

# Local Government Ethics Programs In a Nutshell

by

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## A. The Basics of Government Ethics

Government ethics is not about *being* “good” or “a person of integrity.” It’s not something officials learn at home, at school, or in their house of worship. In fact, 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 wrong in a government context.

Government ethics is about *acting* responsibly and professionally, as a government official or employee, under certain circumstances and following certain rules and procedures. It is about preserving *institutional* rather than *personal* integrity. Government ethics decision-making should be just another professional routine.

For the purpose of government ethics, “ethics” does not mean the field of study concerned with being or doing good (the word’s usual meaning). The word “ethics” means the area of decision-making involving 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 (what are known as “conflicts of interest” or, simply, “conflicts”).

Government ethics involves not only the reality of these obligations, and of the underlying relationships, but also the appearance of these obligations and relationships.

Government ethics **laws** provide minimum, enforceable guidelines to facilitate the handling of conflict situations. Government ethics **programs** provide training and advice to further facilitate the handling of conflict situations. Government ethics programs also require financial and relationship disclosure, which provides information to help the public, as well as officials, better determine if conflicts might exist, so that they are more likely to be dealt with responsibly.

The principal goal of a local government ethics program is to further the public’s trust in those who govern their communities to put their personal interests aside in favor of the public interest. Without this trust, people tend not to participate in their government, even as voters, and they feel as if their government was something apart from their community, an organization designed to benefit its members, rather than an organization that serves and manages the community.

It is important to recognize that 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.

Other goals of a local government ethics program include (1) to stop ethical misconduct before it becomes criminal misconduct, 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 wrong rules, misplace their loyalty, and begin to feel a special entitlement. Effective local government ethics programs indirectly create healthy ethics environments in state and federal government organizations, as well.

Finally, government ethics is not a policy, but a process. This process complements procurement, grant, and land use processes and, like them, is essential to accountability and democracy.

## **1. Fiduciary Duty**

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. The obligation government officials have toward the community is unlike any other obligation. Government ethics deals with conflicts that sometimes arise between this special obligation and an official's other obligations.

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 the community which affect its residents' lives. Our representative system can work only if the public has confidence that its representatives, and those appointed or hired by its representatives, are seeking to benefit the community rather than themselves and those with whom they have special relationships.

We cannot 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 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.

## 2. Appearance of Impropriety

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, and hold them accountable, only by their actions and their relationships as they appear on their face.

In other words, in government ethics, appearances are what matters most. Motivations, feelings, and character are irrelevant.

This is difficult for most government officials to understand, because what they see when they look at themselves is their motivations, feelings, and character, all those things that are invisible to their community. Because officials see their ethical decision-making from the inside and the public sees it from the outside, the best way for an official to handle a conflict situation responsibly is to describe his situation to a neutral observer, to a government ethics adviser if possible, to see how the conduct would appear to others.

Because how a situation appears to the public is so important, and no law can responsibly deal with the appearance of impropriety in enforceable provisions, government ethics laws are only minimum guidelines. What this means is that a government official who has a relationship with someone involved in a matter that has come before him needs to recognize that, even though this relationship is not covered by an ethics code provision, a failure to handle this conflict situation responsibly has the same effect on the public in terms of their trust as it would were the situation covered by the ethics code. For example, if an ethics provision does not prohibit an official from helping his sister-in-law get a contract, that doesn't mean he should help get her the contract. He should seek advice about what to do, *even if participating in the contract process is legal*.

This is why ethics advice is so important. Ethics advice is not limited by laws. It can take into account the *appearance* of impropriety. Enforcement, on the other hand, cannot.

As for the public, what is difficult is recognizing 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 of interest.

### 3. Conflicts

Conflicts of interest in local government are just a subset of our daily conflicts. We have conflicts among our obligations all the time. Our obligations 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 are constantly disappointed in us because of the priorities we set among our obligations. These priorities are necessitated by our limited time and energy.

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. All these people 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. 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. Considering government ethics from the point of view of preferential treatment shows how important fairness is to government ethics. The public must be assured that decisions are made fairly, excluding no one simply due to a lack of connections, especially when it comes to jobs, contracts, and the use of the community's equipment and spaces.

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 do 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 with respect to the public, to putting our obligations to others ahead of our obligations to the public.

Conflicts are based on obligations, or perceived obligations. Conflicts 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, 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 a concealed agent of whoever it is he has a special relationship with. He will be seen as selfish and untrustworthy. And, more important, the government that does not insist on him dealing responsibly with his conflict will be seen as a bunch of people who are in it for themselves and their family and friends.

In other words, government ethics is less about the individual than it is about the government itself. If the public's trust in one official was 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. There are also those who enable and those who know about the conflict, but say and do nothing.

### Two Kinds of Conflict

There are two principal ways in which conflicts occur: they are either pre-existing or created by events.

There is nothing wrong per se with pre-existing conflicts based on personal or business relationships. Everyone has them, especially in smaller communities. These relationships become problematic only when a matter involving a family member or business associate comes before an official, or before someone the official can influence.

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, the drafting, awarding, or supervision of a contract the contractor has or wants. When this happens, there is a conflict situation with which the official has to deal responsibly. This is done by following the procedures required by her local government's ethics program, usually involving disclosure of the conflict and withdrawal from participation in the contract matter, that is, letting someone else, or the rest of the board, deal with the contract.

It is an official's duty not to work on the specifications of a contract that might be awarded to a contractor represented by her law firm, not because she can't be trusted doing an honest job (how can anyone know this?), but because she owes it to the public to deal with the conflict situation 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 business associates.

The principal way of dealing responsibly with a pre-existing conflict is to withdraw from participation in a matter where the official has a special relationship with someone involved. Withdrawal means not only recusal or abstention from voting, but also not discussing the matter with colleagues or others, publicly or privately, not making a call or sending an e-mail explaining one's position on the matter, and not making a speech to a community organization or talking to the press about the matter.

Other conflicts 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. An official who does not seek ethics advice before soliciting or accepting a gift, a job, or a transaction can cure the violation only by turning himself in to the ethics commission and accepting the sanctions it imposes.

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

### Misuse of Office

Another way to look at conflict situations is in terms of misuse of office. Every official temporarily holds an office or position in a government, which is supposed to be used solely for the benefit of the community. When an official uses his office for the benefit of himself or someone with whom he has a special relationship, this is a misuse of office. It is this view of ethical misconduct that underlies basic conflict provisions such as [the City Ethics Model Code's](#), which begins with the phrase "An official or employee may not use his or her official position or office. . ."

## Firewalls

Often, officials offer to set up a firewall between themselves and their professional partners or other business associates, so that they cannot, in theory, have any personal involvement with or benefit from a matter they are dealing with as an official. However, since there is no way for the public to know whether the firewall is truly there, a firewall cannot ensure that there will be no misuse of office. In any event, the official's decision may still benefit her business partners or client. A firewall is not an effective way to handle a conflict situation.

## **4. An Official's Sacrifices and Benefits**

Local government officials need to make certain sacrifices to show their community that they are acting for the community rather than for themselves and for those with whom they have special relationships. There are jobs and clients they cannot take, contracts and grants they cannot get, properties and businesses they cannot invest in, gifts they cannot accept. And they have to disclose to the world the jobs, properties, and businesses they do have. To officials, this seems unfair.

After all, many officials have already sacrificed potentially higher pay in the private sector, or they are serving as volunteers or low-paid local legislators, giving up their precious time for the community. Why should they have to sacrifice more?

The reason is that with power and authority come responsibility and obligations. And every obligation entails sacrifice. For example, parenthood and childhood (as an adult) both require sacrifices. Government service is no different.

What is important for officials to recognize is that government ethics is not only beneficial to a community's residents. It is also beneficial to them. It helps officials do their jobs more professionally, and it helps them keep out of scandals involving themselves and their colleagues. It is hard to manage a community under a cloud of scandal.

While protecting the community from officials' mishandling of conflict situations, a government ethics program also protects officials by providing rules and advice, which allow them to deal with their obligations to others in situations that may be very uncomfortable for them. Take, for example, an official who has little respect for a nephew who wants a no-bid contract, or who disagrees with her own employer's position on riverside development, or who wishes her law firm had never agreed to represent that bastard who is seeking a permit from his board. A government ethics program protects such officials by requiring them not

to be involved with a nephew's contract scheme, not to have to vote against an employer and thereby jeopardize one's job, and to reject a law partner's request to help out a client.

It takes just one decision that appears self-serving to lose one's position or the respect of the community necessary to push for the policies an official thinks are 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.

## 5. Minimum Requirements

The principal difference between a local government ethics code and other ordinances is that an ethics code provides only minimum requirements, that is, states the *least that is expected* from government officials. Other laws provide maximum requirements. For example, 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.

There are two reasons for this difference. An ordinance is usually the way the government regulates citizens, who are expected to act in their own interest. In contrast, an ethics code is the way the community regulates those who serve the community in the local 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 an official finds a loophole in an ethics law, she is not supposed to take advantage of it. Instead, she is supposed to ask an ethics adviser what to do. Unlike a legal adviser, an ethics adviser doesn't look for loopholes; he looks at how best to deal with situations in the gray area where a rule does not clearly apply, but where the desired conduct might equally threaten the community's trust in its government.

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, other ordinances are not meant to guide, but to define and limit conduct. Since laws are not designed to provide guidance, the language of an ethics provision is always insufficient. The policies behind an ethics provision must be taken into account.

If an ethics code does not make it a violation to participate in a matter involving a close friend (because it is impossible to define "close friend"), that does not mean an official

is free to participate. If a gift provision has an exception for educational purposes, that doesn't mean an official should accept from a contractor an all-expenses-paid trip to a Scottish golf course that happens to be hosting a seminar on waste disposal.

A local official should not insist that she didn't do anything wrong because she followed the law. If she entered into a relationship with someone seeking special benefits from the local government, she should have asked an ethics adviser what to do. Similarly, if an official believes the law has unintended consequences with respect to a particular matter, the official should ask the ethics commission for a waiver.

## **6. Government Ethics and Politics**

There is one 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 his political obligations and to benefit his political career and his political colleagues, with some exceptions. Our democratic system allows elected and some appointed officials 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.

Although partisan strife and broken promises do undermine public trust, they are not part of government ethics. Conflicts between political obligations and obligations to the public are dealt with in other ways, such as nonpartisan elections, the council-manager form of government, and limits on interference by elected officials with administrative matters such as hiring, land use decisions, contracts, and grants.

## **7. The Psychology of Government Ethics**

The importance of psychology to government ethics cannot be emphasized too much. 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, and what others see about them. 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 a strong awareness of their own emotional states and motivations.

Below is a list of the blind spots that affect the responsible handling of conflict situations. It is important to try to get officials to recognize that they have blind spots so that these personal limitations do not act as obstacles to their acting responsibly or to their trying to prevent their colleagues from acting irresponsibly. Acknowledging that one has blind spots is an important step toward seeking ethics advice. Teaching about blind spots should be an important part of government ethics training.

The Bias Blind Spot - We believe that others act for selfish reasons, but that we do not. This blind spot exists because we can look into our minds (or think we can), but not into others'. And we have trouble putting ourselves in others' shoes. This difference in perception forms a major obstacle to seeking ethics advice, accepting ethics enforcement, and supporting the creation of an effective government ethics program.

Sense of Entitlement - Failure to responsibly handle a conflict situation often comes not out of selfishness, but rather out of mistaken beliefs. These mistaken beliefs are less about *content* (is this right or wrong?) 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 also tend to justify their actions in the name of a policy goal or a group of people, that is, their circle of officials and party members, their supporters, or the community as a whole (e.g., it's not that the contract helps my brother, it's that it helps the town).

Bounded Awareness - We tend not to see what we need to see in order to make ethical decisions. We exclude important information by placing boundaries around our definition of a problem. We narrow our concept of responsibility (e.g., to our boss rather than to the public). We give in to groupthink, focus on instructions that are given to us, and reject as partisan or self-interested the input we get from those who differ with us. We focus on meeting a deadline. We limit ourselves to our functional boundaries, such as engineering, law, or finance. We focus on the law rather than the ethics. We act (or, more often, fail to act) out of fear of rejection, of being seen as goody-goody, or of the consequences of whistleblowing.

Motivated Blindness - We have a tendency to overlook others' ethical misconduct when it is not in our best interest to notice. In the context of local government ethics, motivated blindness can best be seen when local government attorneys are advising officials on ethics matters. Too often, they give officials advice that is in the official's personal interest 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 has an attorney-client relationship with the official, identifies with the situation the official is in, and is unconsciously motivated by the fact that it is in his interest to have the official be happy with the advice.

Ethical Fading - By seriously underestimating the degree to which our behavior is affected by incentives and other situational factors, we do not see ourselves as conflicted. Instead, we see ourselves as 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.

Ends-Based Mentality - There is a serious clash between government ethics' use of a rules- and process-based approach, and government officials' use of an ends-based approach to decision-making. 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 an official gets there matters far less than the result. The process and the rules are things to be taken advantage of in order to get the desired result. Government ethics is about rules and process. It is hard for ends-oriented people to truly understand and, therefore, respect it.

Fear - In poor ethics environments, fear fueled by intimidation is the principal obstacle to the responsible handling of conflict situations and to the effective operation of a government ethics program.

## **B. The Key Elements of a Local Government Ethics Program**

A local government ethics program is not just an ethics code with a series of ethics provisions. Even in a town or small county, other elements are necessary to have an effective ethics program. The most important elements are quality training and timely, professional advice. Also essential are (1) three types of disclosure, (2) enforcement, and (3) whistleblower protection. An ethics program is administered by an independent ethics commission with enforcement authority and a monopoly on interpreting and enforcing the ethics code.

Other important elements of an ethics program include oversight of the disclosure process; jurisdiction over all agencies and over those who seek special benefits from 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; these will not be considered here.

### **1. Guidance**

Because prevention of ethical misconduct is the principal goal of a local government ethics program, the most important role of an ethics commission and its staff is to provide guidance so that officials and employees can responsibly handle conflict situations. This guidance consists of regular ethics training, timely, professional advice, three kinds of disclosure, and ongoing discussion of the ethical aspects of decision-making. Even enforcement is more important for what it teaches than for the sanctions it imposes.

#### **Government Ethics Training**

The principal goal of ethics training is to gain an understanding of government ethics and the ability to identify conflict situations, one's own and others'.

It is important 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, and their aides: high-level officials and their staff, government attorneys, officials working in the areas of land use, procurement, and grants, and ethics commission members and staff. These individuals need live training. 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, or training from within the agency or from the personnel department.

Live government ethics training should begin with an introduction to the concepts of government ethics and to the [blind spots](#) that make it so difficult for officials to deal responsibly with their conflict situations. Next comes a consideration of the city or county's principal ethics rules, and a 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 enforcement authorities.

Then the class should break up into small groups to discuss specific case studies, 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 to each is different.

The most important thing an official should take out of an ethics training class is that, when she is faced with a conflict situation, 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.

Many local officials are resistant to government ethics training, due to a false belief that people naturally understand ethics or that they learn ethics at home. This is not the "ethics" that is involved in government ethics. No one has a natural or home-taught understanding of how to recognize and discuss complex conflict situations, how to deal responsibly with them, or when to ask for professional ethics advice.

This is especially true of ethics commission members. 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 specialized training that goes far beyond the two hours normally given to ordinary officials. Mayors, local legislators, managers, and their staffs also need extra training.

### Ethics Advice and Waivers

The other most important way of providing guidance and preventing ethical misconduct is the provision of ethics advice by an independent ethics officer or ethics commission.



There are two kinds of ethics advice: formal and informal. Formal advice requires a written request and consideration by the entire ethics commission. Although an important way for an ethics commission to interpret ethics provisions with respect to complex conflict situations, it can take a long time before formal advice is available to the individual who requested it.

Because of the long and uncertain response period associated with formal opinions, officials and employees faced with an imminent situation need quick, informal advice from an ethics officer. An ethics officer may be either a full-time ethics commission staff member or, in smaller jurisdictions, a contracted professional or even an ethics commission member who is given special training. No one under the ethics commission's jurisdiction or who otherwise provides representation to local officials should act as ethics officer.

Ethics advice should be binding on both the official who requests it or to whom it applies, and to the ethics commission, to the extent the facts provided were correct and complete.

Waivers are a form of ethics advice where the official recognizes that conduct would violate an ethics provision, but feels that there are overriding concerns that make the conduct acceptable. Waiver requests should always be dealt with publicly by the ethics commission.

## **2. Conflict of Interest Code**

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

In fact, a code all by itself is often nothing but window dressing for a local government with a poor 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 was creating an ethics program is not to be trusted.

A conflict 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 the ethics commission. The code should set out the process for dealing with ethics complaints and requests for waivers and advice. And finally, the

online version of 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 conflict of interest code should use the simplest language possible, especially in the ethics provisions (as opposed to the administrative and enforcement provisions), because they are intended to be read and followed by the average local government official or employee. 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 employs the defense of a lack of understanding.

Conflict of interest codes are supplemented by ethics commission interpretations, advisory opinions, regulations, and rules of procedure. It is very useful to include links to these after the relevant code provision in the online version of the ethics code.

There are ten essential ethics provisions:

1. Conflict of Interest. This most basic provision prohibits the use of one's position to do anything that may directly or indirectly, financially or personally, benefit an official or employee, his family, or his business associates, except to the extent a large segment of the community also benefits.
2. Withdrawal from Participation. Also known as recusal, withdrawal is what someone usually does to deal responsibly with a pre-existing conflict. Withdrawal means not participating in the matter at all, not even discussing the matter, privately or publicly, directly or indirectly. Withdrawal is not, however, always the most responsible way to handle a pre-existing conflict.
3. Gifts. Prohibiting or limiting gifts from those doing or seeking to get special benefits from the local government (usually referred to 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 they are difficult to prove. Campaign contributions are usually not considered gifts, but it is possible to require withdrawal from a matter that may benefit a sizeable campaign contributor.

4. Representation and Appearances. These two, closely related provisions prohibit government officials and employees from representing others before their agency or board or, for high-level officials, before the local 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 great a conflict as an appearance.

5. Confidential Information. This provision prohibits the use of confidential information to benefit oneself or others. Many ethics codes mistakenly prohibit all disclosure of confidential information. This is mistaken because the disclosure of confidential information, when disclosure does not benefit someone, does not involve a conflict of interest, and is sometimes even desirable.

6. Post-Employment Restrictions. Also known as a “revolving door” provision, this provision applies certain ethics provisions to officials and employees usually for a limited period of time after they have left their government positions (the “cooling off” period). The provisions applied are usually the representation and appearance provisions, the confidential information provision, and the basic conflict provision. These provisions continue to be applied because (1) leaving government office to do work for a company that does business with one’s board or agency makes it look as if the official had been misusing his or her office to help the company, and was being rewarded for the favor; and (2) representing a company before one’s own agency makes it look as if the official was effectively selling to an employer or client his confidential information and special relationships with colleagues and subordinates. Other provisions, essentially pre-employment provisions, restrict representation or participation in matters an official was involved with *before* government service.

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 to the public (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 frequently violated by ordinary employees.

8. Transactions with Subordinates and Political Activity. In a certain sense, this is a subcategory of misuse of government property, except that it involves using government *people* for one's personal benefit. Political activity limitations and bans on soliciting employees prevent the use of subordinates for political purposes and help to prevent patronage systems.

9. Nepotism. Nepotism provisions deal with the conflict of hiring or managing an official's family members. Police and fire departments are often excepted, but should not be.

10. Complicity and Knowledge. People who violate ethics laws rarely act in isolation. Usually, they act with the support, acceptance, or silence of their colleagues. This provision requires the reporting of ethics violations and makes complicity a violation. This requires officials to violate ethics laws alone and in secret, or take a big risk of being caught. People rarely violate ethics laws when they know they cannot count on those around them to keep their conduct secret.

### **3. 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) does three things, all of which are intended to prevent ethics violations.

One, by disclosing, officials remind themselves of possible conflict situations when they have more time to deal with them responsibly.

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. Because officials know their relationships and interests are not secret, they are more likely to seek ethics advice and less likely to engage in ethical misconduct.

And three, disclosure (including updates) means that officials regularly participate in the ethics program, which helps create a good, active ethics environment in the local government.

There are two sides to every disclosure: (1) the official and (2) individuals and entities seeking special benefits from the local government. And there are three types of disclosure: (1) annual disclosure of financial and personal relationships and ownership interests, with updates; (2) “transactional disclosure” of conflicts when a matter comes before an official with a possible conflict; and (3) “applicant disclosure,” that is, disclosure of relationships to officials, direct or indirect, by an individual or entity seeking a contract, permit, or grant from the local government.

It is important to understand that, although disclosure is valuable, it is not alone sufficient. If one discloses a possible conflict situation and does not handle it responsibly, this tells the public that it is acceptable to use one’s office to benefit oneself, one’s family members, and one’s business associates. Disclosure provides information; it is not a replacement for withdrawal from participation, refusing a gift, or other ways of responsibly handling conflict situations.

#### **4. Independent Administration**

Since government ethics is all about conflicts, it is extremely important that there not be any conflicts in the ethics program itself. In practice, this means that no official under the jurisdiction of an ethics program should have any special role in the program.

Unfortunately, high-level officials often select the members of an ethics commission and, sometimes, its ethics officer or executive director; make enforcement decisions; approve the ethics program’s budget; and, in the case of city or county attorneys, provide ethics advice and ethics commission representation. Sometimes, in fact, these officials administer the ethics program themselves.

Whenever officials’ appointees in an ethics program appear to act too indulgently toward officials (or do not act at all, or appear to act to hurt a mayor or council majority’s opponents), this undermines the public’s trust in the government. In addition, the selection of ethics commission members by high-level officials makes it look to the public like they control the program. This undermines trust in the program and means that citizens don’t bother filing complaints. This is why the independence of an ethics program from

government officials is the single most important criterion for its effectiveness.

The trend today is (1) to have all or most ethics commission members selected by community organizations, to give the ethics commission full enforcement authority, and (2) to have the ethics commission choose its own staff, who have a monopoly on enforcement and the provision of ethics advice.

However, doing this worries many officials, who talk about possible “witch hunts” against them. But an independent ethics commission formalizes the handling of ethics complaints, rather than having them take the form of public accusations, blog attacks, and partisan squabbles in a legislative body or council-appointed commission. And the dismissal of a complaint by an independent ethics commission is the best way an official can preserve her reputation. A dismissal by a commission selected by a mayor or council means little to the public.

But what about small cities, towns, and counties? How can they afford to have professional, independent administration of their ethics program? Having the city or county attorney staff the program might not be optimal, but it’s the cheapest solution.

A better solution is hiring a part-time ethics officer under contract. Another solution is a regional or countywide ethics program, which allows independence in administration, a full-time, professional ethics officer, experienced and trained ethics commission members, and cost-sharing by all the municipalities, agencies, and authorities in the county or region. The countywide solution has worked in Miami/Dade County and Palm Beach County, Florida. Most regional programs have been formed through [Interlocal Cooperation Agreements](#). 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.

Another alternative is giving the state ethics commission jurisdiction over local government officials and employees. However, many of the states with such jurisdiction have programs so weak that local governments establish their own programs anyway. Massachusetts and Rhode Island are examples of states with strong programs. In addition, many states deal with the conflicts of school officials and employees at the state level, in a separate ethics program.

A fourth alternative is outsourcing an ethics program to the state commission. San Bernardino County, California was the first to do this, in January 2013.

#### 4. Ethics Environment

A local government's ethics environment is very important to the success of a local ethics program. The values, unwritten rules, and situational forces of a government organization can make it hard for an official to act responsibly. Or they can make it very easy. A good, comprehensive ethics program that has the full support of most high-level officials makes it hard for an official to misuse his office to help himself or others. A poor ethics environment makes an official feel like a chump if he doesn't misuse his office.

The principal characteristic of a healthy ethics environment is leadership, both in the government and in the community. A healthy 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 conflict situations.

Good leaders encourage the open discussion of the ethics aspects of every matter. As with professional discussions of the best way to provide waste removal or to 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 colleagues and supervisors over how to handle them responsibly. This rarely occurs without the full support of government leaders.

In a good 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 that is through training, advice, and open discussion, not the prevention or crushing of an ethics program.

A lack of ethics complaints is often considered to be the mark of a good 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 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.

## **5. 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 there is a state ethics system for school boards). An ethics program should also have jurisdiction over employees and board members of quasi-public and public-private agencies and authorities.

Uniformed departments may have oversight mechanisms, and lawyers and other professionals may have disciplinary bodies. But because these do not deal with government ethics matters, neither uniformed departments nor professionals should be excluded from a government ethics program's 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 be faced with conflict situations. Minor matters, such as gratuities given to teachers or garbage collectors, 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, lobbyists, businesses seeking permits, grants, and other favors from the local government, and anyone who aids or induces ethics violations. It is important to have jurisdiction over all parties to each transaction, so that all parties are enrolled in the program, including training and advice. This makes it in everyone's interest to help officials deal responsibly with their conflicts rather than to help them ignore or create conflicts.

## **6. Enforcement**

Ethics enforcement is what happens when an ethics program has failed. That is, enforcement occurs when an official has not learned, through training and ongoing discussions of ethics issues, to recognize conflict situations and seek advice, and when her supervisor, colleagues, and subordinates have been unable to prevent the official's ethics violation.

Enforcement is intended to prevent the misuse of office not only through sanctions and the belief that misconduct will be reported by colleagues and subordinates. It also does



this through education, that is, by focusing the organization and community's attention on the problems that arise from ethics violations. There will be mistakes and minor ethics violations no matter how effective an ethics program is, but they should become fewer as the ethics program becomes understood and institutionalized.

It is essential that an ethics commission be permitted to initiate investigations without a complaint, based on information it is given through a hotline or that appears in the press. Too often, those who know what is going on are too afraid of retaliation to file a formal complaint.

Compared to criminal enforcement, ethics enforcement should be simple, quick, and inexpensive, usually ending in a public settlement that provides guidance to other officials. Ethics enforcement, which is administrative rather than judicial, has a far lower standard of proof ("preponderance of the evidence" or "clear and convincing evidence," as opposed to the criminal "beyond a reasonable doubt"), much more relaxed presentation of evidence, and little or no requirement to prove motivation or 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. But it is important that an ethics commission have a range of penalties to choose from, including fines, reprimand, damages, civil forfeiture, disciplinary action, injunctive relief, and avoidance of contracts and permits.

Many officials argue that ethics enforcement is better done at the polls. This is wrong for four 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. They may vote out officials who have done nothing wrong. In any event, most citizens don't pay very 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).

Three, voting an official out of office is a harsh penalty for most ethics violations. The enforcement-at-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.

## 7. Transparency

Considering that transparency is one of the two related areas of government ethics (along with campaign finance), a government ethics program should be as transparent as possible, taking into account fairness to officials making use of the program or being accused of ethics violations. Too often, requirements of confidentiality create an aura of secrecy that, to the public, makes it appear that an ethics commission is working behind closed doors in the interest of officials. Such an impression undermines the public's trust in the ethics program.

## 8. Ethics Reform

Those interested in establishing or improving a local government ethics program should read the [Ethics Reform chapter](#) of my book *Local Government Ethics Programs*. The principal goal of the book is to provide the information needed to know how to create or reform a local government ethics program.

In ethics reform, it is best to start with all the features of a comprehensive, independent ethics program, and then decide which provisions are inappropriate for the community, which features of an ethics program the community cannot afford, and which provisions are already covered well at the state level or are not permitted by state law.

## C. Two Lists

### 1. Checklist of Ethics Commission Activities

Many ethics commissions rarely if ever hold meetings, because they are waiting passively for complaints to be filed and requests for advisory opinions to be made. Passivity is not a responsible way to run a government ethics program. There is no reason for an ethics commission not to meet regularly. Below is a checklist of the activities that ethics commissions can and should be participating in.

- Training - for officials and for ethics commission members
- Advice - formal and informal advice, general advisory opinions, making summaries of opinions from other jurisdictions available to officials and employees
- Recommendations for improving the ethics program - to the local legislative body
- Annual report
- Community outreach - educating the public and the press about government ethics
- Ethics commission website - to make available training, advice, the resolution of enforcement proceedings, press releases, contact information, forms, meeting notices, minutes, etc.
- Drafting or amending rules of procedure, bylaws, and regulations
- Awards - to encourage responsible handling of conflict situations, open discussion of ethics issues, and the reporting of ethical misconduct
- Current events - if an ethics commission is allowed to initiate investigations, it should discuss relevant current events in its city or county

For more information about these activities, see [the full checklist](#) in my book *Local Government Ethics Programs*.

## 2. Obstacles to Government Ethics Programs, and How to Overcome Them

1. Ignorance and Incompetence - the biggest obstacle to everything; can be overcome by ethics training and professional ethics advice
2. Blind spots - see [the list above](#); can also be overcome by ethics training and professional advice
3. Fear - officials' fear of being victimized by an independent ethics program; officials need to be shown that an ethics program is best for them and for the community, and is fair
4. Misplaced loyalty - loyalty to supervisors, leaders, and party rather than to the community; loyalty provides an alternative set of values and rules, with a different sort of ethics training and advice
5. Intimidation - the enforcement side of loyalty, ensures loyalty and secrecy and employees' fear of retaliation if they report misconduct; can be partially overcome by whistleblower protection, but the best solution is for individuals to stand up for those being targeted
6. Politicization of the ethics process - through selection of ethics commission members, partisan ethics complaints, and partisan rancor over ethics issues; can be partially overcome by a truly independent ethics program
7. Confusion of person and office - identifying oneself and other individuals with the office they happen to be holding; the basis for nepotism, cronyism, and patronage; this confusion can be dispelled by leadership and good training
8. Demand for retribution - the public and press's emphasis on punishment when officials are found to have violated an ethics provision skews ethics programs toward enforcement and leads to officials' fears; can be overcome by educating officials, the public, and the press
9. Demand for expertise on boards - overvaluing expertise on boards leads to the appointment and election of individuals with many conflicts; can be overcome by using experts as advisers rather than board members
10. Earmarks and slush funds - they call out for abuse; prohibit them or provide external oversight
11. Pet charities - charities associated with local politicians lead to an unusual

- number of scandals; prohibit officials from being identified with or soliciting for any charity, directly or indirectly
12. Non-functioning ethics commissions - this is the norm; for how to overcome this obstacle, see the [Checklist of Ethics Commission Activities](#) above
  13. Backsliding - the erosion of ethics programs by local legislative bodies; can be overcome by language in the charter or ethics code preventing this
  14. SLAPP suits - harassment suits and ethics complaints against complainant or ethics commission; can be partially overcome by not allowing complainants to withdraw complaints (so that threatening them cannot work), providing legal fees for complainants who are sued, and treating contributions to legal defense funds as gifts
  15. Complainant penalties and legal fees - often the highest penalty in an ethics code is for those who file “false or frivolous” complaints; this causes no complaints to be filed; can be overcome by allowing an ethics commission to initiate investigations without a formal complaint, and the public dismissal of baseless complaints, instead of a penalty imposed on the complainant
  16. Local government attorneys - by giving overly legal ethics advice and advice in the interest of the official rather than the public, government attorneys are partially responsible for a large percentage of ethical misconduct; can be overcome by giving an ethics commission a monopoly over ethics advice

For a Glossary of Terms, see [the glossary](#) in my book *Local Government Ethics Programs*.