

DRAFTING AN ETHICS HANDBOOK FOR YOUR CITY OR TOWN

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INTRODUCTION

Ethics in local government has become a significant issue in recent years. Requirements such as financial disclosures, gift bans or disclosures, post employment restrictions, conflict of interest rules and restrictions on lobbying elected and appointed officials are becoming common. Frequently, local government attorneys find themselves in the middle of the issue with requests for opinions on proposed or previous conduct; assisting with or conducting administrative investigations pertaining to alleged ethics violations or advising their jurisdictions on the legal issues implicit in the development of codes of ethics and ethics handbook.

Early this year, the City Attorney's Office was requested by the City Manager to assist in the development of an ethics handbook that would provide a single source for the various ethics codes and rules of the City. In developing the handbook, we have completed a number of steps to understand the ethics issues that may arise in local government and how as local government attorneys we can assist in providing the resources to address those issues. The purpose of this paper is to provide an outline of our methods in developing this handbook and to review those issues of concern to the local government attorney.

BACKGROUND

Most jurisdictions have ethics rules in some form. Frequently, as in Arizona, they consist of a number of state statutes on issues such as conflict of interest, financial disclosures, gifts, post employment restrictions and employment of relatives. At the same time, there may be a second level of local rules and codes on issues such as personnel, procurement, lobbying and general rules of conduct for employees. While the local government attorney understands the interplay between their local rules and codes and state or provincial statutes, the average employee may not be aware of their existence.



It is only when an ethics issue arises, frequently through media coverage, that the ethics rules become an issue. While some conduct such as engaging in conflicts of interest may be intentional, frequently conduct may consist of the acceptance of free tickets to a sporting event or interceding on behalf of a friend or relative doing business with the city. The ethics rules in the jurisdiction may not accurately address the conduct in question or may be vague or overly broad.¹

Most ethics rules are based upon an individual responsibility model. Under this model, the individual public employee is personally responsible for their acts. This model on which the U.S. Ethics in Government Act is based has been upheld by the United States Supreme Court in Crandon v. United States, 494 U.S. 152 (1990) and United States v. National Treasury Employees Union, 513 U.S. 454 (1995). Based on this model, the Court left the ban in place for high level executive branch employees and presidential employees.

Clearly, local government employees are going to be subject to the ethics rules and codes in their jurisdictions. However, as we have learned in other areas such as employment law, it is difficult to hold employees accountable if they are not aware of what the rules are. As with other similar types of conduct such as discrimination on basis of race, ethnicity or other improper factors, sexual harassment and alcohol and drug use, in addition to the legal issues, administrative, management and behavior issues must be addressed. An ethics handbook provides a tool that can incorporate the relevant legal material for the jurisdictions as well as comments, self-assessments and case scenarios that enable employees to understand the consequences of ethical breaches and reinforce ethical behaviors.

WHY SHOULD WE DEVELOP AN ETHICS HANDBOOK

Ethics in local government has become a major issue over the past few years. During the last two years, ethics matters involving local government officials have drawn attention on a statewide basis in Maryland² and Illinois as well as a number of local governments throughout the United States, England and Scotland.

Jurisdictions as diverse as Punta Gorda, Florida³, Howard County Maryland⁴ and Passaic County, New Jersey⁵ have wrestled with ethics issues involving their public officials. Many state and local jurisdictions have a number of laws relating to ethics in government covering such areas as conflict of interest, post public employment representation, employment of relatives and receipt of gifts.

At the same time, enforcement of ethics standards is viewed as an obligation of government to set an example for the greater society.⁶ Professional groups such as the International City-County Management Association and the

American Society of Public Administration have developed a number of training materials for general education on ethics training.⁷

While many of these training materials provide general education on ethics in government, they are not specific to a particular jurisdiction. As a result, it is difficult to tailor the training to the needs of a particular jurisdiction.

To provide a local emphasis on ethics issues and standards, many communities have developed ethics handbooks or a local code of ethics that include the applicable legal requirements, together with application to policy and the organization's standard of behavior. The local code of ethics or ethics handbook is used as part of the local government's training program.

Consistent application of ethical standards in local government has been a component in local government's efforts to improve organizational performance and restore public trust.⁸ Ethics training materials may incorporate relevant state statutes and local codes pertaining to public employees, state or local civil service regulations, attorney general opinions, and local ethics codes, as well as case scenarios and self-assessments.

Ethics training has become the rule, rather than the exception. A 1997 survey of managers and chief administrative officers in local governments with populations over 50,000 revealed that 85.0 percent of respondents believed that ethics was a high priority in their jurisdictions and that 58.5 percent of jurisdictions provided some form of ethics training.⁹

Unfortunately, ethics training and education ethics has not been very well connected to the law. Policies on issues such as Internet access, acceptance of gifts and conflicts of interest raise legal issues for the local government attorney. Administrative and management concerns additionally arise out of the adoption of policies, enforcement of standards of behavior and correction of behavior problems. At the same time, the training may be a "one size fits all" method that is not appropriate to the organization or in line with the law of the jurisdiction.

ETHICS ISSUES IN PEORIA

Peoria, Arizona is located within the greater Phoenix metropolitan area with approximately 90,000 citizens and nearly 800 full time employees. Similar to most cities, there are a number of different sources for ethical standards applicable to our elected and appointed officials and employees. These include Arizona laws on public employees and officers, City Code and Charter provisions, City Personnel Regulations, City Procurement Code, City Travel Regulations and Internet access and electronic mail guidelines. Many of the related professional organizations such as the International City-County Management Association and the American Planning Association have separate ethical standards that are binding on their members.

After an attempted initiative amendment to the City Charter on ethics, the City Council during the last several years has adopted additional ethics rules including a Charter Amendment on Lobbying and Ethics, 1995, Lobbying ordinance, 1996, Council Subcommittee on Ethics, 1997, Revised Procurement Code, 1998, Internet Access and Electronic Mail Policy, 1998. While it appeared that all the ethical issues had been addressed, in recent years the City had a number of incidents that revealed the City still needed a program to develop an ethics handbook.

These ethical problems ranged from a management level employee engaging in improper use of a city credit card, departments instituting restrictive procurement practices that appeared to favor particular vendors, the offering of gifts by outside entities to City employees, such as free professional sporting event tickets, and a supervisor soliciting loans from employees that he supervised. In addressing these problems, it was clear that many of our employees were not aware of the laws governing their conduct nor the standards of ethical behavior that were expected from employees. At the same time different department heads viewed the severity of the behavior differently, creating the possibility of inconsistent enforcement of the City's ethics rules.

DEVELOPING THE LEGAL BASIS FOR ETHICS RULES

Most American states¹⁰ and Canada¹¹ have general ethics laws. These ethics laws are generally based on an individual responsibility model. The laws address such major ethical concerns as Conflicts of Interest, including public employees representing other parties while responsible for the same matter, misuse of position for personal benefit, and post employment restrictions. Generally, there are two separate approaches. Some jurisdictions provide for absolute prohibition of the conduct, while others permit the conduct with disclosure and possibly consent of the local government.

Other ethics rules that exist in many jurisdictions address issues such as impartiality of public employees in performing their official duties, selection for employment and employment of relatives. Ethics rules also address gifts to public officers and employees from outside individuals made with the intent to influence official government action and gifts between employees to influence official conduct. As with conflicts of interest, a number of approaches may be taken. Some jurisdictions prohibit all gifts; others permit gifts but require disclosure, while a third approach prohibits gifts that appear to be made for the purpose of influencing official action. Ethics rules in a few jurisdictions regulate other areas such as outside employment and receipt of honoraria.

In recent years many jurisdictions have added campaign finance and financial disclosure rules. Many of these rules resulted from the aftermath of the Watergate scandal on a federal level and a number of state scandals such as the

AZSCAM matter in Arizona.¹² The financial disclosure requirements involve elected and in some jurisdictions appointed officials, as well as require the filing of annual financial reports disclosing income, loans and gifts. Campaign finance provisions may regulate receipt of donations from parties doing business with the City.

Unfortunately, like Arizona, many of the state and provincial laws are general in nature and do not clearly address common ethical issues that arise in everyday employment. For example, does a state law that prohibits gifts that are of a substantial amount to influence an employee include a gift of professional sporting event tickets? These common ethical problems can arise in a number of situations. A state law containing a general prohibition on gifts of a substantial amount may not address an issue such as gifts from outside parties that are doing business with the City, land developers, homebuilders and sub-dividers. At the same time there are public employees such as planners, engineers and building inspectors involved in regulating their operations in the City. Should these employees receive gifts from the parties they regulate? Such gifts may consist of any of the following types of items:

1. Sporting event tickets or luxury box invitations
2. Meals
3. Discounts to specific employees
4. Gifts other than money

Financial transactions that may influence employees in the performance of their official duties pose similar issues in terms of the applicability of a general state statute, especially when they take place between two local government employees or employees and non-employee parties.

Although, the gifts and transactions may be common in the private sector, when they become public, often through media disclosure, questions arise from citizens and a perception develops that certain connected individuals may be receiving unfair benefits from the local government. It is important to consider the behavior that may constitute ethics violations in developing the local government's code of ethics. Under our state law in Arizona, the statutes would not cover a number of the scenarios below, even though the public may perceive them as unethical behavior.

For example, a major business entity in the metropolitan area that engages in business in the City may provide free "educational seminars" at an exclusive resort to elected officials on important issues such as telecommunications, utility deregulation, etc. At the time the seminars are held there are no pending matters relating to the subject of the seminars before the elected officials. Consequently, it would be difficult to prove that the receipt of the seminar influenced the local government official.

Use of City information obtained from city employment and used by a city employee for private benefit is another ethical issue. Frequently, the information is public but by virtue of their employment, the employee is simply more knowledgeable about how to obtain the information. Clearly, if the information is confidential, the issue of ethical misconduct is easier to resolve. Similar issues arise in the procurement area, where a local government employee engages in the purchase of goods, services or land with the benefit of information gained from their employment.

Ethical issues also arise in the context of elected officials. Examples may include where a local government official becomes aware of a new development adjacent to their property that will require action by the governing body. Prior to the time the issue comes before the governing body, the local government official approaches the developer and seeks to have the developer acquire their property as well. While nothing is said about the pending land use matter, the private developer may feel pressured with the choice of buying the property to alleviate their concern about the impact of a refusal on their pending application.

Many local government elected officials and some appointed officials have full time employment in positions other than those for which they were elected or appointed, such as attorneys, engineers, planners, or real estate agents and other related occupations. Their full time employment may at times conflict with the responsibilities of their public position.

Procurement practices result in ethical issues that need to be considered in the ethics rules drafting process. A local government employee may attempt to direct procurement to a specific vendor that may not be the most favorable selection to the City. For example, a public employee's spouse may own an interest in a sportswear business that is used extensively to provide T-shirts and related items in City recreation programs. Similar concerns may arise out of undisclosed personal relationships with vendors, or parties that the public employee is involved in regulating or working with. These concerns have become more complicated with the advent of two-person working households and the resultant issues of local government employees being involved in matters as a result of their employment that may benefit the other person they reside with. Ethical concerns in the procurement area additionally arise from other practices, such as (1) "customers" of the local government engaging in practices acceptable in the private sector, but not permissible in the public sector. (2) Attempts by vendors to avoid the having the local government using a competitive selection process.

Recently, the growth of information technology raises another group of ethical issues. Many jurisdictions are beginning to address local government employee use of the City's electronic mail, Internet access, computer systems and related equipment, as well as other personal property of the City, for personal use by the employee. Similar issues may arise in the provision of

equipment by the City to the local government employee for telecommuting or after-hours uses that is used by the employee for personal purposes.

In developing the legal basis to address ethical issues like those above, it is important to consider the advice and decision making process that will be used to resolve ethical issues. Where the decision making process is unstructured, the local government attorney may be faced with the problem of inconsistent advice given to employees on ethical issues and inconsistent decision making by management. Employees accused of violations of ethical standards complain to a civil service board or review panel of a double standard being applied to similar acts of conduct by other employees and therefore they should not be subject to discipline. The unstructured decision making process may also result in overreaction or inadequate action by management to particular ethics violations committed by local government employees. Again, in a review process of a local action on the ethics violation, the employee complains of disparate treatment compared to other employees.

The unstructured decision making process impacts on the public perception of the local government. Based on a lack of consistent decisions in addressing ethical misconduct, a public perception develops that there is a lack of ethics by local government employees and elected officials and that certain outside groups have excessive influence over local government decision making based on their status.

Recognizing the underlying legal basis for the decision making and enforcement process for ethics violations is essential. Local government attorneys need to demonstrate a connection between decision making and the enforcement process and the particular local government's need to issue and enforce rules of conduct that are based on a need to maintain confidence in the impartiality and objectivity of public servants,¹³ should the rules be challenged. Understanding the legal basis for decision making and enforcement on ethics matters is an essential component in advising employees and officials on ethical issues and assisting them in developing an understanding of the legal as well as other possible consequences arising from their decision. The legal basis for the decision making process is important for the local government lawyer in avoiding possible conflicts of interest. A process providing for direct lawyer involvement in advising employees creates the risk of possible conflict with local government management may seek to enforce ethical rules involving the same issue.

DEVELOPING AN ETHICS HANDBOOK

After the legal basis for ethics rules has been determined in the local government jurisdiction, there are two underlying principles that should be followed in the development of an ethics handbook containing those rules. First, the handbook should contain all of the applicable rules that will make it a single reference source of employees and officials to obtain guidance on ethics issues.

Second, most local government employees are not lawyers and unlike the statutes, the handbook needs to be in "plain language".¹⁴ The development of the ethics rules for the jurisdiction should be designed to provide greater definition on ethical standards to local government employees and officials than the applicable general state or provincial laws.

As with other types of employment handbooks, it should be remembered that employees rely upon the material included and statements made. Legal review of the material is essential. Promissory language should be avoided and the ethics handbook should include appropriate disclaimers as recognized in the jurisdiction. At the same time the handbook can provide a valuable tool for the local government attorney to use in providing answers to ethics questions and working with their clients to provide a greater degree of consistency in the administration of ethics rules. In addition to the applicable law on local government ethics in the jurisdiction the ethics handbook is one of the components that will be used to communicate to employees the organization's values and ethical standards.

In addition to the legal basis for the ethical rules, understanding the local government's ethical framework and ethical values is necessary. Most dictionaries define ethics as generally accepted principles of what is right and wrong or good and evil. For most individuals and organizations these values may be drawn from a number of sources such as, law, philosophy, religion, etc. The ethical framework and values of an organization will form the basis of the standard of behavior expected within the organization. While at first blush the establishment of a core ethical framework for the organization may appear difficult due to different cultural, religious and societal values, it is a necessary step in framing the ethical rules contained in the local government's ethics handbook.

Underlying the establishment of the core ethical framework is the recognition that an individual's personal sense of ethics may be the result of a number of "ethical types".¹⁵ These types may be based on characteristics such as conformity, duty, self-interest or utilitarianism. From these characteristics develop the individual and organizations approach to ethics. Part of developing an approach to ethics is to establish the core ethical values of the organization. These core ethical values will be based on questions such as the following:

1. "How does the behavior by individual in our organization impact other employees?"
2. Do our ethical standards reflect the behavior that we expect from our employees?"
3. What does the public perceive regarding our ethical standards?"

Important in the establishment of ethical values is the recognition that specific conduct that may be regarded as unethical in some jurisdictions may be

wanted to thank the local government for its assistance? Is the receipt of such a gift really unethical and a behavior that you are attempting to regulate? Similar issues may arise if a major utility or industry in a jurisdiction offers free "seminars" to educate elected officials on upcoming issues such as telecommunications or electric deregulation.

The definition of acceptable behaviors and development of ethical rules is seen as providing an example to citizens by local government. As part of their research for their article in the June, 1998 edition of *Public Management*, West and Berman surveyed a number of jurisdictions and found that strengthening ethics rules were significantly associated with organization revitalization, productivity improvements and self assessments about the level of public trust in local government.¹⁸

The development of ethics rules should give consideration to including a "safe harbor" provision. A safe harbor provision will generally provide that if a local government employee acts upon the written opinion of the local government attorney or ethics review board, the employee may not be held civilly or criminally liable, even if the advice is ultimately overruled by a decision making person or body. The benefit of such a provision is that the employee is encouraged to obtain advice before proceeding with a course of action that may be in violation of the local government's ethical rules and standards. A safe harbor provision also provides a response to the concern of those in local government who see ethics rules as promoting an authoritarian, fear based operating environment.

Encouraging awareness of ethical standards by local government employees may also be facilitated by the local government attorney or ethics board providing informal ethics opinions to appointed and elected public officials and employees, as well as providing formal published opinions on ethical questions. For example, in Peoria we publish all formal opinions of the City Attorney's Office. These formal opinions are provided to the public library, Mayor, City Council, City Manager and all City departments. The City Attorney's Office regularly issues a number of informal letter opinions as well. Further, under Arizona law, all conflict of interest opinions issued by local jurisdictions must remain on file for public inspection.¹⁹ The formal and informal opinions of the local government attorney will also be a valuable resource in the local government jurisdiction's training program.

While the ethics rules need to meet the appropriate legal basis, it is also important that they be drafted in plain language that average local government employees can understand. A number of ethics handbooks that were reviewed, including one from the City of Phoenix, included comments to applicable statutes and rules to provide additional definition of the appropriate ethical standards. The comments provide an application of the standards to typical ethical situations. Underlying a local government's ethics rules should be the question: Will our building inspector, recreation worker and off site inspector understand

and apply the ethics rules to their behavior? The standards or comments need to be specific, rather than refer to a vague aspiration.

A number of ethical rules have been drafted based on standards such as "avoiding an appearance of impropriety"²⁰ or as in Nevada, "prohibiting government officials from using their positions to secure or grant unwarranted privileges, preferences, exemptions or advantages to any person." The vagueness of these standards make them difficult to enforce. Can anyone define what is an appearance of impropriety sufficient to provide a reasonable person with notice of the behavior that constitutes a violation? What appears to be improper to one individual could conceivably be perceived as acceptable to another.

Other ethics codes restrict gifts to an amount that would not reasonably tend to influence or reward official conduct.²¹ Is "reasonably tend to influence" to be construed as giving \$5.00 or \$500.00? Could it depend on the position and subjective opinion of the local government employee? I would recommend that a local government attorney consider an approach used in some jurisdictions where gifts are prohibited or must be publicly disclosed in excess of a certain amount²². This additionally avoids problems where an employee or public officer accepts a gift of a de-minimus amount and then is accused of an ethics violation.

Avoiding ethics problems resulting from public employees or public officials engaging in behavior that violates the local government's ethics standards requires that there be education of the employees and the public officers of the ethical standards and the behavior expected by the organization. The local government's organization's training program should include ethics education on the standards of behavior in its ethics handbook as part of the training program. The training program should emphasize that the Courts have vigorously upheld the individual responsibility model and the ethics legislation that has resulted in recent years, including controversial legislation such as the United States Independent Counsel Act.²³

Another educational training tool is to provide the ethics handbook and related training materials to employees of the local government organization. In the past, in Peoria, we actually refused to provide copies of our personnel regulations on the grounds that the printing would be too expensive. How can you hold employees accountable for behavior in violation of ethical standards if the information is not provided to the employees? Further, if the goal is to educate the local government employee of the organization's ethical standards and expected behavior, the provision of the information is part of that process.

Finally, an ethics program should incorporate creating a resource that public officials and employees of the local government can use to obtain ethics advice. Generally, these programs have taken one of two models. (1) An ethics

committee or (2) providing this function as part of the legal opinion function of the local government attorney. The structure of this program raises a number of issues, including those of professional responsibility in terms of who is the client and conflicting interests between the governmental client and its employees. Secondly, if a separate committee is used, the possibility of separate contradictory adjudications in a civil and criminal context may exist.

Further, an additional problem is that many ethics complaints are the result of disgruntled political opponents who seek to use the ethics standards enforcement structure to do what the voters would not, which is to harass or remove their political opponents.²⁴ The inability to provide a prompt means to address this problem may bring into question the viability of the ethics system. A recent example occurred at the federal level with the U.S. Independent Counsel Act that was not extended by the U.S. Congress. The Independent Counsel system was perceived as resulting in politically motivated complaints resulting in the appointment of independent counsels.

CONCLUSION

Ethical standards and ethical behavior will continue to be an issue facing local government. The Courts continue to uphold the individual responsibility model, which will result in continued liability for local government officials who violate their jurisdiction's ethical rules. In this environment the role of the local government attorney will be an important one. This role will include the development of an ethics code and handbook for the local government organization.

The local government attorney can have a unique role in the development of an ethics code. With the legal analysis and drafting skills the local government attorney can assist in the development of an ethics handbook that will communicate the legal issues regarding employee behavior to all of the employees of the local government organization.

Public confidence in local government can be promoted by the creation of ethical standards for insuring ethical behavior of individual employees and providing for action when the behavior does not meet the standard. Improved, consistent ethical standards of behavior can result in ethics issues involving employees and public officers, being addressed prior to becoming a legal issue for the local government attorney.

FOOTNOTES

- ¹ Arizona law prohibits receipt of gifts "which manifest an substantial and improper influence upon him with respect to their duties"
- ² Maryland, 1999 legislative session, Chapter 130, 1999 session laws, Illinois, 1999 legislative session, Gift Ban Act.
- ³ Sarasota Herald-Tribune, July 30, 1999, pg. 16A
- ⁴ Pittsburgh Post-Gazette, July 4, 1999, Pg. C-1
- ⁵ The Record, Bergen County, NJ, January 6, 1999, Pg. A01
- ⁶ Pew Research Center for People and the Press (1998) Deconstructing Distrust: How Americans view government.
- ⁷ Ethical Insight, Ethical Action, International City-County Management Association, 1988; Combating Corruption / Encouraging Ethics, American Society of Public Administration, 1990.
- ⁸ Frontiers in Ethics Training, Public Management, June, 1998.
- ⁹ Frontiers in Ethics Training, Public Management, June, 1998.
- ¹⁰ Arizona, See, A.R.S. §38-503, Conflict of Interest; §38-481, Employment of Relatives; §38-545, Local Public Officer Financial Disclosure; §38-504, Prohibited Acts.
Georgia, See, Code, 1981 § - - , Conflict of Interest; Code, 1981 §21-5-50, Financial Disclosure
Nevada, See, NRS §281.230 Unlawful Commissions, personal profit and compensation of public officers and employees; §NRS 281.210, Employment of Relatives; §281.561, Public Officer Financial Disclosure
Ohio, See, R.C. §102.01, et.seq., Ohio Ethics Law; R.C. §2921, et.seq. Prohibited Acts
- ¹¹ Canada, See, Criminal Code, R.S.C., 1985, s.121.
- ¹² AZSCAM involved seven legislators who were videotaped soliciting benefits in exchange for favorable votes on legalizing casino gambling in Arizona.
- ¹³ See, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); National Treasury Employees Union v. Von Raab, 486 U.S. 656 (1989) Hinchey v. the Queen [1996] 3 S.C.R. 1128, The Supreme Court and the law of Public Service Ethics, Robert Roberts, Public Integrity, v.1, Winter, 1999.
- ¹⁴ There are a number of "plain legal language resources available. See, Pratt's Legal Writing: A Systematic Approach, 3rd edition.
- ¹⁵ Ethical Virtuosity. Louie V. Larimer, 1997
- ¹⁶ Many city home rule charters, such as Peoria's lack any specific authority for a city council to discipline other council members for ethical violations.
- ¹⁷ Arizona Republic December 22, 1998.
- ¹⁸ Frontiers in Ethics Training, Public Management, June, 1998.
- ¹⁹ See, A.R.S. §38-507, Opinions of the attorney general, county attorneys, city or town attorneys and house and senate ethics committee.
- ²⁰ A prior provision existed in the American Bar Association Disciplinary Rules prior to the enactment of the Rules of Professional Conduct. See DR
- ²¹ See, San Antonio, Texas, Code of Ethics, Section 3A
- ²² See, Portland, Oregon, Code of Ethics, City Code 1.03.020.7
- ²³ The U.S. Independent Counsel Act was upheld by the United States Supreme Court in Morrison v. Olson, 487 U.S. 977 (1988). Subsequently, in 1999, the U.S. Congress refused to extend the act following the impeachment of President Clinton, thereby terminating the act.
- ²⁴ See, Fort Worth Star Telegram, February 12, 1999, Metro, pg. 3, Newsday, December 9, 1998, Suffolk edition, pg. A36, June 18, 1998, The Stuart News, Port St. Lucie News, Local, pg. B3.