Elephants, Ethics and Enigmas: Municipal Government Ethics and Anti-Corruption Programs in the United States

By Carla Miller



It was six men of Hindustan to learning much inclined, Who went to see the Elephant (though all of them were blind), That each by observation might satisfy his mind.[1]

The Hindu fable of *The Blind Men and the Elephant* became well known with the poem of John Godfrey Saxe in 1873. The story has many versions in cultures across the world, but essentially describes several blind men who each touch different parts of an elephant to discover the animal's characteristics. One feels the tail and thinks an elephant is like a rope; one feels a tusk and thinks an elephant is like a spear, and so on. They all think they know the truth of whole when, in fact, they have only experienced a part. The fable underscores the need to have the "complete picture" to ensure success in the endeavor.

As noted by one commentator, scholarly interest in the area of government ethics has increased significantly in the last several years.[2] There has also been a corresponding increase in practitioners, mainly government attorneys, implementing and expanding government ethics programs in the United States. Ethics, compliance, and oversight programs are typically created piecemeal, usually during (or right after) a crisis involving political corruption. Unfortunately, there can be a lack of comprehensive planning in implementing these programs. At best, this can be a result of limited budgetary resources; at worst, it is an effort to calm the public with ethics reforms that are illusory.

This article explores the following areas: definitional challenges; elements of ethics programs across the United States; and illustrative examples of the ethics programs from various sizes of U.S. cities.

Definitional Challenges

Some of the terms that need to be clarified in the context of government ethics are: ethics, conflicts, corruption, law, codes of conduct, ethics codes, and ethics commissions.

In order to develop a code of ethics for the American Society for Public Administration, Montgomery Van Wart elaborated on the definitions for "ethics," "morals," "legality," "codes of ethics," and "codes of conduct."[3] Based on training sessions conducted with thousands of public officials and employees, the author's experience is that these groups are confused about basic concepts and words routinely used in ethics programs. For example, most cannot clearly distinguish between the concepts of law and ethics. An elected official who discusses an "ethics program" may understand this to mean that there should be more laws to govern certain behavior, whereas a human resources specialist may think the same phrase means a program for teaching ethical decision-making. Employees, on the other hand, often become resentful that they have to participate in an ethics program because they believe that "ethics" is a matter to be dealt with by their families or their church. Elected officials will also discuss how an action fits within the law as the sole inquiry as to the appropriateness of their behavior, eliminating the analysis of how the action impacts the public trust.

Mark Davies, Executive Director of the New York City Conflict of Interest Board, distinguishes between conflict of interest laws and ethics as follows:

> ... a conflicts of interest system does not regulate morality. Often conflicts of interest laws are referred to as ethics laws, but that is a misnomer. In most countries, so-called ethics regulations are not really about ethics at all, in the sense of right and wrong, good and evil, moral and immoral. Rather, as noted above, they are about the reality and perception of divided loyalty, of conflicts, primarily financial conflicts, between one's private interests and public duties.[4]

As a result of such reasoning, the

public ethics body in New York City is called the "The Conflicts of Interest Board" to avoid confusion between the two concepts.

Elements of Ethics Programs

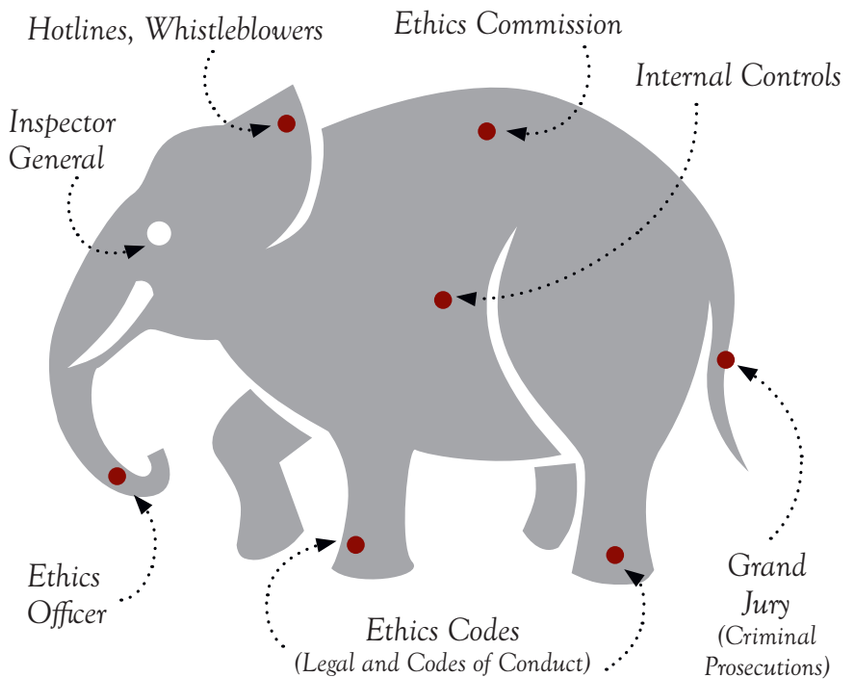
Municipalities adopt combinations of various elements in structuring an "ethics program." If a municipality states that it has an ethics program, it can mean one or more of the following elements, as illustrated by our fabled elephant.

Ethics Codes. Numerous cities in the U.S. have implemented ethics codes. This is often accomplished by adapting the code used by another city in the same state (e.g., the Tampa, Florida Code[5]) or by recourse to a model code. For example, the website for City Ethics has a Model Code that can be utilized by cities.[6] The author's review of codes shows either a rule-oriented model with enforceable conflict of interest provisions, a values-oriented aspirational code of conduct, or a combination of the two.

As stated by Van Wart, "the blurring of the systems of ideals, norms, and actions is inevitable."[7] He notes that codes become scrambled, with provisions on self-dealing (conflict of interest, nepotism, gifts, and use of public resources), being mixed with privacy provisions, whistleblower laws, and financial regulations. Some codes are purely aspirational, with no clear guidance or rules on behavior, or penalties for violations. Others argue for what has been referred to as a "low-road" approach to ethics regulations, limiting rules solely to conflicts of interest and avoiding a values-based approach:

> A high-road approach is not possible because of the number and kind of participants in public policy; simply put, if they were pursuing a philosophic life, they would not be engaged in public policy, and public policy participants cannot be required to learn to be ethical in any higher fashion.[8]

As a practitioner, the author would advocate the exploration and development of a combination approach, models described by Menzel and Lewis in the "fusion model."[9] The City Ethics Model Code referred to previously takes this approach.



Designated Officers. Philadelphia was one of the first cities in America to establish the position of an integrity officer, an internal position answerable directly to the mayor. (Recently, the City's Integrity Officer launched a new website.[10]) Following this example, Jacksonville, Florida passed an ordinance in 1999 requiring its mayor to appoint an ethics officer, to be responsible for all ethics activities for the City, including training, compliance, and coordination of a "departmental ethics officer" system in every department of the city.[11] Other cities that currently have ethics or integrity officers include Miami-Dade, Florida; Tampa, Florida; Atlanta, Georgia; Detroit, Michigan; Austin, Texas; San Antonio, Texas, and others. These positions, staffed by attorneys, are generally considered to be preventative in nature, with an emphasis on education and advice. Some ethics officers, such as the one in Atlanta, Georgia,[12] are appointed by independent ethics board and have enforcement duties, as well.

Office of Inspector-General. Some ethics offices work in coordination with an office of the inspector general, as is the case in Miami-Dade County and Jacksonville, Florida.[13] The inspector general addresses cases that may violate criminal statutes, a jurisdiction that may overlap that of an ethics commission or board, which considers the same conduct in the context of non-criminal ethics code violations. For example, the mission statement of the Miami-Dade County Office of the Inspector General reads it is:

> ...to detect, investigate and, where possible, prevent fraud, waste, mismanagement and abuse of power in County projects, programs or contracts. Our ultimate goal is to

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prevent misconduct and abuse and seek appropriate remedies to recover public monies. Above all, the OIG's principal objective is to promote ethics, honesty and efficiency in government, and to restore and promote the public's trust in government. In the final analysis, we must ensure taxpayers get a fair and honest accounting of their money.[14]

The result is that, in some cases, a single action by a public official can initiate action by several responsive agencies: an inspector general (for fraud and abuse of power), an ethics commission (for conflict of interest violations), and a prosecutor's office (for criminal violations).

Hotlines and Whistleblower Protection. As a result of the Enron crisis, corporate America now operates under federal laws and guidelines requiring the use of telephone hotlines, and protection of whistleblowers. Examples of this new approach include the federal law passed in 2002, commonly referred to as Sarbanes Oxley,[15] and the Federal Sentencing Guidelines.[16] Local governments have historically implemented "fraud alert" phone lines to auditor's offices, but some ethics offices now also have confidential "ethics hotlines" that facilitate the reporting of conflict of interest cases and political corruption. Some of these lines are outsourced to companies that also handle corporate hotlines, but others are handled internally by the municipal staff.

Ethics Commissions and Boards. There are hundreds of ethics boards and commissions across the country. Commissions are set up to provide ethics advice and to hear complaints of violations of local ethics codes. They have widely divergent duties and enforcement mechanisms. These bodies are typically volunteer citizen boards that may or may not have a government budget or staff. For example, the Ethics Commission of the City of Jacksonville, Florida, has no allocated budget, but can rely on the staff assigned to the City's general counsel's office and the ethics officer for assistance in accomplishing its duties. In contrast, Miami-Dade's Ethics Commission is funded with a budget of $2.2 million and has 17 staff.[17]

Internal Controls. Programs for anti-corruption efforts and avoidance of conflicts of interest can also be tucked away into various other departments of local governments — for example, as part of the auditor's office (and reflecting an accounting viewpoint), or within a human resources department (and tending towards a values-based ethics approach).

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Another fruitful area for oversight activities is any department that handles procurement or contract activities. Ethics provisions (conflicts of interest, gifts, and nepotism) can be found in civil service and employee manuals, and can be administered by the personnel/ human resources departments, or through the legal department of a local government.

Whenever there is a codification of ethics and conflict laws, it flows from the legal department. It does appear from initial research that larger cities tend to have dedicated ethics departments and do not rely upon other internal departments to develop and implement their ethics programs.

Grand Jury/Prosecution. If a municipality fails to implement a structure to handle essential advice, education, and monitoring controls for the development of ethical cultures and the avoidance of corruption, the end result could be that questionable actions go to the local prosecutors to look at as potential criminal cases. If the case doesn't meet the evidentiary standards for criminal charges, the underlying acts may go "unpunished." This tends to decrease the public trust; thus, the establishment of an ethics system with the authority to issue minor fines and letters of reprimand can be useful in resolving such issues and establishing closure for citizens.

Examples of Ethics Programs

In studying the Pennsylvania State Ethics Commission, one writer described state commissions as the "street level enforcers of ethics."[18] Actually, municipalities, rather than states, are closer to the "street level" in formulating ethics programs and enforcement mechanisms. If the 50 state commissions have numerous differences in structure and enforcement, one can only imagine the myriad forms that thousands of municipalities have adopted to implement their ethics programs.

In order to examine a wide cross-section of American cities for types of ethics programs, the 200 top cities by population were sorted into four quadrants. Cities in each quadrant were selected for an analysis of ethics program components and training needs. The director of each of the programs was personally interviewed by the author. Numerous aspects of these cities' ethics programs were studied and tabulated, and additional reports will be issued in the future. The initial inquiry was what type of structure (that is, what parts of our "ethics elephant") had been implemented in that municipality as to ethics and to ascertain their training needs. Due to space constraints, only one representative city in each of the quadrants is addressed in this article.

Quadrant A (Cities by population, group 1-50)—New York, N.Y. (Population: 8,391,881; rank: 1/200 cities). Research shows that the largest cities in the United States have evolved intricate, expensive structures for the administration of ethics programs. The key question is how this impacts on the ethical culture of the government and, ultimately, the public trust.

New York City has implemented one of the most sophisticated ethics programs in the United States.[19] In fact, with over 300,000 municipal employees in 70 agencies, New York's city government is larger than the entire government of many countries. The ethics program, The Conflicts of Interest Board, is a separate city division with a staff of 20 and a budget of $1,882,779 (FY 2009). Their activities cover enforcement of the

City conflict of interest codes, ethics advice, monitoring the City's financial disclosure system, and training (which includes publications and newsletters). The first Ethics Advisory Board in New York was legislated into place in 1959, and now, the City has all the elements of an ethics program, including a dedicated ethics staff, an Inspector General, a helpline phone, and internal controls. They train on not only the legal codes, but on values-based ethics concepts.

The top three areas of concern for training are (i) misuse of City resources; (ii) misuse of one's City office, and (iii) inappropriate superior/subordinate relationships.

Quadrant B (Cities by population, group 51-100)—New Orleans, Louisiana. (Population: 311,853; rank: 59/200 cities). New Orleans implemented its ethics code in 2007 and hired an Inspector General, who administers an anonymous hotline for the reporting of violations.[20] In 2009, the first Ethics Counsel for the newly formed Ethics Review Board was hired. Training is done by the State Ethics Commission, not the local Board. The history of the ethics structure is interesting. This is an excerpt from the program's website (emphasis added by the author):

> In 1996, *citizens* of New Orleans voted *to amend the Home Rule Charter* to mandate the Council to establish by ordinance an Ethics Review Board. Under that ordinance the Board is empowered to issue advisory opinions, promulgate rules ... retain counsel and impose fines. The inspector general and the Ethics Review Board worked to secure a ... budget in the amount of *$3.4 million*.[21]

As many can recall, Hurricane Katrina flooded New Orleans in August of 2005, and this had a devastating impact on the local economy and infrastructure. It is interesting to note that after Katrina and the influx of federal money, the implementation of the decade-old initiative on ethics was accelerated.

The main areas of interest for training in New Orleans are: (i) gift laws of the state; (ii) contract and financial relationships of employees and officials; and (iii) nepotism issues.

Quadrant C (Cities by population, group 101-149—Boise, Idaho. (Population: 205,314; rank: 100/200 cities). Boise created an Ethics Commission in 2005 that works with the City's Legal and Human Resource Departments.[22] This Commission was the first in the State of Idaho. Ethics training is conducted and advisory opinions issued to employees, officials and the public. Interestingly, there is no State ethics commission in Idaho, and as a result, the conflict of interest laws are local only. The City does have an anonymous ethics hotline that has been outsourced to a professional hotline company. Although training is not mandatory under the City's Code, constant training sessions are offered for all employees, which address law and values, with exercises in ethical decision-making and creating an ethical culture. The newly-elected mayor was credited for pushing the implementation of the new ethics code and program.

The three top topics for training are (i) transparency and appearance issues; (ii) abuse of position; and (iii) misuse of City property.

Overall, in this quadrant there are many variations of programs. For example, one city has focused on the creation of an ethical culture, advocated from the "top down" by the mayor; one city relies upon a state system with a heavy legal emphasis; and a third city has its inspector general acting, in many respects, as its ethics officer.

Quadrant D (Cities by population, group 150-200)—Sioux Falls, South Dakota. (Population: 154,997; rank: 150/200 cities). The local ethics law for Sioux Falls was created in the City Charter in 1995. There is no State ethics commission in South Dakota, so the local laws are the only ones that apply to officials and employees. The Ethics Commission in Sioux Falls has an advisory function only, with no enforcement duties, The system for handling ethics complaints against City Council members is different from that for handling complaints against employees. The Ethics Board meets as needed, and is coordinated by the City General Counsel's office. The City does not have an Inspector General, but does have a hotline for the filing of complaints. Although ethics training is not required, the General Counsel conducts training on ethics law.

The top topics for training are (i) conflicts of interest and (ii) gift and entertainment issues.

Research shows that, overall, for cities in this quadrant, State law and State ethics commissions have a significant role in the local ethics programs. Sometimes, ethics training is required by the State; sometimes, it is required locally; most often, it is put together by the local General Counsel's office and is heavily based on conflicts of interest laws.

Conclusion

Ethics programs are emerging throughout the United States. Some are tightly controlled by existing state law, while other cities create their own unique programs. Cities of essentially the same size can have extremely divergent approaches in their ethics structures. Ethics programs are mainly dependent on lawyers and general counsel offices, and training places a heavy emphasis on the study of conflict of interest laws. Effective ethics programs, tailored to the needs of the community, enhance public trust. Programs that are poorly defined and implemented are a disservice to the public. Ethics programs should be created that are not just "for show," but to improve the municipality's ethical climate.

Notes

1. Saxe, John Godfrey. "The Blind Men and the Elephant." The Poems of John Godfrey Saxe (Highgate Edition) Boston: Houghton, Mifflin and Company, 1881.
2. Menzel, Donald C., *Research on Ethics and Integrity in Governance*, Pub. Integrity 7, no.2:147-168 (2005).
3. **Ethics:** "Ethics is derived from the Greek term *ethos*, which refers to character and conduct. Ethics is generally defined as the study of moral judgment and the practice of high standards of conduct. Its strongest roots lie in

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philosophy." **Morals:** "Derived from the Latin term *moralis* which refers to manners or customs; making or being capable of making, distinctions between right and wrong conduct at the individual level." **Legality:** "derived from the Greek term, *legein*, which means to collect, and the Old English term *lag*, which refers to something laid down and settled." It has an emphasis on authority and preciseness, its strongest roots are with politics/rule-making and jurisprudence. **Codes of Ethics:** "[G]enerally articulates aspirational principles, such as forthrightness." Codes of Conduct: "[G]enerally asserts aspiration values or sets minimum expectation values." Van Wart, Montgomery, Codes of Ethics as Living Documents, Public Integrity 5, no. 4:331-346 (2003) (hereinafter "Van Wart").

4. Davies, Mark, *A Practical Approach to Establishing and Maintaining a Values Based Conflicts of Interest Compliance System*, Remarks for a session entitled *Rules and Tools for Managing Conflicts of Interest Issues*, The Global Forum on Fighting Corruption, Brasilia, June 7-10, 2005.

5. Tampa, FL, Ethics Code, art. VIII (2003) at http://www.tampagov.net/dept_human_resources/files/City_of_Tampa_Ethics_Code.pdf (last accessed Aug. 13, 2010).

6. CityEthics.Org, *Draft Model Municipal Ethics Code* (2006) at http://www.cityethics.org/content/model-code-introduction (last accessed Aug. 13, 2010).

7. Van Wart, *supra* note 3 at 334.

8. Swain, John W. and Duke, Matthew L., *Recommendations for Research on Ethics in Public Policy from a Public Administration Perspective: Barking Dogs and More*, Int'l J. Pub. Admin. 24, no.1:125-136 (2001).

9. Menzel, Donald C., Ethics Management for Public Administrators (New York, M.E. Sharpe, 2007); Lewis, C.W. & S.C. Gilman, The Ethics Challenge in Public Service: A Problem Solving Guide (2d ed. San Francisco 2005 Jossey-Bass).

10. City of Philadelphia, *IntegrityWorks*, *The place to learn why and how the City operates ethically*, at http://www.phila.gov/integrityworks/index.html (last accessed Nov. 10, 2010).

11. Jacksonville, FL, Ethics Code, ch. 602, § 602.1101 to 1104 (1999).

12. City of Atlanta, *Ethics Office Website* at http://www.atlantaga.gov/government/boards/ethics_ethicsofficer.aspx (last accessed Nov. 10, 2010).

13. *See, e.g.*, Miami-Dade, Miami-Dade Inspector General website at http://www.miamidadeig.org (last accessed Aug. 13, 2010).

14. *Id.*

15. The Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), set standards for all U.S. public companies and accounting firms. It includes penalties for interfering with whistleblowers.

16. United States Sentencing Commission, Federal Sentencing Guidelines, Guidelines Manual, §3E1.1 (Nov. 2005), at http://www.ussc.gov/orgguide.htm (last accessed Aug. 13, 2010). Section 8B2.1, Guide to Effective Compliance and Ethics Programs, requires an organization under section 5C: "to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance...without fear of retaliation." *Id.* at 479.

17. Miami-Dade Commission on Ethics and Public Trust, *2009 Annual Report*, at 6 (staff and budget). *See* http://www.miamidadeethics.com/Publications/annual2009.pdf (last accessed Aug. 13, 2010).

18. Bradbury, Mark D., *Toward a Cost-Effectiveness Assessment of State Ethics Commission: An Analysis of Enforcement Outputs*, Pub. Integrity 9, no.4:333-347 (2007).

19. For more information about the City of New York's Conflict of Interest Board, see http://www.nyc.gov/html/conflicts/html/home/home.shtml (last accessed August 13, 2010).

20. For more information about the City of New Orleans' Ethics Review Board, see http://nolaethics.org/main/inside.php?page=mission (last accessed Aug. 13, 2010).

21. Ethics Review Board, *New Orleans: History of the Ethics Review Board*, at http://nolaethics.org/main/inside.php?page=mission (last accessed Nov. 10, 2010).

22. For more information about the City of Boise's Ethics Commission, see http://www.cityofboise.org/CityGovernment/EthicsCommission (last accessed Aug. 13, 2010). **ML**

Inside Canada

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2(b) and 7 *Charter* challenges to what are now s. 210 and s. 213(1)(c)) of the *Criminal Code*. There, the Court found that the communicating offence represented a prima facie infringement of s. 2(b), but upheld the provision as a reasonable limit on expression under s. 1; further, both provisions clearly infringed the right to liberty under s. 7, but found that the infringement was in accordance with the principles of fundamental justice.

Counsel for the applicants in *Bedford*, York University professor Alan Young, noted that several municipalities collect business license fees from massage and escort businesses despite the "general understanding" that the businesses sell sexual services. The ruling eliminates the possibility that the localities are themselves "living off the avails." Asked for comment, Valerie Scott pointed to a future of sex workers as positive municipal citizens: "We would like to tell residents and business owners: Don't be afraid. We are not aliens. Sex workers across the country ... want to work with municipalities and to be good citizens running good businesses." **ML**

Ordinances

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every grievance its source in their spoken word.

IMLA took the opportunity to submit an *amicus* brief in response to the district court's language, and we urge you to do the same if you notice similar actions by judges in your jurisdiction.

Notes

1. 547 U.S. 410 (2006)
2. *Jackler v. Byrne*, 708 F.Supp.2d 319 (S.D.N.Y. 2010).
3. *Garcetti* at 421.
4. *Jackler* at 324 n.5 (S.D.N.Y. 2010).
5. Milkovich v. Lorain Journal Co., 497 U.S. 1 11 (1990) (citing L. Eldredge, Law of Defamation 5 (1978).
6. *Id.* at 13 (citing 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956).
7. *Milkovich* at 13-14 (emphasis added).

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