Enacting a Local Ethics Law—Part III: Administration

By Mark Davies

The previous issues of the *Municipal Lawyer* contained the first two parts in this three-part series discussing the enactment of a local ethics law. The first part dealt with the code of ethics. The second part focused on disclosure. This third and final part will address administration, the third pillar upon which an effective local ethics law must rest.

This article will thus discuss the composition and structure of a local ethics board and its four primary functions: training and education, legal advice, disclosure, and enforcement. If an ethics law is to be effective, the ethics board must exercise all four of those functions.

Appointment and Structure of Ethics Board

The single most important characteristic of an ethics board consists of its actual and perceived independence. An ethics board that is controlled, in reality or in perception, by the municipality's chief executive officer or governing body will garner little respect, either from those subject to its jurisdiction or from the public or media. Consequently, its advice and enforcement decisions will be viewed as suspect. As a result the board will fail in its mission to promote both the reality and the perception of integrity in government. Thus, its independence lies at the heart of the ethics board.

Three factors, in particular, create independence in an ethics board:

- The process of appointing and removing board members;
- The required qualifications for board members; and
- The absence of control of the board or board members by any other municipal official or body.

Each of these factors is considered below.

First, board members should be appointed by the chief executive officer with the advice and consent of the governing body. Split appointments, such as appointments by the chief executive and the majority and minority leaders of the governing body, risk politicizing the appointment process and creating constituencies among board members. To prevent inaction from blocking appointments to the board, the law should provide for the governing body to make the appointment if the chief executive officer fails to act and vice-versa. Furthermore, board members should be appointed for a set term, preferably staggered and overlapping the term of the chief executive officer, and should be removable only for cause after a due process hearing. Under no circumstances should ethics board members serve at the pleasure of the chief executive officer, a situation that would make them little more than his or her pawns.

Second, Gen. Mun. Law § 808(3) to the contrary notwithstanding, no member of the ethics board should have any other position with the municipality or with any other municipality of which that municipality is a part. Thus, a county official should not sit on the ethics board of any municipality within the county. Appointing a municipal official to the ethics board discourages complaints and requests for advice, out of fear that any information given to the board will make it back to the complainant/requester's superiors. Note that, as the Attorney General has concluded, a local government may enact a local law establishing the composition of a local ethics board that is inconsistent with Gen. Mun. Law § 808(3).[1]

In addition, ethics board members should be prohibited from holding any political party office, from running for any elective office, from participating in any election campaign (except for giving a contribution, which should be minimal if given to a campaign in the municipality), from appearing on behalf of any other person before any agency of the municipality (e.g., as an attorney or architect), from lobbying any agency of the municipality, or from entering into a contract with the municipality. Prohibiting a majority of the members of the board from belonging to the same political party may help preserve the political diversity of the board, of particular importance perhaps where the municipality's elected officials are drawn overwhelming from a single political party, but such a requirement may impede the selection of the best candidates for the board. So, too, a requirement that certain professions, such as clergy or lawyers or educators, be represented on the board may prevent the appointment of the most qualified board members. Indeed, the independence and quality of the board's members will prove to be the single greatest factor in the board's success, especially since, in all but the largest municipalities, the board will have no paid staff. The ethics law may thus profitably contain precatory language such as "members [of the ethics board] shall be chosen for their independence, integrity, civic commitment and high ethical standards."[2]

Ethics board members should receive no compensation, even a per diem, to preserve both the reality and the perception of their independence.

Finally, the municipality should consider providing for a guaranteed budget for the ethics board, to prevent the unseemly situation where the board, needing, for example, an investigator, stenographer, or attorney for an investigation, must seek funding from the very persons it may be investigating. Since enforcement actions will be few and far between in most municipalities, a budget guarantee of 1/100 of 1% of the net total expense budget of the municipality should prove sufficient. Thus, a $20 million municipal expense budget would yield an ethics board budget of $2,000, enough to conduct a modest investigation, provided that much of the legal work is provided pro bono.

Only the largest municipalities, those having perhaps 10,000 employees or more, will be able to afford paid staff for the ethics board. Ethics boards in other municipalities will need to rely on the board members themselves (not an unreasonable burden in most municipalities, since the amount of work will be relatively minimal) or on volunteer consultants, particularly pro bono counsel, to assist in drafting opinions and to supervise investigations and prosecute enforcement cases, or on other municipal staff, particularly clerical staff. To avoid concerns about confidentiality, the ethics law should authorize the board to draw such municipal staff from a relatively independent department of the municipality (almost certainly *not* the municipal attorney), which will vary from municipality to municipality, and should expressly prohibit such borrowed staff from revealing any ethics board business to anyone outside the ethics board.

To further protect the ethics board's integrity and reassure officials and citizens that their confidences will be kept, the work of the board should be protected to the greatest extent permissible under the state Open Meetings and Freedom of Information laws.[3]

Training and Education

Ethics boards tend to scrimp on educating municipal officials about the ethics law, perhaps because ethics boards are, by their very nature, reactive rather than proactive. Requests for advice must be answered; complaints must be investigated; annual disclosure statements must be filed and reviewed. But training requires affirmative action by the board. Also, most ethics board members are neither professional trainers nor teachers.

Yet ethics training is perhaps the single most important responsibility of the ethics board. One cannot obey the ethics law unless one knows that it exists and what it means. For that reason, the ethics law should specifically mandate that the ethics board provide ethics training and education to municipal officials and should also require that municipal officials receive periodic (preferably annual) ethics training. Indeed, one municipal ethics ordinance subjects high-level officials to a $500 fine if, within 120 days of assuming their position and every four years thereafter, they fail to attend an ethics education seminar offered by the ethics board.[4]

Most ethics boards lack the time and resources to conduct live training for every officer and employee of the municipality, although that approach remains the ideal. Since, however, live training offers the most effective ethics training tool, it should be employed to train those officials most at risk of conflicts of interest, namely, all elected officials, all agency heads and deputy and assistant agency heads, all other high-level officials, and those who exercise discretionary authority involving purchases, contracts, licenses, and permits. One would note that this group largely reflects the group of officials who should file annual disclosure statements, as discussed in Part II of this series.

Ethics training must be interesting and fun. When officials sleep through a training session, they learn little. Game software offers one cheap, easy, and lively ethics training option. Moreover, the point of training is not to transform municipal officials into ethics experts, but rather to alert them to potential problems. For example, the New York City Conflicts of Interest Board distributes a one-page ethics guide that simply highlights, in rather broad strokes, common ethics issues, such as accepting a gift from someone doing business with the City, and cautions the public servant to seek advice before engaging in such conduct. The mantra should always be: Ask before you act.

Such a brief ethics guide—and even the code of ethics if it reflects the principles laid out in the first article in this series—can be distributed annually to each municipal official with his or her paycheck (the entire ethics law need not be distributed; just the ethics code itself or a plain language summary). The annual disclosure form, as discussed in Part II, should also require that the filer review, before filing, the code of ethics or a summary of it. The ethics board should also develop some short, plain-language leaflets, in the form of FAQs, which can also be posted on the ethics board's page on the municipality's website (if any) and distributed widely. A poster about the ethics code and how to contact the ethics board to lodge a complaint or request advice or training should also be posted in each municipal facility, right alongside EEO materials. The municipality can also create a video, perhaps in the form of a dialogue between a clueless official and an earnest ethics counselor, which can be shown to new officials and periodically to current ones for whom live training is not available. The video need not entail a professional production; the work of a video

enthusiast in municipal government will suffice, and the video can also be posted on the ethics board's page on the municipality's website (if any).

Officials should be encouraged to offer suggestions for other, creative means of presenting ethics education, and even to participate in their creation. If, for example, the municipality's workforce contains a talented cartoonist or rapper, perhaps he or she would wish to create an ethics comic book or poster series or ethics rap. Ethics education should be subject to only three limitations: Is it accurate? Is it interesting? Is it tasteful?[5]

Legal Advice

An ethics board must also give legal advice on the ethics law. Indeed, providing cover for officials unjustly accused of unethical conduct constitutes one of the most important functions of an ethics board. And the advice it gives must be not only accurate but also quick, clear, and confidential. Nothing frustrates an official more than being precluded from taking an action because the ethics board has failed to act promptly. In the ethics arena, advice delayed is advice denied. An ethics board that fails to give prompt advice will soon observe that officials prefer to risk a possible investigation rather than face interminable delays at the hands of the board. Indeed, one of the most critical duties of the ethics board lies in providing prompt answers to ethics questions. When the novelty or complexity of a question does not require a written request and answer, oral advice must be available, usually within 24 hours, although a quicker response may occasionally be required, for example, when a zoning board member learns at the last minute that the applicant for a use variance is a major customer of her employer. As a general rule, written advice should be available only in response to a written (including email) request.

Both requests for advice and responses to those requests should be confidential to the fullest extent permitted by the Freedom of Information Law, lest municipal officials be discouraged from seeking advice out of fear that their request will become known to others. Where the advice addresses a question of interest to officials generally, then the board should transform the response into a formal advisory opinion, making sure to delete such information as would reveal the identity of the requester.[6]

The ethics law should empower the ethics board to grant waivers from the code of ethics (except where the conduct or interest at issue would violate Article 18). Waivers offer a necessary escape valve where a provision of the code of ethics prohibits conduct that in fairness ought not to be prohibited and that in fact does not constitute a conflict of interest in any meaningful sense. In addition, waivers protect the municipality itself against an application of the ethics code that in fact harms the municipality, for example, by preventing it from placing a trusted employee in a key position with a critical but troubled social services agency. Since waivers may be conditioned upon other actions, such as recusal, waivers offer an ethics board a means by which to turn what would otherwise be a no answer into a yes—and can also help the ethics board avoid ruling on close questions. Waivers ensure that an independent body, namely the ethics board, examines and authorizes what would otherwise be a violation of the ethics code, attaching any appropriate conditions. For that reason waiver power should never be lodged in a legislative body.

Any waiver statute should specify the standard for granting waivers. The New York City standard has worked well: the ethics board may grant a waiver if, after written approval by the head of the agency or agencies involved, the board finds that the interest or conduct "would not be in conflict with the purposes and interests of the city."[7] Note that the New York City statute authorizes that city's ethics board to grant a waiver only after the appropriate agency head has first approved the waiver request. Such a requirement helps ensure not only that the waiver request accurately states the facts but also that granting the request would not work to the detriment of the municipality. Furthermore, since waivers permit what is in effect a violation of the code of ethics, they must be public, to enable the public to assess the validity of the facts upon which the waiver is based and to police compliance with any conditions upon which the waiver is granted. The request for the waiver, however, like any advice request, should remain confidential, for the reasons discussed above.[8]

Disclosure

The second article in this series discussed at length drafting disclosure provisions for the local ethics law. This present discussion focuses on administration of those provisions.

Administering disclosure requires the ethics board to:

- Obtain the transactional, applicant, and annual disclosure statements;
- Review the statements for possible conflicts of interest;
- Maintain the statements on file;
- Impose penalties on those persons who fail to file a required statement or who file late, incomplete, or inaccurate statements; and
- Make the disclosure statements available for public inspection.

Each of these duties is addressed below.

Apart from ensuring, as part of its ethics training program, that municipal officials and applicants are aware of the requirements for transactional and applicant disclosure, the ethics board need not take any specific actions to collect transactional and applicant disclosure statements. They are simply filed by the discloser when the need arises.

Annual disclosure, on the other hand, necessitates the establishment of a distribution and collection system. In smaller municipalities, some central authority, such as the municipality's director of personnel, will identify those individuals required to file an annual disclosure statement under the ethics law. In larger municipalities, that function will usually be performed by each agency head or his or her designee. The list or lists, which include each filer's name, agency, position, and employee (preferably not social security) number, are then sent to the ethics board for review. If the list appears complete, the ethics board returns it to the municipal staff member who will distribute the blank disclosure forms to the filers. Since neither the lists of filers nor the blank forms are confidential, any municipal official may distribute the forms. In most municipalities, the ethics board will enlist the aid of a municipal staff member in photocopying the blank disclosure forms. Alternatively, the form may simply be converted into an Adobe Acrobat form, posted on the municipality's website, and completed online, as many municipal forms now are, although most ethics boards will still prefer hard copy submission of completed disclosure statements. To prevent disputes, each filer should be required to sign for the receipt of the blank disclosure form and to file his or her completed disclosure statement in person, not by mail. At the time of filing, the disclosure statement should be date stamped on its first page, and a receipt should be given to the filer (which can simply be a copy of the date stamped page); the official accepting the filing also logs the receipt onto the list of filers.

If the form contains confidential information (the form proposed in Part II of this series does not), then provision must be made to secure the completed disclosure statements in a filing cabinet accessible only to the ethics board. Confidential information in a form will also necessitate that public viewing copies be made of completed disclosure statements before they are viewed by anyone other than the ethics board. If the form contains no confidential information, then the disclosure statements can simply be housed in the municipal clerk's office and made available there. In any event, assuming the ethics board has no staff other than an official in another municipal agency, an ethics board member should review each disclosure statement for possible conflicts of interest. In most municipalities, the number of filers will be relatively small.

The ethics law must provide for penalties for failure to file or for failing a late, incomplete, or false statement. Otherwise, annual disclosure will become a chimera, as has happened in some municipalities around the state. Article 18 provides for a maximum fine of $10,000; a lesser maximum fine may suffice, but it must be substantial, certainly in excess of $1,000. The ethics law must authorize the ethics board to impose such fines. Penalties should also exist for failure to file a required transactional disclosure or applicant disclosure statement, including statements required by Gen. Mun. Law §§ 803 and 809, discussed in Part II of this series.

Annual, transactional, and applicant disclosure statements must be made available for public inspection. Indeed, it is the public, in particular the media, upon whom an ethics board must rely to ferret out most potential conflicts of interest. While some ethics laws authorize the ethics board to grant specific requests of filers to keep certain information in disclosure reports confidential, such requests should be granted only for reasons of security or safety. Pursuant to the 1987 Ethics in Government Act, upon the sunsetting of the Temporary State Commission on Local Government Ethics on December 31, 1992, its "power, duties, and functions" devolved upon local ethics boards (or upon the local governing body if the municipality had no ethics board).[9] Since the Commission was exempt from the state Freedom of Information Law and the Open Meetings Law, local ethics boards would likewise appear to be exempt from those statutes *in the case of annual disclosure only*.[10] Article 18, however, expressly mandates that annual disclosure statements be made available to members of the public upon request.[11] Transactional and applicant disclosure statements must be made available under FOIL.[12]

Finally, the local ethics law should provide a retention schedule for disclosure statements. Determining the length of the retention period requires the balancing of several factors, including the statute of limitations for misconduct in public office; the need to retain annual disclosure reports for a reasonable period of time in order to facilitate an inquiry into allegations of conflicts of interest or other wrongful conduct; the necessity or desire to conform the retention rule to existing municipal or state retention policies; the concern of the filer that the information not be available indefinitely; and the practical benefits of a fixed retention period, tied to a date certain, allowing the municipal record keeper to manage its space efficiently. In view of those factors, a retention period in excess of six years would seem unnecessary.[13]

Enforcement

An ethics law that fails to provide effective enforcement merely raises expectations that it cannot

meet, eventually engendering less, not more, confidence in the integrity of local government and increasing public cynicism. Such an ethics law is, therefore, often worse than no ethics law at all. So, too, an ethics board that lacks the power to investigate, on its own initiative, possible instances of conduct that violates the ethics code will soon be regarded as a toothless tiger—or as one reporter put it: toothless and useless. In particular, the ethics board should have the power to impose civil fines. The maximum amount of those fines probably matters little, provided that it appears significant to the public, certainly in excess of $1,000. In the largest municipalities, the maximum might range up to $25,000 for a single instance of a violation of the ethics code. Other penalties should include debarment, voiding of contracts obtained in violation of the ethics law, damages, disgorgement of ill-gotten gain, injunctive relief, and disciplinary action. While the ethics board may recommend such other penalties, it should not impose them. Where a municipal governing body simply is not ready to grant an ethics board the power to impose civil fines, the ethics law must at the very least authorize the ethics board to make a public finding of a violation with a recommendation to the governing body of a penalty.[14] That public finding and referral will, one hopes, place political pressure on the governing body to take appropriate action. Although Article 18 does not address enforcement of municipal ethics laws, apart from the annual disclosure provisions. . . . discussed above, the Attorney General has concluded "that a local government by local law may provide for enforcement of violations of local ethics regulations through the imposition of fines and initiation of proceedings for equitable relief."[15]

Before turning to the enforcement process, one should first review the purpose of enforcement: to educate officials about the requirements of the ethics law, to demonstrate that the municipality takes that law seriously, and to deter other unethical conduct. Thus, the purpose of ethics enforcement, just like the purpose of ethics laws generally, lies in the prevention of unethical conduct. Indeed, enforcement proves to be the most powerful ethics education tool. A finding of a violation of the code of ethics brings the code to life in a way that no other educational tool can. For that very reason, such findings of a violation must always be public—always. That requirement does not prevent the ethics board from short-circuiting a full-blown investigation and enforcement action in appropriate cases by sending a confidential letter to the accused public official, stating that (and why) the facts alleged, if true, would appear to violate the ethics law and cautioning the official against engaging in such conduct in the future, at least without first obtaining advice from the ethics board. Since the official in such a case has not received a due process hearing, the board may not inform anyone else—not the public, the official's superior, or the complainant—of the letter's contents or even existence; to be sure, the official may distribute the warning letter on the street corner if he or she so desires.

According to the Attorney General, "a city, or any other local government, by local law may grant to its board of ethics the authority to conduct investigations [whether upon receipt of a complaint or upon the ethics board's own initiative], subpoena power and enforcement power."[16] To ensure both the reality and the perception of the integrity of the enforcement process, the ethics board must fully control its investigations and must, therefore, possess subpoena power; the authority to commence investigations on its own initiative, without waiting for a complaint; the ability to draw upon investigative, legal, and prosecutorial resources, both municipal and private; the power to hold fact-finding hearings or to appoint a hearing officer; and, as noted, the authority to make findings of a violation, impose civil fines, and recommend other penalties.

The enforcement process typically involves an investigation, a confidential notice by the ethics board to the respondent that reasonable cause exists to believe he or she violated the ethics law; a response by the official or his or her attorney or union or other representative; the ethics board's consideration of the response and either dismissal, a confidential warning letter (discussed above), or the sustaining of the finding of probable cause followed by the service of a formal petition upon the respondent; the respondent's answer to the petition; a due process fact-finding hearing held by the ethics board, a member of the board, or a hearing officer designated by the board, followed, in the latter two cases, by a report and recommendation to the full board; submission of final briefs by the respondent and, if applicable, by the prosecutor; consideration by the ethics board of the results of that fact-finding hearing and the final briefs; and a final decision and order by the ethics board. At any point before the issuance of the final order, the respondent may agree to enter into a negotiated disposition (settlement) with the ethics board.

The reason that many ethics laws require both a notice of reasonable cause and a subsequent formal petition, if the reasonable cause is sustained, lies in the desire to afford officials every possible opportunity to rebut accusations of unethical conduct.[17] The notice of reasonable cause should always be confidential, even from the complainant, lest the official suffer significant damage to his or her career as a result of an unfounded accusation. If, however, the official's response to that notice does not convince the board that no basis for the accusation exists, then the petition should probably be public, to reassure the complainant and the public that the matter is being handled fairly and expeditiously.

As with legal advice, so, too, with enforcement matters, confidentiality of all non-public documents and proceedings remains a paramount concern. Nothing can destroy the reputation of an ethics board quicker than a breach of confidentiality, even an inadvertent one. A leak from an ethics board constitutes a serious violation of the ethics code and grounds for removal of the offending individuals from office or employment.

Many smaller municipalities will not be able to employ, even pro bono, a prosecutor to conduct or supervise the investigation and prosecute the case, or outside counsel to advise the board and draft the final order. However, a prosecutor and a separate counsel can facilitate the enforcement process, ameliorate the burden that enforcement can impose on ethics board members, and avoid any appearances of unfairness that may arise when the board itself acts as both prosecutor and adjudicator. Indeed, once the board has sustained probable cause and issued a petition, a wall should be erected between the investigator/prosecutor and the board, and *ex parte* communications between them should cease.

The foregoing process and procedures for enforcement of the ethics law should be set forth in that law and the duly adopted rules of the ethics board.

Conclusion

This three-part series of articles has sought to lay out the underpinnings and content of an effective municipal ethics law. Such a law, as discussed in the first article, rests upon three pillars: a clear and comprehensive code of ethics; a sensible disclosure system; and effective administration, including ethics training and education, legal advice, regulation of disclosure, and enforcement by an independent ethics board. The absence of any of these pillars will ultimately topple the entire ethics system. Thus, the immutable rule for creating an ethics system is this: Do it right or don't do it at all.

With that caveat in mind, however, the enactment of a first-rate ethics law and the establishment of a first-rate ethics board requires nothing more than good faith and hard work. In the end, the result should prove more than worth the effort.

Endnotes

1. 1986 Op. N.Y. Att'y Gen. 100 (Informal Op. No. 86-44), relying upon Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, towns, and villages). *See* Mun. Home Rule Law §§ 2(8) (defining "local government"), 10(1)(i), 10(1)(ii)(a)(1).
2. N.Y.C. Charter § 2602(b).
3. Pub. Off. Law §§ 84-90 (Freedom of Information Law) and §§ 100-111 (Open Meetings Law).
4. Chicago Municipal Code § 2-156-145.
5. *See generally* Joel Rogers, *Communicating Ethics to Municipal Employees*, NYSBA/MLRC MUNICIPAL LAWYER, Winter 2005, at 12 (*available* on the Section's website http://www.nysba.org/municipal, in Municipal Lawyer Ethics Columns under Ethics for Municipal Lawyers).
6. *See, e.g.*, Exec. Law § 94(15); N.Y.C. Charter § 2603(c)(3). *See generally* Steven G. Leventhal & Susan Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?* NYSBA/MLRC MUNICIPAL LAWYER, Spring 2004, at 22 (*available* on the Section's website at http://www.nysba.org/municipal, in Municipal Lawyer Ethics Columns under Ethics for Municipal Lawyers).
7. N.Y.C. Charter § 2604(e).
8. Waivers, and indeed the adoption of municipal ethics laws generally, are discussed at greater length by Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 of Patricia E. Salkin & Barbara F. Smith, ETHICS IN GOVERNMENT—THE PUBLIC TRUST: A TWO-WAY STREET (NYSBA 2002).
9. 1987 N.Y. Laws ch. 813, § 26(c).
10. Gen. Mun. Law § 813(18). Note that the Committee on Open Government does not agree with this conclusion. *See* Op. Comm. on Open Gov't, Jan. 3, 1997.
11. Gen. Mun. Law § 813(18)(a)(1). *See also* Op. Comm. on Open Gov't, July 18, 1995, and Jan. 3, 1997. The same result would obtain under FOIL. See Pub. Off. Law §§ 86(4) and 87(2), discussed in the foregoing opinions of the Committee on Open Government.
12. Pub. Off. Law §§ 86(4), 87(2).
13. *See, e.g.*, 53 RCNY § 1-10 (setting a six-year retention period for annual disclosure reports filed with New York City's ethics board) and the Statement of Basis and Purpose in the Notice of Adoption of that rule.
14. *See* N.Y.C. Charter § 2603(h)(3) (so providing in the case of members and staff of the New York City Council). Note, however, that the provision has not yet been employed because thus far Council members and staff prosecuted by the City's ethics board have entered into settlements with the Board, resulting in recommendations by the Board that no further action by the Council be taken.
15. 1993 Op. N.Y. Att'y Gen. 1022 (Informal Op. No. 93-14), relying upon Mun. Home Rule Law § 10(4)(b). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, towns, and villages). *See* Mun. Home Rule Law §§ 2(8) (defining "local government"), 10(4)(b).
16. 1991 Op. N.Y. Att'y Gen. 1135 (Informal Op. No. 91-68), relying on Mun. Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)(1). Note: This opinion does not apply to municipalities that are not local governments (counties, cities, town, and villages). *See* Mun. Home Rule Law §§ 2(8), 10(1)(i), and 10(1)(ii)(a)(1).
17. *See, e.g.*, Gen. Mun. Law § 813(12); N.Y.C. Charter § 2603(h); Exec. Law § 94(12) (state officials).

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