

Ethics Commissions

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Introduction

Government ethics rules have expanded exponentially, to the point where an entire ethics establishment exists just to enact, interpret and explain the rules. Although the post-Watergate / Vietnam explosion of ethics rules has produced benefits for some parts of society – chiefly journalists, interest groups, ethics consultants, and political operatives – studies have not revealed an increase in public confidence. In fact, faith in government and corporate America has never been lower.[1]

"Judge not according to the appearance, but judge righteous judgment."[2]

Ethics Defined

Ethics is generally regarded as a code of standards defining what is considered good behavior. A common definition found in many dictionaries is as follows:

1. the discipline dealing with what is good and bad and with moral duty and obligation a set of moral principles or values.
2. a theory or system of moral values.
3. the principles of conduct governing an individual or a group (or profession).
4. a guiding philosophy.[3]

Others may view ethics as a matter of conscience, common sense, or community sensibilities.

"Light is the only thing that can sweeten our political atmosphere and open to view the innermost chambers of government."[4]

Legal v. Ethical

Municipal lawyers must often distinguish for themselves, and their clients, whether an issue involves questions of law, or questions of ethics. Some attorneys limit their advice to matters dealing solely with constitutional mandates, statutory provisions or case law. Other attorneys perceive their scope of services to include ethical and political counseling. In Texas, some of the more frequently invoked legal prohibitions are as follows:

Conflicts of Interest

The Texas Local Government Code prohibits a local public official from knowingly participating in a vote or decision on a matter involving a business entity in which the official has a substantial interest if it is reasonably foreseeable that an action on the matter would confer an economic benefit on the business entity.[5]

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[1] Peter W. Morgan and Glenn H. Reynolds, The Appearance of Impropriety: How the Ethics Wars have Undermined American Government, Business, & Society, (New York: The Free Press, 1997) at 1.
[2] John 1:24.
[3] Merriam-Webster Dictionary.
[4] Woodrow Wilson, *Committee or Cabinet Government?*, 3 Overland Monthly 17-33 (Jan. 1884).
[5] See John Mixon et al., Texas Municipal Zoning Law § 11.907 (3d ed. 1999).

Conflicts on Plats
A member of the municipal authority responsible for approving plats has a substantial interest in a subdivided tract, the member must file an affidavit stating the nature and extent of the interest and abstain from further participation in the matter.[6]

Abuse of Official Capacity
Under the Texas Penal Code, a public servant commits the offense of Abuse of Official Capacity if, with intent to obtain a benefit or with intent to harm or defraud another, the servant intentionally or knowingly: (1) violates a law relating to the public servant's office or employment; or (2) misuses government property, services, personnel in the servant's custody by virtue of such office or employment.[7]

Statutes also provide for offenses such as bribery, nepotism, theft, neglect or misconduct. Beyond these common regulations, local ethics codes are typically designed to fill-in the gaps. As a municipality's legal advisor, one should be cautious in letting the client know what type of advise one is dispensing (legal, ethical, political, etc.). Attorneys must also be aware of instances in which the municipality's interests and those of individual municipal officers may diverge.

"If we're being elected to look good, I'd rather not be there." [8]

Covered Persons
Most Texas statutes apply to elected officials, county officials and state officers. Municipal codes of ethics may be broader. Individuals typically covered by local rules include:

1. Elected Officials
2. Staff (full-time or part-time employees)
3. Citizen Advisory Boards
4. Professional Consultants
5. Relatives

"What's the use you learning to do right, when it's troublesome to do right and ain't no trouble to do wrong, and the wages are just the same?" [9]

Topics
These are areas that are most often regulated because these are the types of activities that most often yield misconduct:

1. Financial Conflicts
2. Disclosure
3. Improper Use of Position
4. Incompatible Employment (*Revolving Door*)

[6] Tex. Loc. Gov't Code § 212.017.
[7] Tex. Pen. Code § 39.02.
[8] San Antonio Express News, quoting former San Antonio Councilman Enrique Martin, Saturday, February 1, 2003.
[9] Mark Twain, The Adventures of Huckleberry Finn.

5. Political Activity
6. Public Information
7. Public Property
8. Nepotism
9. Gifts-Honoraria
10. Procurement
11.

"I never did a thing in all my life, virtuous or otherwise, that I didn't repent of in twenty-four hours."[10]

Sanctions

The consequences that are imposed for ethical violations depend on whether the Code aspirational or punitive. The range of options may include:

1. No penalty
2. Public reprimand (admonition, censure)
3. Forfeiture of Office (removal)
4. Disciplinary Action
5. Termination
6. Civil Penalties
7. Criminal Fines (misdemeanor, felony)
8. Action Voided[11]

"Truth is the most valuable thing we have. Let us economize it."[12]

Administration

While the types of ethical rules and corresponding penalties are somewhat common, the means of administering codes of ethics are varied. Perhaps the most controversial issue to be addressed in local ethics programs is how the rules will be implemented. Key questions are:

1. Who will enforce the code?
2. Who is the appointing authority?
3. Who will receive and process complaints?
4. How will complaints be investigated?
5. When will ethical training opportunities be provided (training for drafters, administrators, and the regulated persons)?
6. What level of staff or expert support will be available?
7. What will the funding allocation be?
8. To what extent will the process be public?
9. Who will determine if a violation has occurred?
10. What sanction(s) will be assessed?
11. Will legal counsel be provided for the accused, and if so, at the expense of whom?

[10] Mark Twain, The Facts Concerning the Recent Carnival of Crime in Connecticut.
[11] Ethics Handbook for Michigan Local Governments, The Michigan Municipal League.
[12] Mark Twain, Pudd'nhead Wilson's New Calendar.

12. Are there limitations on *ex parte* communications with the decision-makers?

"Always do right. This will gratify some people, and astonish the rest."[13]

Basis for Authority
Before enacting a code of ethics, municipal officials should be certain as to the legal basis and scope of authority for regulating ethical conduct. Common sources to review are:

1. Charter
2. Statute
3. Constitution(s)

When evaluating these materials, be on the look-out for any limitations on municipal authority (eg., the 1st Amendment) or areas in which the state or federal government has preempted your power to regulate a topic.

"Get your facts first… then you can distort 'em as much as you please."[14]

Information
A governmental body that seeks to withhold certain information from the public at-large may not selectively disclose that information to particular members of the public.[15] However, this prohibition against selective disclosure does not apply to the intra-agency transfer of information to members of the governing body or certain members of particular types of citizen advisory boards.[16]

Municipal lawyers are advised to carefully establish the precise nature of your relationship with volunteer advisory board members, as well as the protocol for distributing otherwise confidential or privileged information to these board members.

We get our morals from books. I didn't get mine from books, but I know that morals do come from books – theoretically, at least.[17]

Ethics Commissions
Key issues to keep in mind when creating or reviewing ethics commissions:

- ***Purpose*** (why is the board being formed)
- ***Documentation*** (ordinance, resolution, executive order home-rule charter)
- ***Membership*** (qualifications, appointment, removal)
- ***Authority & Duties*** (goals, tasks, voting, timelines)

[13] Mark Twain, "To the Young People's Society, Greenpoint Presbyterian Church, Brooklyn.
[14] Mark Twain, quoted by Rudyard Kipling in from Sea to Shining Sea.
[15] See Tex. Gov't Code Ann. § 552.007(b).
[16] See Tex. Att'y Gen. ORD-666 (2000).
[17] Mark Twain, "Remarks from the Opening of the Mark Twain Library."

- ***Products*** (legislation, regulations, policies, procedures, contracts)
- ***Group Dynamics*** (interactions)
- ***Administrative Support*** (funding, education, staff assistance, advisors)
- ***Liability*** (state laws, ordinances, risk coverage)

Conclusion

When it comes to individual behavior, what do you tell your clients when the law does not provide an answer? I am not necessarily advocating the adoption or strengthening local Codes of Ethics. Instead, I am urging those who are going through this process to deliberate carefully regarding the issues raised in this paper. IMLA has outstanding reference materials on this topic, including the model ethics ordinance and a guide to regulating ethics for Michigan municipalities.

"All associations are dangerous to good Government …and associations of Lawyers the most dangerous of any next to the Military." [18]

[18] Cadwallader Colden , a 17th Century Irish-born American politician.