) The authority of the Board will extend at least over the following:

(a) All elected and appointed, paid or unpaid, officials ("Officials") and employees ("Employees") of the City/County of _____ and of all agencies and authorities established or substantially funded by the City/County or whose boards are substantially appointed by Officials, former Officials and Employees, and any candidate for City/County office ("Candidates"); and

(b) All entities and persons that provide, or are seeking to provide, goods or services to the City/County under contract for compensation ("Providers"), as well as those that seek permits, grants, licenses, or other special benefits from the City/County ("Permittees").

(2) The Board will have a monopoly on the provision of ethics advice, providing formal and informal ethics advice to Officials, Employees, Providers, Permittees, and Candidates, and informal ethics advice to any citizen or entity.

(3) The Board will have a monopoly on enforcement of the Code, making determinations on complaints filed by any citizen alleging a violation of the Code. In addition, it may itself initiate investigations and file and amend complaints. A hotline will be instituted to provide the Board with information about possible violations of the Code.

(4) The Board will provide mandatory ethics training to Officials, Employees, Candidates, Providers, and Permittees.

(5) The Board will have an Ethics Officer, appointed by and answerable only to the Board, who will provide training and ethics advice, and counsel to the Board. The Ethics Officer will review disclosures and assist with ethics proceedings.

(6) All Officials, Employees, Candidates, Providers, and Permittees will fully cooperate with investigations conducted by the Board.

7. State Law Change

One of the most interesting methods of ethics reform occurred in Texas in 2009. After serious scandals involving county officials, citizens in El Paso County wanted the county to have its own ethics program (the state has jurisdiction over local ethics). A Citizens' Commission for Best Practices in Government, set up to respond to the scandals, was pushing for one, but state law did not allow counties to have an ethics commission. The state representatives from the county managed to push through a change in state law to allow one, at least for El Paso County.

8. Reform at the Agency Level

The type of reform that is least discussed could actually be the best way of bringing about reform because it is both internal and totally positive. This type of reform occurs at the agency or department level.

If an agency or department head, or the chair of an important board, such as a planning commission, believes that her government's ethics program is providing insufficient requirements and support, the agency can institute its own ethics program. It can designate an ethics officer to provide better training and more timely, professional advice (someone outside the organization is best), require more (and more public) disclosure (including from those seeking benefits from the agency), and even set up a board to deal with violations. After a couple of years, the head or chair can present the results to the local legislative body, recommending that the program be extended to all officials and employees.

I do not know of this happening anywhere, but it probably has. For a high-level official who is frustrated by the failure of his colleagues to embrace ethics reform, acting out ethics reform is the perfect alternative to proposing reforms. Doing this turns the

agency into a bright spot that will lead to far better ethics reform than a dark spot like a scandal.

D. Good Government Organizations

As shown in [the ethics reform scenarios above](#), good government and other community organizations are often the heart and soul of ethics reform. Even when they do not begin an ethics reform initiative, their support, resources, testimony, campaigns, and contacts with officials and other groups make their involvement extremely important. Cities and counties with active good government organizations tend to have better ethics programs. Not only do they help in their creation, but they continue to provide support, seek improvement, and call for more independence and funding (or, in a recession, the maintenance of funding).

A good government organization or coalition can support ethics reform in several ways. It can start the ball rolling by raising the issue. It can sketch out a vision of a new ethics program or draft an entire ethics code (or amendments) which, even if it is not passed or even officially discussed, will be available when a scandal occurs, in order to provide guidance for ethics reform efforts. It can create an ethics pledge and get local officials to sign it. It can schedule forums for citizens and officials to discuss ethics reform publicly. It can try to get the issue on the local legislative body's agenda, attend meetings and make public comments. It can write letters to the editor and op-ed pieces, have members appear on local radio shows, and give talks and answer questions at community organization meetings. If there is opposition or leg-dragging by the legislative body, it can seek a referendum on ethics reform or petition for a charter revision commission that will be able to insert ethics requirements into the charter.

The most effective good government organizations are generally those that have been around for a while, are seen as nonpartisan, and have deep connections in the community. Some cities are fortunate to have organizations going back to the progressive era of the early twentieth century, which pushed through most of the local government reforms we take for granted. But many newer organizations, and specially constituted coalitions of organizations, have been equally effective, especially when there have been local scandals.

A government scandal by itself is not usually enough to ensure effective ethics reform. Without either an organization or coalition of organizations insisting on, and drafting or at least outlining, serious ethics reforms quick or, best, in advance, all that happens are a few minor improvements or, if there was no ethics program, a skeleton program with no guidance, independence, authority, or teeth.

Business organizations, including local chambers of commerce, can be of great use in pushing ethics reform. Many local scandals involve local businesses and business owners, and this can be a great embarrassment. Local businesses are also concerned about a community's reputation, because it affects business growth in the area and the desirability of one's city or county to people considering taking a job there. It is hard for a community that is considered corrupt to grow and prosper.

Jack Brown, a corporate executive in San Bernardino County, California, complained in 2010 that the county's reputation for corruption dogged him when he met with business people and officials outside the county. "Who got indicted in your county today?" was a question he was often asked. Officials so often speak about their personal reputations and how they have to protect it. Their more important job is to protect their government's reputation, for the good of the community.

Unions, professional associations, and universities are less likely to be leaders in ethics reform, but they should be included in any coalition calling for reform. University department or institutes with a focus on municipal government sometimes provide expertise in creating ethics programs. However, few of them actually have such expertise, and I have found most of their proposals to be relatively weak.

E. Doing the Work of Ethics Reform

1. The Ethics Commission

A curious, hardworking ethics commission is in the best position of all to recommend ethics reforms and to draft amendments to the ethics code. Not only should ethics commission members, and their staff, have special training in government ethics, which no one else in town will have had. They also have experience providing ethics advice, reading complaints and messages sent to the commission, learning about hotline calls to the commission, hearing public comments at meetings, investigating allegations, participating

in hearings, and drafting and updating regulations and procedural rules. In other words, they know more about government ethics and the state of their city or county's ethics environment than anyone else around. More specifically, they know what aspects of their ethics program need fixing, what loopholes need filling, what omissions (e.g., applicant disclosure or the authority to initiate investigations) are hampering their work.

This is why ethics commissions are often the instigators of ethics reform. They would do this more often if local legislative bodies were more open to their recommendations and if ethics commissions learned better how to explain the importance of the changes they recommend (something this book should help them with).

One obstacle to officials listening to them is that it can appear to officials that ethics commissions are acting in their self-interest. "What hypocrites they are," officials think, "expecting us to act in the public interest, while they just keep asking for more authority and independence!"

This is why it is important for ethics codes not only to *allow* ethics commissions to make reform recommendations, but to *require* such recommendations at least once a year, usually in the annual report to the legislative body. And it is also important that the full legislative body be required to consider these recommendations at one of more public hearings, with an ethics commission representative present to answer questions and explain each recommendation.

2. The Task Force

As noted in the Atlanta and Philadelphia [ethics reform stories above](#), one valuable approach to drafting ethics reforms is to appoint a special task force of individuals to focus on the work and do it independently of political influence, two things that a legislative committee cannot do. A task force is especially valuable if there is no independent ethics commission, or if the ethics commission has no staff. If there is an ethics commission, the task force should learn from its members' experience and seriously consider their recommendations.

A task force should be selected not by officials who are or will be under the ethics commission's jurisdiction, but by community organizations, just as with an ethics commission (see [the section on ethics commission member selection](#)). This is the approach that was taken in Philadelphia. Community selection of task force members will ensure that the task force's recommendations are seen by the public as independent and reliable.

A task force should include representatives from organizations that have been seeking ethics reform. There is no reason for it to be a “blue ribbon” committee consisting of leading members of the community, because these people are politically involved, are often seeking benefits from the government, and will be seen as doing what high-level officials want. Nor should they consist primarily of lawyers and judges. It is enough that they have counsel with expertise in local government ethics. Too many lawyers and judges will focus on laws rather than the other aspects of an ethics program. This happened most recently in Phoenix, where in March 2013 the task force recommendations said nothing about ethics advice, disclosure (except of gifts), commission staff, the commission budget, commission initiation of investigations, whistleblower protection, or an ethics hotline.

A task force should be able to choose its own advisers and counsel, and should be given sufficient funding for this purpose. It should be required to hold public hearings and accept written testimony, as well. Members should be permitted to draft one or more minority reports, making alternative recommendations and critiquing the majority’s recommendations, just as happens with charter revision commission recommendations in many jurisdictions.

A task force can be a perfect way for a community to create or improve an ethics program. But sometimes a task force can be a problem. One way it can be a problem is when a legislative body creates a task force primarily to delay the issue during a time when a scandal is still fresh in everyone’s memory. In such cases, the task force is generally not very independent, consisting of current and former officials and others with political ties, and it is counseled by the city or county attorney. Such a task force will generally make weak, partial, legalistic recommendations.

Another problem with task forces can be that, without an attorney who has a strong background in government ethics, task force members sometimes approach ethics reform as if it were about personal conduct and character improvement. Not only is this the wrong approach, professionally speaking, but it can lead to an ethics code that provides vague, unenforceable guidelines. And it rarely leads to an ethics program, just a pledge to be good.

A third problem is that task forces are often limited by the mission they are given by the mayor or council. Or they limit themselves to dealing with problems that have recently arisen, rather than taking a comprehensive look at the ethics program that exists and at the

ethics program that should be instituted. The result is piecemeal recommendations that lack any vision of what an ethics program might be.

In other words, a task force should not feel limited by what it is told or what it finds. It should consider the best ethics program possible, determine what is not appropriate and affordable, and set priorities so that it is clear what *must* be done, at the very minimum, and why.

It can be good for a task force to break up into committees to focus on certain issues. But the basis for the creation of committees can seriously skew a task force's recommendations. For example, the Phoenix task force, which reported in 2013, decided to have one committee focus on elected officials and board members, and another committee focus on employees and volunteers. Considering that most ethics codes provide the same rules for all four groups, this does not appear to have been the best choice. Better would have been a committee on rules and disclosure, and a committee on administration and enforcement.

A task force's work is not done the day it files its report. It is important for a task force to continue to talk about its recommendations in the community, to counter false or ignorant statements by high-level officials, and to continue media coverage of how the recommendations are being handled by the mayor and local legislative body (including press conferences, op-ed pieces, blog posts, and the like). Otherwise, their recommendations may be ignored or greatly watered down.

Sometimes, instead of a task force, a university political science department or institute is asked to make formal recommendations. This happened in recent years in [Gwinnett County, Georgia](#) and in Washington, D.C. This sounds like a professional solution, but political science departments rarely have any expertise in government ethics.

Another alternative is to hire a lawyer or government ethics professional to make recommendations. This worked reasonably well with respect to the Washington Metropolitan Area Transit Authority (see [the 2012 report](#) and [my blog post](#) about it).

It is a good idea, when creating an ethics task force, to require the creation of such a task force every five years or so. This prevents ethics reform from stalling or backsliding, and allows a new group of individuals to revisit recommendations, seeing the effect of the ones that were implemented, recommending ones that are still needed, and adding

recommendations. This turns something that can be a one-off PR attempt into an ongoing reform effort.

3. The Grand Jury

It is common, when there has been one or more serious scandals in a city, county, region, or state, for a civil or criminal grand jury to be called and, as part of its mission, for the grand jury to make detailed recommendations for reform, which often include recommendations for changes to ethics programs. This has happened in recent years in [Palm Beach County](#), [San Francisco](#) (a report on the ethics commission itself), [Gwinnett County, Georgia](#), [San Bernardino County, California](#), and [Broward County, Florida](#).

A grand jury is certainly not the optimal body to make recommendations for ethics reform, since it has no government ethics experience or expertise. But when a local government is not up to the job, it can be a way to get the ball rolling. However, even a grand jury can be ignored, as it has been, for example, in San Bernardino County. Recommendations are, after all, only recommendations.

4. The City or County Attorney

When there is not an ethics officer or other ethics commission staff, or a special task force (and sometimes even then), most of the drafting work of ethics reform is done by the city or county attorney's office. This office usually lacks both expertise and understanding of government ethics. But more serious, (1) government attorneys tend to approach ethics programs in terms of law and confidentiality rather than in terms of appearance, guidance, transparency, and independence; (2) government attorneys tend to see high-level officials as their clients, and they, as well as the attorneys themselves, are regulated by the ethics code, putting them in a conflict situation, not the best situation with which to approach ethics reform; (3) government attorneys see as their clients those officials who have chosen not to create an effective ethics program; and (4) government attorneys are political appointees or elected officials whose work is not seen by the public, or by other officials, as neutral or independent of partisan pressures.

With all of these negatives, why are government attorneys the go-to people for ethics reform? Because they're lawyers, and the knee-jerk reaction is to think that any lawyer is sufficiently knowledgeable about government ethics to be able to draft an ethics

code, even if the goal should be to create an ethics program, much of which has nothing to do with drafting or law. Because they won't rock the boat. And because they are not paid extra for drafting ethics provisions.

A sixth problem with government attorneys handling ethics reform is that they sometimes give themselves more power. For example, in 2012 Fort Worth's city attorney proposed to allow his office to provide ethics advice that would protect officials from ethics enforcement by the city's ethics commission.

Houston's city attorney was the principal creator of the city's 2011 ethics reforms. The result left him wearing multiple hats:

Chief drafter of the city's new ethics program

Chief ethics officer, providing advice to council members and others on ethics issues

Supervisor of counsel to, and provider of staff to, the ethics commission

Administrative supervisor of the inspector general's office

Adviser to departmental directors regarding employee discipline based on IG report recommendations

Criminal enforcer of certain ethics provisions, a role handled by the law department's chief prosecutor

Appointer of special prosecutor when he deems this appropriate

Adviser to the council's internal ethics review panel

Director of ethics training

Would anyone but a city attorney have given the city attorney so many roles in an ethics program when, in a city that can well afford independent ethics commission staff, the city attorney should not have had any role at all in the ethics program?

In every community where ethics reform is on the table, someone in a position to be listened to must get up and let officials and the public know that government attorneys are normally not the best individuals to do the work of ethics reform, In fact, they can be the worst: political animals with conflicts, a legalistic approach to ethics, and the inability to recognize that they should not be involved, which means a basic lack of understanding of government ethics.

The only role that a city or county attorney's office should play in ethics reform is to be available to answer specific legal questions asked by an ethics commission or task force that, solely due to decisions made by the attorney's principal "clients," does not have its own counsel.

5. Citizens

Several ethics programs and reforms have originated with citizen referendums and initiatives, usually sponsored and written by good government organizations. For example, the Rhode Island ethics program was the result of a referendum, as were the programs developed in Miami-Dade County, Palm Beach County, and Broward County, Florida.

Referendums can also be used to make small but important improvements to an ethics program, such as the 2010 referendum in New York City that mandated ethics training for all officials and employees. Even a non-binding referendum can put pressure on officials to do what they'd prefer not to do.

Sometimes an ethics code, or the requirement to create an ethics program, is drafted as part of the charter revision process, and is approved by citizens at a referendum either as part of a big charter revision package or as one of several charter revision questions.

Advantages of going the referendum route include (1) it is possible to prevent erosion of an ethics program by local legislators subject to it, and even if the referendum drafters do not protect from erosion (as was done in Broward County; [see above](#)), it is hard for officials to argue that they are representing their constituents by weakening a program directly approved by their constituents; (2) citizen input is guaranteed by the rules governing the process; and (3) when the legislative body is not involved, it is easier to make an ethics program independent of the legislative body, both in terms of ethics commission member selection and a budgetary guarantee.

6. Employees

Toward the end of their book [Switch](#) (Crown, 2010), Chip and Dan Heath discuss an interesting concept that is applicable to ethics reform from within a government organization. The concept is "free space." Free space consists of "small-scale meetings where reformers can gather and ready themselves for collective action without being

observed by members of the dominant group.” Free space allows reformers to develop a language for talking about the advantages of reform, as well as an “oppositional identity.” That is, it allows individuals to start developing an alternative culture. A new school to replace the old school.

In a local government, free space could involve party or other political meetings of the opposition party. But this involves primarily elected officials. It is more difficult for administrators and employees interested in ethics reform to secretly meet to discuss the means of reform. If an agency head feels that her employees are sympathetic, reform may be discussed at regular meetings. A sympathetic agency head may even be convinced to create a government ethics program for the agency, which could, after a few years of success, be applied to the entire city or county (see [the discussion of the agency approach above](#)). Otherwise, special meetings, outside of working hours, will most likely be required. This asks a lot of government employees interested in reform. But it could be a good way to create a special sense of fellowship and mission.

7. The Mayor

Sometimes, a mayor will choose not to bother with a task force and will instead make a major ethics reform proposal himself, often with the help of the city or county attorney. This is [what happened in San Antonio in 2013](#), with some success.

F. Obstacles to Reform

Ethics reform is an issue that practically begs to be exploited. Every official wants to be seen supporting ethics reform, so the issue is raised a lot. Often, multiple officials have multiple bills that take multiple approaches. The bills go to committee, get jumbled up, compromised, weakened, and often forgotten or put off to the next session.

Most of the energy spent on ethics reform is spent trying to limit it, to raise obstacles to its implementation or success, once it becomes an issue. This is why ethics bills are likely to get out of committee (no one wants to be seen voting against an ethics bill unless they support an alternative approach), but not make it to the floor. Concerns are raised, new bills or amendments proposed and, often, to work things out or get more citizen input, a citizen task force is created. Anything not to display opposition to ethics,

because ethics appears to be about being good. So officials say they're trying to do the best job possible, and that takes time. Or, in the alternative, they rush through a few provisions and tell everyone they've vastly improved the ethics code, even though there still isn't even an ethics program. After watching dozens of ethics reform efforts end with little accomplished, it is hard not to be very skeptical about the process. But fortunately, there are also success stories.

When ethics reform is the result of a referendum, elected officials often find many ways to prevent implementation of the reforms. For example, for years the San Diego council prevented the ethics commission from getting the subpoena power provided by the ballot measure that created the commission.

Beyond these tactical maneuvers, the biggest obstacles to effective ethics reform are ignorance, fear, and the difficulty some officials have in giving up control.

1. Ignorance

Few individuals can picture in their mind what an effective ethics program would look like. They have never seen one, heard of one, or read about one. In fact, I have never yet seen a reform effort directed at creating an effective ethics program. The goal is usually to create or improve an ethics code, add a few rules, tighten up loopholes, provide more transparency, and/or increase sanctions or give teeth to the enforcement process so that "bad" officials are more likely to get caught, thrown out, and lose their pensions.

A good way to see the effect that ignorance has on ethics reform is to consider ethics advice. When you focus on an ethics code, the least important thing is ethics advice. Ethics advice is usually given no more than a sentence in an ethics code, if that. And yet it is by far the most important part of a government ethics program. An ethics program that has an independent, professional ethics adviser, with no ethics code and no enforcement mechanism, can be more effective than the usual ethics provisions with a staff-less, budget-less ethics commission, which is the norm. An assertive ethics adviser, with the help of the political leadership, can get officials to seek advice, and the advice that is given can (if it may be organized and distributed to officials and employees) provide concrete guidance better than difficult, legalistic provisions (of course, there shouldn't be such difficult provisions; letting lawyers draft them without guidance about readability is another form of damaging ignorance).

It's hard enough to get past that awful, emotion-filled word "ethics." Even when local legislators recognize that what is really meant is "conflicts of interest," it's hard to see what that has to do with gifts, confidential information, transactions with subordinates, or post-government jobs. This is why the introduction to this book looks at what government ethics is and isn't. It's a much more difficult concept to grasp than crimes (bribery, kickbacks, embezzlement) or misconduct on the job (discrimination, harassment, council members interfering with administration) or off the job (drug use, affairs).

If people do look at what other cities and counties do, they will find hundreds of different variations, with different versions of each sort of ethics provision, not to mention various administrative structures. It's impossible to decide between all the provisions, program aspects, and approaches without some guidance. This is what the Heaths, in their book [Switch](#) (Crown, 2010), call "decision paralysis." And decision paralysis is not helped by the paucity of agreed-upon best practices in government ethics (until now; see [the Best Practices appendix](#)). The usual response to decision paralysis is to limit the scope of ethics reform to specific problems that have arisen in recent scandals, or turn to a mediocre ethics code in a nearby city or county, and either copy it or use it as if it were a model.

Best practices help "shape the path" toward change by making it easier (1) for officials to know the changes that need to be made and to understand the nature of the change, so that they are not afraid of it and, more positively, so that it will be something they can be proud of; and (2) for those who want a good government ethics program, including officials and good government groups, to put forth recommendations that have both legitimacy and strong arguments backing them up.

Officials' reasonable ignorance is a difficult obstacle to overcome. This book is intended to help overcome it by providing not only best practices, but also explanations that can be used to offset the reasonable concerns officials have about the many aspects of a government ethics program (once they recognize that such a thing exists).

Another aspect of ignorance that forms a huge obstacle to ethics reform is our inability to acknowledge that we cannot competently and reliably make decisions regarding our own conflict situations. It is very difficult to see this. We can make decisions regarding others' conflict situations, as long as we don't have a special relationship with them that mars our judgment. But about our own situations, it is altogether different. It is important for an official to be able to recognize this and understand this phenomenon before

recognizing the importance of and truly embracing the need for an effective, comprehensive ethics program that emphasizes advice over law and enforcement.

A third kind of ignorance is what Donald Menzel, in an essay entitled [“Strengthening Ethical Governance in Local Governments,”](#) calls “leadership myopia,” the failure “to recognize the importance of ethics in getting the work of government done.” Most officials seem to see government ethics as a luxury, something that matters to the public, but doesn’t *really* matter. The fact is, ethical decision-making (that is, dealing responsibly with conflict situations) is a part of the decision-making officials feel really is practically important. But when ethical decision-making is not part of discussions, or is only discussed in terms of what people will think (which is important, but only part of the story), government ethics is not seen as part of good, responsible judgment, but rather as something else, a bother, a way to pacify citizens and the press.

The best solution to this is to have conflict situations openly discussed as part of the ordinary course of business. This requires good leadership. Without this, ethics reform sometimes has to be forced on officials.

A fourth kind of ignorance is looking at government through law. Not only are lawyers the principal advisers in government, but many important officials (and good government organization officers, as well) are lawyers themselves. Laypeople not only defer to them, but start seeing the world through their eyes. And their eyes see government ethics programs in terms of laws. But laws are only part of an ethics program. The most important aspects of an ethics program – training, advice, disclosure – are not primarily legal in nature, and therefore these aspects are the least likely to be included in an ethics program. Another important aspect of government ethics, transparency, is anathema to lawyers, whose own professional ethics are based on confidentiality.

In addition, lawyers are all too willing to find ways to satisfy officials’ desire to preserve control and to make it very difficult for an ethics commission to find them in violation of ethics provisions. This sort of cleverness is, from the government ethics point of view, ignorance, because it shows a lack of understanding of government ethics and undermines both its purpose and its goals. It is harder to get ethics reform from lawyers than from anyone else. And it is the extremely rare lawyer who will admit that this is a matter of ignorance.

A fifth common type of ignorance is believing (and confidently saying) things about ethics reform that simply aren't true. For example, in 2010 the chair of the Niles, Illinois ethics board, who was also a member of the village's legislative body, said about an amendment that would require elected officials to disclose their real estate holdings in town, "You'll never get anyone to run for public office." Since hundreds of jurisdictions that require this have somehow managed not to turn into ghost towns, this clearly isn't true. But it becomes "common knowledge" when citizens raise the possibility of annual disclosure. The common decision not to do any research before talking about government ethics is not simply ignorance, it is willful ignorance. It is out of willful ignorance that I get less than 10% as many calls from local officials as I get from local reporters.

2. Fears: Personal and Budgetary

Some parts of an ethics program look scary or expensive: staff members, investigations, hearings, disclosure, hotlines. Some parts look downright undesirable, such as prohibitions on nepotism and political activity.

Officials have reasonable fears about what an ethics program will cost both the local government and themselves as individuals. Will the program be a serious burden on the budget? Will they be the target of political exploitation of the program?

The best way to respond to these reasonable fears is to change the questions. Is it better to have the frivolous attacks against you made via a formal program, or only in the news media and blogosphere? Is it better to have these attacks dismissed by an independent, neutral board, or have them knock around into election season? And won't a responsible, respected ethics program mean that fewer frivolous attacks will be made, knowing that the complainants will be the ones who will look bad?

With respect to budgetary concerns, it is important to ask not how much it will cost, but how much effective ethics reform will save and, in many ways, some of them financial, benefit the community. The short answer is, "A great deal." The savings and benefits come from (1) bidding, rebidding, or canceling of over-priced no-bid or insufficiently bid contracts; (2) prevention of the cost of prosecutions, inspector general and grand jury investigations, and imprisonment; (3) a better reputation for the government and community, which attracts both businesses and individuals to the city or county, and better employees to the local government; (4) better employee morale,

knowing they have somewhere neutral to go with their problems, concerns, and questions, and that it is more difficult for supervisors and elected officials to intimidate them; (5) the increase in the quality of individuals willing to participate in government and run for office or accept appointments to boards and commissions; (6) increased discussion of ethics issues among officials and employees, better ethical decision-making, and less antagonism regarding ethics issues; and (7) the increase in public trust that leads to more public comments, more voting, and a stronger feeling of community and true democracy.

Can anyone honestly say that all this isn't worth \$100,000 a year for an ethics officer to provide training, advice, disclosure, oversight, and enforcement for a sizeable city or county, or a lesser amount of money for a smaller city, town, or county that contracts out the job part-time or shares an ethics officer with one or more nearby governments? Getting one big contract bid or rebid could alone provide far more savings than what the best ethics program will cost over several years.

3. Control

For many individuals, government is about power. Even those who enter into public office to accomplish valuable goals and to serve their community get caught up in the trappings of power. And power is about control. One cannot achieve one's goals without the power to make changes, see projects through, lead coalitions of officials and citizens. A high-level official manages staff and is the speaker, the one people listen to, the one people go to, the one who makes a difference.

High-level officials do not have control over criminal enforcement, but this doesn't matter, because that is not a local government activity, and few officials consider themselves likely to commit a crime. As for civil actions, if one is sued, it's the city or county's problem. The official is not personally liable.

All that stands in one's way is politics, that is, other people seeking power, with other goals and priorities, other parties and factions, bureaucrats who lack vision and elected officials who don't really care or understand.

And then a scandal occurs. From the official's point of view, either she didn't have anything to do with it or, if she did, it's something everyone does. When good government groups start demanding an independent ethics commission with teeth, officials panic. It would be out of their control, and it could mean the end of one's career, for nothing or for

just a trifle, like helping out a relative or business associate. This is the scariest thing possible.

Yes, it's more likely that an official from the other party, and his colleagues, would do what he could to end one's career, but at least there are ways to get back at them. That's just dirty politics. When it comes to an independent commission, with a formal process, and the power of investigation, subpoena, and enforcement, it's not politics anymore. There's not even a prosecutor who might be from one's party. It is outside one's control, directly or indirectly.

From the point of view of control, the most important thing to do is prevent the commission and the process from becoming truly independent. This is why there are so few truly independent ethics commissions, whose decisions and advice are trusted because they are seen by the public as non-political. And if an ethics commission isn't going to be trusted by the public, why have one?

This is why the desire for control is so harmful to an ethics program. The more control politicians have, the less trusted and, therefore, effective the program will be. There can be no true ethics reform without ethics commission independence and authority. And this requires either a really big scandal and knowledgeable reformers, or strong leadership from within the government by someone who understands that control of an ethics program by officials under its jurisdiction is simply wrong and cannot be honestly defended.

Officials will go to great lengths to protect their control over an ethics program, including filing suits. Even when reform comes via a citizen referendum, and even when there are laws about officials involving themselves in a referendum election, they usually find a way to make their personal feelings known. But not as personal feelings. For example, in 2010, before a public referendum, the town of Palm Beach's council passed a resolution that stated that the council members unanimously but individually "determined that making [the ethics] charter amendment applicable within the Town of Palm Beach would not be in the interests of the residents and taxpayers ..."

4. The Prospect of State Jurisdiction

Some states have state ethics programs that have jurisdiction over local officials and employees. But there are many more states that don't. Some of these states consider

starting a local ethics program year after year, but do nothing, often due to opposition by municipal associations.

One effect of this is that many local governments hesitate to create their own program, arguing that it won't be long before there will be a state ethics program. It seems like a waste of time. This is a reasonable position to take. But in fact, local government CEOs are successfully forestalling ethics reform at both the state and local level at the same time. What a clever, effective obstacle!

In 2011, New York State had an odd version of this problem. The new attorney general decided to start placing public integrity officers in all thirteen attorney general offices in the state. The Public Integrity Bureau has a mandate to investigate corruption, fraud, and abuse of authority. It will be harder for officials and citizens to push for local ethics reform when officials can say they are being protected by local public integrity officers, even if their laws are all criminal laws and there is no government ethics training, advice, or enforcement.

[State mandates and models](#) are also obstacles to a comprehensive ethics program. They usually include only a limited number of ethics provisions, and require little in the way of training, advice, disclosure, enforcement, or independence.

5. Challenges

Broward County, Florida has led the way in showing that ethics reform can be blocked by means of a direct challenge to it. The county commission had the county attorney look into the ethics code's constitutionality (the code was written by an independent committee, on the basis of a charter amendment that originated with a charter revision commission). Of course, the county attorney found all sorts of constitutional problems, and sought to solve them (and other problems) by means of a "glitch amendment," since the charter did not allow it to amend the code in any ordinary manner. This led to a lot of arguments, with talk of seeking a declaratory judgment from a court, but the county commission did finally give in.

6. Inaction

Even when ethics reforms have been successfully passed, inaction can prevent them from coming into being. Inaction takes many forms. It can consist of a failure to nominate or

appoint ethics commission members, or an ethics officer. When the ethics officer is the city or county attorney, that attorney can sit on her hands and do nothing. An ethics commission can be appointed, but not meet. Whoever is responsible for instituting ethics training (and unfortunately, the responsibility is not always made clear) may do nothing. No information about the program can be sent to officials and employees or posted on the city or county website.

One might wonder how anyone would allow this to happen. The answer is, there's an ethics code, or a new, improved ethics code. Isn't that enough? If you don't know what an ethics program is, you won't wonder why there isn't one.

Therefore, ethics reformers need to keep the pressure on to make sure that an ethics commission is appointed, that it meets, that it understands its duties, that the ethics officer is selected or, if it is the city or county attorney (not recommended), the ethics officer gets sufficient training, sets up a training program, and does whatever is necessary to get officials and employees to seek ethics advice and fill out disclosure forms on time.

In Laredo, Texas, for example (a city of 250,000 people), it took six years for the ethics program to start functioning. A good government organization had to speak out at three council meetings and then threaten to sue the city. The ethics officer is an assistant city attorney.

In Bath, New York, it took two years to appoint ethics commission members. And then, after the 2012 appointments, the mayor sought to continue the inaction by saying that the ethics commission was not required to meet regularly. "They may meet every two, three years. They meet only when there's a question."

For more obstacles to ethics programs, including reform, see [the final chapter of this book](#).

G. Nontraditional Ethics Reform

It is difficult enough to achieve reform that establishes a traditional ethics program consisting of an ethics code and an independent ethics commission and staff that, with respect to conflicts of interest, trains, advises, investigates, enforces, and oversees disclosure. And yet achieving this is not enough.

A traditional government ethics program does not deal with the institutional corruption, unwritten rules, situational forces, that is, the patterns of legal but unethical conduct that underlie most ethical misconduct and contribute greatly to an unhealthy ethics environment.

A lot *can* be done to deal with these rules, patterns, and forces in a traditional ethics program, but the fact is that little *is* done. Traditional ethics programs focus their training on ethics provisions, limit their advice to ethics provisions, investigate only allegations that would constitute a violation of an ethics provision, and report only on such violations.

And yet those involved in traditional ethics programs often recognize the limitations of the criminal-like ethics enforcement process, which focuses on the individual rather than the institution, the separate instance rather than the pattern, the written rules rather than the unwritten rules, and the surface violations rather than the underlying forces such as loyalty, intimidation, and secrecy. They realize that the basket is at least as damaging as the bad apples, but they don't know what to do about it.

Those who understand the importance of the basket, the unwritten rules, the situational forces, and a government organization's ethics environment must raise these issues. For more on how to do this, see [the section on the System Level of an Ethics Environment](#).

Throughout this book, I have identified nontraditional methods in each area of an ethics program. Here I will bring them all together in one place, so that those seeking nontraditional ethics reform will have a checklist of the possibilities for such reform either through a traditional program or by making changes to the program to make the methods not a choice, but a duty of the ethics commission and its staff.

1. Training

Teach beyond the ethics provisions and the basics of government ethics. Teach about the blind spots and other internal, social, and institutional barriers to recognizing and dealing responsibly with conflicts that we have and that our colleagues have. Teach about how much unwritten rules, patterns of conduct, and situational forces, such as loyalty and intimidation, contribute to an unhealthy ethics environment and individual instances of ethical misconduct.

Public servants need to recognize that what is ethical is not the same as what is legal. They need to understand that their values are insufficient to deal responsibly with conflict situations. They need to identify the pressures they feel from those they work with and under, and confront their reasonable fears in order to give voice to their values. And they need to recognize that their blind spots, not to mention their lack of government ethics expertise, make it difficult for them to handle their conflict situations responsibly without seeking ethics advice.

All of this cannot be conveyed in a class of an hour or two once every year or so. Nor can this be done online. Nontraditional ethics training requires additional lecture time and, especially, time to discuss in small groups the unwritten rules and patterns people see but feel uncomfortable discussing, and the pressures, feelings, and limitations we have and encounter, which make most people even more uncomfortable. Government ethics is not supposed to make people feel comfortable; it's supposed to make people learn to be responsible and professional in their handling of conflicts.

2. Advice

Think how different a government ethics program would be if it required officials and employees to ask the ethics officer for ethics advice whenever they had a special relationship, directly or indirectly, with anyone involved in a matter. This simple requirement would focus officials' attention on the fact that government ethics is about special relationships. It would also help people bypass a lot of obstacles: the blind spots that cause most people to feel that they are acting in the public interest; the reluctance of many officials to seek advice, either because it involves telling personal things to a stranger, because they believe seeking advice puts their integrity in question (or is even an admission of guilt), or because they are concerned they will be told not to do something they want, or feel they are required, to do; and the tendency of many officials to seek advice from a city or county attorney rather than an ethics officer.

A requirement to seek advice would also effectively remove the line between advice and enforcement that causes the many gray areas of government ethics to exist in a sort of limbo, where confusion and accusations undermine the public trust. By this I mean that the media, blogs, and complainants are constantly accusing officials of conduct that falls in a gray area, where there is an appearance of impropriety, but not a clear ethics violation.

These areas are far better dealt with through the advisory process than through the enforcement process, where they create scandals, undermine trust, and sometimes cost taxpayers a lot of money.

Through ethics advice, a conflict situation can be dealt with quickly and authoritatively at the time it arises, or even before, preventing accusations and de-politicizing ethics.

3. Applicant Disclosure

Disclosure of a conflict at a board meeting (transactional disclosure) is the norm, annual disclosure is common although not well-liked by officials, but applicant disclosure is oddly rare. I say “oddly,” because you would think officials would like to share responsibility for conflict situations with applicants for permits, contracts, grants, and the like rather than to be the only ones held responsible. On the other hand, if applicants were required to disclose their special relationships and any interest officials might have in their businesses, then it would be impossible for officials to hide or deny them. This is all the more reason to embrace the useful yet unusual disclosure of potential conflicts by those seeking a special benefit from a local government.

4. Discussion

Making the discussion of conflicts a common, unemotional thing at both board and departmental meetings is, sadly, a nontraditional approach. Nothing can better turn government ethics into something mainstream, something about being professional rather than something about being good or bad.

When there is not open, critical discussion, officials tend not to question their view of conflict situations they face, and they fail to consider other options. When a topic is not discussed openly, or discussion consists of accusations and denials, officials tend to be uncomfortable with it, not to mention the feelings they have about our own conflicts as well as those of their colleagues. Ethics can seem like one of those topics we were not supposed to bring up at the dinner table when we were young, because of the emotions it stirred up or the vague sense that it was wrong or could cause problems.

One way to legislate discussion is to require that whenever a board or commission moves on to a new agenda item, the chair read out the names of all individuals and entities

involved in the matter, and ask if anyone has, or knows of an involved official or employee who has, a special relationship, directly or indirectly, with any individual or entity involved in the matter.

It is more difficult to legislate discussion in departmental and agency meetings. But procedures can be created. For example, take a meeting of procurement officers. When they discuss a contract, they could be required to ask if anyone has or knows of a potential conflict, not only relating to the officers, but relating to any official or employee who might have been or will be involved in any way with the contract preparation, bidding, approval, or oversight process. In addition, the procurement officers could be required to ask whether there have been any irregularities, such as ex parte communications with elected officials, possible contractors, or their representatives, or unusual specifications, amendments, or the like.

If a contract has been presented as a no-bid contract, there could be a requirement that someone give a detailed explanation and that there be a lengthy discussion of whether the explanation is acceptable and whether, despite an adequate explanation, the no-bid nature of the contract is appropriate. Alternatives to a no-bid contract should be discussed. If answers are not clear, time should be provided to investigate facts and possible alternatives.

When anyone contacts a procurement officer regarding a contract, she could be required to ask whether she, or the owners or officers of the entity she is representing, has a relationship or involvement with any potential contractor or subcontractor, or with a government official or employee.

Such rules will at first feel constraining, but they will make an enormous difference to a local government's ethics environment and to the confidence the public has in its local government.

5. Complicity and Knowledge Provision

Government ethics enforcement tends to be like criminal enforcement in that it focuses on the individual rather than the group. Treating only the individual, in isolation from the situation in which the individual acted, leads to talk of bad apples and bad character. This individual orientation separates "good people" from "bad people," and thereby takes "good

people” off the hook, freeing them from their role in creating, sustaining, and conceding to the conditions that contribute to others’ misconduct.

Local governments are organizations full of pressures on individuals. Some individuals help (or even force) others in various ways to engage in ethical misconduct, and others know what is going on, and do or say nothing. In governments, ethical misconduct, unlike embezzlement, rarely occurs in a vacuum. In many cases, it is even common and accepted.

Therefore, it is important for an ethics program to treat an ethics violation not as something committed by an individual, but rather as something done within an organization, some of whose members were complicit in the conduct. The best way to do this is with a complicity provision, which allows an ethics commission to bring into a proceeding all those involved in an alleged act of misconduct.

In addition, it is valuable to take jurisdiction over all those who do business with the local government or seek special benefits from it, so that they too may be brought into an ethics proceeding as more than witnesses.

Not only is this more consistent with reality and, therefore, more fair and more responsible, it also will do far more to prevent misconduct by officials and the temptations that lead to this misconduct.

The other important and nontraditional part of a complicity and knowledge provision is the requirement to report possible ethics violations. Unlike citizens in criminal matters, public servants have special obligations to their community. Their loyalty should be to their community, not to their colleagues.

Ethical misconduct, excluding that done out of ignorance or negligence, usually occurs because the official is confident that no one will report the conduct. A requirement to report undermines this confidence. A requirement to report will lead officials to discuss possible conflicts, because it is in the interest of even those not directly involved in a conflict situation to either convince the individual with the conflict to withdraw or to seek ethics advice.

The requirement to report can be enforced by expanding ethics proceedings to include not only the complicit, but also the knowledgeable. The result is a proceeding that recognizes ethical misconduct as primarily organizational rather than individual.

The complementary requirements to seek ethics advice and to report possible ethics violations, along with the inclusion of those seeking benefits from the government, should greatly increase self-enforcement through advice and discussion, and greatly reduce the need for enforcement by the ethics commission and, most important, reduce the scandals that undermine public trust.

For more on complicity and knowledge provisions, see [the section on them](#).

6. Investigations

In its investigations, an ethics commission should ask questions regarding the relevant unwritten rules and the pressures placed on officials and employees, the roles various individuals played in the relevant process, who knew, who approved, and who failed to disapprove. Investigations should also look into the situational forces at work, the expectations of loyalty and secrecy, the intimidation tactics, the deals. What efforts were made to cover up the misconduct? Did anyone encourage, aid, or induce the respondent, or did the respondent act in any way to intimidate or co-opt anyone else?

Doing this will quickly send a message through the entire government organization that the ethics process is not about bad apples, but rather is about how others in the organization not only play a role in the irresponsible handling of conflicts, but also create and respond to the underlying forces and values.

What is important is, from the beginning of an ethics proceeding, to consider the possibility that a problem may be institutional and to recognizing that the handling of institutional problems is within the province of an ethics commission's duties. This is a big step to take, but it is the responsible thing to do.

7. Sanctions

Situational forces should be considered as mitigating circumstances to lessen a penalty or, for those putting pressure on subordinates, thereby creating situational forces, as aggravating circumstances to increase a penalty.

8. Administering Institutional Corruption

Beyond adding to a complaint those complicit and those who knew about misconduct but did not report it, there are two principal ways in which an ethics commission and its staff can break out of the narrow, criminal-like focus on individual misconduct, and deal with institutional corruption, that is, legal conduct, often generally acceptable within a government organization, that creates an appearance of impropriety, enables illegal conduct, and undermines the public's trust in their government.

a. Investigate legal but damaging conduct that keeps coming up in hotline calls, ethics commission meetings, the press and blogosphere, and conversations with ethics staff. This would not be a formal investigation, although it may lead to a complaint if ethics violations are discovered. Such an investigation would be more like a civil grand jury investigation, leading to a report based on patterns and norms, with recommendations for reform of practices and laws.

b. Hold public meetings or hearings to discuss such issues as the failure to bid out contracts, council members' individual control of development projects in their districts, the use of perks such as travel reimbursements and discretionary funds that can be spent without the need for receipts, the misuse of nonprofits, and the failure to follow formal processes, but instead follow unwritten rules. Failing to set up or follow formal processes, and exploiting loopholes in these processes, are principal ways that officials use their office to benefit themselves and others. Such hearings can make an enormous difference in how contracts, land use, and perks are dealt with, and they also bring the public into the ethics process.

9. Collecting and Sharing Data

There is very little collection and publication of data on local government ethics. The data that is collected and published, usually in annual reports in large cities and states that have jurisdiction over local officials, is usually limited to advice given, hotline calls received, and complaints filed, dismissed, settled, and decided.

There are three limitations here. First, there is limited information behind the numbers that are commonly provided. Advice about what, complaints about what, why dismissed, how settled and decided? All these facts can be dealt with in a spreadsheet.

Second, there is rarely information about the topics of hotline calls, and how they are dealt with. This information can be especially important, because it shows not only

what illegal conduct might be occurring, but also legal conduct that appears to be improper to the officials, employees, and citizens who report it. In other words, it can be an excellent indicator of institutional corruption in a particular governmental organization and, if collected, across local governments statewide, regionally, and nationwide.

Third, the information that exists is rarely formatted in such a way that it can be easily shared. Usually, it appears only inside the PDF of an annual report, rather than on a spreadsheet that can be pulled together into a larger spreadsheet with data from other jurisdictions. And there is no consistency in the choice of topics.

It is true that advice, hotline calls, and complaints are generally confidential. But what is confidential is the specific facts, not the basic nature of the advice sought or complaints made. The local government ethics community needs to work together to put this data in a consistent format so that it can be shared and analyzed by academics in the field. It might even bring more academics into a field where there are very few.

H. Regional Ethics Reform

For those who live in relatively small cities, towns, and counties, the biggest argument against ethics reform is that the local government simply can't afford it. If this is the biggest obstacle, there is a good, but nontraditional solution: the countywide or regional ethics program. Both sorts of program allow smaller jurisdictions to share the costs of a full-time ethics officer, training, and investigations, and thereby greatly increase both the quality and the independence of each town's ethics program. Regional government organizations are the best place to discuss possibilities for cooperation. But if they are not interested, good government organizations can show the way. For more on this, see [the section on regional ethics commissions](#).

I. State Ethics Reform

When local or regional ethics reform runs into too many obstacles, there is always the possibility of trying to get the state to take jurisdiction over local officials, either through the state ethics commission or by creating a separate body to oversee local ethics. In many states without state jurisdiction, there is an ongoing attempt to do this, but it is either a low

priority, lacks support from legislative leaders and the governor, or is opposed by local government associations, whose members (local government CEOs) do not want to lose authority over ethics the way they already have, in most cases, over public records, open meetings, and campaign finance. Ethics is more frightening than any of these. After all, who ever loses his job or office because he is slow at dealing with record requests, holds illegal meetings and executive sessions, or fails to file campaign finance reports on time?

In seeking a state-level ethics program, it's good to have statewide good government organizations leading the way. The problem is that many statewide organizations are not very interested in local government issues except, perhaps, for those of the larger cities and counties, which are the likeliest to have decent ethics programs. Smaller towns and counties are generally not the focus of statewide organizations. If there are multiple scandals, the priority of the issue may be raised. But without major scandals, it is hard to do more than get limited support at the state level.

Similarly, state legislators are not overly interested in local ethics issues. If there is a larger city or county whose local legislative body has been decimated by scandal and yet nothing is being done to improve the local ethics program, and the local state representatives are interested in the issue (and perhaps one of them wants to be the mayor), then the priority of the issue may be raised. But there is still the rest of the state, whose local officials usually do not want state legislators to raise the issue at all.

The state ethics commission, if there is one (sometimes there are two, executive and legislative), would appear to be an excellent ally. And sometimes it will be. But state ethics commissions are usually overburdened with duties, and underfunded and understaffed, so that the prospect of adding local ethics training, advice, and enforcement to its duties is often not highly desirable. Support for state jurisdiction over local ethics really depends on the ethics commission's leadership, both the chair and the executive director. They can be the greatest supporters or do what they can to undermine state-level reform.

Local ethics reformers will need to supplement state good government organizations, and the good will of some state legislators, by forming coalitions of local good government and citizen organizations that have either struck out in their own cities and counties, or see this as a good cause to fight for. One good thing is that organizations across the spectrum of political views, from progressives to business groups to anti-tax

organizations, generally support better ethics programs. It's more a matter of priority, than of support. An issue such as creating an effective state ethics program can bring groups together in a coalition that have never worked together before. This is a good thing for citizens and can be a valuable experience for those participating in the coalition.

The most difficult problems are (1) to overcome lack of interest and understanding and (2) to overcome some of [the obstacles discussed above](#), especially the argument that "one size does not fit all."

XIII. Ethics Environments

“Ethical conduct cannot be effectively shaped and maintained in isolation. The reflective process ... requires a supportive environment if it is to result in responsible conduct.”

—Terry L. Cooper, *The Responsible Administrator* (Jossey-Bass, 1998)

A. Healthy Ethics Environments

As difficult as it is to create a good ethics program, it is equally difficult to create and preserve a good ethics environment. And it is difficult to have a good ethics program without a good ethics environment.

Many people believe that if there are no scandals or if there is a body that enforces an ethics code and yet no enforcement proceedings, then the local government has a healthy ethics environment. Nothing could be less true.

In many cases where there is a perfectly decent ethics code and even an ethics commission, there is so little belief in the possibility of enforcement of the code (usually due to the involvement of high-level officials in the ethics program), that no one tries to start an enforcement proceeding. Or people are too afraid of retaliation to file a complaint.

No definite conclusion can be drawn from a lack of enforcement proceedings. Here, for example, is the range of views on the fact that, in Gwinnett County, Georgia, so few complaints had been filed during the years there was a great deal of ethical misconduct (this comes from a 2007 report by the Vinson Institute of Government at the University of Georgia):

Among ... county officials and department heads, the fact of so few ethics complaints was seen varyingly as a reflection that the county doesn't have any serious ethics issues, that the ordinance has no day to day applicability to employees outside of top management, that the ordinance is not user friendly and does not clearly provide a way to express ethics concerns, and that the scope of the ordinance is insufficient.

In addition, there is often so little understanding of government ethics, due to a lack of training and discussion of ethics issues, that officials as well as citizens do not know enough to distinguish government ethics issues from any other sort of apparent wrongdoing. You cannot file an ethics complaint that will not be immediately dismissed, if you cannot recognize an ethics violation when you see it. There is usually no public record of such complaints and, if there was, it might look like there was a great deal of ethics enforcement activity, when in reality there were complaints that had nothing to do with government ethics. In other words, the number of complaints that are filed says nothing about a government's ethics environment.

One thing that can be said, however, is that a healthy ethics environment, just like a healthy person, is characterized by activity, not by a lack of activity. In a healthy ethics environment, ethics matters are regularly and openly discussed, advice is regularly sought, disclosure and withdrawal are common, the ethics commission meets regularly and sends regular memos and newsletters to officials and employees, and training is done annually. A lack of ethics activity is evidence of an unhealthy ethics environment, just as lack of activity is a sign that a person is sick. And yet a lack of activity relating to conflicts of interest is generally considered evidence of a healthy ethics environment, primarily by people who don't understand what activity should be going on.

A healthy ethics environment is also characterized by the full acceptance and institutionalization of an independent ethics program and of formal processes that protect against the use of position to provide preferential treatment. In a healthy ethics environment, an ethics program is not jeopardized by threats to its budget or public attacks against its personnel, nor do officials talk about how unnecessary government ethics is, because they learned about ethics from their family and religion. In a healthy ethics environment, government attorneys do not look for loopholes, constitutional challenges, or weaknesses in ethics laws or procedures, but rather recognize that ethics laws are minimum requirements, turn ethics matters over to the ethics commission, and do what they can to strengthen the ethics program. Everyone respects the institutions and processes that have been established to help officials deal responsibly with their conflict situations and gain the public's trust, and they work to improve them rather than denigrate or undermine them.

A healthy ethics environment is characterized by transparency and the encouragement of public participation. Secrecy shouts to the public that there is something to hide from them, and that they are not welcome participants in managing their community. Transparency leads to fewer mistakes relating to conflict situations, both because others know what is happening and can point out mistakes, and because those who know they are being watched are more likely to be careful and to seek professional advice when they are concerned they might make a mistake that will lead to criticism, if not enforcement proceedings.

In a healthy ethics environment, open meeting and public records laws are followed to the letter, and beyond (giving an extra day or two's notice of a special meeting never hurts). The local government website is used to make available, on a timely basis, all the information citizens need to know about what is happening in their government so that they can participate with the information they need. This includes not only agendas and minutes, but also budgetary information, reports and audits, and the information necessary to contact officials and agencies. Annual disclosure is not seen as an imposition, but as a necessary part of an ethics program. And high-level officials' work calendars are made public.

The elements or indications of a healthy ethics environment include the following:

Leaders who understand and value a healthy ethics environment, and are willing to take the personal and political risks necessary to create and preserve one.

Open discussion of ethics issues relating to every matter, and the training necessary to engage in these discussions.

Officials' willingness (and ability) to seek professional ethics advice whenever they have a question about their own behavior or that of a colleague.

Full transparency, including clear reasons for every important decision and the full telling of stories of misconduct.

Following formal processes to the letter, and publicly explaining any deviations from them. No unwritten rules.

Officials and employees publicly apologizing for their errors and misconduct.

In one's official role, loyalty and accountability to the public rather than loyalty to individuals, including supervisors, colleagues, party officers, friends, family members, and contributors.

Refusal to use ethics as a political weapon.

Constantly seeking to improve the ethics program rather than say that it is good enough already.

The short way to describe a healthy ethics environment is leadership, ethics discussion, transparency, respect for formal processes, and accountability.

Having a poor ethics program is worse than having no ethics program at all, because it gives people the impression that the local government cares about ethics, when the truth is that it does not. It contributes to an unhealthy ethics environment. Officials and employees, and other people in the know, realize that the government does not care about ethics and that officials make little or no use of the ethics program. Officials fail to deal responsibly with their conflicts out of ignorance due to a lack of training, or because they have no place to go for quick, reliable ethics advice, or because they know they can get away with it. Others go to the city or county attorney, and are given legal advice (rather than ethics advice) that gives them the green light to deal irresponsibly with a conflict whenever the law is not very inclusive or absolutely clear.

A poor ethics program is seen by the public as poor only when there is a scandal or series of scandals that undermine the public's trust in government. Such scandals are usually followed by limited reforms that add prohibitions and sanctions without significantly changing the quality of the ethics program or the ethics environment.

A better ethics program can be created due to a scandal. But better ethics environment can be created only by good leadership.

The opposite of a healthy ethics environment is not corruption. It is an environment where little thought is given to government ethics, where it is not well understood and, to the extent it is understood, it is treated as a irritant or as just another way to fight the ongoing campaign known as politics.

1. Leadership

When a high-level official pushes for a good ethics program, it often looks too goodie-goodie to be true. It looks like self-promotion rather than improvement of government processes. In other words, it is too often seen and treated not as something important to democracy and professionalism, but rather as a way of showing one is holier than thou.

A principal reason for this is leaders' failure to understand, and express to others, that government ethics is not about "being good," that it can be better and more usefully described as "doing well." That is, it is about dealing responsibly and professionally with conflict situations, a skill that is relevant to most matters and is important to the local government's finances as well as to its reputation in the community and to the community's reputation elsewhere.

When a leader talks about government ethics in terms of ethics rather than conflicts, it puts other officials on the defensive. Their natural response is to deny that there is corruption in their government. If there was a recent scandal, that's behind us now. The bad apples are gone. Leaders need to show that government ethics is not about bad apples, but about a bad organization that allows its apples to act unprofessionally due to a failure to analyze and discuss their conflict situations and an inability to deal with them responsibly that goes far beyond each official's character. Leaders need to show that everyone who allows ethical misconduct to occur is responsible for it, just as they are responsible for not speaking out when poor financial or engineering decisions are being contemplated.

A healthy ethics environment is a vision of an organization and its members as having special obligations, in this case to the public. This is a vision learned by those who get public administration degrees, but it is easy to lose this vision in an unhealthy ethics environment, and most elected officials never learn it. Therefore, this vision needs to be institutionalized and preserved, and this is dependent on leadership.

Leaders must not only want to do more than appear that they are responding to a scandal or making of show of caring about ethics. They must subscribe to a vision of the local government as an organization that recognizes and values its special obligations so much that it is willing to include the consideration of these obligations in its decision-making on all matters, to foster open discussion of ethics issues, to strongly encourage officials to seek ethics advice and to disclose and withdraw when appropriate, not only when required by law. Leaders need to recognize and communicate the importance of

appearances of impropriety, and accept that the ethics program, because it has jurisdiction over the government's leaders, cannot be run by anyone selected by those leaders, or its decisions and advice will not be respected by the public.

One reason it is so difficult to apply this vision to the realm of conflicts of interest is that this is not an important topic in public administration schools. It gets lost in something that is often called "government ethics," but applies to a wide range of conduct. Therefore, dealing responsibly with conflict situations has to be taught, carefully, and the teaching has to continue until it becomes common knowledge and there is an inclination among those in the organization to seek ethics advice and openly discuss ethics issues impersonally, like any ordinary matter. This can only be done if dealing with conflict situations is given a high level of priority, and this requires leadership.

Government ethics has to be taught not only in words, but in actions. Leaders must go out of their way to deal openly and responsibly with conflict situations and use them as teaching opportunities. Leadership and confidentiality cannot appear in the same sentence. If the council, mayor, and manager do not deal openly and responsibly with conflict situations, there is no reason to expect anyone else to do so. Who will report misconduct for other than political reasons if government leaders do not feel the rules apply to them?

This is why it is so damaging to an ethics program for a high-level official to insist that legislative immunity protects him from government ethics enforcement (see [the section on this](#)). Putting personal interest in one's reputation ahead of the public interest, and doing it in the name of a policy intended to protect the public from officials acting in their personal interest (for that is what legislative immunity is), is a great way to undermine a local government's ethics environment as well as the public trust.

It is risky for leaders to do what it takes to create and preserve a healthy ethics environment. No one likes to be portrayed as lacking in ethics. This leads to pushback and personal dislike and resentment. And a healthy ethics environment means not only fewer gifts and fewer opportunities to help those to whom one has special obligations. It also means less power and less freedom to maneuver. It means being more under public scrutiny, and having to deal more with citizens who have access to more information. A healthy ethics environment means more explaining what one is doing, and why (in other words, accountability). It makes it harder for politicians to create the web of relationships

and obligations necessary to move into higher office. It even complicates something that is very important to many elected and appointed officials: the social aspects of politics.

Taking government ethics seriously is a pain. It takes a special person to make the case for government ethics well enough that officials will be willing to put up with the annoyances and limitations of a good ethics program. But the rewards are far greater than the annoyances.

2. Ethics As a Team Sport

A healthy ethics environment may require excellent leadership, but the practice of government ethics is a team sport. Let's take the typical situation of a mayor who says that he should be involved in approving a service contract to his sister because she's the best person for the job, not because she's his sister. If the mayor's aides say nothing, the mayor will likely get himself into trouble. But if the aides were to remind him that it is not professional to be involved in approving a contract to his sister, that no one will believe the mayor is not acting because it's his sister, and that it would lessen the public's trust in government by making government look like a way to benefit one's family members (to the exclusion of ordinary citizens), the mayor would likely not do it. A mayor who would go ahead and do it anyway has probably been enabled by silent aides and colleagues for years, that is, by others who are looking after their own personal interests as well, without recognizing that, in the long run, being silent is against everyone's interests.

Teams communicate well. If one member of a football team doesn't understand a play, mistakes will be made and the result will be anywhere from a wasted play to an interception that's run back for a touchdown. In sports, everyone on a team wants to ensure that no such mistakes are made. In government, there are some people who want mistakes to be made, who don't mind the occasional interception, because they believe the mistakes will be helpful to them and to those important to them personally or politically. These people do not want open discussion of ethics issues or professional ethics advice. They want to do what they want to do, and have the team support them not through good communication, but through silence or that magic word, "Yes."

One of the best results of encouraging the open discussion of ethics issues in government is that it empowers subordinates. In an unhealthy ethics environment, subordinates know what is going on, but are afraid to say anything. Open discussion

removes the fear and allows subordinates to say what their superiors, who tend to face far more conflict situations, need to hear. Empowered subordinates, in turn, make it much harder for higher-level officials to deal irresponsibly with their conflicts. It's a win-win situation.

A government official with multiple conflicts is a liability, just like a slow soccer player. No matter what the official's other talents are, no matter that everyone feels on balance the official is a help to the government, the conflicts remain a liability and they should be treated as such. Sitting out can be best for the team.

Of course, politics is a team sport, too. The best thing that can be done about the damaging aspects of politics as a team sport is to bring the best aspects of teamwork (that is, the parts that don't involve opponents) into government ethics.

Ethical misconduct is also accomplished through teamwork. It is generally not the work of one bad apple, but rather of a group of people who participate in the conduct or allow it to occur. The other side, that is, the ethics program, needs teamwork as well in order to oppose and prevent ethical misconduct. Ethics commission members need to develop relationships, and get coaching and practice, not just meet when there is a complaint or a request for an advisory opinion. They also need to communicate with and learn from other local ethics commissions and from their state commission.

Ethics commissions need to work with those in the community who support good government. They need to train these people and learn from them. The communication channels need to be open and frequently used. Ethics commissions have to make sure that misplaced confidentiality does not get in the way of this important communication.

Teamwork between an ethics commission and the rest of the local government is also important. An ethics commission needs to show officials how to discuss the ethical aspects of government decision-making, professionally rather than personally, and how to establish best practices, such as the habit of asking if anyone has a possible conflict whenever a new agenda item comes before a board. Government ethics needs to be helped along by good habits and a recognition that it is part of acting professionally. And ethics commissions need to listen to officials' questions and concerns, and give them responses that are instructive without being overly critical.

B. Unhealthy Ethics Environments

In an unhealthy ethics environment, where government is closed and not trusted, citizens without a personal interest in particular local government decisions tend to stay away and leave the work to those who do have a personal interest in the decisions. When it is perceived that government is run for the personal interests of its officials and their associates, this undermines participation all the more. The result is an unvirtuous circle that deepens the community's lack of trust in its government and its unwillingness to participate in it.

Washington, D.C. is a good example of a lack of participation in government. In March 2012, more than 700 board and commission seats were vacant. In fact, 27 city boards had no members at all or were made up only of people whose terms had expired.

The same mechanism that has allowed mankind to prosper through the creation of groups whose members trust each other is also behind the creation of city machines, agency fiefdoms, old boy networks, racial and ethnic conflict, and partisan discord. Trust is central to government ethics, and yet the dynamics of trust among individuals in a government organization sometimes contributes to the undermining of the public's trust in their local government.

The problem here is that a local government organization in a democracy is not supposed to be like other groups. It is not supposed to be opposed to any other organization or to look down on anyone. It is supposed to embody, manage, represent, and bring together, as much as possible, its community. And yet the government's values and norms are supposed to be not the values and norms of the community, although these are important, but rather the values and norms of our democracy: fairness, responsibility, openness.

1. Fiefdoms

Just as leadership is central to the creation of a healthy ethics environment, it can also be central to the creation of an unhealthy ethics environment. One of the worst types of ethics environment in a local government, agency, or board is what is often referred to as a "fiefdom." This is a funny word from the bad old feudal days. But it's not a funny situation. It's a situation where one or two individuals have complete control over their organization. They may not run the fiefdom for their financial benefit, although they usually do, but they

always abuse their position for the purpose of power. They turn their backs on those to whom they are responsible (the public), and operate primarily for themselves. And no one stands up to them, out of fear, out of loyalty, or because they too financially benefit.

Here is what a 2011 report on a fiefdom in New York said: “When people talk of the RF’s mission or goals, they never ask or say what the Board believes — it is all ‘John wants x,’ or ‘John believes y.’ It is as if the Board of a \$1 billion nonprofit corporation does not even exist. ... There is widespread acknowledgment that the CEO is able, but also concern over his having ‘his own agenda,’ ‘being dedicated primarily to survival,’ and being ‘the guy who taught Machiavelli.’”

There are three characteristics that should give a fiefdom away to outsiders. One is hostility toward anyone who questions the boss or the organization, and a disparaging attitude to, in the case of a government agency, the rest of the government and the public. This hostility and arrogance is often accompanied by a culture of intimidation intended to frighten people into silence and acquiescence. It is also characterized by secrecy and deception. While officials talk of openness and citizen participation, they act in many ways to exclude citizens, to place obstacles in the way of their access to information (from budgetary info to ethical misconduct) as well as their access to officials and the public at public meetings and hearings. Prof. Mark E. Warren of the University of British Columbia calls this “duplicitous exclusion” and considers it central to government corruption.

The second characteristic is a legal staff that acts as if the boss was its client. And the third is a defensive, self-justifying attitude that can turn into a siege mentality when any sort of investigation begins, ethical, criminal, or financial. A fiefdom resists outside “intrusion” as a knee-jerk reaction, calling on such positive values as confidentiality and independence, and using the legal system to protect itself and delay if not prevent inquiry. The New York report says something that I’ve found to be very true, that a fiefdom “cites legal criteria that are not usually the determinative ones. So they have created a remedy — secretiveness — that is far too broad for the supposed disease. The result is corrosive distrust.”

The reason a fiefdom’s arguments and justifications are often inappropriate is that they are intended to create emotional support inside the fiefdom. And yet because they sound like legal arguments, they are often taken at face value by the outside world, rather than seen for the weak self-justifications they are. People are unskilled in sniffing out an

unhealthy ethics environment and doing something about it. People are too quick to take “No” for an answer, especially when it is backed up by a legal opinion.

Board members are also too willing to accept secrecy and powerlessness. If they are not asked to meet, they’re happy. It's less of a bother. If they are not given memos, or if they are not asked to discuss arguments and conclusions in memos they are given, it means less work. It's much easier to depend on one’s staff. But board members have an obligation to oversee their staff. The failure to do so is taken for granted by those who abuse their positions for their own power and wealth.

Although the legal responsibility lies with the board, it is the lawyers who should be the ones to stand up to and report on anyone who asks them to make bogus arguments, who demands more secrecy than is necessary, or who takes a combative, protective attitude. In local government situations, one or two government lawyers who know what is going on can bring an end to any fiefdom or other abuse of position. But they rarely do. They either tell themselves it is not their responsibility (these are their “clients” after all), or they actively provide help. It is important for government attorneys to remind themselves, and each other, that these individuals are *not* their clients. Government attorneys represent the public, the government, and the positions rather than the individuals who hold the positions. This distinction is only important when the individuals in high positions abuse these positions, which is the case in fiefdoms. In such cases, government attorneys have an obligation to the public to put a stop to this abuse.

2. Machines

There are four principal differences between a fiefdom and a machine. One is that fiefdoms usually occur in agencies rather than entire governments, although there are government fiefdoms. Two is that fiefdoms are usually run by unelected officials. Three is that in a fiefdom it is clear who is in charge. In some machines, even when there is a strong mayor form of government, it is not always clear whether the individuals “in power” are really the ones in control, the ones who pull the strings. The traditional machine is run by someone else, or by a cabal of individuals secretly sharing power. How can you make anyone accountable when you don't even know who's in charge?

Keeping the one who wields power a secret undermines the entire government's transparency, even the entire community's. It increases the fear factor, and the discomfort

about participating in government. Is the power in the hands of the head of this or that agency, the county attorney, the city manager, the party committee chair, a power broker who holds no position at all? Or all of them together? Who really puts together the budget, who works the numbers after the budget has been passed? Who controls who gets contracts, kickbacks, grants, and faster permit approval? Who can you trust? What can you do to get rid of them? How will you know you have succeeded?

The fourth thing that distinguishes machines is that they survive through patronage and other forms of preferential treatment. When you run a machine, you have to be careful who you appoint. You have to exclude everyone you can't trust or buy off or, on the other hand, include every group, so that everyone has an interest in the machine's survival (Chicago's machine took the latter approach). And in a machine, everyone is hired with the knowledge that they have an obligation to help the boss get re-elected. In a machine, nearly every relationship is a special relationship, not because officials are political colleagues, but because they are conspirators. Against the public and in favor of the boss.

Even a machine that does fine things for the community is acting against the very people it serves. Its survival and the power of the boss are more important than anything else.

3. Personal Entitlement

Another characteristic of an unhealthy ethics environment is a strong sense of personal entitlement. This sense of entitlement arises from several feelings, including the feeling of sacrifice for the community (lots of time for no or little pay), the feelings that come from being elected or selected, wielding power and position, and having people treat you with special respect, the feeling that comes from knowing what others don't know, and the feeling that one's ethnic or racial group is finally getting its due.

In practice, the sense of entitlement often means secrecy, helping oneself and one's fellows to the spoils of power, preferential treatment of those who can help you, and nepotism both in hiring and in procurement, grant-making, and other government transactions. There is little opposition from one's colleagues for the very reason that they too feel entitled, special, deserving. As for subordinates, they hope to emulate their leaders, or they are too afraid of retaliation to speak out. As for opponents, they hope to do

the same when they gain power in the next election. Power does corrupt, and those who deny this are most open to power's negative effects.

Such environments exist especially in the uniformed departments. An extreme example is the Bronx police, which not only fixed tickets for VIPs and for their colleagues' friends and family members for many years, but when this preferential treatment became public in 2011, the officers' union president "outed" those given preferential treatment (with the exception of officers' family members) as if it were their fault, and demonstrated rudely against the government, as if it were the government that was wrong for uncovering the department's ethical misconduct.

The department called its officers' conduct "professional courtesy," as if it were preferential treatment, rather than ethical behavior, that is professional.

One might argue that ticket fixing isn't such a serious thing (although it must have cost the city millions of dollars), but a department's belief that it makes its own rules, and can hide them from the public, usually goes beyond these relatively minor forms of preferential treatment (in this case, there were also allegations of dealing in drugs and guns). When one justifies ethical misconduct, and gets away with it, it becomes easier to justify more serious misconduct.

In addition, jurors will know that these officers have hidden their ethical misconduct for years, and not trust their words in court. And when officials give preferential treatment to some people, that means they are treating others worse. Where does this stop? Are the same officers discriminating against people of color? Against immigrants? No one will believe they are acting fairly, which destroys trust in an important force in holding together a community and making it feel secure. This goes far beyond the loss of millions of dollars.

The same sense of entitlement justifies nepotism in uniformed departments. The rules that apply to others, it is thought, should not apply to the uniformed departments, because the uniformed departments are special. Officers' children have been following in their footsteps for generations. This view is so powerfully presented as fact that many people outside the departments agree with it or are afraid to counter it.

It's fine to follow in parents' footsteps, but this does not require working in the same department. See [the section on nepotism](#) for more about this.

4. Friends and Enemies

An unhealthy ethics environment has characteristics that go beyond ethical misconduct. In an unhealthy ethics environment, there are enemies other than political enemies. These enemies include the public and its other representatives, the news media. Both are seen as decidedly lesser than government officials. They don't understand the problems, don't know the facts, and all they think about is their wallets or crazy ideas, like stopping development or holding referendums. Ever notice how often when a citizen rises and makes a strong critical point, she is treated as if she didn't know what she was talking about? Disrespect, humiliation, and intimidation are important weapons in an unhealthy ethics environment.

Look at it from the official's point of view. Citizens are a pain to deal with on a daily basis, complaining about services, assessments, and the like, wanting everything right away, treating employees like servants. Local government employees feel underpaid, and it is citizens' refusal to pay more taxes that is the cause. Government officials are constantly harassed by opinionated locals, especially those who care only about keeping taxes down or keeping things out of their neighborhood. Open meetings and public records only make everything more difficult. And then there are elections, where you have to go hat in hand to the very people who make your life miserable. No wonder so many government officials and employees come to despise the very public whose interests they are supposed to put first. This can be a powerful element in a local government's ethics environment.

Seeing the public and the news media as enemies creates an us-them mentality in which the typical reaction to criticism is not to look at the way things are, but rather to circle the wagons, deny, defend, and attack. An us-them mentality creates the kind of loyalty that justifies secrecy and ethical misconduct. When a zoning board member in North Providence, Rhode Island was found by the state ethics commission to have illegally entered into three secret no-bid contracts with the city, the mayor publicly criticized the complainant, a local "gadfly," and looked forward to doing business with the zoning board member. I wonder how many officials who call citizens "gadflies" realize that this is how Socrates referred to himself (referring to the city government as a slow, dimwitted horse that he stung with his questions and comments).

Most people in an unhealthy ethics environment do not violate ethics provisions. But most of them do fail to act or report when their colleagues violate them. They say nothing when their colleagues abuse their positions. And sometimes they even act supportive, nodding at specious justifications, turning away when an official intimidates a

subordinate or a member of the public, voting for weaker ethics provisions or against an increase in the ethics commission's budget. Sometimes they even join in, feeling safety in numbers. Sometimes the reason for inaction is fear. Sometimes the reason is nothing more than feeling ashamed of one's "weakness" in not thinking or acting like the others.

Our desire to belong, to be normal, to be friends with our colleagues, is the glue that holds together an ethics environment. Unethical officials depend on others' desire to belong and be normal, that is, silent.

Since ethical leaders cannot dissolve this glue, they have to work hard to change the meaning of normality.

5. Incivility

When people talk about ethics in government, one of the things they think of first is civility, that is, elected officials being nice to each other and to the public. Civility is not something an ethics code should enforce, because it is too hard after the fact to define incivility, not to mention determine who started it and what the appropriate sanctions should be. Civility should be dealt with as it occurs and by the body where it occurs ([see above](#) for a discussion of this). This is why there are civility rules in Robert's Rules of Order (chapter XX).

However it is dealt with, incivility is a sign of an unhealthy ethics environment. It is a misuse of office that is damaging to the community, and to our democratic system. Personal viciousness and partisan rancor scare citizens away from involvement in local government. People are not so much different from dogs in the way they react as much or more to the tone of people's voices as to their words. When it gets ugly, people skulk away, emotionally speaking, and stay away.

Political rancor is a good indication of how much local government in an unhealthy ethics environment is a game played by officials against officials, with little concern for the public or the public interest. When government appears to be a nasty and exclusive game, only those who enjoy such games will participate, or even watch on a regular basis.

When the venom is directed toward citizens, this is even more true. Not only does it set off emotional reactions in us, but we worry about how our reputation in the community will be affected, and we wonder what there is to gain from getting involved in local political issues. Those who do get involved are individuals attracted to the incivility,

people who enjoy attacking other people, whether at meetings or in comments to blogs. In other words, incivility leads to more incivility. It usually starts with a community's political leaders, and it usually can be stopped only by political leaders, as well, unless other pillars of the community unite to put an end to it. But pillars of a community are often more concerned with their reputation than anyone else, and many choose to contribute to the community in other ways than through criticizing local government leaders, unless things get really out of hand.

However, it is also important to recognize that incivility is only one incarnation of an unhealthy ethics environment. Many of the worst leaders are excellent at preserving a highly civil front. It is much easier to stay calm when you are in control, when you both hold power and are the umpire that determines who is uncivil. Such a leader can calmly do, enable, and allow horrible things to happen. For example, he might state calmly that the law says such-and-such, when it does not. Is anything more harmful than a calmly spoken lie that is accepted as fact due to the way the lie is delivered? Or he may say that a citizen's time is up, when he is cutting her off because he doesn't like what she is saying. Is anything ruder than saying, "Thank you for sharing that with us" (and then moving on) to someone who has made a passionate plea for a response?

At what is sometimes considered incivility is actually the result of frustration and passionate protest. Some of the best-meaning individuals can be excitable, especially in the face of an official's calm misrepresentations and abuse of power. Civility rules can be used by calm but unethical officials to stifle frustrated or protesting citizens, even citizens protesting against a lack of transparency and other legal or ethical violations. Employing civility rules against troublesome people is popular, because most people focus on style rather than substance. But it is not civil to prevent speech and then sanction people who continue to speak anyway or who speak in protest to the crushing of their freedom of speech.

In his short 2008 essay "[Freedom of Listening](#)," Lewis Hyde takes a different approach to civility. He speaks of the freedom to listen to what citizens have to say which, unlike freedom of speech, is a collective rather than a personal right. The freedom to listen emphasizes diversity of speech. In a world that emphasized freedom of listening, a leader's obligations would be "to transparency and to keeping the noise low enough that no speaker gets drowned out."

6. Dishonesty

In an unhealthy ethics environment, there is something more than the usual dishonesty and broken promises. There is a gap between the official version of events and what actually occurred. This isn't exactly lying. It's something much more serious, because it is more pervasive and insidious.

A lie is something limited. For example, saying you've cut taxes when you've increased the mill rate. Worse than a lie is an environment where nothing that is said is actually true, where written rules aren't followed in practice, where what you see is never what you get.

Reality in an unhealthy ethics environment is like pieces of eggshell in a bowl of cracked eggs. If you don't have your own piece of eggshell, it's really hard to get a hold of the pieces of eggshell to get them out of the bowl. Reality can be similarly elusive. The goal of those in charge of the eggs is to make sure that no one gets a piece of eggshell of their own, unless it's clear that they won't use it on the other pieces of eggshell.

It's a Wonderland experience to speak to a room of eggshell holders. If they let you speak at all, they will twist your words in ways you never imagined. If you speak of an official's possible conflict, they will defend his integrity, even if you never mentioned it. If you speak out in favor of government ethics training, they will say that everyone got their ethics training at home and at their house of worship. That little word "government" simply disappears into the bowl of eggs. If you try to explain what you mean, and aren't told you already had your say, that it's someone else's turn, you are personally attacked. Either you don't know what you're talking about, or you're out of order, or this isn't the place or time for this conversation, don't you understand? Reality must remain elusive.

7. Ethics as a Political Weapon

Using ethics complaints and other sorts of attacks on ethical or pseudo-ethical grounds is a common characteristic of an unhealthy ethics environment, one that is very damaging to an ethics program. When an ethics program appears to be nothing more than an extension of partisan rancor, it might as well not exist.

And yet time and again individuals, party leaders, and even party committees bring ethics complaints and make ethics allegations that are baldly political in nature. Often the

attacks occur during the election season or in the midst of dealing with a major issue, to distract attention or undermine the other side's position by attacking the officials rather than their arguments.

What makes the use of ethics as a political weapon so hard to deal with is that, in an unhealthy ethics environment, members of the complainant's own party or faction are not willing to become pariahs by criticizing the politicization of ethics. The accused side says it's all political, but this sounds like denial rather than explanation (and too often it really is nothing but an irresponsible response to a valid ethics complaint, so it is hard to tell the difference). There is usually no one considered sufficiently independent to be able to rise above the fray, explain why what is happening is damaging, and convince those involved to keep their disputes from tainting the ethics program.

An ethics officer or commission could do this, but they are usually hampered by rules that require confidentiality even if they quickly dismiss a complaint for failure to state a violation or because a preliminary investigation has shown that stated facts are not true. Confidentiality rules are supposed to protect the innocent, but they often protect those who use the ethics system as a political weapon. The same is true for conventions of even-handedness, which prevent ethics officials from condemning abuses of the ethics program.

Even rules against the filing of complaints during an election season cannot prevent the making of ethics allegations during this time (see [the section on prohibiting complaints during elections](#)).

When ethics officers or commissions find probable cause or take a long time investigating what appears to be a politically motivated complaint, they appear to be taking sides even when they're just following formal processes. This is especially damaging if they have been appointed by the mayor and/or council, when these individuals or their staff are parties to the complaint. This is one of several situations that show how important it is not to have ethics commission members be selected by anyone under the commission's jurisdiction.

In a healthy ethics environment, it is risky for a party, faction, or candidate's supporters to use ethics as a political weapon. In such an environment, members of the complainant's own party speak out against such conduct, explaining how important it is to keep politics out of the ethics program. And in a truly mature ethics environment, officials

recognize the harm to the ethics program of its politicization and object to any proposal by a colleague to use ethics as a political weapon before it becomes a reality.

8. Special Boards and Districts

One way to ensure an unhealthy ethics environments is for a local legislative body to set up special boards or districts over which it, and no one else, provides oversight. For example, in North Carolina, every local government has its own local alcoholic beverage control board, appointed by local officials. But local officials do not provide oversight over the boards, and the individuals employed by the boards are not considered government employees, so ethics rules do not apply to them. And since many of the boards are actually profitable, and the profits go to the state and to the local government, it is in the interest of the state and of local governments to turn a blind eye to them. The result is a culture of nepotism, secrecy, excess pay, and other ethical misconduct. Due to some scandals in 2010, the state sent the boards a set of ethics guidelines, but they are voluntary.

Another example of governments that seem to naturally have sick ethics environments are the townships of Cook County, Illinois, which due to their limited functions, large tax revenues, and limited oversight and transparency, are abused for personal and political benefit by officials both at the township level and at other levels.

Probably the most famous example of districts with sick ethics environments was the water districts of California. For decades, those involved in property development used the secretive water districts to push their commercial goals at the taxpayers' expense.

9. A Case Study

Every sick local government ethics environment is different, but it's worth taking a close look at one to see how such an environment works in practice. I have chosen the Broward County, Florida school board, as portrayed by a [2011 grand jury report](#). It was an environment characterized by intimidation and fear:

[W]e have a middle management staff that tolerates or is forced to tolerate incompetence, double-dealing, corruption and laziness but which in turn is always fearful of being targeted by upper management should they challenge interference by Board members or attempt to hold contractors accountable for their work. Not that there aren't employees who work hard and do a good job, there are plenty of

those. But the ones who point out problems and advocate change are quickly marginalized and punished.

What might appear to be management problems have underlying government ethics causes. For example, lots of school construction projects were not completed in time for the school year. Instead of penalizing contractors, temporary certificates of occupancy were filed to allow the unfinished schools to be opened, despite serious safety issues (which were, of course, denied). Why? “The Board seems to be more comfortable with opening unfinished schools than angering the contractors that fund their campaigns through political contributions and fundraisers.”

And there was nothing temporary about these “temporary certificates of occupancy.” The schools stayed open, despite the fact that once such a certificate is filed, “the builder is no longer responsible for providing insurance for the structure; the risk immediately passes to the taxpayers.” In other words, favoritism due to the need for campaign contributions led to serious safety and financial risks to citizens.

According to the report, the school board’s construction division had 70 people doing the work that should have been done by 25-35, or even fewer. Why? Because firing incompetent workers meant approvals all the way up, including by the superintendent and a majority of the school board. And the deputy superintendent especially would not approve dismissals. So new employees did the work, while old employees did things like running businesses on the side, which was to their personal benefit.

The school board directed spending towards friends and their political supporters by making informal decisions at board workshops and retreats, or even during training sessions, and then ratifying their decisions by use of a consent agenda. Consent agendas, which are as close to secret decisions as one can get in a state with open meeting laws, are a great way to hide important and often expensive decisions from the public.

Another familiar method of doing business in the Broward school district was allowing board members to have “pet projects”:

[I]t is well known to virtually all District employees that most, if not all, Board members have pet projects that it's best not to interfere with, no matter how wasteful or unjustifiable the project may appear to be.

Pet projects may not lead to financial benefits for officials, but they serve the officials' interests rather than the public's. There is an incentive for officials not to interfere with others' projects, because they don't want others to interfere with their pet project. This situation silences criticism and oversight. Pet projects turn any ethics environment into an unhealthy one, where dereliction of duty is seen not as a problem, but as the virtue of being considerate to others.

School board members' involvement in contracts went beyond the usual final approval. On many occasions, board members pressured employees to change the nature of the bidding process in ways that raised the cost to taxpayers. The principal means was to send the decision on the award to a selection committee on which two board members sat. This gave them "tremendous influence" over the decision, that is, the power to make contractors feel obligated to them. Which leads to the clincher of the grand jury report: (p. 37)

Not surprisingly, the most generous supporters to Board campaigns are contractors and their subcontractors, as well as their lobbyists, friends and families. We agree with witnesses that testified that the Board is in many respects a training ground for newbie politicians, where unfortunately bad habits are learned.

In other words, the school board is a place to learn the ways of pay to play, to make the "right" connections, and get the "right" people obligated to you, so that you have the network necessary to move on to higher office. This is how sick local government ethics environments help create sick state and federal government ethics environments.

The grand jury report also looked at the usual sorts of ethics violations committed by school board members, such as accepting and not reporting gifts, voting with conflicts, naming a field after a sitting board member, and the like. The report also focused on the problems that accompany having board members represent districts rather than the entire county. Needless to say, there was also a serious lack of transparency and inadequate record-keeping.

The grand jury ended with a clear statement of what an ethical school board would have done under the circumstances:

The corruptive influence here is most often campaign contributions from individuals with a financial stake in how Board members vote. Long ago the Board should have recognized the risk that putting themselves in the center of handing out hundreds of millions in taxpayer dollars would inevitably draw attention and undue influence from moneyed interests. They should have taken steps to insulate themselves from this influence by delegating to professionals in the District things like contractor selection and bid processes and simply have adopted a watchdog role. Instead they drew closer to it and fiercely protected their role.

C. Improving an Ethics Environment

1. A Public Health Approach

A valuable way to present the vision of a healthy ethics environment, and thereby help to improve it, is what Philip Zimbardo recommends in his book [*The Lucifer Effect*](#) (Random House, 2007). He uses the metaphor of medical and public health approaches to disease. The medical approach is individualistic, treating the patient for a disease he catches from his environment. In the context of government ethics, this means enforcing rules against individuals who are caught violating them.

The public health approach identifies the origin of diseases and tries to prevent them from spreading. In the context of local government ethics, diseases originate in institutional corruption and an unhealthy ethics environment. If officials keep catching diseases from an unhealthy ethics environment, treating their ethical misconduct individually is a short-sighted and short-term solution. It means one scandal after another, year after year, undermining the public trust more and more as time goes on. This is clearly not a sufficient way to handle ethical misconduct.

Only by recognizing the power of situational forces to corrupt us can we avoid, prevent, challenge, and change them, so that the scandals stop. Just as we need to recognize that we are all vulnerable to diseases, ethics programs need to recognize everyone's vulnerability to situational forces and the need to deal not only with individual conduct, but also with the situational forces themselves. This is similar to what happens during a flu epidemic, where public health professionals try to stop the spread of the flu at the same time that individuals are treated individually.

It's important to emphasize that although an unhealthy ethics environment is a principal cause of ethical misconduct, this does not mean that individuals are not responsible for their actions. However, depending on the particular circumstances, situational forces should be considered as mitigating circumstances and, for those putting pressure on subordinates, for example, as aggravating circumstances in determining an individual's penalty for violating the ethics code.

2. The System Level of an Ethics Environment

There are three levels to an ethics environment. There are the levels of the individual, which is taken into account by the medical approach. There is the situation, which is taken into account by the public health approach. But there is also the system level, the forces that create the situation and give legitimacy to the unethical norms of an unhealthy ethics environment. It is through these norms, also known as unwritten rules, that officials and employees learn the values of an organization. When the unwritten rules contrast with the formal rules, including ethics rules, the unwritten rules usually take precedence. Everyone believes the formal rules are only for show, respected only by being more careful in how the unwritten rules are followed.

The system level of an ethics environment does not just reflect the ideas or ethics of current leaders. Unwritten rules usually have a long history. But each set of new leaders chooses whether to allow the unwritten rules to continue. The unwritten rules are difficult to change, especially by those who have operated well enough under them to take leadership positions. But they can be changed by leaders with sufficient moral courage.

New leaders also determine the level of pressure that is placed on subordinates to play by either the unwritten or the written rules, and how to create this pressure, that is, through intimidation, setting an example, making examples of others, etc. Only when the written and unwritten rules are the same, will the written rules be truly effective.

An ethics environment based on unwritten rules often features a gap between the official version of events and their actual course, between rules and practice, appearance and reality. It is not a matter of politicians lying. It is something much more serious, because it is more pervasive and insidious. There is a cultural norm where nothing that is said is actually true, where written rules are not followed in practice, where what you see is never what you get.

What matters are the unwritten rules, and keeping them secret. Those are the ones officials know and practice, even if they would never mention them in public. The rules that are followed, the real rules, are not for reading, they're for doing. Lawyers are there to make sure that, when necessary, what has been done can be shoehorned into what has been written down.

The best way to see a local government's unwritten ethical norms is not through what officials say or even through what they do, but through how others respond to what they say and do. If an official blasts into a citizen at a public meeting, and there is silence from the other officials, the ethics environment is one that depends on intimidation. Its principal socialization method is demanding loyalty. Its stories are about betrayal.

If a citizen asks a question and does not get an answer, and that is fine with other officials, the ethics environment is one in which citizens are at best pests, and at worst threats to the status quo. Its stories are about how dangerous gadflies can be. It is closed and practices secrecy.

At the system level, one can see how an environment of intimidation turns into a vicious circle. When government officials employ intimidation as a tactic, they scare citizens away from joining boards and commissions, and from speaking out at government meetings. This means that there are fewer people to watch over the government on behalf of the public. Those who take the positions have connections, and are safe, which means that they provide little oversight and are unlikely to depart from the unwritten rules. This makes government officials feel more fearless and act more self-serving and more openly intimidating. And so on. Intimidation becomes less necessary and, therefore, less rare. At this point, it has already has its effects. It is brought out only when someone out of the know speaks out.

Besides ethical misconduct, the result of this vicious circle often is a small in-group of politicians who use taxpayer funds to fight their power fights, including such things as recall elections and suits.

An environment of intimidation works best where there are lots of immigrants and where there is not an active, critical press or strong civic institutions, that is, where there is no one outside the government to perform the oversight function. But such an environment can take hold anywhere.

It is at the system level that long-term changes can best be made. As long as the unwritten rules remain, are kept secret, and are accepted and enforced by those who rule, an ethics program cannot make a great difference. The greatest difference can be made if ethics reforms raise institutional issues and leaders encourage or allow the unwritten rules to be openly discussed and then make public decisions regarding them. The informal processes also need to be openly discussed, including reward systems, too much discretion in the hands of individual elected officials, partisan and union pressures, internal competition (e.g., among agencies), the lobbying process, and the culture of loyalty. The goal of these discussions is to change the unwritten rules and processes so that they become consistent with the written rules. This might be the most difficult and most important thing a leader can do to improve an unhealthy ethics environment. It is far more important than making changes to an ethics code. That is why it is rarely even mentioned when ethics reform is discussed.

Leadership is the principal element in changing informal norms. Formal ethics reforms needs to be accompanied by new stories, new language, new priorities in hiring and promoting, and new conduct, including the encouragement of open, honest discussions not only about ethics matters, but also about the fears that come from an environment of intimidation and the ways that feelings of loyalty, betrayal, and disrespect for the public support an unhealthy ethics environment.

An example of what can be done to change the system is that, when an individual has the courage to report misconduct, internally or to an ethics commission or criminal enforcer, the individual is actively, even aggressively protected, the misconduct is dealt with according to formal processes by an independent body, after the body's decision the situation is openly discussed, along with ways to prevent such situations from coming into being, and the underlying norms and unwritten rules are also discussed and taken on. Simply recognizing the roles of individuals, situational forces, and the system of norms and unwritten rules can go a long way to allowing the system to be changed and a healthy ethics environment to be created.

Max H. Braverman and Ann E. Tenbrunsel, the authors of book [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) (Princeton University Press, 2011), suggest that leaders should inventory the informal systems that exist and work to understand the underlying pressures that are put on employees. In a local government, these pressures

include goal and reward systems, partisan and union pressures, internal competition (e.g., among agencies), lobbying, and demands for loyalty. “Unless leaders take individuals' actual decision processes into account,” government officials and employees will largely ignore formal systems.

When leaders fail to provide ethical leadership, the ethics commission should do as much as it can to fill this role. It is the most important role a hampered ethics commission can play.

3. Changing Moral Systems

In his book [*The Righteous Mind*](#) (Pantheon, 2012), Jonathan Haidt defines morality in terms of “moral systems.” He describes moral systems as “interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible.”

It is important to recognize that an unhealthy ethics environment has a moral system of its own. There are values, norms, practices, identities, institutions, and psychological mechanisms that make its ethics what they are. Such an environment cannot be improved unless all of these things are acknowledged and dealt with. Loyalties must be recognized as misplaced. Much of what is considered confidential must be recognized as a kind of secrecy, and replaced with openness. Special “courtesies” and other unwritten rules that favor officials' associates must be openly discussed, criticized, and replaced with written rules that are fair. Fiefdoms and machines must be recognized for what they are so that they can be changed and, with respect to fiefdoms, effectively overseen. And blind spots must be dealt with through training, independent advice, and ongoing discussion of ethics matters.

In other words, one moral system must be replaced by another. Chipping away will do little more than make common practices go underground. No matter what is done, there will be a moral system. No institution can exist without one. But the moral system spoken of in public is not necessarily the one that exists in reality. The more different they are, the worse the ethics environment. This is why it is so important to have open discussion of ethics issues. Only in this way can the real values, norms, and practices

become known to the public. As long as they are hidden and denied, they cannot change, any more than an alcoholic in denial can change.

Norms and practices will not become public unless people inside and outside government feel safe. The misuse of power to intimidate is the most damaging practice in an unhealthy ethics environment, because it enables all the rest. It is the bad flip side of moral courage, which is what enables all good, open conduct and the reporting of misconduct. Intimidation also destroys employee morale, preventing the government from holding on to good employees. Creating an atmosphere of secrecy that hampers work, it means less transparency across the board, hampering public participation and making it easier to engage in all sorts of misconduct.

4. Relationships

One of the most difficult things to recognize about an unhealthy ethics environment is that the most common relationships can be the worst. The misconduct that becomes the subject of ethics proceedings is sometimes only the tip of the iceberg. For example, in an unhealthy ethics environment, the official-constituent relationship that is central to constituent services can be based not on the need of ordinary constituents, but on the benefits sought by constituents doing business with or seeking grants or permits from the government, constituents who are in a position to keep elected officials in office (or support their opponents) through the use of their influence and the contributions they give and bundle.

In addition, “old boy,” ethnic, and race-based networks, partisan cronyism, and patronage systems, often considered normal and even desirable, make government appear to be for the benefit of those in charge, and their friends, rather than for the community as a whole. Union and business relationships can also be abused at the public’s expense.

Fellowship and deal-making are so common to politics that the ethics of the relationships they involve are usually not analyzed from a government ethics point of view. Even in the best of causes, however, the ethics of each relationship and situation, and its possible appearance of impropriety, should be questioned. For example, when in 2011 a large law firm agreed with the mayor of Chicago to staff the city’s ethics task force at no charge, it should have been considered how this favor to the mayor might be seen as ensuring benefits to the firm’s clients, if not the firm directly, down the road.

When you work in an organization (or in more than one, if you include political parties), you tend to view your conduct in terms of the organization, which has its own norms, often based on expediency. This is true even when, as in government, the organization exists only for the community, that is, when its norms should be based on the values inherent to a democracy. An ethics environment can be improved by viewing all relationships not in terms of the organization, as is common, but rather from the public's point of view. This allows individuals and groups to question ordinary relationships and discuss how best to handle them as part of being public officials responsible to the public rather than to the organization.

5. The Institutionalized Discussion of Ethics Issues

In a healthy ethics environment, discussions of ethics issues are every bit as common, professional, and impersonal as discussions of engineering, fiscal, or personnel issues. And they should be regular, that is, institutionalized. Whenever any matter is discussed, the question should be raised whether there are any ethics issues involved.

For example, at board meetings, whenever the board moves on to a new agenda item, the chair should ask not only if anyone has a motion, but also if anyone has or knows of a potential conflict. I keep repeating this, because it is so logical and yet too rarely done.

Or take the context of a meeting of procurement officers. When they discuss a contract, the question should be raised if anyone has or knows of a potential conflict, not only relating to the procurement officers themselves, but relating to any official or employee who might have been or will be involved in any way with the contract preparation, bidding, approval, and oversight process. In addition, the question should be raised whether there have been any irregularities, such as unusual specifications or ex parte communications with elected officials, possible contractors, or their representatives. If a contract has been presented as a no-bid contract, this decision should be questioned and adequate explanation given. And when people contact a procurement officer regarding a contract, she should ask whether they have a relationship or involvement with any potential contractor or subcontractor, or with a government official or employee.

The same issues should be discussed with respect to land use matters, grants, licenses, and other special benefits that a local government provides.

It is important for both employees and citizens in an unhealthy ethics environment to recognize that unethical leaders are self-serving, even when they are not in any way “on the take,” which is, unfortunately, the only way most of us conceive of corruption. These leaders know, at some level, that what they are doing is wrong, even if it is legal. How can one tell? Because they keep their activities as secret as possible and do their best to prevent discussion, not only before the public, but even among themselves. They also know that their unwritten rules and ways are vulnerable to being portrayed for the self-serving habits they are. That’s why they remain unwritten.

When ethical leadership and open discussion are lacking, an unhealthy ethics environment can be broken down from the outside, by just a few devoted individuals, through many small steps. But this is the hard way to do it. What people on the outside cannot do is create a new environment. Without this, things will return to how they were, only perhaps more underground.

See [the extended discussion of the institutionalized discussion of ethics](#).

6. Rewarding Ethical Behavior

One effective way for leaders and supervisors to create a healthy ethics environment is to reward employees for ethical behavior. How an employee deals with conflict situations should be part of employee performance appraisals and an important consideration for promotion.

Focusing on accomplishments at the expense of means is a major cause of ethical misconduct. It is important to also reward, and thereby focus on, the good means. See [the section on rewarding ethical behavior](#).

7. An Ethics Commission’s Role

An ethics commission in a local government that has an unhealthy ethics environment can take a proactive role in trying to change that environment. An ethics commission does not have to wait for advice to be requested or complaints to be filed. In an unhealthy ethics environment, few people will ask for advice, and most people will be too afraid or skeptical of the consequences to file an ethics complaint.

An ethics commission can invite officials, employees, and the public to its meetings to discuss the local government’s ethics environment. It can discuss the fear, anger, loyalty,

and helplessness people feel, the unwritten rules and informal processes, the secrecy and intimidation, and the role of government attorneys and other professionals. It can sponsor the sort of [workshops discussed in the Enforcement chapter](#). Where leadership is lacking, an ethics commission can take the initiative.

If an ethics commission is truly independent, it can make officials and employees feel more comfortable discussing the local government's ethics environment and ways to both alleviate fear and act so as to change the environment in a way that does not involve getting even. To accomplish this ethically, it is best to start with self-criticism, that is, with discussing what it is about most people – those not involved in ethical misconduct – that allows the misconduct to occur.

It is also important for the silent majority in an unhealthy ethics environment to imagine what they themselves are capable of, so that they can understand what leads others to act as they do. Also, they need to consider what in them prevents them from acting this way, whether it is professional duty, guilt, fear of being caught, respect for others, or respect for our democratic system. And then they can consider the best ways to prevent misconduct. Creating guilt and fear aren't good, because they are part of the intimidation process. Duty and respect, on the other hand, raise us above it.

Ethics commissions can also weave back into the community groups and individuals who have felt ignored or intimidated in an unhealthy ethics environment. Even though government officials and employees are the subjects of an ethics program, it is important to remember that ethics programs exist primarily for citizens. Therefore, in order to deal with the problems created by an unhealthy ethics environment, it is important to reach out to citizens, as well. They may not be within an ethics commission's jurisdiction, but their troubles arising from an unhealthy ethics environment may be addressed by more than changes to an ethics code.

8. A Lawyer's Role

Lawyers in every community understand what is going on in government better than most people. Even when they have no direct involvement with local government, their education and expertise, their experience working with many of the lawyers in local government, the fact that they, as lawyers, are licensed by the government, self-regulated, and bound by special rules of professional conduct that, among other things, require them

to report the misconduct of other lawyers, give them special obligations toward the public with respect to government. When they read about misconduct on the part of local government officials, they do not have the same luxury as ordinary citizens do to flip to the sports section. It is their responsibility to do something about an unhealthy local government ethics environment, especially one involving attorneys. This is especially true when they are asked to get involved.

When I was involved in trying to stop my town government's failure to bid out contracts, its manipulation of the budget, and its culture of intimidation, I wrote to twenty-five lawyers in town, detailing the government's conduct (including that of lawyers in the government) and asking them to meet together to discuss it. None of them was willing to meet. Nor did one of them speak out.

The same thing happens in town after town, county after county. There cannot be unethical local governments without the active and passive support of lawyers in the community. A handful of lawyers, even lawyers outside of government, can put an end to the worst abuses of local government. Lawyers too often ignore their authority and their special obligation to speak out when they are aware of ethical misconduct in the local governments of the communities in which they live and work. If they give precedence to their personal interest in not offending those who could affect their practice, then how can anyone expect those in government to act in any way that jeopardizes *their* personal interests, even at the expense of the public interest?

9. The Role of Individual Officials and Employees

One of the most important steps in moving toward a healthier ethics environment is for each government official and employee to recognize his vulnerability to the unhealthy aspects of the ethics environments. Becoming aware of this vulnerability, which all of us have, is a prerequisite for resisting the influences of an unhealthy ethics environment and for improving it. The worst thing we can do is say that ethical misconduct is something "they" do. We each need to focus on our own role in our ethics environment, what we do and do not do that allows or enables others' ethical misconduct, what we do to allow ourselves to be co-opted into ethical misconduct, how we justify our own ethical misconduct and our failure to do anything about others', and what we can actively do to make our ethics environment better.

As soon as a government official stops and realizes that pointing out a conflict could cause problems for her, she needs to move on to the next step: recognizing that this is evidence of an unhealthy ethics environment, an environment that discourages ethical conduct and the reporting of ethical misconduct.

Government ethics programs sometimes focus too much on violators, even though an ethics environment is equally characterized by its bystanders. Those who do not participate in ethical misconduct, or believe they do not, feel as if they have no role in an ethics program. It's about the bad apples, they tell themselves. They are wrong.

Things are different in the world of bullying (and politics is, in many ways, similar to a school playground). The American Academy of Pediatrics' recommended approach to bullying "focuses attention on the largest group of children, the bystanders. ... [Its approach] manages to turn the school situation around so the other kids realize that the bully is someone who has a problem managing his or her behavior, and the victim [the public in the local government situation] is someone they can protect."

Children seem to understand that they can choose to be either enablers or preventers. They seem to understand that, even if they are neither bullying nor being bullied, they have a role to play in bullying. Local officials in ethics environments characterized by intimidation need to recognize the same thing, and protect the community they are working for.

10. The Role of Political Parties

Political parties play a major role in determining who runs for office and, therefore, who a community's elected officials are. In fact, this is the principal argument in defense of political parties: they vet the people who manage our communities. Some state and local party committees even have their own codes of ethics and party oaths, placing on themselves and/or their members and candidates the obligation to deal responsibly with conflict situations.

Imagine a city that has a terrible ethics environment, in which elected officials are giving their friends (and each other) no-bid contracts, the budget is a bunch of lies, government employees and citizens are intimidated if they speak up. What is the responsibility of the political party in power for what is happening?

All the party has to do is remove its support from one candidate and publicly say why, and the game will be over. Not after the FBI has announced that it is investigating the official, but long before this, when serious misconduct is occurring. Even discussing this possibility openly would be big news, and would move officials toward dealing with the conduct rather than denying it.

But the tendency of any group is to circle its wagons when things go wrong (at least until there are indictments or, sometimes, not until there are convictions). This is especially true of a group whose principal purpose is to obtain and retain power. Anything that might jeopardize its hold on power is very difficult to do, even if everyone realizes it is the responsible thing to do.

But the obligation is still there, as is the possibility. In a city or county with an unhealthy ethics environment, the political party in power (and the other party to the extent it accepts the status quo, benefits from it, or expects to benefit from it in the future) should be held to its obligation to vet its candidates and, when they turn out to be engaging in misconduct, refuse to allow them a place on the ballot and let the public know why. And not only when they know their candidate has no chance to be re-elected. The greatest proof of a party committee's value would be to drop a candidate against whom there are no formal allegations. Yet.

11. Non-Ethics Punishment for Ethical Misconduct

One concrete way in which government leaders can make it clear how seriously they take the creation of a healthy ethics environment is the way they punish officials and employees who engage in ethical misconduct, who aid and abet misconduct, and who do nothing about it when they have the knowledge and the obligation to act. This does not mean that punishment is always appropriate, or that it should be harsh. This is a sensitive area, where the public's demand for retribution cannot be allowed to govern the choices, even though the public trust is very important. It should be made clear that the punishment to the individual must be appropriate to the seriousness of the misconduct. And that, like everything in government ethics enforcement, punishment is first and foremost an opportunity for learning.

Most ethics violations do not merit firing, a request for resignation, or equally serious punishment. For one thing, most ethics violations are minor and based on

ignorance of or a failure to take into account the rules. For such violations, a public apology, a recognition of what occurred, why it was wrong, and what will change in the future, is sufficient, at least for the violator.

In addition, where there is no ethics commission, or where the ethics commission is passive, the mayor, manager, agency director, or board chair might want to go further and ask who knew about the violator's misconduct, ask those who knew about the misconduct what they did or said, and ask those who did not try to prevent the conduct or report it to publicly apologize, too. This approach need not be reserved for more serious infractions. If leaders look beyond violators and this becomes the norm, it will change the dynamic of responsibility for ethics matters, so that officials discuss them both before misconduct occurs and after they learn about an instance of misconduct.

For more serious ethics violations, government leaders should consider punishment that goes beyond the sanctions the ethics commission has available. If the violator is a member of the council, a typical punishment is to take away committee chairmanships or positions on important committees, at least until the next election. There are instances where it would be just as appropriate to do this to council members who aided the violator, participated in similar conduct, or even knew and did nothing. For example, if a council member were to arrange for a relative to get a job with a developer, and this was found to be accepted conduct on the council's land use committee, it would send a powerful message for the mayor or council president to demand the resignation from the committee of *all* its members.

Rarely is a government attorney penalized by an ethics commission. But in many cases, government attorneys advise officials when they should instead send the official to the ethics officer or commission. Sometimes, a government attorney tells an official how to get away with ethical misconduct, and hides behind client confidentiality. If an official has engaged in ethical misconduct and says that he spoke with a government attorney about the matter, government leaders should consider the confidentiality waived and ask the government attorney what was said. It is important to recognize that the client who can waive confidentiality is the government, not the individual who sought advice. If the government attorney refuses or has given inappropriate advice, she should be sanctioned in an appropriate manner.

Ethics programs generally cannot deal with cover-ups, but government leaders can take into account and act on what everyone knows: a cover-up is usually worse than the conduct it tries to hide. Any violation that is accompanied by a cover-up, especially where the cover-up involves intimidation of others, should be punished more severely than a violation that is handled according to the available formal processes. Even where there is simply denial, evasion, and obfuscation that involves no one but the violator, additional punishment is warranted, because denial, evasion, and obfuscation are the opposite of accountability. And accountability is central to our democratic system.

When officials quickly acknowledge their conduct and reach a settlement with the ethics commission or another appropriate agency, saving the government both money and the pain and the cloud of uncertainty that come with an extended investigation and hearing process, this should be publicly commended and rewarded, at least through words.

Segments of the public and the news media may insist on a violator's resignation from the council, but this is only appropriate in the most serious situations. It's easy to call for resignation, and hard for government leaders to explain why this is inappropriate. This can best be done if the situation is described in its entirety and placed in the context both of past conduct and norms, and of future rules and expectations relating to the specific sort of conduct. It can also best be done in the context of an ethics environment where apology and punishment are common, and where each ethics violation is openly explained in a way the public, as well as officials and employees, can understand it.

Pension Forfeiture

A common response to a serious scandal is the passing of a pension forfeiture statute or ordinance. Pension forfeiture is the capital punishment of government ethics. It makes legislators look tough, and it satisfies people's demand for retribution. It makes people feel that justice has been done. With powerful emotions sparking supportive editorials, few think about the arguments pro and con, or the alternatives, including fines and restitution, which could be taken out of future pension payments if the individual does not have sufficient assets and is at or near the age of retirement. A pension forfeiture bill may be accompanied by talk about ethics, justice, and accountability, but it is really about retribution.

The principal rationale behind pension forfeiture is that pensions are rewards for faithful service, and that a breach of public trust negates the public official's entitlement to the pension. But is a pension a reward or is it something that is contracted for (in fact, one of the principal attractions of public service)? And what about spouses and dependents? Have they also breached the public trust? Should they also be punished?

Pension forfeiture does have one major advantage over capital punishment: it is a more likely deterrent. It may not make officials accountable, as is often argued, but it might make them think a third time before they embezzle or accept bribes.

But some pension forfeiture laws do not stop at felonies. They also include misdemeanors and ethics violations. An instance of such a law is Article XV, Section 2 of the Maryland constitution, which in 2008 put the Baltimore mayor in the position of fighting for her job and pension rather than simply fighting ethics and minor criminal allegations. This escalated the situation and cost the state a great deal of money. The mayor spent twenty-two years of her life in public service to Baltimore. She was hardly the most ethical of officials. However, her pension was not offered to her as an extra, but rather as part of her pay, just as it is for everyone lucky enough to get a pension. She earned her conviction, but she also earned her pension. After eighteen months of fighting allegations, she ended up making a deal to keep her pension, a deal that was very unpopular with the public. It appears that no one criticized the constitutional provision or tried to explain the situation to the public from the start, with the end result that public trust was undermined.

[Connecticut's 2008 statute](#), which applies to municipal officials, is one of the more reasonable ones. It applies only to serious crimes that breach the public trust, it may not be applied to whistleblowers, it does not allow the reduction of income needed to support spouses or children, it applies only prospectively (since deterrence is the principal goal), and it gives courts the freedom to reduce or revoke pensions (or not to), including reducing the pension for restitution, fines, and the cost of imprisonment (nothing is mandated).

The bottom line question regarding pension forfeiture is whether it is in the public interest to feed retribution. The emotional seeking after retribution, which usually takes extreme forms such as demands for resignation and pension forfeiture, is intimidating. It takes a great deal of moral courage for high-level officials not to give in to it, to take the

risk of trying to calm the public and explain why it is best to let the formal processes of the ethics program determine the appropriate punishment.

When retribution is taken off the table, then people can talk honestly and compassionately about what sort of punishment is appropriate. Let's say that a mayor accepted from a developer a \$50,000 makeover of her kitchen. That's a serious ethics violation, but considering that she would have to pay back that \$50,000 and, most likely, it means the end of her political career, the loss of power and prestige in the community, need any more be done to her? Should she lose her pension or go to prison?

For more on pension forfeiture, see [Dylan Scott's 2012 essay](#) in *Governing* magazine.

XIV. Obstacles to Overcome

There are many obstacles to overcome in creating, maintaining, and administering a good government ethics program. Some of them are the same as those that stand in the way of creating any good government or, for that matter, corporate or nonprofit program. But many are unique.

Some of the obstacles discussed in this chapter have already been mentioned. But it is valuable to have them all in one place, forming a checklist of the obstacles that can be anticipated, along with suggested ways to overcome them.

A. Incompetence

Incompetence is always the principal obstacle to any sort of action, but there is probably more incompetence with respect to government ethics than with respect to any other area of local government. Every other area has someone with expertise: an administrator, accountant, lawyer, engineer, teacher, social worker, janitor, etc. In nearly every local government in the United States, there is no one with any expertise in government ethics. Nor does the press or the public have much understanding of government ethics. Good government organizations are often the only entities that have anyone on staff with some relevant expertise. For more on this, see [the section on ignorance as an obstacle to reform](#).

This wouldn't matter if everyone recognized this fact and accepted it, the way most of us recognize that we know very little about engineering or medicine. Then officials and government attorneys would find someone who did have expertise in government ethics, something that most reporters do when ethics issues arise. But this is rarely done, due to the second obstacle: misunderstanding.

B. Misunderstanding

There also might be more misunderstanding concerning government ethics than there is concerning any other area of local government. Many people get stuck on the word "ethics" and believe that they learned everything they need to know about government

ethics at home and at their house of worship. In fact, they learned little about government ethics in either place.

Other people get stuck on the idea that even considering a government ethics program puts their personal integrity into question. They insist that they can't be bought, that they put the public first in everything they do, and if they push for their relative to get a job or contract, it is only because that is the best person available.

What does one do when an official defends his personal integrity when a conflict issue is raised, instead of being professional and encouraging a discussion about the conflict situation? The person who has raised the issue might say, "I did not intend to question your integrity," but this looks like backing away from an allegation. And that is often the end of the discussion. The idea that integrity is what government ethics is all about will be ingrained in everyone present, and nothing positive will be accomplished.

Another approach is to acknowledge (or, better, have someone other than the individual who first raised the ethics matter acknowledge) that the official is an ethical person, but explain that this is a professional matter, not a matter of good and bad. Then one can say that the professional way to handle a conflict situation like this is to withdraw from participation, return the gift, seek ethics advice, or whatever. An official insistence that he has integrity should be the beginning, not the end, of the discussion of how to handle a conflict situation.

Of course, sometimes insisting on one's integrity is not a matter of misunderstanding. It is used as a tactic to end discussion of government ethics matters. But the way to handle the situation is the same whether there is misunderstanding or a cynical attempt to manipulate people's emotions. It is important not to get stuck on whether an official's raising of the issue of integrity is sincere or sneaky. Give the official the benefit of the doubt, and use the occasion both to educate and to move the discussion from the personal to the professional.

In any event, it is hard for most officials to embrace a government ethics program, especially when they are personally involved. The next two sections provide some reasons why.

C. Helplessness, Fear, and Feelings of Victimization

Many local government officials are sincerely afraid of what might happen if they were to give up control of government ethics, to an independent ethics commission in their city or county, or to a commission at the regional or state level. They already have no control over criminal enforcement and, in most jurisdictions, sunshine and campaign finance laws at the state level already govern two of the three areas of government ethics. When people talk of creating or putting into actual practice an ethics program that officials don't really understand, these officials feel helpless and vulnerable. Their careers would be in the hands of individuals who are not at all accountable for their actions. Or put another way, their careers would be in the hands of individuals they have no reasonable way of influencing or getting back at. They're not players, like members of other parties and factions, or prosecutors, for that matter. They don't even play by "the rules."

It's no wonder that officials worry about the possibility of what they so often call a "witch hunt" by an independent ethics commission. The idea of an ethics commission independent of politics must seem downright terrifying.

These feelings of helplessness and fear of the unknown are often responsible for opposition to the creation of ethics programs and, when they are created, for the many ways in which ethics programs are hobbled, hamstrung, and incapacitated (see [the section on ways to undermine an ethics commission](#)).

Helplessness and fear cannot be easily countered, but they can be mollified by two things. One is presenting government ethics in terms of the professional, responsible handling of conflicts. Two is showing officials what's in it for them. A good ethics program, based on training and advice, can seriously curtail gotcha! politics. Ask for advice and you're off the hook. If a truly independent ethics commission says that an official didn't violate the ethics code, people will believe it. There will no longer be the lose-lose situation of people arguing that the council or ethics board selected by the council protected a council member.

And if those doing business with the local government are brought into the program, as they should be, they will have as great an interest in preventing scandals as officials do. If they try to go too far in their attempts to influence officials, they will lose their contracts, and officials with whom they develop special relationships will not be able to support their developments.

In other words, a good ethics program protects officials as much as it protects the public, and officials' fears can be lessened by showing how this works.

The same feelings of helplessness and fear sometimes crop up after an ethics complaint has been filed. No matter what an official did, he often sees himself as the victim of a partisan attack. He feels unfairly selected from a number of officials who he knows have done the same as he, or worse. The issue for an official in this situation becomes not dealing responsibly with a conflict, but fighting the fight, and sometimes just trying to survive, against attacks from other politicians, the news media, and the blogosphere.

A politician's indignation at perceived injustice often does more damage to the public trust than the actual ethics violation. Instead of admitting what he did, he denies what happened, says that what he did was legal, or insists that the whole thing is just a political vendetta, an act of malicious envy. Better he admit what happened, explain why it happened, including mitigating circumstances (such as how common his conduct is), and use the occasion as the warning it should be to other high-level officials, as well as the basis for making changes that will end the particular sort of misconduct. If the official fights, the public generally roots for his comeuppance, and he feels even more victimized.

D. Blind Spots

Plato thought “that unjust people did not really understand what they were up to, did not act voluntarily, and were usually so misguided that they really deserved pity. They suffer from disordered psyches and are tormented by driving desires and rages that they are not able to satisfy or control. Irrationality, insolence, uncontrollable desires, aggressiveness, and sheer stupidity are all, in their way, psychic diseases that make us unjust.”

—Judith N. Shklar, *The Faces of Injustice* (Yale Univ. Press, 1990)

People have a lot of personal blind spots, that is, for many reasons they cannot see about themselves what they can easily see about others. This is true more of politicians than of regular people, because politicians succeed on the basis of their *interpersonal* skills, not on the basis of their *intrapersonal* skills. That is, they tend to lack the ability to be aware of their own emotional states, feelings, and motivations, and to draw on them to understand

and guide their behavior. They depend far more on persuading and manipulating others than on persuading and guiding themselves.

This section identifies the various blind spots that stand in the way of dealing responsibly with conflict situations, one's own and those of one's colleagues. Some have been mentioned elsewhere in this book, but it is valuable to list them all in one place and to discuss ways of dealing with them.

It is important to recognize that blind spots should not be used as excuses. What is important is to recognize one's blind spots, so that these personal limitations do not act as obstacles to professional government ethics practices.

1. The Bias Blind Spot

In her book [*Being Wrong: Adventures in the Margin of Error*](#) (Ecco, 2010), Kathryn Schulz notes how difficult it is for us to believe that we act for selfish reasons. For example, we do not believe that we push for a grant because our brother is the executive director of the charity it is going to. We believe we push for the grant because it is going to a cause that is good for the community. And yet most neutral people will believe we voted for the grant because of our brother. This difference in perception forms a major obstacle to seeking ethics advice, accepting ethics enforcement, and supporting the creation of a good government ethics program.

This blind spot is a "bias" because we believe that *others* act for selfish reasons, even though we believe that we do not. "[W]e impute biased and self-serving motives to other people's beliefs all the time. And, significantly, we almost always do so pejoratively. . . . Psychologists refer to this asymmetry as 'the bias blind spot.'"

This asymmetry is produced by the fact that we can look into our own minds, but not into anyone else's, so that we "draw conclusions about other people's biases based on external appearances — on whether their beliefs seem to serve their interests — whereas we draw conclusions about our own biases based on introspection. . . . Our conclusions about our own biases are almost always exculpatory. At most, we might acknowledge the existence of factors that could have prejudiced us, while determining that, in the end, they did not. Unsurprisingly, this method of assessing bias is singularly unconvincing to anyone but ourselves."

It is very difficult for us to let go of this bias. And if anyone questions it, we get self-righteous and defend our integrity. The fact is that few of us have integrity in the sense that we are whole and consistent in our thoughts. There is an asymmetry in our beliefs and biases, we have blind spots, and we are very poor at self-criticism. Recognizing this is a major step toward becoming a responsible adult. It is also a good way to begin a government ethics training class.

Another way of looking at the bias blind spot is to look at how we evaluate ourselves. Our self-evaluation is rarely rational. It takes “the rosier possible interpretation of the facts,” according to the Chip and Dan Heath in their book [*Switch*](#) (Crown, 2010). Most of us think we're above average at everything, from driving a car to making judgments regarding our conflict situations. This makes it hard for government officials to see a need for ethics reform, at least in so far as it would be applied to them individually.

One of the reasons we can get away with evaluating ourselves so positively is that our standards are ambiguous. Being a leader or team player, driving well— these are standards everyone can define so as to feel they have what it takes. Get more specific and things change. Few feel they are better than average race-car drivers or leaders of mountain-climbing expeditions.

With respect to government ethics, officials tend to take the broadest, most ambiguous standard: being a person of integrity. We all believe we are far better than average at that. But analyzing conflict situations, interpreting ethics laws, determining how our conduct will appear to the public — we're much worse at these things. But it isn't these things by which most officials grade their ability to deal with government ethics matters.

What makes thing worse is that in government ethics, people's bias toward themselves is not just any obstacle. It's a crucial obstacle. And it is hindered by the various other blind spots, which together prevent officials from dealing responsibly with their conflict situations.

2. Bounded Awareness

How powerful are our blind spots? I was once told by a state ethics commission staff member that a member of the ethics commission who had been accused of acting inappropriately (in the government ethics sense) was a man “of unquestioned integrity.”

This response implied that someone who fails to recognize and deal responsibly with a conflict must be lacking in integrity rather than, say, competence, understanding, or self-criticism. If government ethics professionals have blind spots regarding the conduct of the people they work with, think how strong the blind spots of ordinary officials must be regarding themselves.

There is a name for this staff member's blind spot: "bounded awareness." According to Max H. Bazerman and Ann E. Tenbrunsel, the authors of [*Blind Spots: Why We Fail to Do What's Right and What to Do about It*](#) (Princeton Univ. Press, 2011), bounded awareness prevents us from seeing what we need to see to make ethical decisions. We tend to exclude important, relevant information from our ethical decision-making by placing bounds around our definition of a problem. In effect, we put on blinders, like a race horse.

There are many ways in which we limit our awareness of a situation. We narrow our concept of responsibility (e.g., to our boss rather than to the public). We focus on instructions that are given to us or on arguments that support a decision our supervisor or local legislators support. We do not ask for neutral external input, and we reject those who differ with us as partisan or self-interested. We focus on meeting a deadline rather than seeking out more information and opinions. We limit ourselves to our functional boundaries, such as engineering, law, or finance. We give in to groupthink, that is, seek or accept consensus rather than consider alternatives. We act out of fear, that is, fear of rejection, of being seen as goody-goody, of the consequences of whistleblowing, of our job being jeopardized. We focus on the law rather than the ethics.

The first steps in dealing with our bounded awareness are to recognize that we ourselves wear blinders (a truly difficult, painful thing to do), and then to talk about them openly. Recognizing our limitation, we are more likely to run ideas and possible decisions by people we trust to give us an honest response that is not biased toward us or our colleagues.

But before we can start taking these steps, at least with respect to government ethics, we have to get beyond the belief in the prophylactic powers of an individual's integrity. We need to recognize that our blinders sometimes allow us to act unethically without realizing it, that our character and our intentions cannot always prevent us from dealing irresponsibly with our conflict situations.

In an unhealthy or even neutral ethics environment, being open about our own blind spots, not to mention others', can be very uncomfortable, or even dangerous. It's not easy to openly question our supervisors' and colleagues' assumptions, to welcome differing opinions (especially from those we consider our opponents), to take on group (sometimes party) consensus, or to talk about ethics when others are talking about laws and results.

Because people so often believe they are doing nothing wrong, they need a rule that is so simple and factually based that their integrity is not an issue, that is, a bureaucratic requirement, like filling out a form or getting a supervisor's approval. This rule is a requirement that officials seek ethics advice whenever they have a special relationship with an individual or entity involved in a matter that is or will come before them, or that they may influence (see [the section on this rule](#)).

3. Ethical Fading

“Ethical fading” is a blind spot whereby we eliminate the ethical dimension of a decision. According to Bazerman and Tenbrunsel, “Most of us dramatically underestimate the degree to which our behavior is affected by incentives and other situational factors.” Goals, rewards, informal pressures, even compliance systems can effectively blind us to the ethical implications of what we do. The result is that we do not see our behavior as ethical, but as something else: acting for our agency, acting strategically, considering the financial costs and benefits, pushing our party's platform, doing what we are required to do by law, doing what it takes to look good.

Ethical fading is an important obstacle to acting ethically, cooperating with ethics enforcement, and seeing the need for government ethics rules in the first place.

Discussing the possible conflict situations involved in every matter focuses officials' attention on ethics, and makes it clear to them that it is as important to the agency, is part of its strategy, saves money, is good for the party, what is required, and what will make the agency look good. Ethics training can help with this, but leadership is also necessary to make these discussions common, respected and, in the end, habitual.

4. Moral Imagination

Another blind spot is our inability to put ourselves in others' shoes and see ourselves through their eyes. This inability prevents us from seeing how we may be hurting others or the institution we are part of.

The ability to put ourselves in others' shoes is called "moral imagination." It is a mirroring process, and mirroring – the way we perceive how others act and see the world – is central to education, especially our social education. It is important to recognize that it takes a lot of thought to overcome the strong emotions we attach to our decisions and to the loyalties on which we often base those decisions – to colleagues, agency, party, family – not to mention one's own career and reputation. Once we "frame" a situation as something we *have* to do for our family or our party, or for the good of our city, it is hard to get out of that frame to see one's decisions and actions from other points of view.

Moral imagination requires empathy. At the extreme, a lack of empathy is psychopathy. The principal characteristics of psychopathy are a lack of empathy and of guilt, the manipulation of others, pathological lying, and a failure to take responsibility for one's actions.

High-level officials, as well as ethics trainers, should try to emphasize the value of empathy and should make an effort to discuss each situation in terms not only of how they see it, but also how others see it. Using one's moral imagination requires guidance, practice, and acceptance from one's peers and leaders.

5. **Motivated Blindness**

Our blind spots do not involve only ourselves. People also have a tendency "to overlook the unethical behavior of others when it is not in their best interest to notice the infraction." Bazerman and Tenbrunsel call this "motivated blindness."

In the context of local government ethics, motivated blindness can best be seen when local government attorneys are advising their "clients," that is to say, officials, especially high-level officials, on ethics matters. Too often, they give officials advice that is in the official's personal interest (that is, what will allow them to do what they want without clearly breaking a law) rather than advice that is in the public interest.

It is generally assumed that this bias is intentional. But often it is not conscious at all. It is a result of the fact that the government attorney identifies with the situation the official is in, and that he is unconsciously motivated by the fact that it is in his interest to have the

official be happy with his advice. We want those we work for to be happy with our performance. We learn this very early in life. And this attitude is validated in law school and in legal practice.

This is why it is so important for local government attorneys, both staff and outside counsel, to constantly remind themselves, or be reminded by their supervisor, that they are not representing the people they consult with, but rather the city, county, or agency, that is, the public. The people they consult with just happen to be sitting in their positions at the moment.

It is also important that local government attorneys consciously recognize that their client in an ethics matter, where there is a conflict between personal and public interest, is not quite the same as the client they help with writing or even interpreting an ordinance, even though an ethics code itself is an ordinance. An official generally has no personal interest in the language of an ordinance. As a representative of the public, an official's opinion matters a great deal and must be the guide for whatever advice about an ordinance the attorney provides. As a conflicted individual, an official's opinion matters very little and should not in any way limit the advice the attorney provides.

In fact, local government attorneys should recognize that, considering the special personal, professional, and political relationship they have with officials, and the bias this creates, they should not be giving officials ethics advice at all, even if there is no ethics officer and even if neither the local ethics code nor the Rules of Professional Conduct prohibit the attorney from providing the advice. They should recognize that they themselves are conflicted, and withdraw from ethics matters. Yes, this would leave officials without a source of ethics advice, but that is a problem they would have to deal with themselves or, better, hand over to an independent ethics task force to recommend a solution.

Motivated blindness is a principal reason why those who give or prepare ethics advice should be appointed by and report only to an independent ethics commission. This removes the organizational loyalty, incentives, pressures, and fears that lead people within a local government to be blinded by their relationships with officials, and therefore biased toward them (or against those they see as their opponents).

6. Sense of Entitlement

The central thesis of Terry L. Price's book [*Understanding Ethical Failures in Leadership*](#) (Cambridge University Press, 2005) is that ethical failures are fundamentally cognitive rather than volitional, that is, they come not out of selfishness or will, as most people assume, but rather out of mistaken beliefs and limited knowledge. Mistaken moral beliefs are less about content (is this right or wrong?), which is again what most people assume, than they are about scope (does this moral obligation apply to me, to us, to them?).

High-level officials do things they would not approve of others doing, because they believe they are different in many ways. They are special.

High-level officials tend to justify their actions in the name of a group of people, whether it is their circle of supporters, their followers in a more general sense, the community, or society as a whole.

High-level officials make exceptions of themselves in the name of particular goals, goals they feel will better their community and that only they can accomplish (say, developing the riverfront or improving the schools). In doing so, they often lose sight of other considerations, including ethical ones, particularly those that involve the means they employ to attain the ends they seek. Thus, any guilt or shame they might feel is offset by feelings of pride and conscientiousness in working hard to attain group ends. People tend to overestimate their team's goals (and their own importance in achieving them) and underestimate the costs of their actions to others.

In addition, success (getting elected, attaining goals, helping one's supporters) tends to inflate a belief in a leader's ability to control outcomes and to conceal actions and their effects, that is, to cover up wrongs they and others do. This makes officials believe not only that they can continue to get away with ethical misconduct, but that their conduct is not unethical under the circumstances, because it is necessary to continuing their accomplishments.

In fact, according to research by Joris Lammers, Diederik A. Stapel, and Adam D. Galinsky ("Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior" *Psychological Science*, 21, 737-744), people who see themselves as powerful are more likely to condemn other people's ethical misconduct while themselves engaging in ethical misconduct more than others. An important factor in this sort of hypocrisy is how legitimate they feel their power is, that is, how strong their feeling of entitlement. Their feeling of entitlement also reduces sensitivity to social disapproval.

High-level officials (with the help of their followers) tend to believe that they have personal characteristics that differentiate them from average citizens, whether it be drive, initiative, or expertise, technical, political, or managerial, and that therefore they know better and may ignore, deceive, or manipulate those who know and understand less, especially those who wrongly oppose them (to help themselves and their party rather than the community, of course). These officials often believe that, because they are faced with extraordinary demands and situations, and because so many people depend on them, they are forced to do extraordinary things to accomplish their goals, things that require the crossing of lines. These beliefs together form a feeling of entitlement, a special kind of arrogance that underlies much ethical misconduct among high-level officials.

We tend to feed this sense of entitlement by putting officials in the position of parents. The specialness they feel, and the different rules we allow to be applied to them, is similar to the way parents feel and the way children feel about the way parents act. Only high-level officials feel this way with respect to the entire community. To them, they are mature and knowledgeable, citizens naive and ignorant.

High-level officials need to be made aware of their fallibility and, by looking at historical mistakes, learn how the natural inclinations of people like them lead to ethical failure. Special ethics training can try to do this, but it will sink in only with the help of aides and other subordinates whom the officials respect (the aides and subordinates therefore need special training, as well). Awareness of their fallibility with respect to conflict situations can lead high-level officials to question whether the way they try to attain even the best of goals is acceptable, whether there are other means to their goals that will do less harm to the community and better maintain the public's trust in their government.

When officials really do believe breaking the rules is necessary, they should explain to the public why they have chosen to deviate from legal and ethical requirements. Just as officials should explain clearly why they are taking a certain position on an issue (not doing so goes against the basic democratic principle of accountability), they should also explain why they have chosen to violate an ethics provision, why it was necessary to ignore ethical principles to accomplish an important goal. And when they violate an ethics provision without such an explanation in advance, they should acknowledge that it was their choice not to openly discuss the situation and, therefore, they will accept the sanctions, publicly apologize, and do what they can to make up for their misconduct.

It is only when officials try to justify, and allow an open discussion of, their actions at the time they occur, rather than when they are caught, that the public can learn to trust municipal officials and to differentiate between which actions are justifiable and which are not.

7. The Need to Be Loved

Many people are attracted to politics by a gnawing need to be loved and admired. Public service is not only an important role for such people, but it also fills a hole in their emotional needs. These needs create something that is not really a blind spot, but has a similar effect when it comes to dealing with ethics complaints.

For those who need to be loved and admired, allegations of ethical misconduct feel like a powerful personal attack. They go against what is most important to them: their reputation as a good, loveable, admirable leader. They react to these allegations emotionally, defensively, often self-destructively. They do not see that the best thing for themselves and for their community is to acknowledge an ethics violation and make amends for it, as quickly and honestly as possible.

They also do not see how destructive their emotional reaction is to their government. Such elected officials often do everything they can to excuse themselves, to cover up what occurred, and to fight to preserve their reputation, while keeping a cloud over their government and their community.

This blind spot is so powerful (and shameful), it is hard for anyone who has it to see, except possibly in retrospect. It can only be dealt with by the official's colleagues and aides. They need to get through to the official that the best way to preserve his reputation is to bring an end to the affair as soon as possible by admitting what is true, apologizing for it, and making what amends are necessary under the law and are best to heal over the wound to the official's reputation and to the harm done to the community's trust in its government leaders.

8. Reciprocity

Reciprocity is the essence of the give-and-take relationships in politics. James Thurber (the American University professor, not the humorist) wondered aloud in his essay "Corruption and Scandal in Washington: Have Lobbying and Ethics Reform Made a Difference?" (in

Corruption and American Politics, eds. Michael A. Genovese and Victoria A. Farrar-Meyers (Cambria, 2011)) whether reciprocity builds “an ethical blind spot and undermine[s] the civic responsibility of the actors in a relationship.” I think it does.

Reciprocity is an important part of every culture. It is something that everyone expects from his relationships with others. It is what makes our relationships seem fair, the glue that keeps our relationships together.

One of the principal elements of reciprocity is mutual gift-giving. It is part of our day-to-day personal, business, and professional relationships to give each other gifts. We take each other out to lunch or a ballgame, invite each other over for dinner or a party, help out each other’s kids when we can. We give holiday gifts to those who do things for us, including our customers and our clients. Lawyers invite clients to their country clubs, and businesses send customers on vacations, or give them free rides in their jets. Gifts are a way of cementing relationships and making people who matter to us (personally or financially, or both) feel special.

They also make the recipient feel good. When we receive a gift, our brain secretes oxytocin, the neurotransmitter that prepares women for motherhood. Oxytocin makes us less selfish, but only with respect to our group, which includes those who give us gifts. It makes us trust them more.

In a government context, however, reciprocity can be very damaging. As Thurber has pointed out, reciprocity lacks transparency. Even if disclosure of financial gifts from restricted sources is required, most of the reciprocity in a relationship, from a smile and a handshake to calls made to help an official’s child get into a university, are not known to the public. Relationships between individuals who are only supposed to relate in their public and business roles are as personal as any relationship. And reciprocity is at the center of what makes the relationships of public servants personal and problematic, from the point of view of the public and from the point of view of fairness and our system of government.

Officials need to be trained to understand that reciprocity in the relationships they have as officials is not a good thing. They need to understand that as a public servant, their relationships with those seeking benefits from them as representatives of the government are not supposed to be personal at all, and that when they are, the official must withdraw from the matter. They simply can’t have it both ways.

And when they talk about relationships with those seeking benefits from the government, officials should be expected to talk professionally rather than personally, recognizing how such relationships look to the public and why the public is right to assume what it does. They should say nothing about how a relationship affects their judgment, or how they cannot be bought, acknowledging not only that everyone can be influenced, that everyone has a price. They should also acknowledge that their personal view of their relationships is irrelevant, and probably not totally accurate. It is only what the public thinks that matters, because they are public officials.

9. Ends-Based Ethics

In government, there is a serious clash between government ethics' use of a rules-based (deontological) approach, and government officials' use of an ends-based (teleological) approach. These two approaches speak different languages and judge each other by different standards.

In government, doing a good job means getting the best result for the most number of citizens. How you get there matters far less than the result. The process and the rules are things to be taken advantage of, to use, even abuse, in order to get the most for your constituents or to get the result you want. The ends justify the means and often determine what the means are in the first place.

Government officials are also judged via ends-based reasoning. A council member who uses her power and skillfully manipulates the rules to get a grant for her neighborhood is considered effective, by both peers and constituents in her district (although not by citizens in other districts, who will see the council member as self-serving), even if the grant goes to her sister's firm. A council member who does not use her power or skillfully manipulate the rules, so that the grant goes to another neighborhood, is considered ineffective (and her sister won't be happy about it, either).

Government ethics is about rules and means and process, handling conflicts responsibly, putting the public interest ahead of one's own private interests, and acting so as to maintain the public's trust, not just the support of one's district or supporters. The result doesn't matter. The means is the end.

And yet government ethics is judged, and it has to be promoted, on the basis of the ends it accomplishes. And most of those are not as clear as the basic values that are

espoused. Yes, when private interests come first, taxpayers usually pay more or get less for their money. But how much? How hard it is to prove.

What it really comes down to is not the type of ethical approach, but the way the approach is used. Those with honest ends-based ethical reasoning truly do what they feel is best for the public, what they were elected to do, not what is best for themselves or their friends or campaign contributors, or even their district. They will steer clear of matters where they have a conflict, and will withdraw whenever there is even an appearance of impropriety, because they understand and respect the end of maintaining the public's trust not in them, but in their government.

The difference between the two principal ethics approaches has more to do with defining ends than with the difference between ends and means.

10. Rights vs. Relationships

We live in a culture that is focused on rights more than on relationships, that gives more value to autonomy than to community. It's not that we don't have relationships and consider them important. It's that when we talk about government, we tend to talk about rights and freedoms rather than relationships and obligations. We don't even have much of a vocabulary for relationships, while we have a strong vocabulary for individual rights, including the right to engage in business with whomever we please and the right of our spouses, partners, and clients to do the same.

In some cultures, there is a strong vocabulary for relationships and obligations. The problem isn't recognizing conflicts among one's obligations, it is determining which ones to give precedence to. Family, business, tribe, and religion usually win out over government obligations. In fact, government jobs and contracts are usually given on the basis of family, business, and tribal ties. Having a strong relationship-oriented vocabulary does not mean that people will embrace government ethics. But they will understand it better.

In our culture, government jobs and contracts often are given on the same basis, but the obligations and conflicts among them are not recognized. It's just the way business is done. It's the bounty of success. You make it and you help those who have helped you. It's your right. After all, your predecessors did it. Now it's your turn.

This can be seen in the way the D.C. mayor's nominee to be chair of the city's new ethics board talked about himself in 2012. A former D.C. city attorney and then private

lawyer with a speciality in representing officials before the city government, he dealt with each possible conflict as an isolated incident rather than presenting himself as an individual with many relationships with officials, present, past, and future. In his testimony before a council committee, he said, “I would recuse myself from Board consideration of any matter involving the specific government employee or official with whom [my] firm is negotiating or requesting relief.” This isolates each conflict situation in terms of person and time.

But that's not really how conflicts work, because they are based on relationships, and relationships are ongoing series of contacts and mutual favors, direct and indirect. Every individual sits in the midst of a web of relationships, where direct and indirect, past, present, and future, all matter equally.

The assumption, however, is that every individual has the right, despite his web of relationships, to take public office, even a seat on an ethics commission, without doing any more than occasionally withdrawing from a matter when there is a current transaction. This was not only the nominee's assumption, but also that of the press, the council, and the current city attorney.

Focusing on rights, having a vocabulary of rights, causes there to be a blind spot that makes it very difficult for officials to recognize the importance of their web of relationships and, therefore, be able to deal with them responsibly. This blind spot is especially problematic when it comes to indirect and indefinite conflicts.

11. A Lack of Disgust

In his book [*The Righteous Mind*](#) (Pantheon, 2012), Jonathan Haidt argues that our morality is driven primarily by our gut reactions, particularly about disgust. Disgust, based in senses (bad smells, yucky tastes, gross textures), extends to our feelings about people who offend our values, especially people who do something we consider unfair.

It's not an accident that “corrupt” not only refers to someone who is using a government office to help himself and his associates, but also to something that is impure, that has become rotten or tainted. Our vocabulary for corruption comes right out of our vocabulary for spoiled food.

But disgust is not the same for everyone. When citizens react strongly against ethics violations, it comes out of their disgust with what was done, how unfair it is. But some

people have a blind spot when it comes to disgust. Not surprisingly, one group with such a blind spot is politicians, at least when it comes to officials' ethical misconduct.

Haidt further notes that people differ in the way they distinguish between violations of moral rules and violations of conventional rules, that is, between violations that harm individuals and violations that break taboos, but where no one is harmed (this includes many conflicts of interest). Haidt was involved in a study that showed that social class was the principal determinant regarding how people distinguished between the two. Wealthier people tended to distinguish the most between them, while poorer people tended to see both sorts of violation as equally wrong.

This might explain why wealthier people, including lawyers and most people who are active in politics, see ethics violations as more minor than the average citizen. Ordinary citizens become very angry when officials use their positions to help those with whom they have special relationships, even when no one is directly harmed. It is enough to do harm to values.

12. The Fundamental Attribution Error

One of the most serious obstacles to an effective government ethics program is a blind spot not of government officials, but of everyone. The blind spot is our tendency to focus on character and ignore the situations people are in and the situational forces that often contribute greatly to ethical misconduct.

As Chip and Dan Heath wrote in their book [*Switch*](#) (Crown, 2010), "What looks like a person problem is often a situation problem." Our tendency to see things as a person problem can be seen everywhere in our culture. A person who is given a huge bucket of popcorn becomes gluttonous when eating it, but it is not useful to call him "a glutton." Someone who is late for an appointment drives crazily, but is not "a crazy driver." When it comes to preventing the conduct we criticize, trying to change the person rather than the situation is likely to fail.

The Heaths use Lee Ross's term for our tendency to ignore situational forces: "the Fundamental Attribution Error." The Heaths wrote, "The error lies in our inclination to attribute people's behavior to the way they are rather than to the situation they are in."

Every institution – department, agency, government – has an ethics environment, that is, a culture where there are unwritten rules, and certain conduct is allowed,

accepted, or expected. The environment may depend on fellowship, shared spoils, or intimidation and fear (or all three), but it is rarely the work of a single individual. It takes a strong individual to buck this sort of culture. A government ethics program that deals solely with the individual, ignoring the ethics environment in which individuals act or fail to act, provides no support or protection to those who want to buck the culture. And it gives the majority of people, who simply go along and keep quiet, no reason to do anything at all.

Government ethics programs need to recognize the powerful effect an ethics environment has on individual conduct and the roles people play in ethical misconduct that benefits someone else. Ethics programs also need to see individual instances of misconduct as part of a pattern of institutional misconduct. They can do this by rejecting the criminal paradigm of prosecuting individuals for “crimes,” and instead try to expand proceedings to include everyone involved and to get the discussion of acceptable conduct out into the public eye. See the sections of this book on [Expanding a Proceeding](#) and [Going Beyond the Call of Duty](#).

13. Handling Blind Spots

Bazerman and Tenbrunsel suggest several ways for people to handle their blind spots. The first is, of course, to become aware of our blind spots and to recognize our vulnerability to our own unconscious biases. “If you find yourself thinking, ‘I’d never do that’ ... it’s likely your planning efforts will fail and you’ll be unprepared for the influence of self-interest at the time of the decision. One useful way to prepare ... is to think about the motivations that are likely to influence you at the time you make a decision.”

One way of doing this is to practice your responses to ethical situations. “When you are able to project yourself into a future situation, almost as if you were actually in it, you can better anticipate which motivations will be most powerful and be prepared to manage them.” By doing this, you arm yourself with accurate information to consider when such a situation arises.

The authors also recommend what they call “self-control strategies.” They recommend that people put in place “pre-commitment devices” to help them follow a desired course of action (think piggy bank for savings). They recognize the problem of how

our commitments escalate, and how reluctant we are to walk away from a course of action once we've decided on it. Therefore, they feel it is best to hold off making a public commitment, and they recommend that people share their pre-commitment ideas with an unbiased individual whose opinion they respect. The combination of putting all the options on the table, brainstorming them, and openly considering the ethical aspects of each option is a good one.

Such a discussion should also consider how others would feel about your decision (your spouse or parents as well as the public), how you would feel about an opponent making the decision, and how you would feel if your decision were to appear on the front page.

14. Ethics Training

Ethics training depends on recognizing the ethical aspects of a situation. Trainers cannot assume that government officials are able to recognize when they have to apply ethics standards and concepts. Ethical fading, and our other blind spots, need to be explained to officials. And exercises need to be developed in order to help them overcome their blind spots, recognize the ethical aspects of their decisions, and then act upon them. See [the subsection on training about blind spots](#).

Also useful is training that helps officials identify and correct the distorted feedback they give themselves, emphasizing the psychological mechanisms that lead to inaccurate recollections and ethical misconduct. Bazerman and Tenbrunsel discuss techniques to help people accurately recall their behavior, including immediate feedback from others on the likelihood of distortions and the operation of bias. The authors call this “ethical debriefing.” As with stretching, ethics advice can be just as valuable after a decision as before a decision.

E. Framing Ethical Misconduct

In his essay “Bending the Frame to Corrupt the Lenses, ” in the essay collection [Corruption and American Politics](#), edited by Michael A. Genovese and Victoria A. Farrar-Meyers (Cambria, 2011), Wayne S. Le Cheminant notes that the way we come to believe the stories told us by politicians about ethical misconduct (known as “framing”) is a very important part of the story of how we perceive and deal with ethical misconduct.

By determining the frames through which we see corruption, officials can manage our expectations and effectively protect themselves against accusations of corruption. They do this by saying such common things as “I had the community's best interests at heart” and “I've done so much for the community.” Or “I was just doing constituent services.” Or “I followed the law,” even though they voted for or even drafted the law, or failed to create or improve an ethics program (an alternate version is, “I was not found guilty,” even when the reason is procedural or due to a settlement). And there's the ever-popular “Everyone does it,” which is really a statement that the conduct is a norm in the ethics environment, and that the speaker has done nothing to oppose it, despite his obligation to do so.

How is this corruption of how we view ethical misconduct accomplished? Le Cheminant discusses six ways in which the process works. One, because “experience is merely the rewiring of our brains through new synaptic connections, it is the case that we will take the truth to be what we hear over and over again.” Our connections are strengthened by repetition. This is as true for propaganda as it is for humor – think *Seinfeld* or, for older folks, *Laugh In*.

Two, “politicians can count on using a variety of metaphors to which we respond in order to bend the frames of experience.” The most important metaphors used to obscure government ethics are law and rights. They are used so successfully that few question them or even recognize that they are being used primarily as metaphors. Ethics laws are only minimum requirements, and individuals give up all sorts of rights when they become government officials. And some of the rights they get, such as legislative immunity, are not personal rights, but rights of their constituents. Government ethics is only a little about law, and not at all about rights.

Three, we are “wired” toward empathy and, therefore, “believe those we ‘know’ we can trust because we have a ‘gut feeling’ about the person.” Citizens tend to trust *their* representatives more than anyone else's.

Four, we “believe that people and things are imbued within a central core that cannot be broken or altered.” People are either “good” or “bad.” It's hard for us to accept contradictory information, that is, the knowledge that someone who has done many good things for the community, who seems so friendly, concerned, and competent, could actually be “bad.”

Five is “reciprocal altruism,” which means that we trust others because we do something for *them*, like vote for them, and they seem to do something for us, like feel our pain. In politics, there is a serious asymmetry to this reciprocity, and yet it works.

Six, we believe what we feel, not what we know (e.g., what we know about human nature).

Since most people feel they can determine whether a politician is honest or not, whether a politician has integrity not, and they believe that character is what matters with respect to ethical misconduct, politicians always portray themselves as honest people of integrity. To do this, they often do what they can to limit information about their actions and motives, so that the public has as little as possible to go on in making their determinations. Since there is limited coverage of local politics, except in blogs, which are often strident and not believed (or even read or discussed) by the community, it is not difficult to do this.

This is why it is so important to counter the individual character aspect of what Le Cheminant calls the “traditional story of corruption.” This framing of the story gives unethical politicians more power and lets them get away with misconduct as well as poor government ethics programs.

It is important to recognize that it is politicians who are best at misusing an ethics program to portray their opponents as unethical. If the issue was not character but rather the norms of the ethics environment, the possibilities of temptation, the definitions and limitations of roles, formal procedures and oversight, and the professional handling of conflict situations, government ethics could be treated like any other institutional issue. But it is not, Le Cheminant believes, in the interest of politicians to make government ethics just another government oversight institution.

Le Cheminant asks an important question about the typical approach to government ethics. “Why [do] we care so much about the intention of actors in general and of politicians specifically?” It is caring about people's intentions that allows politicians not only to criminalize ethics, making it very hard to enforce, but also allows them to talk about intentions (and therefore character) rather than about conduct, relationships, obligations, transparency, and the like.

Talk about character is easy to manipulate in order to, as Le Cheminant would say, bend the frame and corrupt the lense through which we view our local officials' behavior. Talk about the other things is much harder to manipulate.

One frame that's interesting to consider comes from Chip and Dan Heath's book [*Switch*](#) (Crown, 2010): a government's "defect rate." One of the Heaths' case studies involves a hospital administration consultant who tried to bring down the "defect rate" involved in giving patients drugs. The death rate from drug errors was 1 in 1,000 (.1%), which sounds low, but that still meant a lot of deaths every year. For change to even be considered, the hospital had to acknowledge that it had a defect rate, that is, that some people who were dying didn't have to die. "Hospital lawyers were not keen to put this admission on record."

This sounds very much like a local government. No one wants to acknowledge ethical misconduct, least of all government attorneys, who are in the best position to understand conflict situations when they see them, but are themselves conflicted due to their daily relationship with officials. The most that is usually acknowledged is that, every now and then, there is a bad apple, an acknowledgment that is immediately followed by the statement that bad apples can't be taught to be ethical and that everyone else is good. So what need is there for a government ethics program?

How did things change at the hospitals? A guest at the consultant's speech, who happened to be chair of the state hospital association, said, "An awful lot of people for a long time have had their heads in the sand on this issue, and it's time to do the right thing." That is, it's time to acknowledge the defect rate and set up a system that will bring it down as close to zero as possible. It would be great if the chairs of state municipal associations would say something like this about government ethics.

F. Misplaced Loyalty

Personal and organizational loyalty forms an obstacle to a local government ethics program by providing an alternative set of values. Personal and organizational loyalty is misplaced because in a democratic form of government, a public servant's loyalty is supposed to be to the community. When government officials' and employees' strongest loyalty is to certain members of the community, including high-level officials and their supervisors, their

contributors, their family and their business associates, themselves, and even their ethnic, religious, or racial group, this means there will be preferential treatment and that conflicting obligations will not be handled responsibly. It also means that anyone who tries to prevent preferential treatment will be seen as either attacking them for political reasons (an outsider) or betraying (an insider), because betrayal is how a lack of loyalty is experienced in an organization or group that demands loyalty.

Loyalty does not prevent fairness, honesty, and compassion. What it does is practice these virtues in an insular way, among the in-group only, for the preservation of power and group cohesion, rather than for the public.

The other dark side of loyalty is the fear of retribution and being ostracized, which makes individuals outside and inside government unwilling to report misconduct or in any other way cross high-level officials. It is loyalty, and its consequences, that place the personal interest of every official and employee above the public interest.

Misplaced loyalty leads to an unusual sort of communal secrecy, the same sort of secrecy that we know from our families, a sort of secrecy that has no place in government today. Dan Goleman, the author of [*Emotional Intelligence*](#) (Bantam, 2006), refers to something he calls the Four Attentional Rules. “In any group, from the family, to organizations, to entire societies, there are these unstated rules that we learn tacitly about the questions that can't be asked.” The Four Attentional Rules are as follows:

1. Here's what we notice.
2. Here's what we call it.
3. Here's what can't be noticed.
4. We are at a loss to talk about it because we can't admit we see it.

Ethical misconduct is one of the principal things in local government that, in an unhealthy or even neutral ethics environment, simply can't be noticed, that no one talks about. It would be discussing the undiscussable. This unspoken restriction feels comfortable, because we all learned it at home. You just don't mention that people are using city equipment or giving contracts to their relatives. It's not good manners. Some things are better off not discussed. And yet, in government, transparency is supposed to be

the rule, policies are supposed to be discussed in public. Misplaced loyalty undermines this value.

In a local government with an unhealthy ethics environment, loyalty is the most powerful feeling. It involves social status and tradition. If officials have in the past said and done nothing about officials who misuse their office for their own benefit (except after a scandal), then it's almost impossible for new officials to do so. A young official who considers speaking out about another official's conflict situation worries about breaking from tradition and about being ostracized. Her career may even be over. And all by “sticking her nose in where it doesn't belong.”

This is why it is not enough to change the written rules through amendments to an ethics code. The unwritten rules have to be changed, too. The Heaths have a wonderful term in their book [Switch](#) (Crown, 2010) for what needs to happen: “organizational molting.” Officials and employees need to know that they are expected to report ethical misconduct and to speak up when it appears a colleague or even a supervisor is about to mishandle a conflict situation.

Because personal and organizational loyalty is an obstacle to the reporting of ethical misconduct, officials feel protected from an ethics program. Misplaced loyalty is a major force in keeping the program under the control of high-level officials and the city or county's attorney office. It also prevents the provision of independent advice. An organization based on personal loyalty does not allow any agency to act on its own, even an oversight board.

Loyalty is very comfortable for most people, because it echoes the family. It provides something like the unquestioning love that is so hard to find outside the family. It provides an us-against-them mentality. It even provides the sort of discipline and tension we find in our family, and the secrecy that makes screwing up not so bad, because it stays in the family.

Loyalty to the public, on the other hand, is abstract. The public consists of demanding individuals you don't see very often, not supportive individuals you see every day. And power, like the power parents have over children, can be very attractive both to those who have it, and to followers who respect it and hope to either attain it someday or enjoy it vicariously.

Loyalty is a classic damaging public-personal problem, but except for an official's family, business associates, and the officials themselves, government ethics programs cannot deal with misplaced loyalty. For example, patronage — one of the paybacks for loyalty that cements a government's culture of loyalty — is rarely prohibited by a local government ethics code. And although coercion may be prohibited, fears, expectations, and emotional needs cannot.

Loyalty can be a problem in the other direction, as well. That is, ethical misconduct can thrive in a government organization due to its leader's misplaced loyalty to those he appoints. In his essay in the collection [*Corruption and American Politics*](#) (Cambria, 2011), which he edited along with Victoria A. Farrar-Meyers, Michael Genovese argues that the one thing most corrupt presidential administrations have in common is that the presidents were poor judges of character. They appointed people who tended to be out for themselves and who could not be trusted to even let the president know what they were doing. This weakness is usually accompanied by the tendency to stick by one's family and friends when they are accused of misconduct. Personal loyalty undermines moral authority. It makes personal loyalty rather than responsibility to the public the standard for an entire administration.

Genovese quotes Warren Harding as saying, "I have no trouble with my enemies. I can take care of my enemies all right. But my damn friends, my God damn friends; they're the ones that keep me walking the floor nights."

If corruption is a virus, loyalty is what allows the virus to spread through a government organization.

Here's the kind of thing loyalty can do. A Philadelphia city council member sat on the board of the Citizens Alliance for Better Neighborhoods, a nonprofit organization controlled by a state senator who had great power in the Philadelphia area. Until the news media started to write about the organization's questionable activities, its board hardly ever met. Due to the media attention, the city council member left the board, saying he didn't even know who was the head of the organization. His loyalty had been so strong, he did not even fulfil the most basic duties of his position. He was simply doing a favor out of loyalty to a political colleague. But in doing so, he used his office to give legitimacy to a nonprofit organization being misused by another public servant.

How does one deal with this sort of loyalty? One way is for government officials and employees to remind themselves that loyalty is a two-way street. Someone who recognizes this would never ask you to take a position and turn a blind eye to the position's duties. That is not being loyal to the one doing the favor. That is taking advantage of him.

Hugh Sloan, the treasurer of the 1972 Nixon campaign, has said that the most important lesson he learned from Watergate was that "I didn't leave the team, the team left me. Loyalty and respect have to be earned. If anyone asks you to sacrifice your integrity, they don't deserve your loyalty or respect." There is no reason to do something wrong out of loyalty to someone who feels no loyalty to you, who cares so little about you that he is willing to corrupt you.

The second way to deal with misplaced loyalty is for officials and employees to remind themselves about their fiduciary duties to the community. That may be abstract, but so is democracy, freedom, security, and justice. Government is founded on abstract principles, and being a government official or employee means following those principles, and not replacing them with a principle that feels good to you because it involves your concrete relationships with the people around you.

The third way to deal with misplaced loyalty is to recognize that loyalty does not provide an alternative set of values, because it is not a virtue at all. Like courage, loyalty is instrumental. That is, it enables one to be virtuous. It allows one to be fair, compassionate, honest and open with people. It is an important element in holding together families and businesses and other sorts of groups.

But like courage, which can allow one to commit crimes and fight wars to take over other people's land, loyalty can enable one to act badly. It can be an obstacle to being virtuous, and fulfilling one's obligations, to people outside the group or organization. To be loyal to one's group or organization often requires one to be unfair, dishonest, and without compassion for others.

When an enabler like courage or loyalty is treated as a virtue, as it sometimes is in governmental organizations, it no longer enables virtues. It is unfair to and disrespectful of citizens. It leads to dishonesty instead of honesty, secrecy instead of transparency, and responsibility to the wrong people. It creates an us-against-them mentality that can be used to justify everything. It enables the preservation of power, and it sometimes becomes an end in itself. Loyalty is even an obstacle to that other enabler, moral courage, the ability to

stand up to those around you, an ability that is often required in order to form a healthy ethics environment.

Loyalty among the political leaders of ethnic and racial groups who have been kept out of power in their community can be a special problem when a group finally gets into office. Since immigration moved into high gear toward the end of the nineteenth century, cities across the country have witnessed an ongoing parade of different groups in power, from Anglos to Irish and German, from Italian, Slavic, and Jewish to Black and Hispanic. Members of each new group, both in government and in the community, tend to feel that it's high time the group used its power to help themselves, as the groups in power did before them.

Nothing is harder than improving an ethics environment when a new group moves into power, because they feel that their time is now.

Prince George's County, Maryland provides a good example of what can happen, even outside a big city. When the makeup of the county's population changed from primarily white to primarily black, membership in the old-boy network changed (it is now the most affluent county in the country with an African-American majority), but not the county's pay-to-play culture, which allowed the council and county executive to control and therefore profit from development.

Nor did the culture of complicity change. In fact, by the time a new ethnic or racial groups comes into power, they have been working together so many years for the goal of taking power, their loyalty has long been misplaced.

G. Partisanship

Partisanship is a subset of loyalty that government ethics can do nothing about, at least not in term of enforcement. But partisan rancor can undermine citizen participation and trust just as much as ethical misconduct.

Even though an ethics commission can do nothing legally about partisan rancor, it can remind both officials and the public how devastating it is to a local government's ethics environment. If the business community, civic associations, and houses of worship are unwilling to come out publicly against partisan rancor, an ethics commission can provide

an independent, non-partisan voice on the damage partisan rancor causes and on what officials should do to lessen it.

The one place partisan rancor shows up in an ethics program is in ethics complaints made for partisan purposes, especially during election seasons. This can be very damaging to an ethics program, turning it into a partisan field of play, in the eyes both of the public and of its representatives.

Usually, members of the complainant's own party or faction are not willing to become pariahs by criticizing the politicization of ethics. The accused side says the allegations are all political, but this sounds like denial rather than explanation. The complainant's side backs the complainant all the way.

Some local newspapers will condemn this politicization of ethics, but they themselves often support one side or the other. When there are no good government organizations interested in what happens in a local government, someone considered sufficiently independent needs to rise above the fray, explain why what is happening is damaging, and convince those involved to keep their disputes from tainting the ethics program. "Let the ethics program handle the case, and stop making misleading statements about it." The commission should correct misleading statements about the ethics program, and about government ethics. This can make officials think twice before they speak about a case.

However, an ethics officer or commission is usually hampered by rules that require confidentiality. Confidentiality rules are supposed to protect the innocent, but they often protect those who use the ethics system as a political weapon. The same is true for conventions of even-handedness, which prevent ethics officials from condemning abuses of the ethics program. (For more, see [the section on confidentiality](#).)

Even rules against the filing of complaints during an election season cannot prevent the making of ethics allegations during an election season (see [the section on prohibiting complaints during elections](#)).

When ethics officers or commissions find probable cause or take a long time investigating what appears to be a politically motivated complaint, they appear to be taking sides even when they are just following formal procedures. This is especially damaging if they have been appointed by the mayor and/or council, when the appointing authority, or one of its party members, is a party to the complaint. This is one of several situations that

show how important it is not to have ethics commission members selected by anyone under the commission's jurisdiction.

H. Intimidation

Loyalty is often practiced under the protection of intimidation, the big gorilla of government ethics. Government ethics seeks to put the public interest above personal interests; intimidation's goal is to make everyone's personal interests paramount, especially their interest in their career. Government ethics requires discussion; intimidation leads to silence. Government ethics is about transparency; intimidation is meant to keep things secret. Government ethics seeks to increase citizen participation; intimidation seeks to prevent citizens from participating. Government ethics prohibits the misuse of office against subordinates; for subordinates, intimidation makes life in government a nightmare. Government ethics prohibits retaliation against those who speak up; intimidation is a form of retaliation that prevents speaking up and is hard to enforce against. Government ethics seeks to replace the unwritten rules with formal rules and processes; intimidation keeps the unwritten rules alive and itself states an unwritten rule: if you dare say a word, there will be retaliation. Government ethics cannot operate without moral courage; intimidation, as the word suggests, seeks to make people timid.

Intimidation is the most efficient form of ethical misconduct. Successfully retaliating against one individual intimidates dozens, hundreds, even thousands of individuals into silence and inaction. An atmosphere of intimidation means that retaliation is not even necessary; the threat of retaliation is enough. What professional is going to speak out if she believes that she will lose clients as the result of a smear campaign against her? What local business owner, or employee for that matter, is going to take the chance that his business will lose a contract, or customers, due to his criticism of a high-level official? Parents worry about what will happen to their children in school and in local sports leagues. Individuals who do no business in town worry what will happen to their siblings' and parents' businesses. Party members worry about their ability to become a real player, or even to belong, if they don't toe the line. Giving in to intimidation is a horrible, humiliating experience.

Intimidation is also the most damaging kind of ethical misconduct, because it is emotionally damaging, enables ethical misconduct, and undermines participation in local government. Intimidation can even lead subordinates to violate ethics and criminal laws themselves. Take the county treasurer who ran a law practice out of his office for thirteen years by making it clear to all of his subordinates that if they did not work for the law practice, while being paid by the county, they would be fired. Even employees who quit because they couldn't bear it were afraid to report what was going on.

Ethics programs that put too much emphasis on financial benefits and losses ignore intimidation at a peril to their community and government.

Intimidation is the easy, unimaginative way to push one's weight around (or, actually, the weight of one's office). Every time intimidation is successfully employed by a government official, it sends the signal that intimidation is the best, easiest way to solve problems inside and outside government. It is the moral equivalent of violence, without the worry of doing jail time. It is an adult form of bullying.

The focus above is on intimidation of subordinates in the government. But there is also intimidation of citizens: mistreatment of citizens at government meetings, harassment of them outside of meetings, the spreading of false rumors about them, and enlisting others in attempts to change citizens' behavior, to ruin their reputations, and to make it in their interest to no longer be involved in local politics. More concretely, here is a voice mail message left by a Palm Beach County commissioner on the machine of someone who was representing an individual opposed to the commissioner's pet project:

I want [the opponent's family] to say "We'd love to have this project." I'm going to go door to door to every tenant in their building and throw them under the fucking bus. I'm going to say they want a marina out here versus a public island. I'm going to go to the FBI who's, who's in their building. I'm going to go to the Quantum Foundation [which supports local charitable and government projects]. I'm going to go to every tenant in that building. I'm going to see if I've got banking relationships with anybody there. I want this done and it's a personal thing for me.

Intimidation is actually recognized in one of the two federal constitutional clauses dealing with government ethics. The Speech or Debate Clause ([see below](#), where the clause is dealt with at length) protects federal legislators from being intimidated by the

executive and judicial branches, or by anyone who wants to file a suit against them relating to their legislative activities. But there is little to protect subordinates or citizens from intimidation by high-level officials. It is, for example, acceptable for a council member to file (or threaten to file) a suit against an ethics complainant in order to intimidate the citizen into withdrawing the complaint (or not filing the complaint in the first place) (see [the section below on SLAPP suits](#)). And yet the same council member can argue that the complaint must be dismissed to protect himself from intimidation by the citizen, no matter how true the citizen's allegations are. The Constitution's one-sided treatment of intimidation suggests that intimidation by lawsuit is acceptable by, but not against, a legislator. So why not other forms of intimidation?

Intimidation should not be shoe-horned into an ethics provision. It should be taken into account when drafting an ethics code. Intimidation can be dealt with through the conflict provision, through an expansion of whistleblower protection to include intimidation before rather than only after a report or testimony about misconduct, or through a separate provision.

The best way to deal with intimidation is for other individuals to stand up for the victims of intimidation. It is hard for the victims to stand up for themselves. Whatever they say not only jeopardizes their careers, but looks defensive and often makes them look worse. One of the things that is most dispiriting to victims of intimidation is that no one stands up for them. When you see someone being attacked or threatened, remind yourself that the attacker is nothing but a bully, and would not be making the attack if he thought that someone would defend the victim. If more than one person, especially someone who is not identified with the victim, defends him, the bully (and other bullies) will think twice the next time. You may be the next victim, but someone will be more likely to defend you. Just as intimidation of one or two individuals can spread silence throughout a community, defending one or two victims can lead people to stand up in others' defense, and silence the intimidators. They are no different from the bullies you knew when you were ten, except that they have not only mouths, but also power in the community.

The City Ethics Model Code has two intimidation provisions, one prohibiting officials from [falsely impugning citizens' reputations](#), and a [whistleblower protection provision](#) relating solely to ethics matters.

Intimidation can come not only from government officials. It can also come from the executives of companies that seek benefits from a government. Such intimidation can take the form of demands, requests, and expectations (which all amount to the same thing) that employees vote a certain way, participate (or not participate) in a political campaign, attend public meetings to show support for corporate objectives and, most seriously, ethical and criminal misconduct, including the giving of gifts, bribes, and kickbacks to government officials.

Some ethics programs can enforce the ethics code against those who engage in ethical misconduct. But it lacks the authority to enforce against such corporate intimidation. However, if an employee of a government contractor, permittee, or grantee comes to an ethics commission with a complaint or information regarding employer intimidation related to political participation or gift-giving, it would be valuable for the commission both to discuss this matter in public, hearing from employees and employers alike, and to ask employers to refrain from such conduct. Such a discussion would provide a good opportunity to show how such conduct could be, or be seen to be, a form of institutional corruption that makes other ethical misconduct more likely to occur. Such a discussion would also provide an opportunity to show officials why it is important not to suggest that employers be in any way involved in their employees' political participation.

I. Logical Fallacies

Logical fallacies are pseudo-arguments that consciously or unconsciously attempt to falsely persuade or manipulate people into dismissing the arguments of others and believing the official's arguments. Employing logical fallacies treats people as means rather than as ends, manipulating their thoughts, their feelings, their prejudices, and their loyalties for the speaker's ends. In government ethics situations, they are often employed for the official's personal benefit. They are most effective when used by those who are self-confident, are respected (often solely due to their position), and hold power (including the power to prevent responses to what they say). Here are five logical fallacies and ways to respond to them. Hugh Mercer Cutler's [*Ethical Argument: Critical Thinking in Ethics*](#) (New York: Oxford Univ. Press, 2004) was very helpful in preparing this subsection.

1. Ad Hominem Attack. The ad hominem (“to the person”) argument directs attention away from an opponent's argument and toward the person making the argument. It makes a strong appeal to feelings rather than reason. In government, for example, it is common to attack someone as unpatriotic or, in a municipal context, as not devoted to the city or simply from out of town. This has nothing to do with the validity of his arguments or, say, of a development proposal.

The most common ad hominem attack by government officials against citizens is, “You don't know what you're talking about.” There is no better way to destroy someone's argument than by attacking his legitimacy. What can someone say? “I do too know what I'm talking about!”? Rarely can someone honestly respond that she has a degree in public administration or accounting or whatever the discussion involves.

What the official is really saying is, “I don't have a good response to what you're saying, so I'm going to say you are not worth listening to.” And it works. People respect authority, knowledge, and supposed expertise.

Ad hominem attacks should be treated like attempts at intimidation. What needs to happen is for someone else to stand up and say, “Why are you showing her disrespect? She does know what she's talking about. And she has a good argument. Why don't you respond to it!” Too often, everyone lies low, because they might be the next to be turned from respectable citizen to know-nothing right before their friends' eyes.

This is the ultimate abuse of one's position: to demean or slander someone in a way that no one would, or could, if he did not hold such a position. This abuse of position cannot be dealt with in ethics codes, because it involves speech. But an ethics commission member would be the perfect person to stand up and defend a citizen attacked in this way.

Another common form of the ad hominem fallacy is known as the tu quoque (“and you are another”) fallacy. Here an official refers to someone's actions (and her supposed hypocrisy) rather than to her argument. Such a reference implies that the person is saying what she is saying not because she believes it, but because it suits her goals. For example, an official from one party attacks a citizen from the other party who has filed an ethics complaint, saying that it was done purely for political purposes. Or an official attacks a candidate for reneging on a promise she made in her campaign (for example, to create an ethics hotline), even if the attacking official is herself against having a hotline (and the new

official is saying that an independent ethics commission and officer are needed before a hotline can be installed).

It's hard to defend against *tu quoque* attacks. One thing that can be done is to ask why you are being attacked by someone who agrees with your position, or why it matters so much what you said in the past. What is important are the current circumstances and how best to deal with them.

The *ad hominem* fallacy is also employed in the positive sense. Officials appeal to how devoted they are to their town, how hard they and their colleagues have worked on, say, an ethics reform project, how they have brought in the best experts available. They praise their personal legitimacy in order to give legitimacy to their ethics amendments, however problematic they may be.

This is harder to respond to, because no one has been attacked, and it would seem to be showing disrespect to their public service, even if their public service is irrelevant to the current discussion. The only thing to do is acknowledge the service and then focus on the problems with particular ethics proposals.

2. The Ad Populum Defense. The Ad Populum (“[appeal] to the people”) Defense is the opposite of the Ad Hominem Attack. The typical Ad Populum Defense is a form of “Everybody does it.” For example, “Everybody goes to parties given by developers.”

There are two simple responses to this. One is to question the validity of the statement, by saying, for example, “Does everybody else really go to these parties?” In other words, you can't show that what you are saying is true. Or you can name some officials who *don't* go to developers' parties. Another approach is to say, “Even if everybody did do it, that doesn't make it right.” Or, as your mother used to say, “If everybody jumped off a cliff, would you?” Why a motherly response? Because the Ad Populum Defense is a child's defense.

The most important lesson to learn from this logical fallacy is to become suspicious whenever someone argues a case in terms of “every” or “all.” It sounds like they're showing that they are simply one example of a general case, and we often argue in terms of what is typical. But because claims about “every” and “all” cannot be proven true or false, they have no place in logical argument. A proper, adult response would be, “Seven of the nine council members attended at least one developer party in the last year, and five of the nine attended all three (including me).” That doesn't make the speaker look quite as good.

Ad Populum Defenses are not meant to be part of an argument, but instead part of a defense, a way to manipulate people into approving of their behavior.

3. The Straw Man Fallacy. The Straw Man fallacy is an attempt to dismiss (usually not just oppose) an argument by making it appear weaker than it really is. It does this by turning it into a straw man, a scarecrow of an argument, and then shooting the straw man, rather than the full-blooded argument, down.

The Straw Man is set up when the speaker or writer cannot come up with an adequate response to an argument. For example, when someone argues that accepting meals from contractors makes it look to the public like you're accepting bribes, an official might say, "Are you saying that I can be bought for the price of a dinner?" The Straw Man here is the argument that officials can be bought for a small amount of money; the real argument involves the appearance of impropriety.

The use of a Straw Man is nearly an admission that an opposing argument is valid. Straw Man arguments are end runs around reality, attempts to get people not to think about the real problems involved in municipal government issues. They're ruses. It is easier to respond to a straw argument than to respond to the actual argument, and since most people don't recognize the difference, it's a good way to manipulate people's thoughts.

When an official makes an Ad Hominem attack, everyone realizes there is an attack. But when an official sets up a Straw Man, the situation isn't so clear. It's not an attack or a defense, but appears to be a reasonable response to an argument. Straw Man fallacies dress in the camouflage of discussion, but they are deeply disrespectful of the other person and, especially, of the audience.

It is important that someone else redirect the discussion back to the actual argument, by saying, for example, "No one is talking about how much you can be bought for, or whether you can be bought at all. We are talking about preserving the public trust by prohibiting gifts that might appear to be bribes. After all, contractors aren't taking ordinary citizens to dinner. People wonder why they're taking *you* to dinner."

4. Begging the Question and Appeals to Emotion. When an official begs the question, she assumes something has been established or proven. The way a logician would define the Begging the Question Fallacy is that the premises include the claim or assumption that the conclusion is true, without providing any evidence or actual argument.

The result is a circular argument, taking for granted what it's supposed to prove. In other words, it's no argument at all.

When someone questions whether a law is right, an official will often argue that it's right because it's the law. With ethics issues, it is more common to argue that it is right because it is not prohibited by the law. This sort of legalism is common in municipal government, and is often used to put a stop to discussion. But in an ethics discussion, the law is only the starting point, not the conclusion.

Another use of this fallacy is when a government employee is accused of having done something wrong, and someone says in his defense, "No one in the police department would do a thing like that!"

The most common use of the Begging the Question Fallacy is in question-begging epithets, for example, referring to someone accused of a crime as "a criminal," or saying "no right-thinking American." These references both assume conclusions and appeal to our emotions, such as our fears of crime and our patriotism. Begging the question appeals to our emotions: to our belief that laws are right, or to our belief in our police.

The Appeals to Emotion Fallacy is related, but not quite the same. Here, there is no logical connection between the premise and the conclusion. A typical example is the defense lawyer pointing out that his client has an innocent face, implying that, therefore, he can't be guilty. An example of this in the local government world would be, "If you love our city, you have to vote for [or against] this development." Or with respect to government ethics, "We cannot afford one more government department or one more series of regulations. Our bureaucracy is already too big."

What do you do when faced with an appeal to emotion? You respond directly: "This is not about bureaucracy or the regulation of citizens or businesses. *You're* the ones being regulated, not the public. The public is being protected. And it won't cost taxpayers much."

What do you do when faced with a Begging the Question Fallacy? Respond directly, for example, to the statement that conduct is right because it is not prohibited by law: "Ethics laws are minimum requirements. You need to look at the spirit of the laws, not look for loopholes or limitations in their language. Officials need to be sensitive to appearances of impropriety far beyond what can be prohibited by any law."

5. The Slippery Slope Fallacy. The Slippery Slope Fallacy (if you do this, it will lead the government down the path to . . .) is based on the assumption that we cannot stop, that each new situation will not be evaluated anew and decided on its merits. Even when the person making the argument can point to a situation where things went “too far,” his argument assumes that others will do the same and cannot learn from what has happened in the past or elsewhere. The Slippery Slope Fallacy is so effective that its users even use the term “slippery slope” when making their arguments, as if it were not a fallacy.

An example of the Slippery Slope Fallacy in government ethics is the argument that if you make a few prohibitions, prohibitions will proliferate indefinitely, leading to large compliance costs and creating a huge ethics bureaucracy.

It is true that no government ethics rule will totally prevent circumvention. When they are circumvented, there is often a demand for an extension of the original prohibition. But government ethics professionals accept the fact that there will be circumvention. One reason is that they understand that government ethics rules are minimum requirements. Another reason is that they are very used to not getting what they want. Rather than living at the top of a slippery slope, they tend to live in a hole where their ethics program is in constant jeopardy of being buried. Then suddenly there is a big scandal (usually not a government ethics scandal), and they get to move to a bit higher ground, at least for a while. The ground is never as high as everyone says it is, of course, but one works with what one has and asks for more. The slippery slope is not a real problem in local government ethics.

J. Confusion of Person and Office

“If the question you are asking me is, ‘Did you talk to the president about [the government job]?’ No. Did I talk about that with my father? Yes.”

—Jean Sarkozy, son of the French President, after announcing he would not pursue a political position his father held earlier in his career

“As George Washington, I would do anything in my power for you. As President, I can do nothing.”

—Letter from President Washington to a friend

An important obstacle for an ethics program to overcome is officials' confusion of person and office. It is important for officials to recognize that, when they enter into high office especially, they have responsibilities that have nothing to do with who they are or what they believe. When they speak, they are representing their community. When they act, they are representing their community. They preserve a personal life, but it should be kept as separate as possible from their government work.

For example, a council member who owns or works at a local car dealership should not go around with his GM hat on his head. Nor should he look to government to give his children summer jobs, the way he would at his dealership. He should not try to get the city to buy cars from GM, even if the sales do not go directly to his dealership. In fact, he should stay far away from car purchases. Nor should he push the charity his spouse works for or the religion he professes.

It is natural for people to identify the mayor's office with the individual currently holding it. But that is not consistent with our democracy, which makes the individual holding the office a representative of the community that voted him into office. The individual sits in that office only to the extent he fulfills the duties of that office, and only temporarily. When he violates those duties, he is to be held accountable, either at the next election or in other ways, including ethics and criminal enforcement.

When an official violates his duties to the public, the separation of person and office becomes most clear: Joe is an individual who has violated the duties that accompany the office of the mayor.

Many officials go further than confusing themselves and their office. They feel they have a right to the office. For example, some officials who are sick, sometimes deathly ill, do not feel an obligation to resign and let someone else represent their constituents. Local legislative bodies, and boards, should have rules that limit the number of absences before a member must resign and allow someone else to take her place. Another example is that some officials move out of their district, and keep it a secret so they do not lose their government office.

The confusion goes far beyond these kinds of situations. Confusion of person and office can lead an official to expect her subordinates to work on her house, or baby sit her

children, or work on her campaign. Someone who works in government works for an individual only to the extent the individual is working for the public. Work on an official's house or for an official's children or campaign is not in any way working for the public, and should not be required or even requested, since it is hard for a subordinate to say No.

Confusion of person and office is also the basis for nepotism, cronyism, and patronage. Those who participate in such ethical misconduct believe that government jobs are something that should help the person, not the public. Handing out government jobs is treated as a reward for electoral success, not as an obligation to the public like any other.

Personal loyalty also arises out of the confusion of person and office. And this loyalty can go both ways. Often, a mayor will view those around them, especially their appointees, through their personal relationships, which leads them to trust them in a personal manner. But this sort of trust, which is fine in one's private life, is not sufficient in government. A mayor is not just a person who trusts other people. He is someone with an obligation to ensure that misconduct does not occur in his administration. When people around a mayor deny reports and rumors, and keep pointing their fingers at others, the mayor does not have the luxury of trusting them personally. He has an obligation to act like a mayor and get to the bottom of the reports and rumors. He has to demand evidence and to hand matters over to an ethics commission, the criminal justice system, or an independent investigator.

Allowing misconduct to occur is itself ethical misconduct, especially when one is in a responsible position such as mayor, manager, council member, or board chair. High-level officials are also responsible for misconduct when they fail to seek rules and procedures that will prevent it from occurring.

But possibly the most serious confusion of person and office involves legal representation, which is the subject of [a later section of this chapter](#).

Another form of confusion of person and office is when someone accepts a position, usually on a board or commission, with no intention of actually doing the work required by the position. Such a person does not attend many meetings of the body to which she was appointed or elected (often she is not even in town much of the year) and, when she does attend, is usually not prepared. When her support is needed, she will sometimes read a short speech prepared for her by someone else. Such a person is nothing but a placeholder, someone to fill a spot, usually for the mayor or a political party.

One placeholder here or there is not too big a problem (although still not acceptable), but multiple placeholders on the same body can (1) lead to quorum problems, and (2) create the appearance that elected and appointed officials are simply rubber stamps, and that ordinary citizens, with their own opinions, need not apply, because one or both of the parties don't want them. This is demoralizing. Not only do citizens with opinions feel their service is not wanted by government. But when such citizens go to a public meeting, they find that, if they disagree with the ruling party's policy, there is no one from the ruling party who is listening and will openly discuss the issue. Instead, board members support moving to a vote as soon as possible, always, always, always voting the same as each other. This seriously limits public participation.

A placeholder misuses his office if he continuously puts his personal obligations to whoever asked him to run for or accept an office ahead of his public obligation to fulfill the duties of the office. It is only one's office to the extent one actively and responsibly does the work. If one does not or cannot, then one should relinquish the office.

If the placeholder were an employee, the employee's supervisor would discipline him, unless, of course, the supervisor was told to look the other way. An elected or appointed official should be held to standards as well, or be disciplined. But who is, effectively, an official's supervisor? His appointing authority or the head of the party ticket? He will hardly be seen as unbiased. The chair of the body on which he sits? She, too, will be seen as biased, one way or the other. It's hard for the body itself to do the disciplining. This puts members in the uncomfortable position (1) of disciplining a colleague, (2) of turning what is usually considered a personal problem (the refusal to do one's job) into a partisan issue, and (3) of going against one's party colleagues by disciplining, and perhaps even voting out, a member of one's own party. No one should be put in this position, but this is what is ordinarily done. Or not done, because rarely is anyone removed from a board or commission for failure to prepare for meetings and failure to come to a large percentage of meetings.

The problem could better be dealt with by an independent ethics commission. But how is it to prove that someone is a placeholder? There could be a hard-and-fast rule about attending meetings, but such a rule is normally upheld by the body or its chair (if any complaint had to be dealt with). The best way to involve the ethics commission is to

require board members to seek from it a waiver of the attendance rule due to extraordinary circumstances.

The harder problem to deal with is the member who attends a sufficient percentage of meetings, but does not participate in deliberations, shows no sign of being prepared, and votes automatically. How can a rule be written to cover conduct when it involves primarily a lack of conduct, when the member is doing nothing wrong because he does nothing?

What an ethics commission could do is deal with this problem when it goes beyond one person here, another person there, that is, when it is a pattern, a manifestation of the government's ethics environment, a form of institutional corruption. If this is the case, the ethics commission could hold one or more public hearings on the subject, inviting officials who have been accused of being placeholders, as well as their bodies' chairs, appointing authorities, party leaders, and interested citizens.

Simply talking about this topic out in the open might lead to important changes. Some placeholders may be shamed either into resigning or into taking their places more seriously. Appointing authorities and party leaders may feel obliged to seek out more independent individuals who will actually fulfil their duties. And chairs may come to expect more from members, asking them for their opinions and, if they do not seem to be prepared, asking that they be prepared for the next meeting. Ignoring those who are unprepared and stay silent could be replaced by the expectation of preparation and discussion.

It is important for ethics commissions to remember that they can deal with important issues even when they have no enforcement authority with respect to them. Just raising issues can sometimes do as much as enforcing against them.

When an official confuses person and office, he needs to be reminded that he is only sitting in that office temporarily and in order to serve the community, not himself, his family, his business associates, or other individuals. When he does serve himself or those with whom he has a special relationship, he has violated the duties of the office. That is what an ethics violation is.

A public servant gives up many rights when he takes a government position, and certainly has no right to the position in any personal sense (at least beyond the specific protections provided by personnel, civil service, union, ethics, and criminal laws and rules).

Public service is a difficult thing, and the distinction between person and office is one of the more difficult aspects to understand. This distinction should be an important part of ethics training.

Some municipal citizens have their own confusion of person and office, their office being that of citizen. Such citizens believe that local government exists to give them jobs, sharing the bounty of political power. They don't mind politicians taking some for themselves, as long as they spread some around, as well. They believe in electing not those who will best represent them, but those who will best help them and their families, and who will live a life they would like to live themselves (vicarious pleasure in others' wealth is not sufficiently recognized as an enable of ethical misconduct). In some places, these citizens make a difference. They help preserve an unhealthy ethics environment in their local government. Machines depend on them for their survival.

K. Demand for Retribution

The wrong sort of pressure is sometimes placed on ethics programs by the public, the press, and the blogosphere, and this pressure can be a serious obstacle to the creation and preservation of a good government ethics program. Whereas the quality of a program should be determined by the quality of its training, advice, and handling of disclosure and withdrawal, the program is too often judged primarily by its enforcement, and even then not by the quality of its enforcement processes, but rather on the basis of the results. There is no story in training, advice, and the handling of disclosure and withdrawal (except when they are not done).

Too often what the public wants is retribution, and that means serious fines, an official's resignation, and the official's loss of his pension. The question is whether it is truly in the public interest to feed retribution, an emotional, exaggerated form of seeking justice.

The emotional seeking after retribution is intimidating to an ethics commission or others charged with enforcing ethics laws ([pension forfeiture](#) is usually handled by state officials or it is automatic upon the finding of certain violations). It takes moral courage for ethics commission members to act rationally, to not give in to public demands for retribution, and to explain why it is best to let the rules and formal processes of the ethics

program determine the appropriate punishment. It is even more difficult for high-level officials to stand by the ethics program when its sanctions fall short of public demands, because this makes it look like the officials are acting in their self-interest, or in the interests of their colleagues, rather than in the interest of the ethics program and its protection of the community.

The public's demand for retribution has other damaging consequences. Officials worry that an independent ethics program will lead to retribution against them and, therefore, try to prevent an ethics program from being independent or having authority to punish them. When they see the public demanding retribution, in their own cities and counties, as well as elsewhere, they are less likely to allow for the creation of an effective, independent ethics program. And when they are respondents in a case, they fight for their lives, fearing the worst.

In addition, opposition politicians feed on the public's demand for retribution by abusing the government ethics process for political purposes.

It is important to create a truly independent ethics program and have an independent ethics commission explain clearly to the public, and especially to the press, how an effective ethics program works. An effective ethics program is intended to prevent scandals and to deal with those that do occur by means of formal processes. It undermines an ethics program for the press and the blogosphere (1) to turn allegations into scandals when there is a formal process to deal with these allegations, and (2) to demand retribution rather than settlement or reasonable, appropriate sanctions. These points need to be made by government leaders as well, but they should be made before there is the hint of a scandal, so that it will be clear that they are not defending themselves or their colleagues, but rather the viability and responsibility of the ethics program.

L. Demand for Expertise on Boards

Too great an emphasis is placed on putting those with directly relevant expertise on boards and commissions, and in certain appointed positions. Local government employees certainly need expertise to do their work, but they usually obtain this expertise through their education and government jobs. It's a different story for board and commission members. They are supposed to be members of the public who provide oversight over

those who employ their expertise to make money in the community. Boards and commissions need to have access to those with expertise, of course, but this can be supplied by government employees and attorneys.

The problem is that those who have the most expertise are generally those with the biggest conflicts. It can be helpful if retired experts or those who work exclusively outside the area are willing to sit on boards, but even they may be seen as giving preference to their fellow developers, social service agencies, teachers (and teacher unions), or whatever. Ethically responsible experts who are practicing their trade locally will have to withdraw so often, they will be of little use to a board.

Experts can usually be more useful if they do not sit on the board, but rather provide testimony or advice to the board. As advocates and advisers, they have no say in how the board decides, and yet their expertise is put at the board's disposal. In short, expertise and power need not go together.

But advisory boards are not always the answer either. For more on this topic, see the [Advisory Board section](#) of this book.

The real issue is not a choice between expertise and government ethics, but how best to employ available expertise so that there is not an appearance of impropriety.

M. Earmarks and Slush Funds

Earmarks and slush funds are to government ethics what junk food is to people. A council member does not *have to* abuse earmarks and slush funds any more than the rest of us *have to* abuse junk food. But since there is usually little or no oversight (no one to make sure the chips are baked and the pretzels whole wheat), it takes a lot of self-control not to abuse cash that's put into your lap.

There are two principal differences. One, while a few potato chips here, a candy bar there, doesn't hurt too much, an earmark to a business associate or a slush fund expenditure to an organization run by a family member is a harmful ethics violation. Two, no one feels an obligation to a pretzel, and potato chips don't play on your feelings of family loyalty.

There are two ways to deal responsibly with earmarks and slush funds. One is to get rid of them altogether. The other is to have strong oversight by an office or board that is

truly and clearly independent, and to require that earmarks be competitively bid. But even if good enough rules could be formulated and inappropriate earmarks and slush funds could be stopped, just the fact that officials were trying to make inappropriate expenditures, albeit unsuccessfully, would undermine the public's trust in those representing them. And the fact is that good rules are hard to draft and hard to administer.

Council members can live without slush funds, just as we can live without junk food. And funds are best allocated not by elected officials in the form of earmarks, but by government employees according to formal processes such as competitive bidding.

A third alternative is in the experimental stage in Chicago and New York City: participatory budgeting. Constituents in each council district (one in Chicago, four in New York City) have been given control over a slice of their council members' discretionary budgets — about \$1 million in each district. The citizens join a committee, propose projects, research their viability, and run them by city agencies. Then voters choose which of the proposals to fund. This is the way to use district budgets to increase, rather than decrease, citizen participation. It's a great idea, and the beginning of a new kind of participatory democracy movement.

Not only local legislative bodies have slush funds. Departments and agencies can have them, as well. For example, the Miami-Dade County police department had an environmental fund to pool together federal, state, and local resources intended to combat environmental crime. The fund had three big problems: (i) hardly anyone knew about it, (ii) only two people had authority over it, and (iii) there was a lot of money in it.

What do people with authority over a secret fund intended for a purpose not central to their department do with the money? Purchase such things as cars for high-level officers (ten for them, none for environmental officers), surveillance equipment, satellite TV subscriptions, cellphones, office furniture, boats, and laptop computers.

For detailed proposals for dealing with earmarks, see [Robert S. Bennett's 2010 report](#) to the council of the District of Columbia.

N. Pet Charities

To someone with little knowledge of ethical misconduct in action, charities would appear to be the most surprising obstacle to government ethics. But the fact is that pet charities

have been a favorite way to get around gift provisions for many decades, probably ever since the charitable deduction was created during the First World War, when universities were concerned that their alumni's dollars would stop flowing in. Little did Harvard and Bryn Mawr know that their concerns would lead to the blossoming of mayoral golf tournaments throughout the land.

The pet charity is the perfect way to get those seeking special benefits from a local government to pay in order to play. A pet charity, and especially a pet charity event, is a beacon, attracting support from anyone who wants officials associated with the charity or event to approve his contracts, projects, grant or land use requests. According to the *Detroit Free Press*, the former Detroit mayor used a nonprofit as his "personal piggy bank." Too often, nonprofits are used as a family piggy bank.

A charity is the perfect front. It's pay to play with a velvet hand extended. It is hard for anyone to criticize charities or charitable contributions. The official does not benefit financially (most of the time, at least). And the charity does good things for the community. Only a heartless good government extremist would criticize charitable contributions and events.

The first thing to recognize is that a charity is a black box. Most charitable organizations are opaque. Neither their list of contributors nor their expenditures are public information. And even when a charity is relatively transparent, a charitable contributor can choose to remain anonymous or at least keep the amount of the contribution secret; a campaign contributor cannot. And it is hard to expect charities to disclose donors who ask to be anonymous, because this would seriously affect their ability to get donations.

How bad can charitable gifts like this be? Take the financial transactions that led Jefferson County, Alabama to bankruptcy. The investment adviser who made these transactions was chosen partly on the basis of his positive response to the county commission president's call for money to send children to Bible camp and to support a charitable skeet shoot-off. This adviser's advice led to the county's bankruptcy.

But the norm is ordinary pay to play, where everyone who benefits from government feels obliged to give to an official's pet charity. One problem here is the use of office to coerce citizens. And even when the official does not directly benefit from the contributions, there are often multiple indirect benefits, including reputational benefits as

well as jobs with the charity for family members and others with whom the official has special relationships. Often the pet charity takes public positions in favor of the mayor's policies and emphasizes the mayor's contribution to the cause during election season (sometimes complete with campaign workers).

It is difficult to draft government ethics laws that apply to charitable contributions. The laws that do exist apply only when government officials solicit or personally accept the contributions. But solicitation is generally unnecessary, and there's no reason to hand the check to the official. An official's public association with a charity or event is enough to send the message, and it is assumed that the official's aides will have access to the list of contributors.

The only way to prevent such situations is via a provision prohibiting officials from any involvement with a nonprofit, directly or indirectly, including through their subordinates, immediate family, or business associates. The argument for this involves two essential ethics concepts: misuse of office and preferential treatment. It is a misuse of office for an individual in that office to use it to favor a charity she personally favors. And it is preferential treatment for an official to act in ways that specially help one charity rather than all local charities, no matter how helpful it is to the community. Is having a pet charity any different from being a spokesperson for one business rather than for all the businesses in one's community, a situation that is sometimes expressly prohibited in ethics codes?

Breaking ties with particular charities while in office is an excellent example of the sort of sacrifice that officials need to make when they become public servants. It might help their political careers and make them feel good to be identified with a charity, even if they have no thought in the world of using it as a vehicle for pay to play. But even without any corrupt intent at all, it is still preferential treatment.

For more on this topic, see [the subsection of the gifts discussion on gifts to officials' pet charities](#).

O. Non-Functioning Ethics Commissions

It is more common than one would think for cities and counties to have non-functioning ethics commissions. They either have no members, too few members, ill-informed members, co-opted members, or members who lack any curiosity about what ethics

commissions should be doing. And they have no staff, no budget, no website, no training program. They provide no advice nor oversee disclosure. They are not even window dressing. No one knows they exist, and no one seems to care, at least until there's a scandal. When people call for something to be done about ethical misconduct, they discover that the city or county actually has an ethics commission, and it is revived, at least for the time being.

There are several ways for an ethics commission's appointing authority to cause an ethics commission to be non-functioning, and thereby prevent the ethics program from working. One way is not to provide a budget for the ethics program (see [the section on budget guarantees](#)). A second, related way is to provide a budget, but not use it to hire an ethics officer or other staff. An interesting approach to this occurred in 2012 in Jacksonville, where even though there was a budget and the ethics board hired a staff member pursuant to the new ethics law, the mayor tried to block having the budget be used to pay the staff member's salary.

A third way to prevent an ethics program from working is not to fill vacancies on the ethics commission, which makes it difficult or impossible for the commission to get the quorum necessary to meet. If it can meet, it is very difficult to reach a finding of probable cause or an ethics violation. Sometimes this is even done at the start of an ethics program, to prevent it from getting off the ground.

Sometimes the second and third ways are combined, as in Memphis, where it took three years after a new ethics code was passed for ethics commission members to be sworn in, and then another year for a full-time ethics officer to be hired.

A fourth way to prevent an ethics program from working is to fill the ethics commission with individuals who either support those in power or have insufficient interest in government ethics to question the recommendations of the city or county attorney who, in the majority of local governments, acts as staff to the commission.

A fifth, and probably the most common way is simply not to tell ethics commission members that they have any role but the passive one of responding to requests for advisory opinions and ethics complaints (this usually goes hand in hand with codes that do not require the ethics commission to meet more than once or twice a year). When an ethics commission's members do not have, or do not realize they have, an obligation to train, make informal ethics advice readily available, let officials, employees, and the public know

about the program through government and community outreach (and a good website), or make recommendations to improve the ethics code and program, the commission will feel it has no reason to meet (see [the checklist of things an ethics commission should be doing](#)).

A sixth way is a bit more difficult to achieve. It comes in two varieties. In one, the administration throws obstacles in the way of an effective ethics commission, leading some or all of its members to resign in protest. In the second variety, when a controversial matter comes before the ethics commission, enough members resign to prevent a meeting from being held or, when it takes a supermajority to approve an investigation or a finding of probable cause, the number necessary to prevent this.

A variation on this occurred in Kansas City, Missouri in 2010. When a controversy arose regarding ethics commission members who made campaign contributions to candidates over whom they had jurisdiction, two resigned. When the council expressly prohibited ethics commission members from making contributions, two more members resigned, leaving only three members and no quorum to deal with a pending investigation, among other responsibilities.

Speaking of supermajorities, even the requirement of a majority vote can mean a non-functioning ethics commission if there are open seats and the definition of “majority” is not a majority of members present, or even a majority of current members, but rather a majority of the number of members there should be on the board. Among local governments that have such a “majority” rule is Houston, which passed it in 2011. Majorities should only be majorities of those present at a meeting. Any more than this should be treated as an intentional stumbling block in the way of ethics commission action.

Another way to effectively require unanimity at many ethics commission meetings is to create an ethics commission with only three members and no alternate members. Usually, at any particular meeting, one member will be unavailable, so the two members who do come will have to agree, or nothing will be done.

What can be done about a non-functioning ethics commission? In 2010, Erie County, New York (home of Buffalo) did something worth considering. The comptroller investigated the commission and [reported on what he found](#). To see how non-functioning an ethics commission can be, here are the comptroller’s findings:

- The Board is presently comprised of one member. In the summer of 2009, the three remaining members of what should be a six-member board of ethics asked the

county executive to nominate new members. He had nominated one in 2008 and another in May 2009, but neither was confirmed by the county legislature. The term of one member expired, while another resigned, leaving one member, who continued to ask for new members to be nominated.

- The Board has no written by-laws, policies, procedures, manuals or formal guidelines.
- The Board has incomplete minutes for the years 2007 and 2009 and no minutes for 2008.
- County employees are not disclosing to the Clerk of the Legislature their interests in County contracts, as required under the Code.
- The Board reviewed only a small sample of all the Ethics Disclosure Forms for 2007, 2008 or 2009, and Board members believe the Board does not have the authority to investigate the data disclosed on these forms.
- There is no mechanism for persons to report conflicts of interest to the Board of Ethics.
- The Board did not issue any “Advisory Opinions” for the period of our review, nor do we have any evidence that any were requested.

This could simply be a case of neglect: no one cares about government ethics. This is what the one Board member said was the problem. But the problem was not neglect. In the spring of 2010, the comptroller asked the county attorney for disclosure forms and other materials and information in order to write his report, and was told he had no authority to conduct a review of the ethics board (the comptroller's office had conducted such a review in 1980). When the comptroller sought to subpoena the information, he was refused. He went to court, and the county executive, personnel department, and ethics board chair (whose term had run out in 2009) fought the subpoenas in court. Clearly, the reason for a non-functioning ethics board was the refusal of high-level officials to allow an ethics board to function.

The story ends somewhat happily, at least as of June 2013. The comptroller, who won the suit, is county executive, and there are five ethics board members who have met at least four times in 2013. Rules and regulations were adopted in 2011. The website still

has no information about the ethics program other than scanned, unsearchable copies of the ethics laws and a searchable copy of the rules and regulations. But the ethics board is no longer moribund, due to the comptroller's efforts.

P. Backsliding

There is a tendency among local legislative bodies to backslide, that is, to try to erode an ethics program after it has been established. In the short term, an ethics program will have failures. Until training gets going, until people start seeking advice, until it becomes a habit to file disclosure statements on time and withdraw from participation due to a conflict, until the ethics commission learns the ropes and gets the kinks out of the system, and until political parties and gadflies, reporters and bloggers, get over the excitement of filing ethics complaints, there will be mistakes and more rather than fewer scandals.

Therefore, it is important to create an expectation of short-term failure as a natural part of change, so that failure does not undermine the acceptance of a government ethics program.

But sometimes backsliding occurs even without mistakes, misunderstanding, and scandals. Whereas establishing an ethics program is a public event every official wants trumpeted throughout the community, eroding an ethics program is usually done so that few people notice or understand. There are "good" arguments that can be made for every change, including constitutional arguments, cost-benefit arguments, and arguments concerning the ethics commission's lack of responsibility and accountability. Here are some of the ways in which an ethics program may be eroded. It is important to recognize these ways, in order to show them for what they are and prevent them from working.

One way has just been discussed: preventing an ethics commission from having a quorum.

A second way is to whittle away at an ethics code, especially its administrative provisions. Shorten the time in which the ethics commission can investigate, exclude local legislators from certain provisions, take out words such as "indirect." The cleverness of government attorneys is endless and effective.

This can easily be prevented, however. Here's the way it was done in Broward County, Florida:

The Board of County Commissioners may at any time strengthen or supplement the restrictions and protections provided under this Code, but the restrictions and protections hereof may be weakened or removed, in whole or in part, only by citizen initiative...

For those jurisdictions that do not allow citizen initiatives or referendums, and where the ethics commission is truly independent, an alternative could be to require ethics commission approval of all amendments to the ethics code (whether they actually appear as part of the ethics code or elsewhere, for example in the charter or personnel regulations). If the ethics commission is appointed in whole or in part by the legislative body, ethics amendments that would weaken or remove protections could be required to have a supermajority vote (Broward County's backup solution in case a court overturns the citizen initiative requirement), at least one public hearing, and advanced, written explanation for the changes, so that good government and other civic organizations may prepare for the hearing and publicly challenge the reasons given, which often cannot hold up to challenge.

A third way to erode an ethics program is through cutting, limiting, or even not approving the ethics program budget. This can be done in many ways, and can be easily lost in the budget process, especially if the ethics commission is not outspoken and successful in bringing in civic groups and the press to support it. Sometimes, this can be done outside the budget process, by not providing the ethics commission with an office, a phone, or money for independent counsel. How to defend such actions? It's easy: just tell employees to go to their supervisor or the local prosecutor, and say that's cheaper and times are tough.

This can be prevented by budget guarantees (see [the section on budget guarantees](#)) and by an ethics commission educating the public.

A fourth way is to give an ethics commission extra responsibilities without extra funds. Typical additions include campaign finance, lobbying, or transparency responsibilities, and the addition of an inspector general, who will hog all the money if she has the support of high-level officials.

A fifth way is to publicly criticize the executive director or the ethics commission chair for the least problem, even calling for their resignation. Local legislators often refer to ethics investigations as "witch hunts," implying that the ethics commission is acting for

personal or political reasons, rather than fulfilling its mission. They say that the ethics commission members are pushing their personal agendas, do not handle their role responsibly, and are not accountable to voters, elected officials, or administrators.

These tactics may seem childish and unprofessional, but they are often effective, because the public and the news media know little about ethics programs and especially do not understand that officials should play no role with respect to a government ethics program that oversees their conduct.

A sixth way is to undermine the program preemptively. This was done by the Tennessee House. In 2005, after a scandal, it passed an ethics code that had to be readopted for each session, or it would be nonoperative. Four years later, there was still an ethics committee, but no operative code.

And a seventh way is through spreading as essential truths the Three Untruths of Government Ethics:

Untruth number one: No one has complained about the current ethics program (see [how to respond to this untruth](#)).

Untruth number two: Independent, citizen-run ethics commissions aren't necessary because citizens are already the final arbiter at the voting booth. If politicians act unethically, they will be voted out (see [how to respond to this untruth](#)).

Untruth number three: Independent, citizen-run ethics commissions will go after a politician and wrongfully ruin his or her career (see [the section on fear and helplessness](#) in this chapter).

Q. SLAPP Suits

One way that individual officials can throw up an obstacle to ethics enforcement, and also jeopardize an ethics program, is to file a suit against an ethics complainant for defamation, emotional distress, loss of employment, or other alleged harm done by reporting possible misconduct. An official can make life very difficult, and expensive, for a complainant, and scare off future complainants, by filing what is known as a SLAPP suit (SLAPP stands for Strategic Lawsuit Against Public Participation). Such suits can be filed not only against a

complainant, but also against an ethics commission and its staff, and against the local government itself. Such suits often raise constitutional and charter-based issues, as well.

Wikipedia defines SLAPP suits as suits “intended to intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.” The goal of a SLAPP suit is not usually to win, but to prevent speech or action, in this case, to prevent the complaint from going forward. Sometimes just the threat of litigation will stop an individual from filing a complaint or intimidate the complainant into quickly withdrawing or requesting dismissal of the complaint. This is true especially after one or more officials in a city or county have shown that they mean business by filing such suits.

Sometimes, indictments act as SLAPP suits. They can be even more threatening than suits. In many cities and counties, criminal cases can be brought by the city or county attorney, working for colleagues, for his appointing authority, or even for himself.

High-level officials and other community leaders have an obligation to publicly criticize any official who files a SLAPP suit or who threatens to file one. Lawyers have a special obligation to explain to the public that, although everyone has a right to file a suit to defend himself,(1) a local government official has an obligation not to sue a citizen except in extraordinary circumstances, which certainly does not include damage to one’s reputation; (2) a local government official has an obligation to raise constitutional and charter-based issues within the government rather than via a suit related to a specific case against him or a colleague; and (3) a local government official has an obligation to protect the ethics program and the city or county from unnecessary expenses related to self-serving litigation, especially when the issues raised can be settled or adjudicated through a formal process that the official has tacitly accepted as legitimate, that is, the ethics enforcement process.

One way an ethics code can protect complainants from SLAPP suits is to provide legal fees for a complainant who has been sued and whose allegations are not found to be false and malicious, usually as part of whistleblower protection. Knowing that a complainant would be protected in this manner would cause an official to think twice before filing a SLAPP suit and would make individuals more likely to file a complaint.

SLAPP suits are usually considered defensive acts by those who bring them and, therefore, can be funded by a legal defense fund. An ethics code can make a difference by

not making gifts to a legal defense fund an exception to the gift provision. Doing this prevents those doing business with the local government from funding SLAPP suits against those filing ethics complaints against them or their political allies.

It should be noted that ethics commission members, due especially to their quasi-judicial function, should be personally immune from SLAPP suits. See [a 2010 decision](#) regarding Philadelphia's ethics board members. But the appellate court suggested that this only applies to official actions, which would not include a press conference.

Besides SLAPP suits, officials can file ethics charges in order to intimidate a complainant into withdrawing his complaint. For example, in 2010 an ethics respondent in Stamford, Connecticut charged that the complainant, a city employee, violated the ethics code because, by filing his complaint, he sought to preserve his employment and influence the respondent "for his own financial gain." According to this argument, any government employee who files an ethics complaint would have a conflict of interest, because he is presumably doing it to preserve his pay check under a whistleblower protection provision. If this were held to be the case, government employees could not file ethics complaints unless they first resigned, there would be no whistleblower protection, and intimidation would rule. The respondent's complaint was correctly dismissed.

Another variation on the SLAPP suit is the situation where an official retaliates against a complainant, tipster, or witness by having the individual arrested, sued, or fined by the local government (for, say, a housing infraction).

R. Complainant Sanctions and Legal Fees

Some ethics codes include provisions that have an effect similar to a SLAPP suit. Such provisions set forth sanctions for complainants who make false or "frivolous" allegations, while the code often contains no sanction beyond a reprimand for officials found in violation of an ethics provision. Other ethics codes require complainants to pay an ethics commission's costs and/or an official's legal fees if the ethics commission finds any allegation false, and yet no official is required to pay an ethics commission's costs or the complainant's legal fees, no matter how serious his violation.

Since no one can be certain that an ethics commission will not find one of her allegations to be false or frivolous (especially considering how subjective the word

“frivolous” is), such sanctions make many potential complainants decide not to take the risk of filing a complaint.

In addition, many ethics codes require a complainant to swear that the facts stated in the complaint are true to the best of his or her knowledge. This opens a complainant to charges of perjury. The issue in court would be whether the complainant knew or had reason to know that the fact was false. A criminal proceeding is very frightening to anyone, as well as expensive. Therefore, swearing to the facts of a complaint is also an obstacle to ethics enforcement.

Since uncertainty is common and most people’s communication skills are limited, the thought that one might be sued or convicted of perjury if one is wrong about a fact, or if one’s wording is such that one appears to be stating something one did not intend to state, prevents a lot of people from filing complaints. This is one of the goals of many attorneys who draft such provisions, and of the officials to whom they answer.

Officials who intentionally engage in ethical misconduct depend on the reluctance of employees and of their colleagues to file an ethics complaint. They, and those concerned they will be falsely accused of ethical misconduct, want citizens to be equally reluctant. Officials who pass ethics codes with significant penalties for false or “frivolous” statements in complaints, and relatively small penalties for ethics violations, are effectively saying they are more concerned about themselves than about the public.

One way to deal with these problems is to allow individuals to provide tips to an ethics commission and allow the ethics commission to investigate on its own initiative and, if evidence is found, file a complaint itself. This is a valuable alternative, but a citizen or government employee who makes a tip has no control over whether a complaint is actually filed. Even where anonymous tips are allowed, it is best to provide as few obstacles as possible to the filing of complaints.

Officials need to be reminded that ethics codes are intended to regulate *their* conduct, not the conduct of citizens. It is not an ethics program’s job to penalize citizens; it is an ethics program’s job to ensure that officials act in the public interest. A citizen who makes an unsubstantiated allegation is not violating her obligations the way an official does when he fails to seek ethics advice and violates an ethics provision. And the citizen is certainly not worse, as too many ethics codes imply.

Many complaints that citizens file could be termed “frivolous,” since they generally do not understand government ethics (they get no ethics training and they are usually not permitted to seek ethics advice). It is important to have a procedure to dismiss these complaints as quickly as possible, and it is equally important to allow the ethics commission to rewrite a complaint so that it does allege a possible violation. It is also valuable for an ethics commission to ask (but not require) that citizens meet with a staff member before filing a complaint, so that the original complaint will be of a higher quality and so that complaints based on a misunderstanding of government ethics are not filed in the first place.

A complainant can best be penalized simply by publicizing the dismissal of a complaint on the grounds that it did not state a violation. To call this “frivolous” is simply to put a value judgment on it, a value judgment that is hostile and discriminatory to citizens. Why is it that an official who denies allegations is not called something equivalent to “frivolous,” but rather is considered within his rights? Why is it that an official who denies allegations and publicly attacks the complainant is rarely called “false and malicious?” It is officials who have special obligations to citizens, not the other way around, and an ethics code should reflect this.

Better that officials be protected by requiring the local government to pay reasonable legal fees if the ethics commission finds that there is no probable cause for believing that a violation occurred. This is the protection provided in City Ethics Model Code Section 213.14 (see [the section on legal fees](#) for more about this).

S. Local Government Attorneys

There is no more difficult, conflicted role than that of the local government attorney. The position of city or county attorney, solicitor, or corporation counsel is a political position that receives a great deal of political pressure, but is required to act as if it was not political. The local government attorney is usually required to represent both the legislative and executive branches of the local government, and sometimes prosecute, as well.

As if that’s not difficult enough, most local government attorneys are also required to advise officials in ethics matters while representing the ethics commission as well. When there is no ethics commission, local government attorneys either represent the council in

its handling of ethics matters or they handle ethics matters themselves, including training, advice, disclosure, and enforcement, usually with no guidelines or supervision. In addition, many local government attorneys have a private practice on the side, giving rise to many more potential conflicts.

The rules of professional conduct do not give local government attorneys a great deal of guidance with respect to wearing all these hats.

It should, therefore, come as no surprise that, in a large percentage of ethics matters I have read about or seen, there is a government attorney at its heart, sometimes as an enabler of ethical misconduct, almost always as someone conflicted and yet participating in the matter.

It is arguable that, in all but the largest municipalities (and even in some of them), the principal government attorney makes more difference to an ethics program than anyone else. A city or county attorney can ensure an excellent ethics program, as well as undermine the best on-paper ethics program anyone could devise. He can be the ethical leader a community needs, or the political anchor that drags an ethics program down into the depths. And yet he has little or no training in government ethics, and has given little or no thought to how he should and should not act in an ethics program due to the conflicts he has.

Here are the valuable words of two attorneys who represent cities as city attorney or special counsel:

Perhaps some of the most important lessons learned for city attorneys and public lawyers are that you must remain vigilant and perform your duties as required by law and ethical standards. A city's attorney must call out wrongdoing and non-best practices loudly and clearly. A city attorney cannot be a shrinking violet with his/her clients or be a legal advisor who goes along to get along.

— James M. Casso and Jayne W. Williams, "[Bell – What Happened and How It Happened: The Role of the New Administration and the City Attorney](#)," paper given at the League of California Cities Conference, May 2011

A government attorney who goes along to get along can be a large obstacle to the effectiveness of a local government ethics program. He can do this through the advice he gives to officials (both ethics advice and legal advice relevant to ethics situations), the

advice he gives to an ethics commission, the drafting and interpretation of ethics provisions, the preparation of advisory opinions, findings, and ethics commission decisions, the way he handles transparency and confidentiality in the government and in the ethics program, ethics training and, most important, the example he sets and the ethical leadership he provides to his staff and to all the city's officials and employees.

In the context of government ethics, a city or county attorney is much like a corporation's chief legal officer (CLO), who oversees compliance with the Sarbanes-Oxley Act. One CLO is quoted in a 2012 *Economist* article as saying that "before taking the job, a lawyer should interview his chief executive. If you can't say no to that person, 'you don't want to work for that company.'" How many city attorneys have done this?

Government attorneys have an even stronger obligation than a CLO to be independent and to think about the reputation of the government rather than of its high-level officials. As Susan Hackett, a former director of the Association of Corporate Counsel, is quoted as saying, "Most lawyers will look at legal rules and say: 'Here are the ways you can do it.' A good [general counsel] says: 'Of course it's legal, but it's stupid.'" Similarly, a government ethics professional will say, "It might be legal, but it will appear improper and, therefore, you shouldn't do it." A government attorney should say this, too, but this is not usually how they're trained and this is not usually what officials want to hear.

1. Ethics Advice

A conflict situation involves a potential or apparent conflict between an official's personal interest and the public interest. A government attorney is supposed to represent not the personal interest of an official, but only an official acting within her official duties, that is, an official who is acting for the public, in the public interest. When there is a question whether or not that official is acting in the public interest, and the official wants, or may want, to be told she may act in her personal interest, is it appropriate for the official to ask a government attorney for advice, especially when that official is in a position (mayor, council, manager) to affect the attorney's career? And is it appropriate for a government attorney to *provide* ethics advice under such circumstances?

Most officials don't know the difference between legal and ethics advice. When they have a question involving a law, whether it's about the budget or this stuff called "ethics," they ask a government attorney. One cannot expect an official to consider

whether it is appropriate to ask a government attorney for advice, unless she has received excellent ethics training and the environment supports this training with ongoing discussions about ethics matters. So it is usually up to the government attorney to determine how appropriate it is to provide ethics advice.

One thing government attorneys should take into account is their “motivated blindness” (see above for [a discussion of this](#)). Essentially, motivated blindness refers to the fact that we have a bias toward the individuals we work for. We want to make them happy, and it is in our personal interest to make them happy because they affect our livelihood. When a private lawyer represents a private client with respect to the client’s private interests, this is usually a problem only when the client seeks to act criminally, due to professional obligations attorneys have under their Rules of Professional Conduct. But when a public attorney represents a public client with respect to an official’s private interests, any bias toward the individual standing in for the public client creates a problem, in terms of both reality and appearance.

This is why it is so important for local government attorneys, both staff and outside counsel, to constantly remind themselves, or be reminded by their supervisor, that they are not representing the people they consult with, but rather the city, county, or agency, that is, the public. The people they consult with just happen to be sitting in their positions at the moment.

It is also important that if a local government attorney is to give ethics advice, he consciously recognize and openly state that his client in an ethics matter, where the official’s personal interests are at issue, is not the official, as it is when the attorney helps an official draft an ordinance or negotiate with a union. In an ethics matter, the question is whether the official can act as a representative of the public; to help make this decision, the attorney must represent the public, not the official. And this is very difficult for both parties to ethics advice.

Considering the personal, professional, and political relationship a local government attorney has with officials, and the organizational loyalty, incentives, pressures, fears, and biases associated with this relationship, it is not appropriate for a government attorney to give officials ethics advice at all. A government attorney should recognize that he himself is conflicted, even if neither the local ethics code nor the Rules of Professional Conduct prohibit him from providing the advice. Just because it’s not prohibited by the Rules of

Professional Conduct does not make it appropriate (see below for [a discussion of how the Rules apply](#)).

Here's an example of government attorney advice that was inappropriate and unfortunate. In 2009, the mayor of Brookings, South Dakota raised money for the South Dakota State University Foundation. The university is the city's major employer, receives funding from the city, and is involved in many important city matters. The city attorney was asked whether the mayor's job involved a conflict, and he concluded that it did not, because the mayor does not *directly* report to the university. The city attorney did not consider it sufficient to create a serious appearance of impropriety that the mayor's job was raising money for the university through its foundation, something that laypeople recognize as extremely important to and valued by a university. Nor did the city attorney appear to consider the serious problems that arise when the principal representative of the city solicits funds from citizens for another purpose, and solicits funds from those seeking special benefits from the city government, create a serious appearance of pay to play (and everyone knows that it is in the interest of an organization to have a mayor be able to use his office to its benefit).

Not only would a government ethics professional most likely not have come to this conclusion, but if she did, it would at least appear to the public as an independent decision, rather than as an appointee letting a member of his appointing authority (the council) eat his cake and have it, too.

The *Carrigan* case provides a good example of the problems that can arise when a local government attorney gives ethics advice to a local official rather than telling the official to go to an independent ethics officer or commission for advice. In this case, the Sparks City, Nevada city attorney told a council member that he could vote on a matter involving his close friend, campaign manager, and major campaign vendor. The council member voted, and was found in violation by the state ethics commission, which has jurisdiction over local officials. The city attorney, partly at the city's expense, fought the ethics commission's determination all the way up to the U.S. Supreme Court in 2011.

The appropriate thing for the city attorney to have done was tell the council member to ask the state ethics commission for advice. Justice Kagan said as much during the oral argument before the U.S. Supreme Court: "There was an advisory process that was set up by the Nevada commission here. ... Mr. Carrigan chose not to use it. But he

could have gone to the commission, said: What do you think about this relationship? Does it fit or does it not fit?”

But a council member depends on the city attorney’s advice. He cannot be expected to know that the city attorney’s advice is right or wrong, appropriate or inappropriate, or what the consequences might be if he accepts the city attorney’s advice, as he usually does. It was the city attorney’s responsibility to tell Carrigan he should go to the state ethics commission for advice.

According to the [Public Law Ethics Primer For Government Lawyers](#) prepared by the Washington State Municipal Attorneys Association (2010), it is “necessary for a governmental attorney (ethically) to advise a public employee or official that he/she should secure private counsel ... any time the attorney believes that the individual interests of the official will conflict with those of the public agency.” Of course, if it is an ethics issue, the official need not get private counsel if there is an ethics officer or ethics commission to consult. If the government does not provide someone other than a government attorney to provide ethics advice, then the official should seek private counsel. And if the official asks the government attorney, she should tell the official to do this.

Local government attorneys across the country provide ethics advice every day. They are so used to advising officials on matters relating to laws, they are so used to treating the individual officials as their clients, that they don’t stop and think whether giving the ethics advice is appropriate, whether there is a more appropriate adviser available, whether they have sufficient expertise (ethics advice differs in important ways from legal advice), whether they have a bias or apparent bias, or how the public trust would be affected if it turned out that their advice was wrong and led to a scandal.

One problem is that nothing happens to government attorneys who fail to tell officials to go elsewhere for ethics advice, even when they give advice that is harmful to everyone involved. It is hard to imagine any ethics commission finding a government attorney in violation of an aiding and abetting provision due to her providing an official with a green light to participate in what is clearly misconduct. Nor would providing ethics advice be considered a violation of the Rules of Professional Conduct (see [the subsection below](#)).

And nothing usually happens to the official who can say that he acted on legal advice (the Nevada ethics commission decision is unusual). Seeking legal rather than ethics advice

is, in the great majority of jurisdictions, the best way not to deal responsibly with a potential conflict while making it appear that you acted responsibly. What does happen in thousands of cases every year is that poor, inappropriate and, sometimes, intentionally wrong ethics advice from a local government attorney ends up leading to a scandal and undermining the public trust.

This happens because government attorneys hide behind their role. I'm just representing my client as best I can, they say to themselves and others. They are almost never considered accountable for what they say or do (see [the subsection on accountability below](#)).

We believe in individuals taking responsibility for their actions, not to mention government officials being held accountable, but we also believe that officials should be able to act on the advice of counsel, because that is a normal part of government protocol. This causes a difficult dilemma when it comes to enforcement in situations where a government attorney has provided ethics advice that leads to ethical misconduct.

Amazingly, this quandary has not been dealt with much by our courts. But in California, at least, it is clear that officials who obtain ethics advice from a government attorney may not be protecting themselves from ethics enforcement. The Supreme Court of California, in [The People v. Chacon](#), S125236 (February 8, 2007), found that Chacon, a former council member charged with a conflict of interest, could not use the defense that she had acted upon the advice of the city attorney.

In 2008, the Florida ethics commission, which has jurisdiction over local officials, proposed that it be made clear via state statute that local officials cannot depend on the ethics advice of a local government attorney. It noted that in many situations it had reviewed, "local public officials acted on erroneous advice from their local government attorneys." The commission also noted "the attorney's client is the governmental agency and not the individual public official." These are two excellent reasons for prohibiting local government attorneys from giving ethics advice.

When a state ethics commission has jurisdiction over local officials, state law or the ethics program's rules and regulations should clearly state that local government attorneys should not provide ethics advice and that local officials and employees cannot depend on such advice if it is given. And this information should be spread through ethics training, as

well as through municipal attorney, local government, and specific position (such as clerk) associations in the state.

One solution that has been suggested for allowing a big city or county attorney's office to provide ethics advice is a firewall between a member of the city or county attorney's office who provides ethics advice, a member who represents the ethics commission (which could be the same individual), and other members who represent officials in their government capacity. However, no firewall can change the fact that the city or county attorney is a political position, or that the office's responsibility is to represent the city or county, not its officials with respect to their personal interests. No firewall can change the public's perception that any such ethics advice would not be independent of officials under the jurisdiction of the ethics code (1) because government attorneys are themselves subject to the code, and (2) because officials have a special relationship with government attorneys who represent them, as well as with the government attorney's supervisor or appointing authority. A green light to a mayor or her ally looks to the public like it's helping the official, not the public.

Beyond conflicts, another problem with government attorneys providing ethics advice is that they think legally. They focus on the language of the provision and the details of a situation rather than the appearance to the public and the possibilities of the situation undermining the public's trust in its local government. They focus on the trees instead of on the forest. They read ethics laws as maximum rules, looking for possible exceptions and loopholes, when they are actually minimum requirements for people who have special duties to the public. Too often, they simply don't get government ethics, and nothing in their training or experience helps them with it (see [the discussion on the difference between legal and government ethics](#)).

There are certainly many local government attorneys who give ethics advice as good as that of the average independent ethics officer. They would make excellent ethics officers, but as government attorneys their advice is unfortunately suspect, for reasons that have nothing to do with the individual's integrity.

Government attorneys need to realize that giving such advice puts them in an awkward position. When a government attorney cannot send an official elsewhere, due to the rules in her jurisdiction, she can make the situation less awkward by telling the official that, if she were to give advice, (1) she would be thinking solely of the interest of the

government organization and the public it represents, (2) there would be no attorney-client privilege or confidentiality, and (3) that following her advice would not be a defense (in court, before an ethics commission, or to the public).

But the best thing to do is tell the official to seek advice from the ethics officer, the ethics commission, or other individual or entity formally given that job. If there is no such individual or entity, the official should seek advice from private counsel.

2. Representation of Ethics Commission

As with ethics advice, a city or county attorney can harm an ethics program by seeking to represent the local ethics commission. A government attorney has a special relationship with most of the individuals who come before an ethics commission. There is an apparent conflict when the same individual or office that represents an official advises an independent body that must deal with a complaint by or against that official, including whether or how to settle and whether to dismiss a matter, go to a hearing, find that a violation occurred, and determine the appropriate sanction. This apparent conflict can seriously undermine the public's belief that the ethics program will protect the public interest rather than officials' personal and political interests. An ethics program may not be allowed to deal with conflicting political interests, but those political interests should have no role in the functioning of an ethics program.

As the 2011 [New York State Bar Association report](#) on local government ethics reform stated, "having the municipal attorney advise the ethics board raises ... the specter of a 'mole' on the board. Article 18 should therefore require that municipalities provide separate counsel on a case-by-case basis upon request of the ethics board and perhaps should also require that the municipality provide a budget sufficient for the ethics board to meet its mandate."

However, many local government attorneys have insisted on representing the ethics commission when the commission seeks to hire independent counsel. In 2010, for example, the Texas attorney general drafted [an advisory opinion](#) on the question of whether a county ethics commission must have the county attorney's consent to hire outside legal counsel "to provide legal advice to the Commission." The opinion said that the state's Local Government Code "vests the county attorney with the responsibility to

represent the Commission in court [and in all legal matters]. ... Absent a valid ethical or other legal bar, the county attorney must do so.”

There’s a big jump in this argument, which the A.G. ignored. When an ethics commission chooses to seek outside counsel, this is not “ousting” the county attorney from his legal duties, as the county attorney argued. A “responsibility to represent” means that you are required to provide services upon request, not that you have a right to prevent others from providing these services upon request. This is like arguing that because a doctor has a responsibility to treat a patient, that patient cannot get a second opinion without the doctor’s approval. Or switch to another doctor altogether.

It is worth noting that the ethics commission chair in the Texas matter resigned from his position in response to the A.G.’s decision. This is a good indication of how wrong a decision it was. But it is also a good indication of how many government attorneys feel about letting independent attorneys provide advice to an ethics commission.

Government attorneys should not be disingenuous when it comes to representing an ethics commission. They should openly acknowledge that commission counsel has a great deal of power. Not only does he provide legal expertise, which generally goes unquestioned, but he often is involved in setting the agenda, negotiating and drafting settlements, performing or overseeing investigations, making enforcement decisions, and drafting advisory opinions, findings of probable cause, and decisions. Someone who represents an official (and who is an appointee of that official or of that official’s colleague or opponent) can use his position to help that official’s cause in the ethics program. And even more important, this attorney cannot be seen as unbiased when he negotiates a settlement with that official, investigates that official, advocates against that official, or helps make decisions regarding that official’s conduct.

Another thing to watch out for when attorneys are involved in ethics matters, even when they wear only the hat of ethics commission counsel, is acting zealously. Zealous representation is only relevant to criminal defense, not to ethics defense or to ethics enforcement (or criminal enforcement, for that matter). Take for example a former chief counsel to the House Committee on Standards of Official Conduct, whose job it was to argue ethics cases against members of Congress. In 2010, the chief counsel said, “The goal is to win. It is, to me, about making the case.” He also quoted, “Theirs not to reason why, theirs but to do and die.”

As a government lawyer in a government context, it's never about winning. It's about doing right. If ethics commission counsel believes that an official is being treated unfairly, it is his job to point this out to an ethics commission. If the facts don't add up, it's his job to point this out, not merely advocate for a finding of probable cause or of an ethics violation.

This is true of government lawyers in any context. They are not representing a private client, but the public. And justice is more important than winning. This is why criminal prosecutors are required to share all evidence, even if it hurts the government's case. The same should hold true for ethics attorneys.

3. Rules of Professional Conduct

The law profession's Rules of Professional Conduct include some rules that relate to government attorneys, providing an overlap between legal and government ethics. These rules provide some guidance to the government attorney caught in a tough situation involving an ethics matter, but the guidance is too general to make its application clear to the two most important issues relating to government ethics: (1) Who is the government attorney's client and what does this mean in practice? and (2) Should a government attorney provide ethics advice or advise an ethics commission?

Lawyers' rules should not be applied within a government in the same manner as elsewhere, because so many of the factors involved are different. Therefore, lawyers' rules need to be supplemented by ordinance or statute to clarify what the government attorney should do, both to take pressure off the government attorney and to protect an ethics program from accusations of political and personal favoritism. Without such supplementary rules, government attorneys should err on the side of withdrawal from any role or ethics matter where they appear to have a conflict or where providing advice appears, or might appear, to be inappropriate and damaging to the public trust.

Rule 1.13 is the rule of professional conduct most relevant to government attorneys, but it involves the more general relationship between an attorney and the organization for which he works, including governmental, business, and nonprofit organizations. Subsection (a) says that the lawyer "employed or retained" by the organization "represents the organization acting through its duly authorized constituents." That is, although a lawyer represents the organization, because the organization acts

through its officers, the lawyer may in most cases ignore the distinction between organization and officer. This makes life easier for the organization lawyer.

But a government attorney is in a different position than other organizational attorneys. The officers he works for are not executives chosen by a board, but officials chosen directly or indirectly by the public to fill their positions for a limited period of time and to act pursuant to the rules and the philosophy of our democratic form of government. The government attorney lives in a messy democratic system rather than in a relatively straightforward, profit-oriented, bureaucratic system.

Subsection (b) deals with situations where the lawyer knows that an officer intends to violate a legal obligation to the organization “that is likely to result in substantial injury to the organization.” In this instance, the lawyer should “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.”

Think of the situation where a council member comes to a government attorney seeking ethics advice regarding a matter involving a brother whose company wants a no-bid contract with the city. The council member wants to help the family member get the contract, and she is asking for a way to be able to do this. Were the government attorney to say that the council member had to have nothing to do with the matter, and the council member said that she would do what she could behind the scenes, what should the government attorney do?

Subsection (b) gives the government attorney an out. He could argue that the council member’s participation behind the scenes would be “likely” to result in a “substantial injury to the organization”?

On the other hand, he could argue that this would not be likely. He could argue that it is not “likely” that participation behind the scenes would be discovered. And he could argue that the council member’s participation, even if discovered, would not be likely to substantially injure the organization. Is damage to the public trust “injury to the organization”? It is far more likely that the council member’s personal reputation would be injured, but that is up to her. And wouldn’t there have to be a lot more votes than the

contractor's sister's to get the contract approved? It's not as if the council member controls her colleagues' votes. So any injury that would happen to the organization could equally be blamed on the council members who voted for the no-bid contract.

What is most important is that these are not the questions a government attorney should be asking himself when an official asks him for ethics advice. First of all, he should be asking himself whether he should provide any advice at all to the council member, considering his conflicts. But if he chooses to provide advice, he should be considering not "injury" to the government organization, but the organization's reputation. And this reputation is not important in and of itself. It is important for how it affects the public's trust in it. In this sense, subsection (b) is not at all relevant to a governmental organization in an ethics context. Protecting a governmental organization's best interest is not always in the public interest. In fact, in government it is the public that is the "highest authority" of all (which is why we have transparency laws). A community is not just a bunch of public shareholders concerned about the value of its investment, whatever the concern of many people about the value of their homes. A community is represented by the local legislative body, but for the purposes of dealing responsibly with conflicts, the legislative body is not the "highest authority," because it is conflicted itself.

Think of the idea of "higher authority," which in a business organization applies to supervisors, executives, and the board of directors, in the context of a local government that has an independent ethics commission. The Rules would have a government attorney report a possible ethics violation to the city or county attorney, the mayor, or the council, even when the ethics code gives the ethics commission the authority to deal with government ethics. Thus, a government attorney is put in the position where his obligations under an ethics code may differ from his obligations under the Rules of Professional Conduct. Any such conflicting obligations should be clearly delineated and dealt with by the government. If not, the government attorney should err in favor of ethics commission authority, since for a government attorney state and local laws should take precedence over Rules of Professional Conduct that are intended for other kinds of organizations. It is one of a government attorney's difficulties that he is government first, attorney second (see Comment 9 to Rule 1.13).

Subsection (b) does not provide useful guidance to the government attorney asked for ethics advice or aware of an official's intention to violate an ethics provision. And when

ethical misconduct is not intentional, which would still be a violation under most ethics codes, subsection (b) gives the government attorney no guidance at all.

Subsection (c) deals with the situation where the “highest authority” fails to address the matter, a “clear” violation of the law actually occurs, and there is “reasonable certainty” that a substantial injury to the organization will result. Then and only then may the lawyer “reveal information relating to the representation.” But at this point, the damage has already been done. By following the Rules of Professional Conduct and only telling the mayor about an official’s violation of an ethics provision, a government attorney has allowed the violation to occur. This is not an acceptable solution from the government ethics point of view. Ethics programs seek to prevent ethics violations.

Instead, the government attorney or, better, the government itself should recognize that this rule does not apply in a local government that has an independent ethics officer and/or commission (or a state commission with jurisdiction over local officials) that is given the authority to deal with just such situations where an official may be intending to violate, knowingly or unknowingly, an ethics provision. If the official tells the government attorney his story, the attorney should tell the official to go to the ethics officer or commission for advice. If the official says he will not do this or the attorney knows that the official did not seek advice, rather than go to the highest authority, the attorney should go directly to the ethics officer or commission that has the sole authority to deal with such a matter.

Subsection (f) provides some guidance regarding the important issue of how the question, “Who is the government attorney’s client?” should be dealt with in practice: “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.” This gives a government attorney the obligation to tell an official with an adverse interest (in the government ethics situation, a personal interest) that the attorney is representing not the official, but the agency or government. The next logical step would be to tell the official that, due to the possible conflict of the official’s personal interest with the public interest, the attorney cannot represent him, or provide him ethics advice. Comment 10 makes this more clear:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

However, the language of this rule and its comment is limiting in that the attorney has to *find* that the official has an adverse interest and tell him so, something that can only be done after the attorney has agreed to provide ethics advice and the official has told the attorney the entire situation he is in. In other words, according to the rule, a government attorney has to represent and provide advice up until it has been established that the official has an adverse interest and, if the attorney determines there is no conflict or only a possible conflict, there is no limit to the attorney's representation of the official, even in suits and before the ethics commission. Since the major problems arise when a government attorney gives an official the green light to participate with a conflict or accept a gift, that is, where the attorney finds there is no adverse interest, this rule does not deal effectively with the most important problem involving ethics advice from a government attorney.

The only difference this rule could make is that, where the attorney has determined the official has a conflict, he could use the rule as a basis for telling the official that she must now go to the ethics officer or commission, or the attorney will be obligated to report her.

The one specific reference to government attorneys appears in Comment 9 to Rule 1.13, which acknowledges the government attorney's difficult position, as well as the fact that Rule 1.13 does not limit the authority of local laws to determine the duties of government attorneys. However, the comment does not otherwise provide clear guidelines for how to resolve the problems that arise from the attorney's difficult position:

The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client

may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.

This comment points the way to dealing with the involvement of government attorneys in providing ethics advice. This way is for a city or state to make express in the form of a law the requirement that, if a question arises whether an official has an adverse interest, that is, a conflict, a government attorney should do what it says to do in Comment 10 to Rule 1.13: advise the official to obtain counsel elsewhere, preferably a designated contractor effectively acting as ethics officer if there is no ethics officer or commission.

This would take the pressure off government attorneys while at the same time ensuring consistent, professional ethics advice untainted by political connections or appearances of impropriety.

It would also be helpful to make it clear to officials that the ethics officer or commission has [a monopoly on ethics advice](#), so that government attorneys can point to a particular rule when they refuse to provide ethics advice to individuals who are used to turning to them for legal advice.

The other Rule of Professional Conduct that applies expressly to government attorneys is Rule 1.11. It applies to past and current government service by lawyers. It provides an alternate revolving door provision (see [the section on post-employment restrictions](#)).

The Rules of Professional Conduct raise another issue: what are the obligations of a government attorney to know about ethical misconduct? Put the other way, can a government attorney practice willful (or deliberate) ignorance (or blindness; also known as

plausible deniability) when there is reason to believe that ethical misconduct is occurring? Can a government attorney choose not to look further into the matter in order to be able to deny any knowledge of the misconduct?

Model Rule 1.2(d) says that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Since this rule requires knowledge, it allows an attorney to practice willful ignorance.

But Comment 3 to Rule 1.13, which applies to the organization as client, adds to the definition of “knowledge” in Rule 1.0(f), “a lawyer cannot ignore the obvious.” A lawyer cannot remain willfully ignorant. The reason for this is that there is no duty of confidentiality toward a government official, at least within the government organization, because the official is not the client, the organization is. Therefore, if a government attorney suspects that an employee is engaged in ethical misconduct, the attorney is in no way harming the client by reporting the suspected misconduct to the appropriate internal authority, that is, the ethics commission. In fact, the attorney is doing the client a favor.

Rules 1.1 and 1.3 also require competence and diligence. How can you competently advise a client if you don't know the facts? Therefore, a lawyer has an obligation to ask for all the relevant facts, and to show diligence if he believes that he is not getting all the facts or if he believes an official is not telling him the truth.

Willful ignorance is not an option for government attorneys. If they have reason to believe that ethical misconduct has occurred or that it may occur, they must ask the appropriate questions and look at the relevant documents.

The League of California Cities has a publication entitled [*Practicing Ethics: A Handbook for Municipal Lawyers*](#) (2004), which applies the Rules of Professional Conduct to the situation of the local government attorney. It strongly takes the position that a local government attorney's client is the city, and then describes what that means in terms of the attorney's obligations:

Understanding that the city itself is the client is critical, especially when the interests of the city may conflict with those of its officials or employees. The city attorney has an interest in ensuring that the client city's interests are free from the taint of the conflicting interests of a recalcitrant council member or city official who insists on participating in a decision in violation [of the ethics code]

There are occasions where the Rules of Professional Conduct are the focus of a discussion that actually involves government ethics. One such case arose in Westport, Connecticut in 2007 when the law firm that represented the town's board of education decided to represent a developer in a controversial suit against the town's planning and zoning commission. A member of the town's representative town meeting (an unusual hybrid of New England town meeting and town council) said that the town's taxpayers were paying money to a firm that was "aggressively trying to harm the town" through its representation.

Many towns cannot afford in-house counsel and, therefore, depend on law firms to represent them. There is no doubt that in this, as in many other cases, the Rules of Professional Conduct do not prohibit the representation of one town body along with the representation of someone bringing a suit against a different town body. There is also no reason why the board of education should have to give up the firm's representation. Nor should the board of education be permitted to waive the conflict when its interests are different from those of the planning and zoning commission, and even of the town government itself. In other words, the Rules of Professional Conduct do not really apply here.

What is problematic is the law firm's insistence on following only the Rules of Professional Conduct and not considering the appearance of impropriety it created by representing the developer in its suit. The firm effectively told the people of the town that their feelings of betrayal were invalid, based on the Rules of Professional Conduct, which are not intended to protect the public from their officials' conflicts. It was wrong of the firm to do this.

Not only does the firm have obligations to the people of the town. But the firm also has an obligation not to undermine the public's respect for our legal system. By acting as if the Rules of Professional Conduct are all that matter, a law firm leads people to say that lawyers wrote the Rules of Professional Conduct to accommodate their desire to make money, and that judges (who are all lawyers) make decisions supporting those rules. At what cost to our society do attorneys take clients whose interests, in the eyes of the public, are clearly opposed to the town's? And why does it seem so difficult to discuss such a difficult situation honestly, that is, in terms of government ethics (in this case, the

appearance of impropriety) rather than just in terms of the rules attorneys have developed to police themselves?

4. Confidentiality and Ethics Advice

The other legal ethics concept that makes government attorney participation in government ethics matters problematic is attorney-client confidentiality. Confidentiality is problematic not only with respect to advice, but also with respect to other aspects of ethics matters.

It is common for informal ethics advice provided by an ethics officer to be confidential, and for formal ethics advice by an ethics commission to be public, although often any facts that might show which official sought the advice are redacted. Sometimes, however, informal advice is also made public, with redaction. Sometimes there is no redaction at all.

The values that are balanced with respect to the confidentiality of ethics advice include (1) the value of encouraging officials to seek ethics advice (and thereby comply with ethics laws) by making the advice, and especially the underlying facts, confidential, which is the value behind attorney-client confidentiality; (2) the value to other officials of knowing about ethics advice given to their colleagues, both with respect to the specific situation (“oh, that’s why he didn’t withdraw from that matter”) and with respect to their own future situations when the circumstances are similar; (3) the value to the ethics program of others in the ethics program knowing about all ethics advice that is given, in order to ensure that it is given consistently (fairness); and (4) the value to the public of knowing about the ethics advice that is given so that (a) it may be determined whether officials followed the advice or not, and (b) there may be public discussion of the ethics advice itself, so that it can better be understood and, in some cases, corrected when public criticism puts into question the validity of the advice (in this way, ethics advice is no different from any other internal government communication that is made public according to transparency laws).

In short, the values underlying attorney-client confidentiality must be balanced against three values that do not appear in the Rules of Professional Conduct, except on the edges of Comment 9, which focuses on another question: who is the client who holds the privilege to keep officials’ communications with a lawyer confidential? In government, the

client is not the individual who seeks legal or ethics advice, but rather the agency or government. Therefore, the value being protected is not the client's individual right to have what she tells the attorney remain confidential. The value is the encouragement of ethics advice, which may not be sought if the official knows that the advice, and the underlying facts (which involve personal interests), were to be made public.

Since this privilege is held not by the individual official, but by the government, it is the government's obligation to make it clear how the advice process should be handled, both by officials and by attorneys, to ensure that officials seek ethics advice in order to protect the public trust in the government, while preventing the public from believing that the advice is being hidden from them for a reason.

The best way to do this is to prevent some of the problems that accompany confidentiality from arising, that is, to require that officials seek their advice not from a government attorney, but from an ethics officer or the ethics commission (assuming they themselves are considered independent from those under their jurisdiction). Since an independent ethics officer or commission has no other relationship, personal, business, or political, with the official, the confidentiality of their ethics advice is less problematic, as long as it is understood that, if the official does not follow the advice, the advice, and the underlying facts, are likely to be made public in an ethics enforcement proceeding.

This all seems reasonable, but many government attorneys are not reasonable when it comes to attorney-client confidentiality. Confidentiality is such a strong value for attorneys that they do not take into account other values, even in a government situation. For example, in 2009 Chicago's corporation counsel, who refused to share documents with the city's inspector general, told a council committee, "If a court held that I would have to submit these documents to the IG because of statutes within the Municipal Code, I'd probably ask you all to amend the Municipal Code to say that my privilege is sacred."

Note those last four words, "my privilege is sacred." First of all, it is not the corporation counsel's privilege; it is her client's privilege, and her client, the city, has given the IG the power to investigate certain city matters and to request documents from city officials relating to these matters.

Second, no privilege is sacred. As one of the appellate court judges told the assistant corporation counsel arguing the case, "a privilege is not a right." And even rights are not

sacred; they are balanced against other rights (including other people's rights), and against obligations.

The corporation counsel's position shows how emotional the issue of attorney-client privilege is to many lawyers, how biased they are in its favor, and how blind this bias makes them to public policy considerations that must be balanced against the attorney-client privilege. This bias, which is even held by many government ethics professionals, can present a serious obstacle when government attorneys getting involved in an ethics program, both with respect to advice and with respect to enforcement.

The corporation counsel's position would allow an official to place her personal interest in protecting herself from an investigation ahead of the public interest in discovering and sanctioning misconduct by government officials. To protect herself, all the official has to do is consult with the corporation counsel's office, which puts the consulting attorney in the position of becoming an accomplice by simply doing his job.

A few federal courts have concluded that no attorney-client privilege exists when the federal government attempts to compel testimony from its own attorneys or officials. But state courts have not dealt with this issue much. The privilege is something that is not often questioned, especially by lawyers.

California's Institute for Local Government, which is run by the League of California Cities and the California State Association of Counties, [wrote in 2007](#) on the topic of who is a government attorney's client:

It is important to keep in mind, though, that an agency attorney's client is the agency, not individual decision-makers in an agency. Any advice she gives to help individual public officials avoid violations of the law are designed to protect the agency as a whole. Individual officials do not enjoy an attorney-client relationship with the agency's attorney (and conversations with individual officials are not necessarily protected by the attorney-client privilege) because the attorney's client is the agency itself. ... [C]ity attorneys encourage each other to resist pressure to be "creative" coming up with questionable legal theories in an effort to provide cover for public officials who want to engage in activity that the attorney believes is unlawful. Nor does it matter that no one is likely to either find out about the situation or challenge it.

The Institute took the position that not only is the attorney-client privilege not sacred, but it does not even apply to officials seeking advice from a government attorney, because officials are not clients. According to this argument, the local government attorney should explain to an official (1) that he does not represent the official, but rather the agency or city, (2) that “any information shared with the attorney is not confidential and cannot be withheld from others in the city with authority over the matter,” (League of California Cities, [*Practicing Ethics: A Handbook for Municipal Lawyers*](#) (2004)); (3) that following his advice is not a defense in court, before an ethics commission, or to the public, and that, therefore, (4) the official should seek ethics advice from the ethics officer or commission.

It is valuable to explain this to each official when the issue arises, but it is also good to draft a memorandum to this effect, send it around once a year at least to all high-level officials, and place it prominently on both the city or county attorney office’s website and the ethics commission’s website.

A final consideration is the harm to the ethics program that ensues when a government attorney gives confidential ethics advice. For example, there is a California Attorney General opinion saying that when a city attorney obtains information in confidence from a council member as though a confidential relationship existed between the city attorney and the council member, the city attorney is precluded from prosecuting the council member under the Political Reform Act, the state’s ethics code. Since in most local governments, the city or county attorney is involved in the ethics enforcement process, giving confidential ethics advice might preclude the city or county attorney’s office from any involvement in enforcing against the official’s decision not to follow the ethics advice and could possibly prevent enforcement if the official decided to follow ethics advice that was mistaken.

For more on the topic of ethics advice confidentiality, see [the section on the topic above](#).

5. Confidentiality and Cooperation with Investigations

Government attorneys are not excepted from ethics code provisions that require all officials and employees to cooperate with an ethics investigation. There are four arguments why requested documents should not be protected by the attorney-client privilege:

1. According to many ethics codes, every official owes an express statutory duty of full cooperation (this is a best practice). Because they have this duty, officials have no expectation of confidentiality with respect to matters that may be investigated by an ethics commission. I would argue that, because of this duty, the official (or, others would argue, the legislative body, since the city or county, rather than the official, is the client) has an obligation to waive whatever privilege there might be. An ethics code could expressly state that, with respect to an ethics investigation, any privilege is automatically waived, taking the burden off the official and the legislative body, and preventing situations where one or the other attempts to keep documents relevant to an ethics matter secret.

2. The local government and an ethics commission share a common interest in the goal of preventing and uncovering ethical misconduct. Any documents sought by an ethics investigation are effectively staying within the same political entity, and they are being used for a shared purpose.

3. Obstructing an investigation by insisting that documents are privileged poses a risk of undermining public trust in the integrity of the government and its commitment to serving the public interest. Thus, it undermines an ethics program for any official to insist he has an attorney-client privilege with respect to evidence sought for an ethics investigation. This is equally true for a body on which the official sits, especially when, as sometimes happens, the official votes against waiver rather than withdrawing. It looks to the public as if the official and his colleagues were hiding valuable information from the office responsible for investigating ethical misconduct.

4. Comment 9 to Rule 1.13 of the Rules of Professional Conduct recognizes that attorney-client confidentiality does not apply to government attorneys the same way it does to private attorneys: “[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.” The League of California Cities’ *Practicing Ethics: A Handbook for Municipal Lawyers* (2004) also notes that, “The fact that the city itself, and not any particular official or subordinate board, is the city attorney’s client is important because the city attorney typically advises individuals along the entire chain in the city’s hierarchy. Since these individuals are the embodiments of the city – and not separate and independent clients – the city attorney has no obligation to keep information obtained from one individual confidential from others in the hierarchy. This is significant because a city attorney typically has to gather information from a number

of officials in order to provide legal advice and representation to the city.” This is another reason why officials have no expectation of confidentiality from their interactions with a city attorney, especially with respect to an ethics matter, where their personal interests may conflict with the city’s interests.

Another question arises with respect to confidentiality in the government context: Should government attorneys be differentiated from other government officials on the basis of their function or on the basis of their membership in a professional group? Bar associations take the position that it is membership in a group (their group) that matters. I will use myself to make the argument for instead making this differentiation on the basis of function.

I used to administer a public campaign financing program in New Haven, but I was not a member of any bar association, although I have a law degree and was a member of the Massachusetts bar many years ago, when I practiced. When the board members or participants in the program had questions about the program’s ordinance, or other laws and policy matters, they came to me. I dealt with legal issues all the time. If I were a member of a bar association, most attorneys would say that what the board members or participants said or wrote to me would be privileged, and that no one would have an obligation to waive this privilege, even if an ethics commission subpoenaed the documents and by law officials have an obligation to cooperate with them. However, because I am not a member of a bar association, they would say that what the board members or participants said or wrote to me would not be privileged at all. In other words, all that matters is membership of a bar association. This privilege, many would argue, applies to attorneys even when they are not giving legal advice, but not to non-attorneys when they are providing information about laws.

It seems unreasonable that the words and acts performed by one official are treated in a different manner from the same words and acts performed by another official, simply on the basis that one official is a member of a professional association. It is clearly irrational, in a government context, to base a confidentiality privilege on membership rather than on function.

This shows how irrational lawyer-client confidentiality is in a government context. It is a professional association rule that has no place in an organization where attorneys are

government officials first, and only secondarily attorneys, and where these bar members have, as government officials, special duties to the public.

Ethics code cooperation provisions should make it clear that cooperation overrides any attorney-client privilege that might exist.

6. The Contracts of Contract Government Attorneys

Many city and county attorneys are not employees of their local governments, but are under contract. This is also true of the many special counsel hired by local governments. In many jurisdictions by law, and elsewhere in terms of obligations, contract government attorneys are officials for the purpose of government ethics. Therefore, a problem arises when their contracts with the government are negotiated.

The League of California Cities advises that, when negotiating their employment contracts, attorneys create a wall between themselves and the local legislative body, which in many cases they advise and represent. “Make it clear that you are representing yourself in your personal capacity and not advising the body as the city attorney. Present your proposal to the city manager/executive director and allow him or her to present it to the city council or agency. Explain that if the legislative body wants legal advice about the contract it should retain independent counsel.”

In *Campagna v. City of Sanger*, 42 Cal.App.4th 533 (1996), a contract city attorney negotiated an agreement with the city whereby his firm and another firm would file a lawsuit against chemical companies on the city’s behalf. The contingency fee agreement approved by the city council explained how the total fee would be calculated, but did not explain how the two firms would split the fee. It turns out that the firms entered into a separate oral agreement, according to which the city attorney’s firm was to receive a 35% referral fee. The court found this separate agreement to be a conflict of interest, because the contract attorney, although allowed to negotiate with the city as a private attorney, was not allowed to negotiate with the other law firm as a private attorney, but only on behalf of the city.

It is also important for contract government attorneys not to get too close with the agency heads they report to. The blind spots this can create should be openly discussed, and there should be a time limit for representation, just as with auditors. Most fiefdoms are characterized by a long-term agency head-counsel relationship. Since an agency board is

dependent on the agency counsel, this relationship enables insufficient oversight. An agency should be required to change law firms every five years or so.

7. Jurisdiction

Rather than seeking guidelines to make their position more clear with respect to ethics matters, some city and county attorneys have sought to exclude themselves altogether from an ethics code's jurisdiction on the grounds that their ethics are already governed by the lawyer disciplinary system that is part of the judicial branch. One place where lawyers were successful in doing this is Jackson County, Missouri, which excluded lawyers in 2009.

In 2003, the Rhode Island Ethics Commission, which has jurisdiction over local officials, was asked by an assistant town solicitor for an advisory opinion regarding the ethics commission's jurisdiction over attorneys, in light of the fact that the judiciary has jurisdiction over them. The commission referred to its "power to enact substantive ethics laws that apply to all government officials and employees without regard to outside employment or regulation by other bodies." In other words, lawyers are no different than other professionals that have their own professional ethics codes and disciplinary systems. The ethics commission also found that there is no separation of powers issue between the ethics commission and the judiciary.

The following example of a lawyer insisting that a government ethics code does not apply to him shows how this position is more a matter of arrogance than of overlapping or conflicting jurisdiction. When, in 2004, Robert Proctor was fined \$1,000 for failing to register with the state of Georgia as a lobbyist, he said that he was only regulated by the Supreme Court and the state bar association. According to an article in the *Atlanta Journal-Constitution*, when told that the attorney general had issued an advisory opinion that lawyers must also register as lobbyists, Proctor said "it didn't matter because the Attorney General is just another attorney." Not only did Proctor not pay the fine, but he accepted an appointment to the state ethics commission in 2010. When his failure to pay his fine came out, he resigned before attending his first meeting.

The overlap between legal and government ethics is far too limited to argue that legal ethics rules sufficiently apply to government ethics issues. For example, Rules of Professional Conduct do not deal with situations that involve a client who is not dealing responsibly with her own conflict of interest, which is the most common ethics situation

facing the government attorney. The Rules do not deal with gifts from restricted sources or many other sorts of relationships and conflict situations.

A Michigan attorney discipline decision in 2010, involving Detroit's corporation counsel, shows how difficult it is for lawyers to discipline a government attorney, under the Rules of Professional Conduct, for misconduct relating to his obligations as a government attorney. See [my blog post](#) on the problems raised by this decision.

Some local governments expressly include government attorneys under the ethics commission's jurisdiction. Some local governments, such as Greenburgh, New York, even have a special ethics provision that applies only to their attorneys and the attorneys' law firms:

§570-4.K. Additional standards for Town Attorney. The Town Attorney and Deputy Town Attorneys are prohibited from exercising any discretion in any matter of Town interest which shall involve any person or legal entity who or which was a client of her/his or a law firm of which she/he was a member or employee during one year prior to the time that said matter is handled by the office of the Town Attorney. This, however, shall not prevent the assignment of such a matter to another attorney in the Town Attorney's office who has had no interest in such matter, provided that, in the event the Town Attorney shall be so disqualified, the Deputy Town Attorney to whom the matter is assigned shall report directly to the Supervisor with respect thereto. Any law firm of which the Town Attorney or any Deputy Town Attorney shall be a member, associate attorney, counsel or employee shall not practice before the Town or any agency of the Town while such member, associate attorney, counsel or employee is an employee or appointed officer of the Town.

8. Legality

Local government attorneys can put up large obstacles to an ethics program by determining the legality of ethics laws. When a controversy about legality arises, they sometimes respond by arguing that an ethics provision is illegal, because it goes against the charter, state law, or the state constitution. Or they argue that the ethics commission or ethics officer (who is often the city or county attorney) does not have jurisdiction over a respondent. This gives them a great deal of power, and responsibility, regarding the

authority of ethics programs. And sometimes they abuse this power at the request of high-level officials.

For example, in Taylor, Michigan, the city attorney is supposed to determine if a complaint is valid and, if so, recommend to the board of ethics or human resources department what to do next. But nothing was done with a complaint that was filed early in 2010, and nothing was said to the complainants. Nor was anything done in response to a second complaint filed in November. When a question was raised by a citizen at a council meeting, the city attorney said he had done nothing because the ethics ordinance might not be valid.

The Broward County attorney argued in 2010 that lobbying provisions in the county ethics commission's proposed ethics code were unconstitutional and, therefore, should be removed. The argument was not very strong. The reason the argument was made was that the county commission was prohibited by a citizen referendum from removing any provisions from the code. Since it could not remove the lobbying provisions itself, the commission sought to invalidate them. And the county attorney obliged.

Local government attorneys are often the ones to help officials raise the legislative immunity defense, as well, in order to remove the officials or evidence of their legislative activities from the ethics commission's jurisdiction (see [the section on this defense](#) below). They are also the people who sometimes seek to have government attorneys like themselves excluded from an ethics program's jurisdiction.

Because local government attorneys generally speak for high-level officials, who are subject to an ethics code, their views of a provision or code's legality must be taken with more than a grain of salt. By making such arguments not for the city or county, but for officials, they undermine trust in their position and in the legal system in general.

Officials often put them in a difficult position such as this, but it is a position that has to be treated responsibly and explained clearly and honestly to officials and citizens alike.

9. Accountability

Too often, government attorneys hide behind their roles. "I'm just representing my client as best I can," they say. They are almost never held accountable for what they say or do. Nor are those who accept their advice. That is why government attorney ethics advice is the number one way in which ethics issues are improperly handled.

As Elizabeth Wolgast points out in her book [*Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*](#) (Stanford Univ. Press, 1992), ethics is based on one person acting for himself, not one person acting for another. When two people are brought into the ethics equation, especially in the official-lawyer relationship, our ethical views, not to mention our ethics laws, are undermined. We have the choice either to change our ethical views, that is, to not feel people should be responsible for their actions, or to change our institutional arrangements. The important institutional question here is: should advice of counsel release both a government attorney and a government official from responsibility for their advice, decisions, and actions?

We believe in individuals taking responsibility for their actions, not to mention government officials being held accountable, but we also believe that officials should be able to act on the advice of counsel, because that is a normal part of government protocol. It is therefore hard to accept either that an official has no responsibility or that he can't depend on legal advice he is given (see above for [a discussion of the ability to depend on ethics advice](#)).

One government attorney who has been held accountable for his ethical misconduct is Andrew Thomas, former county attorney in Maricopa County, Arizona. He was disbarred in 2012 for bringing false charges against the very county officials he was supposed to represent. But this was not a case of poor or even intentionally false ethics advice, or a conflict in representing officials and the ethics commission charged with investigating them. Thomas's problem appears to have been that he truly believed the people he charged were the enemy and had to be stopped, and he was given too much authority to do something about his beliefs, authority he could not responsibly handle.

One reason to limit the hats one individual can wear, as well as the authority any one individual can have, is to control those whose strong beliefs, in the words of the legal disciplinary panel, "inflict an economic blizzard [and "emotional devastation"] on [the] public and multiple individuals."

Anything short of Thomas's conduct is very rarely sanctioned by attorney grievance committees, by ethics programs, or by governments. This allows local government attorneys full rein to provide the advice that officials want rather than the advice that is best for the community.

T. Independent Agencies

Independent agencies and authorities sometimes put their own independence ahead of the independence, fairness, and competence of government ethics programs. They insist that a city or county ethics program should not have jurisdiction over them, so that they can have their own ethics programs. This is especially true of sheriff and district attorney offices, independent authorities, school boards, and public-private partnerships.

This concept of independence is self-serving, especially if an ethics commission is appropriately selected by community groups rather than by the government officials from whom the office or authority insists it is independent. No one should be independent of independent ethics training, advice, disclosure, and enforcement. If some agencies are excluded from an ethics program, those covered will feel that the ethics program is unfair. It is important that an ethics commission have authority over all government offices and authorities, so that the ethics program does not appear to favor certain officials over others. It is important that the public as well as government officials and employees see ethics enforcement as fair, objective, and comprehensive, and that rules as well as the interpretation of rules be consistent throughout a government.

Also, the more officials and employees that are covered by an ethics code, the more resources the ethics program will have and, therefore, it will be more likely to be able to afford full-time staff and a quality training program. Also, a comprehensive ethics program is less expensive for each department, agency, or authority. Only the biggest authorities have the resources for a quality ethics program.

Some officials are willing to fight for their right to self-regulate their ethics. In 2007, the Metropolitan Sewer District (MSD) in Louisville, whose board is appointed by the mayor, successfully sued to have its board and executive director declared outside the ethics commission's jurisdiction. In 2011, it was alleged that the MSD was doing business with two of its board members, including unbid contracts with the chair totaling almost \$600,000. The contracts would have been prohibited under the Louisville ethics code. So much for the value of an authority's independence and self-regulation of its officials' conduct.

In Palm Beach County, the 2009 ethics code did not include the county sheriff, the school board, the tax collector, the county clerk, the property appraiser, and the

supervisor of elections. Due to their objections, they were allowed to decide for themselves if they and their staffs would submit to ethics oversight. When insisting that his office should not have to take a county ethics training course, the sheriff said it was a constitutional issue: “If the office of sheriff is allowed to be governed, where does it stop?” Calling ethics training “governing” shows how desperate agency and authority leaders can be to prevent themselves from being subject to ethics oversight.

When independent offices and authorities raise the issue of independence, it should be pointed out that officials who oppose ethics commission authority over them are putting their personal interest, rather than the interest of their authority (which is, after all, the public interest), ahead of the public interest in having independent ethics oversight of all local public servants. For more, see [the subsection on jurisdiction over independent offices](#).

It should also be recognized that independent agencies and authorities often abuse their independence and lack of oversight by becoming [fiefdoms](#). Usually the fiefdom’s prince is the CEO, but sometimes it’s someone else. For example, in 2009 it was discovered that Detroit’s pension funds were controlled by their counsel. He reportedly helped them break away from city oversight. One pension board gave him a five-year contract and changed the rule so that a unanimous vote was required to fire him. Counsel offered trustees sports tickets and vacations, paid for by those doing or seeking business with the boards. And he made no effort to give the boards ethics or transparency rules that might restrict them. In fact, one of the boards argued in court that it was not a public body and, therefore, was exempt from public records laws. Fiefdoms such as this always fight against ethics commission jurisdiction over their officials. Fortunately, the state attorney grievance commission investigated the situation.

Government attorneys sometimes twist themselves into pretzels to defend the independence of agencies. For example, in 2012 the Hallandale Beach (FL) Community Redevelopment Agency (CRA) attorney said in arguing that the CRA should not be under the county inspector general’s jurisdiction, “[T]he individual Hallandale Beach CRA board members and the city commissioners are each one and the same person. However, in these separate capacities they wear separate hats and are guided by separate legal requirements.” This is simply not true. Commissioners on the CRA are acting solely as city

commissioners. They were not elected or appointed to the CRA. They appointed themselves and they themselves declared the CRA an independent agency.

Legal independence is irrelevant to ethics independence. A government agency or authority is a legal fiction created by public officials solely in the public interest. The question needs to be asked of each agency, Why is it independent? Is it independent in order to protect itself from interference by elected officials? If so, why would that require independence from independent oversight? Is it independent out of tradition? Traditionally, there were no government ethics programs, so traditional independence should not be an issue. Is it independent so that there will be less oversight? Then outside oversight is necessary.

If government attorneys defend the independence of something like the CRA, whose board consists solely of the elected officials who created it, they might defend the independence of any agency, in order to prevent oversight.

The best way to deal with recalcitrant independent agencies is in a charter. For those agencies that are not included in the charter, the ordinance or other document that deals with their creation should be amended to include the ethics commission's jurisdiction over them, their officials and employees, their contractors and others over whom the ethics commission generally has jurisdiction.

Taking jurisdiction over independent agencies is yet another reason why an ethics program should be truly independent. It is easy to argue that an ethics commission selected by local officials should not have jurisdiction over a truly independent agency. It is much harder to argue that a truly independent ethics commission could harm the independence of an agency.

It's important for citizens and independent agencies to recognize that, just because they are not legally under an ethics program's jurisdiction, they can still place themselves under its jurisdiction. In 2012, former Chicago inspector general David Hoffman was named to the board of a new Infrastructure Trust, a huge public-private project that could be a magnet for ethical misconduct. The Trust is not subject to the current inspector general's jurisdiction. Hoffman said that this fact does not prevent "the [Trust's] board from taking the position that the IG should have oversight."

When an official says that an ethics program has no jurisdiction over him or his agency, the correct response is, "Yes, but that doesn't mean that you can't give the ethics

program jurisdiction over you and your agency. Nothing is stopping you but your personal preference not to participate in the ethics program.”

Post-employment issues seem to be more problematic in independent agencies and authorities than in local governments themselves. The principal reason is that there is less oversight. Another reason may be that in independent agencies, there is more of an attitude that board positions are less for political purposes, and more for furthering one’s career. One response to this is a special post-employment provision for independent agencies and authorities. Here is one from Marlboro, New Jersey:

§V.B(8). No independent authority shall, for a period of one year next subsequent to the termination of office of a member of that authority:

- a. award any contract which is not publicly bid to a former member of that authority;
- b. allow a former member of that authority to represent, appear for or negotiate on behalf of any other party before that authority; or
- c. employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority.

The restrictions contained in this subsection shall also apply to any business organization in which the former authority member holds an interest.

U. The Legislative Immunity Defense

Until 2007, state and local legislators assumed that if their legislative bodies had passed ethics codes and created ethics commissions, those codes applied to them and those commissions had jurisdiction over them. In fact, most legislators still assume they are subject to programs they establish, and rightfully so. No one but an attorney would have reason to believe otherwise.

In 2007, Jeff Arnold and Alex Heaton, two state legislators from New Orleans, one from each party, with the support of their legislative leaders, waged a constitutional battle that has jeopardized ethics commission jurisdiction nationwide.

These legislators sought an injunction against the Louisiana Board of Ethics to stop its investigation and prevent a hearing on the legislators' participation in matters relating to their family members' jobs. And in 2008 they succeeded. A state appellate court in [*In re Arnold*](#) (May 23, 2008) found that the state's equivalent of the federal Speech or Debate Clause prevented the ethics board from investigating or making decisions regarding state representatives participating with a conflict. It also found that the ethics board was prohibited from investigating or making decisions regarding any other legislative activity, for that matter. Another way of putting this is that, to the extent an official is participating in legislative activity, he has legislative immunity from ethics enforcement.

The legislators in this case were state legislators, but this decision also opened the door to local legislators seeking immunity. And it wasn't long before a local legislator stepped through that door.

The legislative immunity defense poses a serious challenge to ethics commission jurisdiction over local legislators as well as over executive officials and board members, to the extent they participate in legislative activity. This challenge is serious, because excluding, even partially, the legislators who created the ethics program, who also happen to be more likely than anyone else to misuse their office, makes an ethics program appear unfair. An unfair ethics program will not be respected by those it *does* apply to, and the public will lose trust in legislators who choose not to apply their own ethics laws to themselves. Excluding legislators from an ethics program prevents that ethics program from working effectively.

There are steps a local government can take to deal with this challenge, and I will look at them at [the end of this section](#). But first it is important to truly understand legislative immunity and why it is inappropriate that it be applied in a government ethics context.

1. The History and the Law

The Same Goal

The basis for legislative immunity is the Speech or Debate Clause of the U.S. Constitution, which appears in many state constitutions, as well:

Article I, Section 6: [F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place.

The first thing to know about this clause, and something that no court decision or even brief has so far recognized, is that it is a government ethics provision. This clause looked back to the British situation where the executive (the king) could threaten members of Parliament (MPs) with civil suits or arrest in order to get them to do his bidding. What such threats did was to put the MP's personal interest in not being sued or arrested ahead of the public interest in having an MP represent his constituents. It also forced the MP to show preferential treatment to the King. In other words, it put the MP into a conflict situation.

The drafters of the Constitution worried that a future president, or someone else with an interest in a matter before Congress using the court system, could put the same sort of pressure on members of Congress. Rather than requiring that such conflicted representatives withdraw from participation, the drafters of the Constitution chose to prevent the conflict from occurring by prohibiting such suits and arrests. Without the power to sue or arrest, a president's threats would be meaningless. It was an excellent solution.

But it is not an excellent solution when the potential threat is a government ethics proceeding rather than executive interference in the legislative branch. The reason is that the goal of government ethics is exactly the same as the goal of legislative immunity. Both seek to protect the public from effectively losing their representation due to their representative's personal interests.

Prohibiting an ethics proceeding against a legislator due to legislative immunity allows a representative to act in his or another's personal interest rather than on behalf of his constituents. Interpreting the Speech or Debate Clause to apply to ethics proceedings therefore undermines the goal of this constitutional protection.

Here's another way to look at this. A suit or arrest, or the threat of a suit or arrest, based on legislative activity is an imposition of a conflict from the outside. It is a negative equivalent to a gift from a restricted source, which also creates a conflict where one did not exist before. In one case, the public is protected by prohibiting the gift. In the other case, the public is protected by prohibiting the suit or arrest. In both cases, instead of the usual

withdrawal where a conflict already exists, the law prevents the conflict from coming into existence. In each case, the goal and even the approach is the same.

Absolutely Not

Legislative immunity is usually referred to as “absolute,” implying that there are no exceptions and that the values and goals of legislative immunity may not be balanced against other considerations, such as preventing corruption or the appearance of corruption. The word “absolute” is wishful thinking rather than accurate.

The Supreme Court in [*United States v. Johnson*](#), 383 U.S. 169 (1966), a case involving charges of conspiracy to defraud brought against a member of Congress, effectively said that laws limiting legislative immunity should be given strict scrutiny, making legislative immunity no more “absolute” than the First Amendment. The case also involved conflict of interest charges, but the government did not ask the Supreme Court to deal with them. Here is what the court wrote:

we expressly leave open for consideration . . . a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

This statement clearly opened the door for a determination that the Speech or Debate Clause does not apply in a government ethics context, because a government ethics code is a narrowly drawn statute passed by a legislature to regulate the conduct of its members.

Six years later, the U.S. Supreme Court applied this statement in a bribery case involving a member of Congress. The decision in [*U.S. v. Brewster*](#), 408 U.S. 501 (1972) said:

[T]he purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.

Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.

If bribery is enough to make it acceptable for the executive branch to arrest an official, why shouldn't accepting an illegal gift make it acceptable for an ethics commission to investigate an official? In other words, why haven't courts applied the same reasoning to ethics enforcement as the Supreme Court has to enforcement of bribery laws? The principal reason is that no one has asked them to. Yet.

In addition, there is a belief among many judges that there must be a quid pro quo for ethical misconduct to threaten the integrity of the legislative process. This leads to a lack of recognition that gift provisions, as well as other conflict provisions, have the same goal as a bribery provision. The principal differences are the forum in which enforcement occurs, the standard of proof, criminal vs. administrative evidentiary and procedural requirements, and sanctions. There is no difference when it comes to the integrity of the legislative process or the appearance of corruption.

In fact, the threat to a legislator, the burden on a legislator, and the chance that enforcement will be politicized are greater in the bribery context (with a prosecutor in charge) than in the ethics context (with an independent ethics commission in charge). It is the ethics proceeding that is less threatening to the legislator and, therefore, it could be argued that, were one forced to choose, it is the ethics proceeding that should be excepted from the Speech or Debate Clause, not the bribery proceeding.

The Speech or Debate Clause

The language of the Speech or Debate Clause is enigmatic: “[F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place.” This language presents three principal questions: what constitutes “speech or debate”; what does it mean to be “questioned”; and what constitutes an “other place”?

“Speech or debate” has been defined as including any legislative activity. This is usually defined loosely, but it only includes conduct related to legislative duties, not to all duties required of a legislator. Legislative activity does not include personal conduct, taking care of administrative duties, most constituent services, or political campaigns.

But not only legislators engage in legislative activity. Executive officials and employees, school board, zoning board, even ethics commission members, would also be protected, to the extent that they are involved in legislative activity, that is, activity that relates to legislation, rule-making, and the like.

“Questioned” means not only that the legislator cannot be sued or arrested, but also that the legislator cannot be deposed or required to otherwise give testimony, to the extent the testimony relates to legislative activity. In addition, no evidence of legislative activity can be presented. This means that a legislator can be asked if her brother owns a developer, but not whether the legislator ever participated in any activity relating to that developer’s project or whether she voted on it. In fact, no one can be asked about the legislator’s participation relating to the project, and a newspaper article or minutes of the meeting where the legislative body voted on the project cannot be put into evidence. This makes it very difficult to find that the legislator did not responsibly handle her conflict.

“Other place” is the most difficult of the three terms to interpret. It means any place other than the legislature, but this still leaves open two important questions.

One, to what extent does legislative involvement in creating an other place, drafting its laws and procedures, selecting or approving its members, and giving it jurisdiction over the legislative body and other bodies that support or participate in legislative activity make this other place not an “other place”? The reasonable response is that such a place would not really be an “other place,” but rather a special sort of place designed by legislators to apply to themselves. This not-so-other place could even be considered (or made) a part of the legislative branch of the local government ([the related issue of separation of powers](#) is discussed below).

An ethics commission could be considered an other place that is not an “other place.” And if the ethics commission is truly independent (except possibly to the extent that legislators can choose some or all of its members), how could it be seen as being part of the executive or judicial branches, that is, part of what the drafters of the Constitution feared could use their power to control legislators?

Two, when the Constitution was written, no one had any idea that there would be such a thing as an independent ethics commission, a body that is part of a local government and yet has jurisdiction over the legislative *and* executive branches of a local government, that is part of neither branch, nor part of the judicial branch. It is a hybrid that requires a

different interpretation of the Speech or Debate Clause. So far, it has not received such an interpretation, because no one has asked for it.

In the eighteenth century, legislative bodies handled their own ethics (considered part of a legislator's conduct), and there were no ethics codes, no disclosure requirements, and no formal ethics advice or ethics training programs. Government ethics, beyond a basic conflict provision, is a recent idea. Government ethics programs did not blossom until after Watergate, that is, not until the mid-1970s.

No one can say that the founding fathers contemplated the Speech or Debate Clause applying to independent ethics commissions. Whether it applies to a hybrid, unanticipated body is an open issue that should be debated.

Common-Law Legislative Immunity and Waiver

The federal Speech or Debate Clause does not directly apply to local officials. It has been applied in the context of certain federal court cases, but this is not relevant to a local ethics commission proceeding. Even a Speech or Debate Clause in a state constitution is intended to apply to state legislators, not local legislators.

But there is a longstanding common-law legislative immunity policy that does supply protection to local officials. This immunity is similar to constitutionally based immunity, except that it can be far more easily waived. In fact, it can be waived by the legislative body, which is referred to as "institutional waiver." This includes the legislative body's provision to an ethics commission, by ordinance, of jurisdiction over local legislators and other officials who participate in legislative activity. In other words, a local legislative body that passes an ethics code enforceable against legislators by an ethics commission waives each of its members' right to contest the ethics commission's jurisdiction.

Constitutional legislative immunity can be waived only by each individual official. The waiver can be made explicitly or by failing to raise legislative immunity as a defense and appearing in a proceeding.

There is at least one city that has passed an ordinance that makes the Speech or Debate Clause law with respect to council members: the District of Columbia (D.C. Official Code § 1-301.42). The language follows the Constitution's, except that it adds the words "in the course of their legislative duties" and defines the term. But it does not

provide constitutional legislative immunity. In effect, it is no different than common-law legislative immunity, because the council can simply strike the language and thereby institutionally waive the immunity. And each council member can waive it, as well.

The first place the legislative immunity defense was successfully employed in ethics matters by local legislators was Baltimore. However, the defense was not used in or with respect to ethics commission proceedings. There are two court decisions involving Baltimore council members that permitted them to make a common-law legislative immunity defense to the introduction of evidence of legislative activity in criminal proceedings that related to ethics matters but applied state criminal law ([Maryland v Dixon](#) (Balt Cir Ct, 2009) and [Maryland v. Holton](#) (MD Court of Special Appeals, 2010)). Included among the charges were perjury charges for allegedly making false statements on annual financial disclosure forms.

The worst part of these decisions was the courts' finding that common-law legislative immunity is "co-extensive" with constitutional legislative immunity. However, it is hard to take this finding too seriously, since the decisions did not mention waiver, which is the principal difference between common-law and constitutional legislative immunity. With respect to legislative immunity, the case appears to have been poorly argued by the district attorney.

Separation of Powers and the Discipline Clause

In the absence of a constitutional provision, state legislators have argued that separation of powers prevents a state ethics commission from having jurisdiction over them. This argument was accepted by the Nevada Supreme Court with respect to an action brought by a state legislator in [Commission on Ethics v. Hardy](#), 212 P.3d 1098 (2009). But the actual basis for this decision was the state constitution's Discipline Clause, which specifically gives to the state legislature the exclusive right to discipline its own members.

The court's portrayal of ethics enforcement as "discipline" is out of date, applicable more to the pre-1970s period when there were no government ethics programs. And the decision would not be applicable to local officials unless there were a discipline clause in the charter.

As for separation of powers, this is different at the local level. In most cities and towns, the chief executive is hired and fired by the legislative body. Therefore, the powers

are not so clearly separate. In strong mayor governments, there is no reason to place an ethics commission in the executive branch. It can be defined as legislative, or as independent of both branches.

Free Speech

A local legislator from Nevada took a First Amendment free speech argument against a state ethics commission conflict provision all the way to the U.S. Supreme Court in 2011 ([*Nevada Commission on Ethics v. Carrigan*](#) (June 13, 2011)). The argument made by Carrigan was that a local legislator could not be required to recuse himself from voting, because a vote is a form of speech and he had a free speech right to vote.

The philosophy behind Justice Scalia's opinion that free speech does not apply to a local legislative vote is interesting: "a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. . . . [a legislator casts a vote] as trustee for his constituents, not as a prerogative of personal power."

This view of the government official as trustee, with fiduciary duties to the public, is consistent with government ethics.

Another Recent Decision

In 2009, the Rhode Island Supreme Court reached an odd decision in [*Irons v. Rhode Island Ethics Commission*](#), 973 A.2d 1124, insisting that the state's Speech and (*sic*) Debate Clause overrode the people's own 1986 constitutional amendment that granted the state ethics commission full authority over state legislators, simply because the amendment did not *expressly* repeal the Speech and Debate Clause.

This went against the reality of the situation: the amendment's intent and the fact that everyone in the state had assumed the amendment repealed the Clause and had acted as if it did. The lesson here is: be explicit. Don't leave anything to anyone's imagination, because some day an attorney's imagination will have seek to have any level of vagueness interpreted in such a way as to undermine an ethics commission's jurisdiction.

The Alternative

Too often, legislators do not consider what the alternative is to having an ethics commission (an “other place”) deal with their ethics matters. The alternative is being investigated and tried in one’s *own* place. This means putting one’s faith in one’s colleagues, including those who would do anything to wrest their opponents’ seats away from them.

Why would any legislator in his right mind rather be brought before his own legislative body by people who want him out of office, rather than before an independent, nonpartisan body of individuals who have no personal or political stake in the matter? And why would anyone who cares about dealing responsibly with conflicts create an enforcement mechanism that is one big conflict and that, simply by acting or not acting, can seriously undermine the community’s trust in its government? Is the devil you know really so much better than the devil you don’t know?

And if the charges are eventually dismissed by a local legislature, what is the public left with? Just another show of party rancor. A council member from Battle Ground, Washington said after charges against him were dismissed in 2010, “I think [the mayor] and some members of the council have been after me for a very long time. I’m not surprised that they found a way to come after me.” Only the next time, they might be successful. Why would anyone want there to be a next time?

2. Practical Approaches to Legislative Immunity

Most of the above court decisions, as limited as their application is, have provided bad news for government ethics enforcement and good news for officials who do not want to have to deal with ethics complaints. There is other good news: very few local officials have used the legislative immunity defense. They have apparently recognized how damaging it can be to the community’s trust in those who govern them.

However, one cannot count on this being true, especially when a local official is in very hot water and has asked an attorney to see if there is any way he can get out of the situation he is in. There are several ways in which a local government can take the initiative and prevent the legislative immunity defense from being raised in a government ethics context, so that such a defense is not allowed to undermine the public’s trust in its legislators and cost the government a lot of money to adjudicate the issue.

a. Statute/Charter Amendment/Ordinance (Local). Since institutional waiver is acceptable with respect to common-law legislative immunity, the simplest approach is the passage of a state statute, local charter amendment, or even a local ordinance that expressly excepts the ethics commission from application of common-law legislative immunity or expressly makes officials, and evidence of legislative activity, fully subject to ethics commission jurisdiction despite common-law legislative immunity.

A state statute is best, since it covers all local governments. But this is possible only if local government ethics is handled by the state or is done locally pursuant to state law. One state provision saves an enormous amount of energy, but it is likely to be strenuously fought by state municipal associations. The statute approach was taken in 2009 in Nevada, at the same time state legislators were excepted from the state ethics commission's jurisdiction. Here is the language of the Nevada statute:

[NRS 281A.185](#) Abrogation of common-law privileges and immunities; exceptions.

1. In any proceeding commenced against a public officer or employee pursuant to the authority of this chapter, including any judicial review thereof, the public officer or employee who is the subject of the proceeding may not assert, claim or raise any common-law privilege or immunity as an affirmative defense, for testimonial or evidentiary purposes or for any other purpose.
2. The provisions of this chapter are intended to abrogate common-law privileges and immunities only in a proceeding commenced pursuant to the authority of this chapter and only for the public officer or employee who is the subject of the proceeding. ...

b. Personal Waiver/Local Referendum. A second waiver approach is to have all officials who participate in legislative activity, including high-level executive officials and certain board and commission members, and their staff, include with their oath of office a statement that they are fully subject to the jurisdiction of the ethics commission and will not raise the defense of legislative immunity, or other constitutional defenses, with respect to any ethics proceeding or disclosure requirement. An official could refuse to make this statement, but it would make him look suspect in the eyes of the public. Appointing authorities could make this statement a requirement of each appointed position.

Although the U.S. Supreme Court has recognized personal waiver (and, in fact, an official waives the legislative immunity defense every time he fails to raise it), it is possible that someone would raise a concern about the legality of this waiver, since legislative immunity has been held to protect the public rather than the legislator. If necessary, a referendum on the issue could be held, so that it is the public itself that requires local officials to personally waive legislative immunity on the public's behalf. Such a referendum would easily pass everywhere.

c. Separate Legislative and Executive Ethics Commissions. Having two separate legislative and executive branch commissions, as many states have done, prevents both legislative immunity and separation of powers issues, but it is expensive and usually (although not necessarily) means self-regulation or a lack of ethics commission independence. This is a solution only available to large cities and counties, due to the greater expense. And it would be completely unnecessary in a council-manager city or county.

d. The Same Place. A cheaper and easier solution is to have the local legislative body appoint (but not necessarily select) all ethics commission members and have the commission expressly made part of the legislative branch, so that it is not an "other place." This would work overall, because there is no equivalent executive immunity. If the executive branch raises a separation of powers issue (or in any event, since it is a best practice), the legislative body could designate independent community groups to select ethics commission members to be appointed by the mayor with the approval of the legislative body, and expressly make the ethics commission a hybrid body that is part of both branches, or neither. If the local government has a council-manager form, there is no separation of powers issue.

Appendix 1. Special Conflict Provisions

Many ethics codes have one or two provisions that are special and thought-provoking. This section will look at some of the better ideas I have found in local and state ethics codes. In some cases, I will edit the language to improve it or take away some of the unforeseen consequences.

These provisions may be unusual, but they raise some important issues that are not dealt with elsewhere in this book.

1. Influencing Contractors and Grantees. A Houston ethics provision passed in 2011 as part of an ethics reform bill deals in an original way with an indirect means by which officials may try to benefit themselves and others through the use of their position:

18.2(b)(2) [I]t shall be unlawful for any elected city official to: ... Use or attempt to use the official's position to influence or attempt to influence a contractor or a recipient of grant money administered by the city to utilize the goods, labor, or services of any person for the private gain or advantage of the official or others...

2. Licensed Trades. Most of the attention in local government ethics is given to procurement, land use, grants, and hiring. Regulation and licensing are often overlooked. The New Jersey Uniform Ethics Code gives these areas attention in its requirement of disclosure by state officials of their participation in activities that are licensed or regulated:

No State officer or employee or special State officer or employee should engage in any particular business, profession, trade or occupation which is subject to licensing or regulation by a specific agency of State Government without promptly filing notice of such activity with the Commission.

After disclosure, something needs to be done about oversight, so that an official is not in any way involved in oversight of himself.

3. Reputation and Position. San Francisco's Conflict of Interest code has an unusual provision about voting on or influencing decisions regarding one's own conduct or position. You would think this provision goes without saying, but I can assure you it does not.

§3.210. Voting on Own Character or Conduct.

(a) **Prohibition**. No officer or employee of the City and County shall knowingly vote on or attempt to influence a governmental decision involving his or her own character or conduct, or his or her appointment to any office, position, or employment.

(b) **Exceptions**. Nothing in this Section shall prohibit an officer or employee from (i) responding to allegations, applying for an office, position, or employment, or responding to inquiries; or (ii) participating in the decision of his or her board, commission, or committee to choose him or her as chair, vice chair, or other officer of the board, commission, or committee.

This provision is really two provisions. The first involves matters of character and conduct. The second involves an office or position.

It is unusual for an official to actually vote when the issue is his or her character or conduct, but I have seen, for example, a mayor refuse to allow a motion for censure against him be considered by the council he sat on.

An official who does this actually has a good argument on his side, at least in terms of law. Most conflict laws limit disclosure and withdrawal to financial interests and benefits, and these do not include one's character or conduct. Therefore, there is usually no law that prevents an official from participating in matters involving his personal conduct. This is why, where an ethics code only considers financial interests and benefits, a provision like San Francisco's is so valuable.

From the point of view of personal vs. public interest, participation in matters involving an official's reputation is just as damaging as participation in matters involving an official's financial interests. In fact, one's reputation is more valuable than any particular financial interest.

Effectively, the San Francisco provision says that officials and employees have an interest in (or benefit from) their reputation. Therefore, another way to deal with this problem would be to specify reputation in the definition of “interest” and/or “benefit.” In the alternative, personal benefits in general can be added to financial benefits, since there are other instances of non-financial benefits that are valuable to officials and employees, for example, the appointment of a family member to an unpaid local government office. Conflicts are based not on money, but on relationships and obligations.

The second part of the provision involves a more common problem: influencing decisions involving one’s own office or position.

There have been two examples of this in my own town, one involving a paid position, another involving an unpaid office. The chair of a committee applied to head the department the committee oversaw. The committee was supposed to make recommendations for the position, and was asked by the first selectman (effectively the mayor) to select three of the people applying for the job. Although the chair did not vote on the selection, it was apparent that she had influence on the decision of the committee, because it chose to select not three, but only one candidate, and that was the chair. The chair should not have spoken to anyone about the selection process, and the committee should have gone out of its way to comply with the selection request to the letter.

The other situation involved an allegation, made publicly, that a board chair offered a board member his chairmanship in return for using the board member’s influence as a party committee chair to get another board member a town job. Since the chairmanship has no financial value, this would not normally be considered a conflict on the chairman’s part. And the misuse of a political position, as opposed to an elected board position, is also not generally considered an ethics violation. And yet no one would consider such an offer, or acceptance of the offer, to be appropriate or responsible.

The provision preceding the above provision in San Francisco’s code deals directly with this second situation, using the unusual term “any other valuable thing,” which might be interpreted to include a job recommendation (the usual term in the ethics code is “other thing of economic value”):

No person shall give or promise, and no officer or employee of the City and County may solicit or accept, any money or other valuable thing in consideration for (i) the person's nomination or appointment to any City and County office or employment,

or promotion or other favorable City and County employment action, or (ii) any other person's nomination or appointment to any City and County office or employment or promotion or other favorable City and County employment action.

4. Withholding of Information. In 2010, Fayette County, Georgia passed a new ethics code that contained an unusual provision prohibiting not the sharing confidential information (although that is prohibited elsewhere in the code), but the *withholding* of important information. It's refreshing to see this sort of departure from the common focus on confidentiality. Here is the language, edited to make it grammatically clear:

No county official or employee may knowingly withhold any information when withholding the information would impair the proper decision-making of any of the county boards, authorities, agencies, or commissions.

The International Municipal Lawyers Association Model Code has a provision that deals with withheld information in a completely different way:

§9-114(i). No public servant shall suppress any public document, record, report or any other public information available to the general public because it might tend to unfavorably affect their private financial, personal, or political interest.

The problem with this approach is that an official can deny that he was in any way trying to protect his personal interest. He can say that it was a matter of protecting the government's interests, for example, by preventing litigation or not giving away the government's hand before it was the appropriate time.

5. Contracts with Former Officials. Tacoma, Washington has a code provision that deals directly with the matter of contracts, often considered "sweetheart deals," given to officials and employees who have left their service with the local government. Government ethics is all about obligations, and when an official leaves service, her colleagues and subordinates often feel obliged to hire her as a consultant. Here is the Tacoma language:

Whenever a current City officer or employee wishes to contract with a former City officer or employee for expert or consultant services within one year of the latter

leaving City service or office, advance notice shall be given to the City Manager for matters concerning City government or to the Director of Public Utilities for matters concerning the Department of Public Utilities about the proposed agreement. The City Manager or Director of Utilities shall evaluate the proposed contract to determine if there is a conflict with this Code of Ethics. If there is a question of this nature, the City Manager or Director of Utilities may submit the matter to the Board of Ethics for an opinion. If the proposed contract is found to present a conflict with this Code, it shall not be allowed.

One problem with this language is that there will be many occasions where the consulting contract does not clearly present a conflict under the code, and yet would create a serious appearance of impropriety due to the former official's special relationship with former colleagues. The contract should be approved or prohibited on the basis of appearance of impropriety.

The second problem involves who should approve the contract. The city manager or director of public utilities might have a special relationship with the former official. The former official might have done a lot for the manager or director, and the manager or director might feel an obligation toward the former official. One way to deal with this is to allow the manager or director to determine whether such a special relationship exists and, if he determines one does, to hand the matter over to the board of ethics. The better way to deal with this is to have the manager or director present the matter to the board of ethics and let the board make a neutral determination whether or not there is an appearance of impropriety.

6. Logrolling. Trading votes, also known as "logrolling," is done every day without anyone giving it much of a thought, ethicswise. But Windsor, Colorado feels it can be unethical. So let's give it a thought, ethicswise. More specifically, let's consider the question, "Is vote trading solely a valuable part of our democracy, or can it sometimes be a form of institutional corruption?" But first Windsor's ethics code provision:

§5.2.M. No elected or appointed official or public body member shall offer or promise to give his or her vote or influence in favor of or against any proposed official action in consideration or upon condition that any other elected or appointed

official, public body member, will promise or assent to give his or her vote or influence in favor of or against any other proposed official action.

Most trades of votes involve ordinary compromises or exchanges related to the making of policies or the appointment of individuals, where no preferential treatment is given to anyone who has a special relationship with one of the officials involved.

However, in many instances a special relationship *is* involved. After all, an official generally trades his vote on something he cares less about for a vote on something he cares more about. A very important policy matter might be involved, but this is relatively unlikely, because the more important a policy matter is to one official, the more likely it will be important to other officials (or, at least, their constituents), so no one will be likely to change their vote as part of a purely policy-related deal, except perhaps with respect to an amendment. That is, no one will likely trade a vote on an important policy matter unless something *very* important is offered in return, that is, something especially important to that official and unimportant to other officials, such as a particular project, contract, permit, grant, or job. In other words, trades are likely to be made in the very areas where most ethical misconduct occurs.

Therefore, although vote trading can be a valuable way for local government boards and commissions to do their work, it is sometimes a legal way to enable ethical misconduct. It is also a way to legislate out of view of the public. In fact, a well-done trade of votes can allow a conflicted official to appear to be dealing responsibly with a conflict by withdrawing from the matter, at least after the trade or trades have assured him victory. Everyone is, apparently, a winner, but only because a conflicted official secretly participated in a matter from which he should have withdrawn.

The truth is that vote trading is often used as a legal maneuver to do an end run around ethics rules. In other words, it is a classic form of institutional corruption.

There's a lot of potentially unethical conduct going on in a trade of votes. Besides the conflicted official not fully withdrawing, at least one other official is being complicit in a colleague's ethics violation and failing to be transparent regarding a vote (the public vote will not tell the whole story). And trading creates further obligations that lead to more trading, complicity, and secrecy.

After all, if everyone truly thought logrolling was an important and ethical way to make democracy work, wouldn't officials proudly state the deal they had made at the time they voted or recused themselves from voting? The fact that they usually do not says a great deal.

7. Acting in a Quasi-Judicial Capacity. The Santa Fe ethics code notes at the very beginning that there are

additional standards of conduct that are required of public officials and employees when acting in a quasi-judicial capacity which standards are imposed by the New Mexico and United States Constitutions and which are not set out in this section. Under the United States and New Mexico Constitutions those standards prohibit official actions tainted by a decision-maker's conflicts of interest, bias and prejudice, prejudgment, or other conduct creating the actuality or the appearance of impropriety.

And North Carolina has the following provision for cities and counties, which applies to boards of adjustment (zoning boards) acting on a quasi-judicial matter (§60A-388(e1), and §153a-345(e1), respectively):

A member of the board or any other body exercising the functions of a board of adjustment shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

Ethics codes often make special rules for different sorts of official, for example, council members, department heads, volunteers, attorneys. But rarely do they make special rules for officials acting in a quasi-judicial capacity, even though ethics commission

members themselves often act in a quasi-judicial capacity. It would be helpful if ethics codes were to point out that officials acting in a quasi-judicial capacity have an additional obligation to be and appear impartial or without bias, much as judges do. This would, among other things, support those who, like me, feel that ethics commission members should not be politically involved, so that they will not be seen to be biased toward or against those who come before them. The obligations of local officials acting in a quasi-judicial manner go beyond dealing responsibly with ordinary conflict situations by including as a conflict having a fixed opinion or having a more distant relationship with parties to a matter or the matter itself (for example, proximity to the property involved).

This would mean, for instance, that a strong anti-development zoning board member, elected precisely because of her strong position on development, could be considered to have a conflict in certain cases. Such a requirement might be considered reasonable for ethics commission members, but it might be a harder sell for zoning boards and the like.

8. Intimidation. Here is a provision from the Montgomery County, Maryland ethics code that goes beyond the City Ethics Model Code's intimidation provisions, which are limited to one prohibiting officials from [falsely impugning citizens' reputations](#) and a [whistleblower protection provision](#) relating solely to ethics matters (where there is a culture of intimidation, it takes someone with great courage to blow the whistle in the first place).

Sec. 19A-14. Misuse of prestige of office; harassment; improper influence. ...

(e) A public employee must not intimidate, threaten, or coerce any person for the purpose of interfering with that person's freedom to engage in political activity.

A provision such as this can be hard for an ethics commission to enforce, because many sorts of conduct could violate this provision and force an ethics commission to investigate. Settlement could be difficult in many such situations, because these cases can be especially political in nature, and intimidation is something no one wants to be seen doing.

And yet intimidation of citizens and subordinates is the worst sort of misconduct, because it is a serious misuse of office, goes to the heart of our democracy by preventing

participation in our government, and affects so many people who are not directly intimidated (and this is an important reason for intimidating). Tying intimidation specifically to political activity emphasizes the regime values of democracy, that is, the importance of citizen participation.

9. Undated Resignations. The Massachusetts Conflict of Interest Law prohibits high-level officials from requiring the signing of an undated resignation. Here is the language:

268A:21B. No mayor, city manager, or town manager shall require a prospective appointee to a board, commission or position under his jurisdiction to submit as a condition precedent to said appointment an undated resignation from said board, commission or position. Whoever violates the provisions of this section shall be punished by a fine of not more than five hundred dollars.

10. Property Sales. Cook County, Illinois has special language for sales of property to officials:

Compensation for property taken pursuant to the County's eminent domain power shall not constitute a financial interest within the meaning of this section. Unless sold pursuant to a process of competitive bidding following public notice, no elected official or employee shall have a financial interest in the purchase of any property that:

- (1) Belongs to the County;
- (2) Is sold for taxes or assessments; or
- (3) Is sold by virtue of legal process at the suit of the County.

In 2010, a county commissioner proposed that no Cook County elected official or employee be permitted to sell property *to* the county under the guise of eminent domain. This apparently was intended to deal with a recent scandal.

11. Campaigning in Uniform. In 2009, an ethics reform bill was introduced in Albany. It contained a provision that prohibited wearing a city uniform or insignia while campaigning. Effectively, this is a misuse of city property. Here is the language (the bill was not passed):

No City officer or employee shall wear any City of Albany uniform or insignia when engaged in any political campaign activity.

12. High-Level Official Employment. Incompatible employment provisions can be ambiguous, because it's not always clear what it means to be "incompatible." Full-time employees are generally prohibited from holding any outside employment, at least without approval. This is a personnel rule. But high-level officials, whose conflicts can be very damaging, are not covered by personnel rules. Therefore, their outside employment should be under the jurisdiction of the ethics commission. And it is best if there is a presumption that any outside employment is incompatible, so that the burden is on the official to show it is not.

Here is language from the Anchorage ethics code. It relates only to the mayor, but such a provision could also apply to a city or county manager, big-city council members, and other high-level officials who receive substantial pay and are expected to work for the local government at least full-time.

The mayor holds a full time position of employment with municipal authority presumed incompatible and in conflict with serving as an employee to another person or entity.

Pursuant to another provision, the same presumption holds with respect to municipal contracts.

13. Interest in Contract Disclosure. Not everyone is required to file an annual disclosure statement, and most annual disclosure forms do not specifically ask for information relating to contractors and others who do business with the government. They just ask for the names of companies an official has an ownership interest in.

[Anchorage](#) requires all new employees to disclose their interest in contracts, as follows:

Within thirty (30) days of hire, a municipal employee having an economic interest in a municipal contract shall submit a written disclosure to the municipal clerk, signed by the department director or designee and the designated ethics officer. A

copy shall be retained by the department in a file of disclosures open to the public. The disclosure of present economic interest shall include any economic interest in a contract with the municipality, or in an organization or enterprise engaging in business with the municipality, held by the employee or a member of the employee's household.

It would be better if employees were required to disclose their personal or other indirect relationship with a contractor or its principals. It would be valuable to know if an employee's sister's company had a contract with the city or if the employee worked for a company that subcontracted from a city contractor or was owned by a principal of a contractor.

14. Contingent Compensation. Some local governments have a prohibition on contingent compensation even in situations where an official or employee is permitted to represent people before the local government. Here is Baltimore's version of this provision:

A public servant may not assist or represent a party for contingent compensation in any matter before or involving any City agency.

Other local governments spell out contingency fee arrangements by prohibiting them on the basis that they are tied to success before an official or body. Here is language from the Palm Beach County, Florida ethics code:

§2-443(g) No person shall, in whole or in part, pay, give or agree to pay or give a contingency fee to another person. No person shall, in whole or in part, receive or agree to receive a contingency fee. As used herein, "contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent on or in any way contingent on the passage, defeat, or modification of: an ordinance, resolution, action or decision of the board of county commissioners or local municipal governing body as applicable, any employee authorized to act on behalf of the board of county commissioners or local municipal governing body as applicable, the county administrator or municipal administrator as applicable, or any action or decision of an advisory board or committee.

There are exceptions for salespersons, real estate brokers, and lawyers in judicial and “formal administrative” hearings, which would presumably allow a lawyer to have a contingency fee arrangement with respect to an ethics proceeding (most likely an unintended consequence).

See [the section on contingency fee prohibitions](#) regarding the representation of contractors, in the Procurement chapter.

15. Prestige of Office. Dallas has a misuse of prestige of office provision that does two things. One, it prohibits the use of the prestige of office in personal transactions, for example, a mayor advertising her legal services on the basis of the fact that she is the mayor. Two, it prohibits officials from telling anyone that they can influence the city policies or decisions on any basis other than the merits. This would mean that an official violates the ethics code when he tells people he can help them get a job or a permit.

12A-7(b)(3) **Prestige of office and improper influence**. In connection with the representation of private interests before the city, a city official or employee shall not:

(A) assert the prestige of the official's or employee's city position for the purpose of advancing private interests; or

(B) state or imply that he or she is able to influence city action on any basis other than the merits.

16. Identification at Public Meetings. In most jurisdictions, citizens who speak at public meetings are asked to give their name and address. Many citizens resent this, seeing it as their right to remain anonymous. One reason for the requirement is to ensure that they live in the city or county. But another reason is to disclose a fact that could be relevant to a conflict.

This reason led to a Dallas ethics provision:

Sect. A-16. A person who appears before the city council, a city board or commission, or any other city body shall identify himself or herself and give his or her business or residence address.

Sect. A-17. A person who represents, orally or in writing, the interests of another person (other than his or her spouse, minor children, or domestic partner) before the city council, a city board or commission, shall disclose the identity of the person represented.

The provision implies that identification at a public meeting is yet another form of disclosure that will enable the public to determine whether there is any impropriety (such as coming in from out of town and not letting the public or its officials know this) and what hat the individual is wearing (he may be a citizen representing an outside company seeking business with the local government, or seeking not to be regulated by it). It is important that speakers be told that they cannot be there representing an outside company and yet act as if they are speaking only in their capacity as a citizen. I have seen attorneys representing someone, and officials too, act as if they can simply take their hats off and be ordinary citizens. It doesn't work like that, unless they are representing only themselves in a personal matter. Nor can they have a family member speak for them without letting everyone know that she is doing this.

Some states have laws that prohibit government bodies from requiring identification of citizens. This should prevent only basic identification of local citizens who are not officials, but not disclosure of representation.

17. Interest in Depository. Greenburgh, New York has a provision that specifically deals with the relationship of those in control of local government funds with banks where those funds are kept:

§570-4.F. The Supervisor, Comptroller, Deputy Comptroller and employees in the Comptroller's Department shall not have any interest, direct or indirect, in a bank or trust company designated as a depository paying agent, registration agent or for investment of funds of the Town; provided, however, that a personal checking account or other personal banking relationship maintained in the regular course of business on no more favorable terms than those extended to the general public shall not be prohibited by this section.

18. Assessors and Building Professionals. Greenburgh, New York also has special subprovisions that limit the work and transactions the town assessor and those involved

with buildings and development can participate in. However, there are numerous exceptions, which are not included here.

§570-4.M. Public officers and employees of the Tax Assessor's office shall not engage in the business of real estate or receive or benefit from, directly or indirectly, any fees or commissions involving the sale of real property in the Town or the disposition of any real property in the Town, including the settlement of tax certiorari claims.

§570-4.N. No public officer or employee of the Building Department or Department of Community Development and Conservation shall engage within the territorial limits of the unincorporated area of the Town in the legal, real estate, insurance, building contracting or building materials, architectural, community development or planning or engineering businesses during her/his tenure or term of office. . . .

19. Acting as Surety. Texas prohibits local officials from acting as surety on local government contracts or bonds:

Texas Local Government Code §171.003. It is an offense for a City Official to act as a surety for a business entity that is contracting with the city, or to act as a surety on any official bond required of an officer of the City.

20. Chronic Violations. As the [International Municipal Lawyers Association Model Ordinance](#) says in a comment imbedded in §9-106(d)(8), “chronic or excessive violations of state and city laws may indicate disrespect for the law and may contribute to the erosion of public trust.” For this reason, the IMLA Model Ordinance makes it an ethics violation to:

Be convicted of chronic violations of other general federal, state and local laws. Public servants have an ethical duty to abide by the general laws of the State and City, such as the laws governing parking, jaywalking, drunken driving, speeding and so forth.

The provision goes on to recommend that local governments more precisely describe this duty. This kind of a provision is a good compromise when people demand that ethics codes prohibit officials from breaking any law or participating in any sort of misconduct. Single instances of law-breaking, which is are frequent, should be beyond the jurisdiction of an ethics commission. However, chronic law-breaking, which is rare, arguably undermine the public trust sufficiently to be dealt with by an ethics program. But still, these are not conflict problems, are enforced elsewhere, and are not really appropriate for enforcement by an ethics program.

21. Borrowing. Many ethics codes prohibit transactions with subordinates, including loans. Jacksonville's ethics code extends this restriction, with respect to loans over \$500, to any officials and employees in the same department. Note that it, as well as the prohibition of loans over \$100 with subordinates, applies to indirect loans as well.

§602.401(c). ... It is also unlawful for an officer or employee of the City or an independent agency, to directly or indirectly lend or borrow over \$500 to or from anyone else in the officer or employee's department. This subsection shall not be applicable to lending between family members.

22. Suits Against Local Government. Jacksonville's ethics code also includes a blanket prohibition against its officials and employees' involvement in a suit against the city. This is a problem that often arises, especially in smaller jurisdictions, where a town attorney, or more likely a contract attorney working for a specific board, represents someone suing the town. The attorney is seen as a turncoat, and a lot of anger can be generated.

§602.402(a). It shall be unlawful for an officer or employee of the City or an independent agency, otherwise than in the proper discharge of his or her official duties:

(1) To act as agent or attorney for prosecuting any claim against the City or an independent agency, or to receive any gratuity or any share of or interest in any claim against the City or an independent agency, in consideration of assistance in the prosecution of the claim;

23. Sexual Favors. This is such a G-rated book that I feel obliged to spice it up with this provision from the Newcastle County, Delaware ethics code:

§2.03.104. No County employee or County official, in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or County Department.

24. Municipal Bonds. It's a good thing for an official to show faith in her government by purchasing its bonds, but if this happens at the time the bonds are first put on the market, it might look as if the official had some special information or might have affected the bond sale in a way that would benefit her (and, of course, others who purchased the bonds). Therefore, the New York State comptroller's 2010 [Model Code of Ethics for Local Governments](#) allows an exception from the prohibition on investments that would create a conflict for purchases of the local government's bonds, but only those "acquired more than one year after the date on which the bonds or notes were originally issued." (§8(b)(3)).

25. Grantees. Rochester has an ethics provision that prohibits certain officials from being a director, officer, or trustee of an organization that receives substantial funds from the city:

No City officer or employee privy to non-public information regarding the allocation of City funds, or having direct influence or control over the allocation of City funds, shall be a director, officer or trustee of any organization which receives from or through the City funds that constitute ten percent or more of the organization's annual operating and capital budget, except where appointment to such position is approved by a duly adopted resolution of the City Council.

The 10% figure is appropriate for most organizations, except for the biggest, which might very well get large local government grants, and yet fall short of 10%. As is true elsewhere, no number is going to be appropriate to every situation. In government ethics, numbers should be used as guidelines, not as hard-and-fast rules.

I also question whether the council should be the one to provide waivers. Council members may allow each other to sit on nonprofit boards (or may prevent a minority party

or faction member for political reasons). Better this be decided by an independent body, such as the ethics commission.

26. Following Property-Related Laws. Some ethics codes make it a violation for an official or employee to violate any law. This is not really an ethics issue, and there are other bodies to enforce such laws. However, there are situations where it appears that an official might be favored due to his position, and should be expected to comply just like any other citizen. Rochester has an ethics provision that specifically requires officials to bring their real property into compliance when told to:

No City officer or employee shall own in person or through an agent or broker, or be a principal in any corporation, partnership or other business entity which owns, any real property within the City of Rochester that is in violation of City or state laws or regulations. Property shall be deemed to be in violation when a reasonable and proper notice and order to correct violations duly issued has not been obeyed in a timely manner.

27. Preferential Treatment in Hiring. Madison, Wisconsin has a provision that deals with the other side of preferential treatment, that is, requests to officials for preferential treatment. It applies only to hiring (Madison also prohibits officials from giving preferential treatment). It's a good idea, as much as possible, to include both sides to each transaction, but to recognize that it is the official who has the fiduciary duty. In this case, the individual seeking government employment (that is, seeking to have a fiduciary duty) should also be responsible, but should not be penalized unless she is given this provision to read at the beginning of the hiring process.

Any person who is a candidate for City employment who canvasses or contacts any member of the Common Council, an appointing authority, or any person involved in the screening or examination of applicants outside scheduled procedures, in order to obtain preferential consideration in connection with any appointment to any City position, shall be disqualified from appointment. This provision shall apply to all candidates whether or not currently employed by the City.

28. Paying Bills. One important part of local government that is often ignored by ethics codes, but which can be abused even by individuals who do not usually have much authority, is paying bills. Here is a provision from the Marlboro, New Jersey ethics code that deals with bill-paying matters where there is a conflict.

V.B(9). No officer or employee elected or appointed in the Township shall approve or disapprove or in any way recommend the payment of any bill, voucher or indebtedness owed or allegedly owed by the Township in which he or she has a direct or indirect personal, pecuniary or private interest.

29. Wearing Policy and Party Hats. New York City has an interesting prohibition on certain policy-making officials and employees. These individuals who wear a policy hat are not permitted also to wear certain national, state, and local party hats:

No elected official, deputy mayor, deputy to a citywide or boroughwide elected official, head of an agency, or other public servant who is charged with substantial policy discretion as defined by rule of the board may be a member of the national or state committee of a political party, serve as an assembly district leader of a political party or serve as the chair or as an officer of the county committee or county executive committee of a political party, except that a member of the council may serve as an assembly district leader or hold any lesser political office as defined by rule of the board.

30. Gambling. Legalized gambling is usually handled at the state level, but it may not look good when local officials are involved even in legal gambling operations. One reason is that it may look as if they used their position to get special treatment by state officials. So Pittsburgh has a prohibition specifically related to legalized gambling (the other sort of gambling is already a crime):

(c) No public official nor a member of his immediate family shall:

(1) Apply for or otherwise seek approval from the Pennsylvania Gaming Commission to engage in any act or activity which is regulated under the provisions of ... the Pennsylvania Race Horse Development and Gaming Act; or,

(2) Own any portion of any slot machine licensee, manufacturer licensee, supplier licensee, or other entity licensed by the Pennsylvania Gaming Control Board

31. Preferential Treatment of Officials and Employees. The Stamford, Connecticut ethics code has a provision that prohibits preferential treatment not by, but *of* government officials:

An officer or employee shall not receive special consideration, treatment or advantage in any activity or business transaction in which the city is a client or a customer beyond that which is generally available to other citizens of the city.

It would be an interesting exercise to list situations that would be violations under this provision, but not violations under an ordinary conflict provision.

32. Finder's Fee. Louisiana, where the state ethics program has jurisdiction over local officials, has two provisions that expressly prohibit officials from taking money for providing help with respect to their local government.

§11111.B. No public servant shall receive any thing of economic value from a person to whom the public servant has directed business of the governmental entity.

§1111.E(1). No public servant, and no legal entity of which such public servant is an officer, director, trustee, partner, or employee, or in which such public servant has a substantial economic interest, shall receive or agree to receive any thing of economic value for assisting a person in a transaction, or in an appearance in connection with a transaction, with the agency of such public servant.

The second provision goes on to detail what officials cannot take money for, but also to allow some transactions if a sworn statement is filed, I don't understand why.

33. Subterfuge to Avoid Compliance. Louisiana also expressly prohibits clever ways of getting around ethics prohibitions, at least if the clever ways involve transfers of things of value:

§1117.1.A. No public servant or other person shall transfer any thing of economic value or any asset, interest, or liability to any person or governmental entity for the purpose of circumventing any provision of this Chapter, unless such transfer is irrevocable. A transfer shall not be irrevocable if there exists any contract, letter, counter letter, trust, note, or any other legally enforceable agreement or authority which if exercised or enforced would require or authorize any asset, interest, or liability transferred by the public servant or other person to revert back to such public servant or other person.

34. Subcontractor Gifts. Chicago has an unusual gift prohibition, a prohibition on subcontractors making gifts to prime contractors or higher-tier contractors to get a subcontract or order .

§2-156-120. No payment, gratuity or offer of employment shall be made in connection with any City contract, by or on behalf of a subcontractor to the prime contractor or higher-tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order. This prohibition shall be set forth in every City contract and solicitation thereof

35. Postage. The 2011 District of Columbia ethics bill has a few interesting provisions. But the provision below did not make it into the final bill. It deals with the everyday use of official mail for personal reasons. Such use certainly is not deserving of investigation and hearing, and should have its own summary procedure. What is interesting about this provision is its recognition that intent is completely irrelevant, and the very clear penalty attached to the violation:

Any person who by reason of ignorance, forgetfulness, or misunderstanding improperly or unlawfully uses official mail shall be liable to the District for double the cost of the postage.

Appendix 2 - Best Practices

The City Ethics Model Code, as well as this book, are full of best practices. It is valuable to list some of the most important best practices, including those that cannot be placed in an ethics code.

Basic Matters

1. Speaking not in terms of personal integrity, but rather in terms of the responsible, professional handling of conflict situations.
2. Recognition, as the basis for local government ethics rules and administration, of the fiduciary duties of government officials and employees, the appearance of their conduct to the community, and how officials' handling of conflict situations affects the public's trust in those who manage their community and public participation in the government.
3. Transparency as the default position of the ethics program, with respect to advice, disclosure, and enforcement. Whenever there is confidentiality, an ethics officer should ask the official involved to waive it.

Ethics Program Independence

1. The involvement in an ethics program of no one under its jurisdiction, including the selection of ethics commission members by community organizations rather than by local government officials.
2. Ethics commission monopoly on ethics advice and enforcement.
3. Ethics commission initiation of investigations on the basis of tips, news reports, or other information, with a hotline for the communication of information about possible ethical misconduct.
4. A guaranteed ethics program budget.

Ethics Commission Authority and Jurisdiction

1. Ethics commission authority to amend and consolidate complaints.

2. Ethics commission authority to provide waivers after a public hearing and with the reasons for the waiver clearly articulated in writing.
3. Ethics commission to authority to impose sanctions short of the dismissal of an official or the suspension or termination of an employee.
4. Ethics commission authority to subpoena witnesses and documents.
5. Ethics commission jurisdiction over all officials and employees, including volunteers, government attorneys, and independent agencies (including public-private partnerships); and over candidates, former officials and employees, consultants, members of advisory boards, those who do government work, and those who seek special benefits from or are regulated by the government.
6. Ethics commission jurisdiction only over conflict-related official conduct, that is, conduct related to a government office or position, or involving government resources or personnel, not personal conduct.

The Ethics Commission

1. Staff: at least a full-time or part-time ethics officer, or one shared with other local governments, to be selected by the ethics commission.
2. Ethics commission membership of at least five, with at least one additional alternate member.
3. An annual report of the ethics commission, including recommendations to the local legislative body for improvement of the ethics program.
4. Monthly ethics commission meetings, even when there is no proceeding or request for a formal advisory opinion.
5. Ethics commission discussion of and recommendations regarding institutional norms, formal processes, and situational forces in areas where there have been reports of ethical misconduct.
6. Ethics commission votes: a majority of those present and voting.

7. Ethics commission member limitations, including no one under ethics commission jurisdiction, no party officials, recent government officials, individuals who have done substantial work in local political campaigns, large contributors, or political advisers.
8. Restrictions on ethics commission member political activity.
9. An ethics commission website that contains information and forms for obtaining ethics advice, making disclosures, and reporting information about possible ethical misconduct; ethics training materials; searchable advice, decisions, and disclosures; ethics commission meeting notices, agendas, and minutes; laws and regulations; and contact information.
10. The giving of awards and other forms of recognition for the responsible handling of conflict situations, the reporting of ethical misconduct, ethical leadership, and other conduct helpful to the local government ethics program and environment. Awards should be for conduct, not for the person.
11. Ethics advice to ethics commission members and staff, and ethics enforcement against them, by another local ethics commission, pursuant to a formal exchange arrangement, or by a state ethics commission.
12. Recognition that ethical misconduct usually involves teamwork, and that addressing it can only be done by working with the rest of the government to prevent it and enforce against it.

Guidance: Advice and Training

1. Timely informal ethics advice from the ethics officer, taking into consideration that ethics laws are minimum requirements.
2. Informal advice to anyone, relating to real or hypothetical situations; formal advisory opinions only to those under the ethics program's jurisdiction and only about real situations. Advice only regarding future or ongoing conduct, and taking into account precedents.

3. Advice binding on both the individual seeking advice and the ethics commission, but only to the extent the facts provided were accurate and complete.
4. Formal advisory opinions written in clear, simple language, with a restatement of the facts.
5. Mandatory ethics training followed by continuing ethics education.
6. Ethics training on the blind spots, institutional norms, and situational forces that interfere with officials' ability to deal responsibly with conflict situations.

Disclosure

1. Three kinds of sensible disclosure: annual, transactional, and applicant disclosure.
2. Annual disclosure only by high-level officials and those in a position to affect contracts, permits, grants, licenses, property purchases and sales, and other matters that specially benefit individuals and entities.
3. Timely updating of annual disclosure statements.
4. A list of everyone who is required to file an annual disclosure statement.
5. Disclosure of all gifts to the government or its agencies, including the names of the gift giver's officers and principals.

Enforcement

1. Administrative rather than criminal enforcement of ethics laws, with no criminal sanctions.
2. Initial review of complaint, with quick dismissal of the complaint if it fails to state an ethics violation against someone under the ethics commission's jurisdiction; if the conduct was based on ethics advice; if there has already been a decision on the matter; if the statute of limitations has run; or if what is alleged would be a de minimis violation (in which case, a warning letter should be sent to the respondent). If it is merely a matter of a poorly written complaint, the ethics officer should offer the complainant help in writing a proper complaint.

3. No limits on who may file an unsworn complaint or make a tip.
4. Instead of defining “de minimis” interests, benefits, or violations in an ethics code, leaving what is “de minimis” up to the ethics commission with respect to enforcement decisions.
5. Separation of investigative/advocacy and adjudicative roles in ethics proceedings.
6. Standards of proof: for probable cause, “reasonable grounds that a violation has occurred”; for the finding of a violation, “preponderance of the evidence.”
7. Ethics commission authority to enter into a settlement of an ethics proceeding at any time after the filing of a complaint. Settlement is the preferable way to conclude an ethics proceeding when a complaint is not dismissed in the initial review or after a preliminary investigation.
8. Requirement of an admission of the respondent’s misconduct in a settlement agreement.
9. Requirement of cooperation in an ethics investigation by everyone under the ethics program’s jurisdiction.
10. Statute of limitations based on the discovery of possible misconduct rather than on the occurrence of the conduct.
11. Limited role of a complainant in an ethics proceeding (not a party to it), including the ability to file a response to a respondent’s response to the complaint, to recommend changes or additions to the complaint, and to attend a public hearing, but with no formal role except, perhaps, as a witness, if called.
12. Limitations on ex parte communications with the ethics commission and staff.
13. A list of mitigating and aggravating circumstances to take into account when imposing sanctions.
14. Sanctions including reprimand, censure, fine, damages, disciplinary action, civil forfeiture, voidance of contracts and other transactions, injunctive relief, and debarment from contracts. Only disciplinary action should require approval by the local legislative body (official) or the CEO (employee).

15. The payment of all fines, damages, and other monetary penalties into the government's general fund, not into the ethics commission budget.
16. Judicial review only of ethics commission final decisions on violations.
17. The reimbursement to a respondent of reasonable ethics proceeding legal fees only when there is a finding of no probable cause.

The Ethics Code

1. The placement of aspirational provisions in a Declaration of Policy section at the beginning of an ethics code, with a clear statement that these provisions are not enforceable.
2. The use of clear, simple language in ethics provisions, recognizing that they are intended to provide guidance to non-lawyer officials and employees.
3. The treatment of appearance of impropriety, preferential treatment, and favoritism as values behind ethics rules, not as enforceable ethics language.
4. Placement of the parts of an ethics code most useful to the ordinary official, that is, the ethics and disclosure provisions, before the administrative and enforcement provisions. Placement of definitions after the ethics provisions, not before.
5. No use in ethics provisions of "impairment of judgment" or "intent to influence" or other language that deals with motive, knowledge, or other internal states.

Basic Conflict Provisions

1. Defining conflicts not in terms of interests, but in terms of benefits and relationships.
2. Not prohibiting conflicts of interest, but instead requiring conflicts to be dealt with responsibly.
3. Regular inclusion in conflict provisions of the phrase "directly or indirectly."
4. Withdrawal from any participation whatsoever in a matter as soon as an official or employee recognizes he or she may benefit, directly or indirectly, or has a special

relationship, directly or indirectly, with anyone who may benefit, with public disclosure of the relevant conflict.

5. The word “may” preceding the word “benefit” in a conflict provision.
6. The inclusion of non-financial benefits in conflict provisions.
7. Requirement that officials with ongoing conflicts either resign or remove the conflict.

Other Ethics Provisions

1. The prohibition of officials wearing multiple hats, including the holding of incompatible jobs or offices and the representation of clients before their agency or board.
2. The limitation of gift bans to direct and indirect gifts from those seeking special benefits from the government.
3. Gift bans with very few exceptions.
4. Gift provisions that cover both influence and pay to play.
5. Handling of gratuities as a personnel, not ethics issue.
6. The prohibition of sharing or using confidential information for one’s own or another’s financial benefit, but not prohibiting the general disclosure of confidential information for another purpose.
7. Nepotism prohibition that covers hiring, managing, and oversight of relatives, and applies to all officials, employees, and consultants, with no exclusions for uniformed departments.
8. The prohibition on transactions with subordinates.
9. The prohibition of officials representing clients in suits against the city or county.
10. A requirement to report possible ethical misconduct.
11. Complicity in ethical misconduct as an ethics violation.
12. Whistleblower protection.

Best Practices for Government Officials

1. Recognition that, despite one's integrity, one has blind spots, one can be influenced, one is vulnerable to one's unconscious biases as well as the unhealthy aspects and pressures of a government organization's ethics environment, and that whatever one thinks about one's relationships or transactions, it is what the public thinks that matters and that the public is right to make its assumptions considering the information it has.
2. Recognition that, as a public servant, one has special obligations, gives up some of one's rights, and needs to make certain sacrifices.
3. Standing up for the victims of intimidation, pay to play, and SLAPP suits.
4. Board chairs: asking, each time a new matter comes before a board, if anyone has a special relationship, directly or indirectly, with anyone involved in the matter, or if anyone may benefit, directly or indirectly, from the matter.

Ethics Reform

1. A start-at-the-top approach to ethics reform, considering all the possible provisions and elements of an ethics program.
2. In smaller jurisdictions, consideration of a countywide or regional ethics program, to allow for independent, professional administration.
3. "Organizational molting" when a local government ethics program is instituted or improved in an unhealthy ethics environment: new stories, new language, new priorities in hiring and promoting, new norms, and new conduct, including the encouragement of open, honest discussions not only about ethics matters, but also about the fears that come from an environment of intimidation and the ways that feelings of loyalty, betrayal, and disrespect for the public support an unhealthy ethics environment.

Other Best Practices

1. Firewalls are not a best practice because they are completely self-enforced, more of a screen than a wall.

2. Lists of contractors and subcontractors, and their officers and principals; of grantees and their officers and principals; of permittees and their officers and principals.
3. Limitations on ex parte communications with procurement officials (“Cone of Silence” provision).
4. Getting lawyers fully on board: two or three government, or even private, attorneys can prevent or bring to an end institutional misconduct by recognizing their duties as lawyers and exposing the misconduct or threatening to expose it if is engaged in.
5. Oversight of earmarks and discretionary funds by ethics commission, auditor, or other independent board or office.
6. Express institutional and/or personal waiver of legislative immunity with respect to an ethics program, and express designation of an ethics commission as either a part of the legislative branch (where the branches are separate) or a hybrid that is part of both branches, so that ethics enforcement does not occur in an “other place” than the legislative branch.

Books of Interest

Most books of relevance to local government ethics deal with administrative ethics, that is, the ethical behavior of government administrators, rather than with conflicts or government ethics programs. However, they do deal partially with government ethics, and it is valuable to see how government ethics fits in the larger context of administrative ethics. Most of the books on government ethics deal primarily with the federal and state levels; the ones that focus on local government are either old or international.

The books on this list are not necessarily recommended. I have included them here primarily to show what has been written in the field. I also include a list of interesting and valuable books that are not directly about government ethics, but which I have written about in my blog (most of them, at least) and which would make a nice addition to the reading lists of those involved in government ethics.

Government Ethics

Cody, W. J., Michael and Richardson R. Lynn, *Honest Government: An Ethics Guide for Public Service* (Praeger, 1992)

El-Ayouty, Yassin, Kevin J. Ford, and Mark Davies eds., *Government Ethics and Law Enforcement: Toward Global Guidelines* (Praeger, 2000)

Gardiner, John A. and Theodore R. Lyman, *Decisions for Sale: Corruption and Reform in Land-Use and Building Regulation* (Praeger, 1978)

_____ and David J. Olson eds, *Theft of the City: Readings on Corruption in Urban America* (Indiana UP, 1974)

Genovese, Michael A. and Victoria Farrar-Meyers, eds., *Corruption and American Politics* (Cambria, 2011)

Johnson, Roberta Ann, *Whistleblowing: When It Works — and Why* (Rienner, 1993)

Klitgaard, Robert, Ronald Mclean-Abaroa & H. Lindsey Parris, *Corrupt Cities: A Practical Guide to Cure and Prevention* (ICS Press, 2000)(International)

Levine, Gregory J., *Municipal Ethics Regimes* (Municipal World, 2009)(Canada)

- MacKenzie, G. Calvin and Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Brookings Institution, 2002)
- Moore, Don A. et al, *Conflicts of Interest* (Cambridge, 2005)
- Morgan, Peter W. and Glenn H. Reynolds, *The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business, and Society* (Free Press, 1997)
- Painter, Richard, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference* (Oxford UP, 2009)
- Rose-Ackerman, Susan, *Corruption and Government: Causes, Consequences and Reform* (Cambridge UP, 1999)
- Rosenson, Beth A, *The Shadowlands of Conduct: Ethics and State Politics* (Georgetown UP, 2005)
- Salkin, Patricia E., *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials* (American Bar Association Section on State and Local Government Law, 1999)
- Sherman, Ted & Josh Margolin, *The Jersey Sting* (St. Martin's, 2011)
- Thompson, Dennis F., *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution, 1995)
- _____, *Political Ethics and Public Office* (Harvard UP, 1987)
- _____, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (Cambridge UP, 2004)

Administrative Ethics

- Berman, Evan M., Jonathan P. West, and Stephen J. Bonczek, eds, *The Ethics Edge* (International City/County Managers Association, 1998)
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Glossary

Accountability - Holding government officials to account for their conduct, whether ethical, managerial, policy-oriented, or otherwise. There are two kinds of accountability, vertical accountability — direct accountability by voters at elections, which is what most people think of as accountability — and horizontal accountability, which includes government ethics enforcement, criminal enforcement, and enforcement by officials against their colleagues and subordinates.

Administrative ethics - An area of study concerned with appropriate behavior by government administrators, which includes government ethics but goes well beyond the boundaries of government ethics to include non-discrimination, civility, obeying laws, taking responsibility, having good character, making good decisions, and considering all stakeholders. Administrative ethics codes are primarily aspirational.

Advisory opinion - The opinion of an ethics officer or ethics commission concerning the responsible handling of a conflict situation, usually in response to a request by an official. Formal advisory opinions are usually in writing and made by the ethics commission; informal advisory opinions are usually verbal and made by an ethics officer or other commission staff member. See [Ethics advice](#).

Advocate - An individual or body who argues that the respondent violated one or more ethics provisions. This term is preferred over “prosecutor,” since the role is different and neither the process nor the sanctions are criminal.

Annual disclosure - One of the three types of disclosure, usually made in the form of an annual statement regarding the property, employment, and business relationships of high-level officials.

Appearance of impropriety - A term that acknowledges how important it is to the public's trust in its government that the conduct of officials appears proper to the public, who cannot know the reason behind their officials' actions, for example, whether they are helping a family member or doing what is best for the community.

Applicant disclosure - One of the three types of disclosure, provided by those seeking contracts, permits, grants, or other special benefits from the government. Applicants disclose their relationships with officials or others involved in the transaction, or any other relevant relationships and financial interests they know about.

Aspirational provisions - Provisions in an ethics code that are not intended to be enforced. They provide useful guidelines as well as the policy considerations behind enforceable provisions.

Avoidance - The voiding or cancellation of a contract, permit, grant, or other result of a government transaction due to the discovery that ethical misconduct enabled the transaction to occur.

Blind spots - The psychological mechanisms that prevent us from having an accurate picture of how and why we act, as well as how and why those with whom we have special relationships act.

Bribery - A crime that involves the offering, giving, receiving, or soliciting of any item of value to influence the actions of an official. Bribery is very hard to prove. By prohibiting sizeable gifts to officials from those who may benefit from government decisions, government ethics prevents bribery.

Character - There is an alternative approach to government ethics that focuses on personal character, emphasizing personal ethics rather than the responsible handling of conflicts. Officials themselves tend to see government ethics in terms of character rather than conduct, and insist that they have integrity. This leads to denial, the emotionalizing of government ethics, and much confusion.

Class exception - This exception to basic conflict provisions relates to government benefits that are shared with a substantial segment of the city or county's population. If a benefit is shared with a lot of people in the community, then it is considered not to be a special benefit and, therefore, not the basis for a conflict. Examples include a council member over 65 voting on a property tax break for senior citizens, or a business owner voting on a personal property tax issue that affects all business owners.

Compliance - Compliance is the principal way in which conflicts are dealt with by corporations. Like a government ethics program, a compliance program involves rules and oversight, but the rules compliance focus on generally involve such things as accounting, procurement, and other administrative processes. Its focus is primarily economic. With respect to investigation, it depends primarily on auditing, which is a way of finding out how an organization's funds may have been misused. In government, the focus of compliance is on waste, which is not an ethics issue; embezzlement, which is a criminal issue; and fraud, which is also a criminal issue. In government, compliance is the work of auditor and inspector general offices. Compliance training is the work of human resource departments. Compliance programs usually do not provide advice or enforce laws.

Confidential information - The term is often defined as information that is not available to members of the public and that a government official is not authorized to disclose, except to designated individuals or bodies. With respect to government ethics, availability of information to the public at large is what matters. What is most important about confidential information is not its confidentiality, but rather that one or more people or entities are specially benefited by its distribution.

Conflict (of interest) - A conflict of interest arises from a situation where a government official has a special relationship (with apparent obligations) with someone involved in a government matter, or may benefit, directly or indirectly, from a government matter.

Conflicts of interest code - What an ethics code should actually be called, as it is in New York City.

Cooling off period - The period after (or sometimes before) government employment during which an official is prohibited from representing, appearing for, or taking a job with an individual or entity involved in a government matter within the official's area of responsibility.

Corruption - The abuse of public roles or resources for private benefit. It encompasses both ethical misconduct and criminal misconduct such as bribery, kickbacks, and pay to play.

Criminal enforcement paradigm - Enforcement as the prosecution of an individual alleged to have broken a law. This is the paradigm commonly used in government ethics enforcement. However, the paradigm ignores the fact that officials have special obligations that citizens do not have, and that officials often act not on their own, but as part of a group or organization.

Cronyism - The preferential treatment of friends, party colleagues, and supporters, especially by appointing them to positions regardless of their qualifications.

De minimis - With respect to a violation, small or minor so that is not worth investigating. Also used with respect to small benefits received and the insignificance of the resulting conflict. De minimis conflicts are still conflicts and should not be ignored, but rather disclosed and waived.

Debarment - A sanction that prohibits an individual or entity from entering into a contract with a local government for some period of time, due to ethical or other violations.

Disqualification - Another word for withdrawal from participation in a matter due to a conflict.

Doing business with (a local government)- A term often used in ethics codes to cover a variety of situations, including seeking or having a contract with, seeking a permit or grant from, or being regulated by the local government.

Ethical misconduct - A short way to describe conduct that is in violation of an ethics provision or that an ethics officer would advise an official not to engage in. It is preferable to using “unethical,” which implies that the conduct is morally wrong, rather than involves the irresponsible handling of a conflict situation.

Ethics advice - Advice given, preferably by an ethics officer or an ethics commission, regarding how an official or employee should act, considering the local government and state’s ethics rules and the appearance of impropriety that might arise from the official or employee’s conduct.

Ethics code - An ordinance that provides rules relating to conflicts, gifts, withdrawal, and disclosure, as well as providing for the jurisdiction, powers, and responsibilities of an ethics commission and its staff, and the procedures for providing ethics advice and for enforcing the rules.

Ethics commission - A body of citizens that, along with its staff, administers and enforces a local government’s ethics program. This is the general term used throughout this book, but ethics commissions are given many different names, including called ethics board or committee, conflicts of interest board, and integrity commission.

Ethics environment - The culture in a local government, agency, or department relating to the handling of conflicts as well as obligations and formal processes in general.

Ethics officer - The individual responsible for training, providing ethics advice, and advising an ethics commission. In many large jurisdictions that can afford a larger staff, there is usually an executive director rather than an ethics officer. Ethics officers can be employees or contractors, and they can be shared among jurisdictions.

Ex parte communications - Communications made to influence a decision-making official off the record and out of the presence of other parties.

Favoritism - See [Preferential treatment](#).

Firewall - An arrangement intended to separate an official from both involvement and information regarding a matter where there would otherwise be a conflict. Sometimes called a “Chinese wall.”

Formal processes - Procedures set up by law, rule, or regulation for doing things such as hiring, obtaining land use permits, and bidding for contracts.

Government ethics - The area that involves the proper handling of conflicts between, on the one hand, the obligations government officials and employees have toward the public and, on the other hand, their obligations to themselves and their family, their business associates, and others with whom they have a special relationship. It involves not only the reality of these obligations, and of the underlying relationships, but also the appearance that arises from these obligations and relationships.

Hats - Roles played by an official. An official who wears multiple hats has a conflict when she is required to wear them in the same matter.

Honest services fraud - The federal crime of depriving others of the intangible right of honest services (18 U.S.C. §1346). Until recently, this crime used to allow the FBI to investigate ethical misconduct at the local level. Now it applies only to bribery and kickbacks.

Honorarium - Fee paid to officials, usually for a speech.

Hotline - A special phone line that allows individuals to confidentially (and sometimes anonymously) report ethical misconduct, to decrease the chance that they become the

victim of retaliation for coming forward with information that helps an ethics program enforce its ethics code.

Impairment of judgment - A term used in some conflict provisions, but which has little meaning and provides little guidance, since no one believes that their judgment is impaired by relationships, obligations, or gifts.

Influence - A term used in some conflict provisions, in the context of gifts provided in order to influence an official. However, it is irrelevant whether a gift is intended to influence, is part of an ongoing relationship based on the mutual provision of benefits, or is done to satisfy an official's pay-to-play requirements. Motive is not a required element of a government ethics provision.

Institutional corruption - Corruption is institutional in so far as the gain an official receives is political rather than personal, the service the official provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the government or the democratic process. (from Dennis F. Thompson, *The Ethics of Congress*)

Integrity - Having a good character. It is what officials say they have when it is alleged that they have not responsibly handled a conflict situation. However, people with integrity often do not responsibly handle conflicts, either out of ignorance or due to their blind spots.

Interest - This term has at least four meanings in government ethics: (1) A financial stake in a business or property; (2) What is best for an individual or for the public ("the public interest"); (3) Obligation, as in "conflict of interest," where the official may not have a financial stake in a matter, but does have obligations to people or entities who may benefit from decisions made with respect to the matter; and (4) a "personal interest," including in one's reputation and the pleasure of seeing a relative or business associate receive a special benefit.

Kickback - What is paid to an official in return for help with contracts, permits, or grants, or in return for confidential information. It usually takes the form of a portion of the giver's benefits from the transaction, such as the difference between the price of a no-bid contract and a competitively bid contract.

Legal ethics - Conflict and other rules for lawyers that govern their treatment of clients. These rules, as they relate to government lawyers, do not overlap much with government ethics rules.

Legislative immunity defense - A defense against ethics commission jurisdiction over local legislators and over others, to the extent they are involved in legislative activity. It applies not only to complaints against officials, but also to evidence presented about legislative activity. Those who use the defense, and the courts that have allowed its use, in a government ethics context have not yet dealt with the fact that the policy behind the defense is the same as that behind government ethics: to prevent an official's personal interest (in the legislative immunity case, the interest in not being sued) from interfering with the public interest.

Local government associations - State and national associations of the chief executive officers of local governments. There are also associations of other local officials, such as clerks and assessors, as well as sections of bar associations that consist of local government attorneys.

Matter - A contract, permit, grant, construction or other transaction or situation that comes before a government official or employee, or which an official or employee may influence. Often referred to as a "transaction," but this makes it seem too business-oriented. Any item that can be on a board's agenda, or that can be discussed in a department or agency meeting, is a "matter" if the board, department, or agency will possibly act on it or make recommendations concerning it.

Minimum requirement - An ethics provision is not a maximum rule, like a criminal law, that is intended to restrict what a citizen can do, but rather a minimum requirement

that provides guidance to those with a fiduciary duty to citizens, letting them know the least that is expected of them. Because it is a minimum requirement, it is inappropriate to look for loopholes. It is appropriate to do more than is required, never less.

Misuse of office - Another way of describing ethical misconduct, which involves the misuse of office to specially benefit oneself or others.

Nepotism - A kind of conflict situation where an official is in a position to participate in or influence the hiring or promoting of a relative, giving a relative a raise, or supervising a relative, directly or indirectly, and therefore is in a position to provide the relative with preferential treatment.

Paper tiger - An ethics commission that looks good on paper, but in reality either does not function or has no authority or enforcement power.

Participation in a matter - Formally or informally, privately or publicly, communicating, acting, or voting with respect to a matter.

Patronage - The promise or expectation of an appointment or of the use of influence to obtain an appointment to a government position as a reward for political activity or a campaign contribution. A local government based on patronage cannot have a good ethics environment, because most of its officials and employees are there on the basis of a special relationship that makes them loyal not to the public, but to the individuals they helped get into high government positions and who then gave them their jobs.

Pay to play - A form of extortion by which an official misuses the power of her office to effectively coerce those seeking benefits from the government to make gifts, direct or indirect, legal or illegal, in order to obtain or preserve their benefits.

Pension forfeiture - The requirement that officials convicted of crimes or, sometimes, found to have violated an ethics provision, forfeit their pensions.

Pet charity - Many high-level elected officials, especially mayors and county executives, associate themselves closely with one or more local charities, sometimes in the form of a mayor's golf tournament or the like. Many contributions to these charities are effectively pay to play.

Preliminary investigation - An investigation done by an ethics commission or its staff after the initial review. The goal of a preliminary investigation is to determine whether or not there is probable cause that an ethics violation occurred, sufficient to merit further investigation and a public hearing.

Preferential treatment - Giving benefits, privileges, exemptions, or faster service to one or more individuals or entities that are not available to ordinary citizens. Even where there is no conflict, this leads the public to feel that its local government is not fair, that it exists to help those with connections. Also referred to as "special consideration" or "favoritism." When it comes to jobs, it is often called "cronyism."

Probable cause - The common standard for determining whether or not the allegations in a complaint merit further investigation and a public hearing. The City Ethics Model Code defines this standard as "reasonable grounds that a violation has occurred."

Quid pro quo - This Latin term, meaning "this for that," refers to a relatively equal exchange. In the government ethics context, it refers to a gift made to an official in return for a promise to benefit the giver in some way through the use of the official's position in government. Where there is a quid pro quo, a gift becomes a bribe. However, exchanges are not so specific in most relationships, inside or outside government. This is why, in an ethics code, gifts are prohibited without the need to show a quid pro quo.

Recusal - See [Withdrawal from participation](#).

Revolving door - A popular term for government officials going back and forth between business and government, bringing with them conflicts and the perception that they are in government to help their past and future employers rather than the public. Post-employment and other provisions in an ethics code deal with the revolving door.

Rule of necessity - If withdrawal from participation would leave a board with less than a quorum capable of acting, members may disclose their conflicts on the public record and then vote.

Self-dealing - The situation that occurs when an official is wearing two hats in the same matter, for example, when a council member is in a position to provide a grant to an organization he runs or a zoning board member is in a position to approve a permit for a developer the member represents.

Situational forces - Those things, such as unwritten rules, expectations of loyalty and secrecy, and intimidation tactics, that place pressure on individual employees and officials to either engage in ethical misconduct, help others engage in or hide ethical misconduct, or fail to report ethical misconduct they know about.

SLAPP suit - SLAPP stands for Strategic Lawsuit Against Public Participation. A suit intended to intimidate and silence critics and whistleblowers by threatening to burden them with the cost of a legal defense. The goal is not to win the suit, but to prevent or retaliate for speech or action, in the government ethics case, to prevent an ethics complaint from going forward or retaliate for reporting ethical misconduct. SLAPP suits also make it far less likely that others will report ethical misconduct.

Slush fund - A discretionary fund, often secret or without sufficient oversight, that is sometimes abused through spending directed toward relatives, business associates, friends, and political supporters.

Special consideration - See [Preferential treatment](#).

Statute of limitations - The maximum time after an event or the discovery of an event that an ethics complaint based on that event may be filed.

Teeth - The power of an ethics commission to enforce ethics provisions by directly penalizing those who violate them. A lack of teeth means either that the ethics commission can only make recommendations regarding enforcement, that sanctions are limited to reprimands and small fines, or that there is no enforcement mechanism at all.

Transaction - see [Matter](#)

Transactional disclosure - The disclosure of relationships and possible benefits that relate to a particular matter, such as approval of a contract, the appointment of a board member, or the provision of a permit or grant.

Transparency - The area of government ethics that deals with access to public documents and information, open meetings, and openness in general. The principal goals of transparency laws and enforcement are to make information available so that the public can effectively participate in government, and to prevent officials from misusing their office by keeping their actions secret.

Unwritten rules - Informal processes and customs, including district courtesy, ticket fixing, speeding up the permit process, and patronage. Most unwritten rules involve changing the power structure of the charter or providing preferential treatment.

Waiver - A waiver request is basically a request for an advisory opinion where it is clear that conduct would violate an ethics provision. The waiver process allows exceptions to ethics provisions where there are special circumstances or a compelling need. Waivers should be made only after opportunity for public discussion, and the reasons for the waiver should be clearly articulated in writing.

Warning letter - Unrequested ethics advice given to the respondent in an ethics proceeding when the alleged violation is minor, or “de minimis.” It lets the official know that, if the allegation was true, the official violated the ethics code and should be careful not to engage in such conduct in the future, even at a de minimis level.

Whistleblower protection - An ethics provision that protects individuals who report ethical misconduct, or give testimony to an ethics commission, from retaliation in the form of discharge, discipline, personal attack, harassment, intimidation, or change in job, salary, or responsibilities.

Withdrawal from participation - Neither formally nor informally, privately nor publicly, communicating, acting, or voting with respect to a matter. The official’s only communication regarding the matter should be disclosure of the conflict and, if there is a question about how to handle the conflict, a consultation with an official ethics adviser or the ethics commission. Also known as “recusal” or “disqualification,” but these are judicial terms that, in the government ethics context, are too often used only with respect to abstention from voting.