

## Ethics in Government at the Local Level

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### I. BUILDING GOVERNMENT ACCOUNTABILITY

Efforts to foster ethics in government<sup>1</sup> should begin at the local,<sup>2</sup> rather than the state or national,<sup>3</sup> level. City officials and employees

<sup>1</sup> Ethics are “the rules that translate characteristic ideals or ethos into everyday practice.” Susan Corby, *The Ethics of Equal Opportunities*, in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM 35, 36 (Richard A. Chapman ed., 2000) (quoting the Organization for Economic Co-operation and Development after it looked at public service cross-nationally). “Ethics in public service is about the practical application of moral standards in government.” Robert A. Chapman, *Ethics in Public Service for the New Millennium*, in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM, *supra*, at 217, 218. “[I]n the public sector, ethics embraces the values that public officers bring to the exercise of power and responsibility.” Harry W. Reynolds, Jr., *Preface*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 9 (1995).

<sup>2</sup> This Article focuses on cities as the basic unit of local government. However, in many respects, the same principles for good government would apply to other local government units, such as counties, townships, and villages. *But see* Helen W. Gunnarsson, *Ethics Overkill?*, 92 ILL. B.J. 288, 288 (2004) (discussing problems with imposing stringent ethics regulations on small governmental entities and quoting a source as stating that “many units of local government, such as mosquito abatement districts and library boards, are very small” and “there’s just no reasonable basis for a three-member body’s creation of an ethics commission or appointment of an ethics officer”).

<sup>3</sup> Many ethics laws have been enacted at the federal and state levels. *See* THE BETTER GOVERNMENT ASSOCIATION, THE BGA INTEGRITY INDEX 1–2 (2002), [http://www.bettergov.org/pdfs/IntegrityIndex\\_10.22.02.pdf](http://www.bettergov.org/pdfs/IntegrityIndex_10.22.02.pdf) (ranking state laws dealing with conflicts of interest, gifts, and other ethics issues); UNITED STATES OFFICE

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make a broad range of decisions that affect the welfare of citizens in many ways. Those actions—relating, for example, to licensing, zoning, contracting, hiring, and basic municipal services<sup>4</sup>—determine to a large extent whether, on an everyday basis, people have equal access to the benefits and opportunities that government provides.

Officials who begin their careers in local government often progress to other positions in state or national settings.<sup>5</sup> If proper values<sup>6</sup> and ethical practices have been ingrained in those officials when they first serve in local government, there is reason to hope that the same high standards and practices may follow them when their careers move to a broader stage.<sup>7</sup> However, if officials start their careers un-

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OF GOVERNMENT ETHICS, COMPILATION OF FEDERAL ETHICS LAWS (2004), [http://www.usoge.gov/pages/laws\\_regs\\_fedreg\\_stats/comp\\_fed\\_ethics\\_laws.pdf](http://www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf) (reproducing texts). Some ethics laws are so complex as to be virtually unreadable. *See, e.g.*, 18 U.S.C. § 208 (2000) (imposing restrictions on participation in matters involving a potential employer). However, one occasionally finds a clear statement of ethics principles. *See* 5 C.F.R. § 2635.101(b) (2005) (articulating general principles applicable to federal executive branch employees).

<sup>4</sup> For example, the City of San Antonio's website lists more than one hundred categories of services that the city provides to residents, ranging from adult basic education, alarm permits, and arson investigation to waste collection, youth recreation, and zoning. Services on the San Antonio Community Portal, <http://www.sanantonio.gov/services.asp?res=1024&ver=true> (last visited Feb. 11, 2006).

<sup>5</sup> *See, e.g.*, Erin P. Billings, *Hill Mourns Matsui's Passing*, ROLL CALL, Jan. 4, 2005, available at 2005 WLNR 89937 (discussing a Congressman who had previously served on the Sacramento City Council); Ellen Gedalius, *Commissioners Cast Eyes Toward 2006: 5 Could Run for Office, Undoing Board Harmony*, TAMPA TRIB., Feb. 21, 2005, at 1, available at 2005 WLNR 13850599 (discussing speculation that two county commissioners would run for seats in Congress); Mark Simon, *Senate and Assembly Primaries: Democrats Duel in March to Control November*, SAN. FRAN. CHRON., Feb. 29, 2004, at D3, available at 2004 WLNR 7626261 (discussing several candidates for the legislature who had served in local government as supervisors or members of city councils or school boards); Dennis J. Willard, *Ohio House Election is Battle: Slaby-Williams Clash in Summit is Rare. Area Races Incumbent-Heavy*, AKRON BEACON J., Oct. 17, 2004, at B1, available at 2004 WLNR 18788911 (discussing state re-election bids involving three legislators who had previously served in city government, one on the Cuyahoga Falls City Council, another on the Akron City Council, and a third on the Kent City Council).

<sup>6</sup> In contrast to the nonpublic arena, “[p]ublic sector values emphasize . . . avoiding conflict of interest, discharging one’s responsibilities fairly and impartially, shunning private gain in the course of discharging public tasks, and promoting the public interest.” Reynolds, *supra* note 1, at 9.

<sup>7</sup> *See* Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 397 (1990–91) (discussing formation of moral habits and arguing that virtues “are something you learn and perfect as you grow, more than they are something you choose”). *Cf.* Colin Campbell, *Democratic Accountability and Models of Governance: Purchaser/Provider, Owner/Trustee*, in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM, *supra* note 1, at 141, 141 (“A culture which does not bring officials along gradually in the exercise of discretion can expect a high incidence of opportunistic entrepreneurship from pub-

der circumstances which tolerate unethical conduct, it will be difficult or impossible to change bad practices when those persons move to less immediate settings for public service.<sup>8</sup>

Focusing on city government ethics may also be the best way to build public support for high standards of conduct at all levels of government.<sup>9</sup> If the public comes to expect (and demand) fair treatment and ethical conduct from city officials and employees—the governmental actors who affect their lives most frequently and directly—they are more likely to have high expectations (and demands) for those who hold the reins of power in state and national arenas.<sup>10</sup>

This Article offers a distinctly American perspective<sup>11</sup> on legal regulation of ethics in government at the local level.<sup>12</sup> The Article reflects a number of important assumptions that are widely embraced today<sup>13</sup> in the United States, but sometimes not broadly subscribed to

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lic servants who encounter greater discretionary power than that for which their training prepared them.”); *id.* at 142 (“Officials who have learned to engage their moral agency in ambiguous situations will be more likely to summon the internal and institutional resources required for them to behave responsibly when confronted with issues of ethical import.”).

<sup>8</sup> *But see* Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1757 (1998) (discussing how, when reason enters moral life, the “rational reform of habit follows”).

<sup>9</sup> This idea is in some respects similar to the “bottom-up” approach of building democratic institutions abroad. *See* THOMAS CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA* 64 (1996) (stating that the “prospects for the internalization of new norms in a parliament appear to be greater when those norms are introduced through the bottom-up approach” of providing assistance to organizations and groups within a country, rather than directly to the foreign parliament for training, equipment, etc.).

<sup>10</sup> Of course, even if public servants take high standards with them from the local to state or national level, the public may not hold them in high regard. “The paradox of distance explains that while people trust and even revere those government officials who are near at hand, they believe that government officials who are far away are lazy, incompetent, and probably dishonest.” H. George Frederickson & David G. Frederickson, *Public Perceptions of Ethics in Government*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 167 (1995).

<sup>11</sup> There are other approaches to ethics in government. *See* Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 187 (1995) [hereinafter Davies, *Myths*] (briefly discussing the “German system of life tenure and high pay for government officials in return for stringent ethical standards”).

<sup>12</sup> This Article assumes that local government is generally distinct from state or national government. That is not always true in other countries. *See* CHENGLIN LIU, *CHINESE LAW ON SARS* 45 (2004) (discussing the unitary centralized system in China, which emphasizes subordination of the local government to the Central Government).

<sup>13</sup> One author divides the history of ethics in American government into five distinct phases, described as government by: the righteous (1620–1790); the gentry (1790–1828); the humble (1828–64); the meritorious (1865–1945); and the experts

in other countries<sup>14</sup>—which may mean that American ethics standards are not readily exportable.<sup>15</sup> Two of those assumptions bear noting. The first assumption is that all persons—rich and poor, male and female, majority and minority, young and old, educated and illiterate, native and immigrant—should be treated equally by the government, and that no person should enjoy an advantage because he or she has

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(1945–present). Hubert G. Locke, *Ethics in American Government: A Look Backward*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 15–21 (1995). He observes that “[p]rinciples held sacred in one period gave rise to excesses that engendered the reactions and reforms that ushered in the era that followed.” *Id.* at 23.

<sup>14</sup> See, e.g., Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 720–21 (1999) [hereinafter Johnson, *America’s Preoccupation*] (discussing the Chinese concept of “guanxi,” “the use of special connections and privileged relationships for the purpose of gaining an advantage or accomplishing results,” which has been said to “pervade every aspect of Chinese culture”).

<sup>15</sup> Romania, a country with one of the worst public corruption problems in Europe, is a case in point. The Constitution of Romania broadly endorses principles of equality. Article 4 states that “Romania is the common and indivisible homeland of all of its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.” CONSTITUTIA ROMÂNIEI art. 4(2). Article 16 proclaims that “Citizens are equal before the law and public authorities, without any privilege or discrimination.” *Id.* art. 16(1). These provisions can be read as committing Romania to the same ideals of equal treatment that animate American concerns about ethics in government. However, the United States is a country with a history and traditions very different from Romania. In particular, American society has long been individualistic, affluent, and highly mobile, and it now enjoys the benefit of mature, well-established governmental and professional institutions. Romania has only recently emerged from the yoke of communism, prosperity is yet to be fully achieved, and mobility (both geographic and social) is less pervasive in Romania than in the United States. Moreover, Romanian governmental and professional institutions are still young and developing. There is reason to question whether the type of government ethics regulations that are appropriate today in the United States could also work in Romania at this point in Romanian history. Furthermore, codified rules can play only a limited role in assuring high ethical standards; beyond that, much depends upon the character and integrity of the persons who hold government positions. Yet, when the European Union, international organizations, and foreign businesses urge Romania to improve accountability and transparency in government, they may be thinking of the type of legal regulations that are now found in the United States and other developed countries. See generally TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2005, (2005) [http://www.transparency.org/publications/gcr/download\\_gcr/download\\_gcr\\_2005](http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2005). The Transparency International Country Report for Romania indicates that Romania ranks 87 out of 146 countries in the Corruption Perceptions Index. *Id.* at 196. That is the lowest ranking in Europe, except for Albania and Serbia & Montenegro. *Id.* at 235. The report states that there are “gaping legal and administrative flaws in the Romanian public integrity system.” *Id.* at 198. The United States, tied with Belgium and Ireland, ranked 17th on the Corruption Perceptions index. *Id.* at 235.

a special relationship to those who exercise governmental power.<sup>16</sup> In colloquial terms, Americans believe that everyone should stand before the government on “equal footing.”<sup>17</sup> This expectation is now deeply held by Americans, but the view was probably not so common in earlier times.<sup>18</sup>

At the time of the American revolution, “bribery, favoritism, and corruption in a great variety of forms were rampant not only in [British] politics, but at all levels of society.”<sup>19</sup> At least some of those pernicious practices were alive in the colonies in North America as well. George Washington, long universally revered for his high standards of conduct, is said to have “joined a group of ten investors, most members of the Virginia Council or House of Burgesses, who used their influence as insiders to purchase forty thousand acres of swamp-land that they proposed to drain and develop.”<sup>20</sup> Nepotism by public officials was also once widely practiced. As historian Stacy Schiff has written, “[t]he founding of America was very much a family affair. [John] Jay’s private secretary in Spain was his . . . brother-in-law; Jefferson invited a distant relative as his clerk when he sailed to Paris in 1784.”<sup>21</sup> Washington urged incoming President John Adams to promote his son, John Quincy, within the diplomatic corps.<sup>22</sup> In certain

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<sup>16</sup> Cf. SAN ANTONIO, TEX., CODE OF ETHICS § 2-41 (2006) [hereinafter SAN ANTONIO ETHICS CODE], available at <http://www.ci.sat.tx.us/atty/ethics/codetext.htm>. Section 2-41 states:

It is essential in a democratic system that the public have confidence in the integrity, independence, and impartiality of those who act on their behalf in government. Such confidence depends not only on the conduct of those who exercise official power, but on the availability of aid or redress to all persons on equal terms and on the accessibility and dissemination of information relating to the conduct of public affairs.

*Id.*

<sup>17</sup> See generally Johnson, *America’s Preoccupation*, *supra* note 14, at 725–33 (discussing ethical rules applicable to lawyers, judges, and public officials which seek to promote equal treatment of all persons whose interests are affected by the exercise of governmental power).

<sup>18</sup> See DENNIS F. THOMPSON, *RESTORING RESPONSIBILITY: ETHICS IN GOVERNMENT, BUSINESS, AND HEALTHCARE* 1 (2005) (“Conduct that was widely ignored in previous eras (petty graft, nepotism, payola, drunkenness, and physical violence in Congress) would be grounds for prosecution today.”).

<sup>19</sup> DAVID McCULLOUGH, 1776, at 9 (2005).

<sup>20</sup> JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 54 (2004) (stating that the story illustrates Washington’s willingness to “use political connections in Williamsburg to get what he wanted”).

<sup>21</sup> STACY SCHIFF, *A GREAT IMPROVISATION: FRANKLIN, FRANCE, AND THE BIRTH OF AMERICA* 342 (2005).

<sup>22</sup> DAVID McCULLOUGH, *JOHN ADAMS* 476 (2001) (stating that “before leaving of office [Washington] had written an unsolicited letter expressing the ‘strong hope’ that as President, Adams would not withhold ‘merited promotion’ from John Quincy.”)

cases, favoritism for family members may have promoted the interests of good government. While representing America in France, Benjamin Franklin made his grandson, William Temple Franklin, his personal secretary<sup>23</sup> and eventually secured for him an official appointment with the diplomatic mission.<sup>24</sup> “Temple’s service solved two of Franklin’s most pressing problems. There was at least one member of the Passy household on whose loyalty he could unequivocally rely. And the apprenticeship allowed Franklin to streamline his operation.”<sup>25</sup> More recently, one American president concluded that it was in the public interest to name his brother as attorney general<sup>26</sup> and another president appointed his wife to head healthcare reform.<sup>27</sup>

Regardless of what the standards for conduct in public life once were, they have become ever more demanding.<sup>28</sup> Practices that previously went unnoticed are now subject to objection. Today, even

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whom Washington regarded as “the most valuable public character we have abroad”).

<sup>23</sup> See SCHIFF, *supra* note 21, at 91–92 (discussing Temple’s service as Franklin’s personal secretary).

<sup>24</sup> See *id.* at 344 (discussing Temple’s appointment as secretary to the American commissioners in Paris—at Franklin’s instigation, with Jay’s consent, and to Adams’ disgust).

<sup>25</sup> *Id.* at 92.

<sup>26</sup> See CLARK CLIFFORD & RICHARD HOLBROOKE, COUNSEL TO THE PRESIDENT: A MEMOIR 335–38 (1991) (discussing President Kennedy’s appointment of his brother, Robert Kennedy, to head the Justice Department); Richard P. Wulwick & Frank Macchiarola, *Congressional Interference with the President’s Power to Appoint*, 24 STETSON L. REV. 625, 631 (1995) (stating that “many incorrectly believe that the Federal Anti-Nepotism statute was enacted in response to” the appointment of Robert Kennedy as Attorney General).

<sup>27</sup> See Carl David Wasserman, Note, *Firing the First Lady: The Role and Accountability of the Presidential Spouse*, 48 VAND. L. REV. 1215, 1219 (1995) (“President Clinton quickly appointed his wife to head the President’s Task Force on National Health Care Reform . . . , a body formed to prepare health care reform legislation to be submitted to Congress within the first 100 days of the Clinton Administration.”). See also *Ass’n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898, 916 (D.C. Cir. 1993) (holding that the task force was not required to hold public meetings because it was “a committee composed wholly of full-time government officials,” including Hillary Clinton).

<sup>28</sup> See Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 281 (1991–92) (“For twenty years or more, extraordinary public attention has been focused upon the ethics of government officials. . . . [T]he years are marked by the promulgation of new and tightened codes often accompanied by new machinery for administration and enforcement.”). But see Adam Cohen, Editorial, *‘The Shame’ That Lincoln Steffens Found Has Not Left Our Country*, N.Y. TIMES, Apr. 11, 2004, § 4, at 10, available at 2004 WLNR 5501526 (discussing the one hundredth anniversary of the muckraking book, *The Shame of Cities*, which condemned public corruption and still sounds a “rallying cry that resonates today”).

those in high government positions are commonly called to account for allegedly unethical conduct.<sup>29</sup>

The current prevailing view that no one should enjoy an advantage based on special connections to those in office is a result of powerful streams of social development.<sup>30</sup> First, the twentieth century in America was in large measure a search for equal opportunity.<sup>31</sup> Over the course of that century, there were great efforts in the United States to reduce the barriers to opportunity caused by poverty, to improve the status and treatment of minorities and women, to protect consumers from abusive business practices, and to welcome immigrants to the mainstream of American prosperity.<sup>32</sup> It would be surprising if a country so dedicated to civil rights and social fairness were not also committed to ethical principles that attempt to ensure that all persons have a fair chance to benefit from the services and opportunities that government offers. If Americans fall short in their quests for social equality or for ethics in government, it is not because the primacy of those ideals is doubted.

The second key assumption animating American debates about ethics in government is that law is a proper tool for ensuring good

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<sup>29</sup> The most egregious cases of allegedly unethical conduct often result in criminal prosecutions. *E.g.*, John M. Broder, *Representative Quits, Pleading Guilty in Graft*, N.Y. TIMES, Nov. 29, 2005, at A1, available at 2005 WLNR 19186909 (discussing a California congressman who resigned after taking \$2.4 million in bribes “to help friends and campaign contributors win military contracts”); Jodi Wilgoren, *Trial Shows Ex-Governor in 2 Lights*, N.Y. TIMES, Sept. 29, 2005, at A14, available at 2005 WLNR 15333758 (discussing a prosecution that capped a seven-year investigation that “netted 73 convictions of state officials, political operatives and business leaders”); *see also* Mark Brown, *Ryan Seems Cool, Confident as he Gets his Day in Court*, CHI. SUN TIMES, Sept. 20, 2005, at 2, available at 2005 WLNR 16884965 (stating that in a public corruption trial the former governor of Illinois was charged with “steering state contracts and leases . . . [to friends] while he and his family members allegedly received illegal cash payments, gifts and services in return”).

<sup>30</sup> *See* Johnson, *America's Preoccupation*, *supra* note 14, at 734–35 (“[T]he current visibility of governmental ethics issues may be an outgrowth of two of the most significant developments in American society during the twentieth century—the search for social equality . . . and the transformation of professional ethical standards into enforceable rules of law . . .”).

<sup>31</sup> The search often culminated in the passage of new legislation which ameliorated social problems or disparities in wealth or power. *See, e.g.*, Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2001h (2000)); Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e to e-17 (2000); Fair Housing Act, 42 U.S.C. §§ 3601–31 (2000); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2000); Social Security Act, 42 U.S.C. §§ 301–1397 (2000); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

<sup>32</sup> *See* Johnson, *America's Preoccupation*, *supra* note 14, at 735–50 (discussing the search for social equality).



conduct.<sup>33</sup> This is not surprising, for America is a legally oriented culture that prefers for social problems to be addressed by the adoption and enforcement of laws.<sup>34</sup> “Many Americans today expect that . . . law *can, should, and will be used* to ensure that a level playing field in public life exists by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government.”<sup>35</sup> Americans in general,<sup>36</sup> and the American media in particular,<sup>37</sup> today<sup>38</sup> strongly support the enactment of ethical standards and the enforcement of those norms, not only by special review boards, but also, when necessary, by an independent judiciary.<sup>39</sup> American judges themselves are

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<sup>33</sup> Cf. Editorial, *The Duke Shames the Capitol*, N.Y. TIMES, Nov. 30, 2005, at A30, available at 2005 WLNR 19252273 (calling for Congress to legislate credit controls over the dealings between lobbyists and members of Congress and repair “an ethics process that now stands as a scandal unto itself”); Vincent R. Johnson, Editorial, *Lobbying of Officials Undermines Confidence in City Government*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 1998, at 5B (calling for rules to regulate “big-time” city lobbyists).

<sup>34</sup> See Johnson, *America’s Preoccupation*, *supra* note 14, at 752–53 (discussing statutory solutions).

<sup>35</sup> See *id.* at 724. “Governments at both the federal and state levels have responded to public demands for new rules to limit campaign contributions, require disclosure of financial interests, restrict the gifts officials may accept, and regulate the types of jobs they may take after they leave office.” THOMPSON, *supra* note 18, at 2.

<sup>36</sup> Cf. Locke, *supra* note 13, at 23 (“[I]n the past several decades, a welter of attempts to enact ethical norms into law have been passed by state legislatures and city councils . . .”).

<sup>37</sup> See THOMPSON, *supra* note 18, at 2 (stating that in recent years “the media have been more aggressive [in covering ethics charges] for good and for ill”); Warren Francke, *The Evolving Watchdog: The Media’s Role in Government Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 109, 110 (1995) (“[M]ass media’s influence on the ethics of public life is assumed to be significant.”); Johnson, *America’s Preoccupation*, *supra* note 14, at 751 (“News reports about the shortcomings of public officials inevitably call for higher ethical standards and stronger enforcement of those norms.”). See also Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595, 595–96 (2005) (“Democracy . . . generally connotes a governmental structure that is continually monitored by an unabashed media industry.”). Bloggers are also beginning to play a role in prompting calls for ethics in government. See Editorial, *New Rules in Yonkers*, N.Y. TIMES, Oct. 9, 2005, § 14WC, at 15, available at 2005 WLNR 16360959 (opining that an “acid-tongued bloggers’ battling average in exposing hidden outrages” was not particularly high but should not be dismissed “out of hand”).

<sup>38</sup> A half century ago there was less interest in having mandatory ethics rules that could be enforced. See, e.g., Fritz Morstein Marx, *Ethics in Local Government*, 41 NAT’L MUN. REV. 438, 440 (1952) (“[A] ‘code’ of official morality should seek to inform individual judgment and thus strengthen it, rather than insist on unflinching obedience to a thousand special rules.”).

<sup>39</sup> See Patricia E. Salkin, *Summary of 2000 Ethics Issues in Land Use*, SG021 ALI-ABA 199, 212 (2001) (“Ethics allegations continue to be made liberally in courts across the country.”).

heavily regulated by ethical standards that endeavor to ensure that special relationships and favoritism play as small a role as possible in court decisions.<sup>40</sup>

The idea that law should be used to promote ethics in government is neither new nor uniquely American. The centuries-old Constitution of the United States contains provisions addressing conflicts of interest<sup>41</sup> and other countries respond to ethical crises by passing new laws.<sup>42</sup> What is distinctive about the current American mindset is the expectation in many quarters that law should address issues relating to ethics in public life at all levels and in a comprehensive fashion.<sup>43</sup>

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<sup>40</sup> See generally MODEL CODE OF JUDICIAL CONDUCT (2004); Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, The First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 314–15 (2003) (discussing the evolution of judicial ethics and restrictions on campaign speech); Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1028 (2002) [hereinafter Johnson, *Ethical Foundations*] (“The independence of the American judiciary depends heavily on the ethical standards that prevent or mitigate harm to the exercise of judicial judgment by inappropriate pressures flowing from activities or relationships involving persons outside the court.”); Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH. L. REV. 811, 814 (1998) (“The [ethical] standards differentiating permissible forms of [judicial] political activity from those which are forbidden are finely drawn . . . .”); Judge Michael E. Keasler, *Ethical Issues in Judicial Campaigns*, 35 ST. MARY'S L.J. 991, 992 (2004) (“Under the leadership of Chief Justice William Taft and with the aid of Dean Pound of Harvard Law School, the American Bar Association (ABA) Canons of Judicial Ethics were promulgated in 1924.”).

<sup>41</sup> See John D. Feerick, *Ethics, Lawyers, and the Public Sector: A Historical Overview*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 1, 2 (Patricia E. Salkin ed., 1999) [hereinafter Feerick, *Historical Overview*] (opining that “[o]ne cannot read the debates at the Constitutional Convention of 1787 and the state ratifying conventions without concluding that the Framers were concerned about the potential for the abuse of power” and stating that sections six and nine of article I “[p]lainly . . . illustrate that the Framers recognized the potential for conflicts of interest in a democratic government and the necessity for provisions to protect government integrity”); *id.* at 3 (“Threshold requirements for integrity in public office were adopted by the First Congress in the creation of the United States Treasury.”).

<sup>42</sup> See Rodney Brooke, *Corruption in Local Government—Some Ethical Issues of the Last Twenty-Five Years*, in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM, *supra* note 1, at 9, 19 (discussing Great Britain).

<sup>43</sup> For example, consider the detail with which the conduct of American legislators is regulated in comparison with the rules governing their counterparts in Great Britain. The ethics manual for members of Congress runs more than 200 pages. See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 943–88 (5th ed. 2000) (discussing Congressional rules of ethics and prosecutions); ETHICS MANUAL FOR MEMBERS, OFFICERS, AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES (1992) (324 pages). The British House of Commons, up to recent times, has had few “rules governing conflicts of interest” and has “preferred to believe that its members could be trusted

Government ethics codes are a relatively new innovation.<sup>44</sup> Many Americans would be surprised, if not dismayed, to learn that in many cities the ethics rules are not a clear and coherent document, but either non-existent<sup>45</sup> or a tangle of disparate provisions that often lack coherent themes<sup>46</sup> or have serious omissions.<sup>47</sup> “Few [municipalities] have enacted a code of ethics that provides a simple and comprehensive list of ‘do’s and don’t’s’ for their officers and employees,”<sup>48</sup> let

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to behave honourably.” Michael Hunt, *Parliament and Ethical Behaviour*, in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM, *supra* note 1, at 23, 27.

<sup>44</sup> See Mark W. Huddleston & Joseph C. Sands, *Enforcing Administrative Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 142 (1995) (noting that “only 4 state codes predate 1973” and that the “mid-1970s and beyond were particularly fecund years for ethics activities because of heightened sensitivity to these issues in the wake of the Watergate scandal”); Marx, *supra* note 38, at 440 (indicating that prior to 1951 no body had ever been organized in Arlington County, Virginia, to “delve into the subject of public ethics”).

<sup>45</sup> See Anthony Ramirez, *Metro Briefing Connecticut: Hartford: Report Criticizes City Governments*, N.Y. TIMES, Apr. 27, 2005, at B6, available at 2005 WLNR 6559359 (“Connecticut Common Cause, a government watchdog group[,] . . . found that 69 of the state’s 169 cities and towns had no ethics codes on the books, and that existing codes were vague.”). Ethics rules passed at the state level are sometimes inapplicable to cities that are smaller than a certain size. See, e.g., John D. Feerick et al., *Municipal Ethical Standards: The Need for a New Approach*, 10 PACE L. REV. 107, 108 (1990) (indicating that a 1987 law passed by the New York state legislature was inapplicable to more than ninety-five percent of the state’s municipalities that had populations of less than 50,000 persons). See also Editorial, *Sheriff Ralph Lopez Shows Bad Judgment*, SAN ANTONIO EXPRESS-NEWS, Dec. 22, 2005, at 6B (“State law gives county sheriffs complete control over awarding commissary contracts, . . . [but] no ethics policy is in place [for Bexar County, Texas] governing how officials interact with contract vendors.”).

<sup>46</sup> See Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT’L & COMP. L. 319, 324 (1988) (“Ethics laws in this country have proceeded not from a comprehensive view of the rights and duties of public officials but largely in reaction to specific scandals . . . .”); Huddleston & Sands, *supra* note 44, at 141 (noting that some “jurisdictions that profess to have codes [of ethics] have a jumble of discrete legal and administrative instruments, with little if any overarching structure”).

<sup>47</sup> See Editorial, *Putting Yonkers on the Level*, N.Y. TIMES, Feb. 6, 2005, § 14WC, at 13 available at 2005 WLNR 1655826 (stating that during a recent four-year span, New York’s fourth largest city “awarded millions of dollars in contracts . . . to top city officials who run outside businesses, or to their relatives—a problem that existing ethics rules do not even address”); Stacey Stowe, *Back-Burner Issues Too Hot to Handle*, N.Y. TIMES, June 19, 2005, § 14CN, at 1, available at 2005 WLNR 9695900 (discussing Connecticut’s failure to pass a “bill [that] would have required municipalities to adhere to provisions of the state’s ethics code”). See also Editorial, *New Jersey’s Cinderella Governor*, N.Y. TIMES, Nov. 17, 2004, at A28, available at 2004 WLNR 9858976 (referring to the challenges posed by “New Jersey’s porous code of ethics”).

<sup>48</sup> Mark Davies, *Article 18 of New York’s General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALB. L. REV. 1321, 1340 (1996) [hereinafter Davies, *Conflicts*] (“As a result, municipal officials lack guidance as to what they may and may not do, and consequently too often fall prey to accusations by self-proclaimed

alone a more precise document stating obligations susceptible to legal enforcement. Published scholarship has also tended to overlook how ethical standards for public servants can be implemented by cities.<sup>49</sup> For these reasons, and because of the overriding importance of high standards of conduct at the local government level, it is appropriate to consider in detail what types of rules should be part of a city ethics code and how those rules should be enforced.<sup>50</sup>

There are limits on what an ethics code can do to assure the observance of high standards of conduct.<sup>51</sup> Among those limits are the inability of language to define precisely all ethical obligations in a potentially vast range of factual settings, the difficulty of integrating moral principles with the type of mandatory standards found in codes, and the political compromises in the code-adoption process that often weaken codified ethical regulations.<sup>52</sup> Nevertheless, a well-

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ethics 'experts' of unspecified 'unethical' conduct."). *See also* Deborah L. Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 VT. L. REV. 579, 592 (1992) ("Vermont statutory law provides few clear standards for the conduct of local government officials."); *id.* at 595 (discussing "the paucity of municipal codes of ethics in Vermont"); William L. Steude, *Reflections on Ethics in the Public Sector*, PUB. CORP. L.Q., Winter 2001, at 1, available at <http://www.michbar.org/publiccorp/pdfs/winter01.pdf> (discussing a report which found Michigan's ethics laws "narrow and piecemeal, and deficient in having no clearly defined, comprehensive conflict of interest standards").

<sup>49</sup> "[T]he professional literature on governmental ethics tends to come from the field of public administration . . . and is directed primarily toward bureaucratic ethics, as opposed to the ethics of elected officials." Max J. Skidmore, *Ethics and Public Service*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 27 (1995). "Until quite recently, most academic work on administrative ethics has been rather densely scholastic, marked . . . by sweeping philosophical speculation and abstract moral reasoning." Huddleston & Sands, *supra* note 44, at 140 ("Scholarly articles explaining in clear terms how to run an ethical organization have been scarce . . .").

<sup>50</sup> *See generally* INSTITUTE FOR LOCAL SELF GOVERNMENT, DEVELOPING A LOCAL AGENCY ETHICS CODE: A PROCESS-ORIENTED GUIDE (JoAnne Speers ed., 2003), <http://www.ilsg.org> (follow "Publications" hyperlink; then follow "Developing a Local Agency Ethics Code: A Process-Oriented Guide" hyperlink) (discussing issues in the adoption and implementation process). A Model Ordinance on Ethics has been published by the International Municipal Lawyers Association. *See* International Municipal Lawyers Association, [www.imla.org](http://www.imla.org) (last visited Feb. 12, 2006).

<sup>51</sup> Gerald S. Reamey, Editorial, *Ethics Code Not Hollow Words*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 1998, at 5B ("[E]ven highly skilled wordsmiths and astute students of political anthropology fail to anticipate every possible way in which creatively unscrupulous people can slide around and through the most tightly knit law.").

<sup>52</sup> *See* Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 40-46 (2000) (describing limitations of ethics codes). *See also* Markowitz, *supra* note 48, at 598 ("[C]odes of ethics are not generally designed to address ethical implications of governmental policy and processes because they involve systemic difficulties which would require radical change in our notions of government accountability.").

drafted ethics code can reflect the best aspirations of a society<sup>53</sup> and bring to the transaction of public business an important measure of consistency, predictability, and fairness. The work of the public in any city of more than minor size is carried out by dozens, hundreds, or even thousands of persons. Some are elected, some appointed, some employed. Even if those individuals are all persons of good character,<sup>54</sup> the failure to provide clear guidance as to what standards of conduct must be observed with respect to such issues as conflict of interest, use of city property, acceptance of gifts, and other important matters will invite confusion, varying practices, and the appearance of impropriety—all of which are harmful to good government.

Part II of this Article discusses the key rules that should govern the conduct of current city officials and employees. Part III addresses the standards that should apply to city officials and employees who have left government service. Part IV considers how disclosure requirements imposed on current city officials and employees or persons doing business with the city can facilitate enforcement of ethics rules. Part V deals with enforcement mechanisms, including the considerations relevant to constituting an ethics review board, adjudicating allegations of unethical conduct, and imposing sanctions. Part VI explores the role of ethics education in assuring high standards of conduct in public life, and in particular considers the functions of periodic training and issuance of formal ethics opinions. Part VII concludes that city ethics codes, though expensive and burdensome to write and enforce, can make a valuable contribution to public life by ensuring fairness to individual citizens, creating a climate conducive to business, and strengthening democratic institutions. The Appendix to this Article contains selected ethics code provisions illustrating how the concepts discussed in the text may be embodied in legal rules.

## II. CURRENT CITY OFFICIALS AND EMPLOYEES

To be effective, a city ethics code must have a broad reach. Its terms must apply not only to elected public officials, but to all public employees and citizen-volunteers (e.g., appointed members of boards

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<sup>53</sup> See Reamey, *supra* note 51 (stating that if a city “better expresses ‘what is right’ and makes clear that ‘right’ counts,” adopting an ethics code is worth the effort.).

<sup>54</sup> Character plays an important role in insuring high standards of conduct in government and other fields of endeavor. However, one professor of public administration has written that “[v]iable notions of character-driven ethics in the public sector . . . have largely been on hold during the past generation . . . .” Harry W. Reynolds, Jr., *Educating Public Administrators about Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 134 (1995).

and commissions) who exercise the power of government.<sup>55</sup> Thus, if a code is written as imposing obligations on “city officials” and “city employees,” it is essential that those terms be carefully defined in the code to encompass the full array of governmental actors without limitation.<sup>56</sup>

“[O]utright dishonesty has become only one minor aspect of the ethical problems facing those in government service . . . [because most] ethical dilemmas raise the more subtle questions of conflict of interest, self-dealing, and preferential treatment.”<sup>57</sup> To address these various problems, five types of rules relating to current city officials and employees are essential components of an effective local government ethics code. Those provisions deal with: (1) improper economic benefit; (2) unfair advancement of private interests; (3) gifts; (4) representation of private interests; and (5) conflicting outside employment. As the list suggests, “[g]overnment ethics laws do not regulate ethics per se but rather, as a general rule, regulate financial conflicts of interest, that is conflicts between a public official’s [or another person’s] private financial interests and public responsibilities.”<sup>58</sup> Rules addressing the five named topics and related provisions are discussed in the following sections. Provisions governing these types of issues must always be crafted to prevent not only actual impropriety, but also the appearance of impropriety, in governmental affairs.<sup>59</sup>

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<sup>55</sup> “[I]n many municipalities, unpaid officials, such as members of planning and zoning boards, wield the greatest power.” Davies, *Conflicts*, *supra* note 48, at 1324–25. See also Markowitz, *supra* note 48, at 581 (“Vermont’s local boards consist primarily of lay people who volunteer their time.”).

<sup>56</sup> For example, the term “city official” might be defined as including “the mayor, [other specified elected or appointed persons], and [m]embers of all boards, commissions . . . , committees, and other bodies created by the [c]ity . . . .” See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(u) (containing more detailed definition). “City employee” might be defined as “any person listed on the [city] payroll as an employee, whether part-time or full-time.” See *id.* § 2-42(o) (containing more detailed definition).

<sup>57</sup> Markowitz, *supra* note 48, at 581.

<sup>58</sup> Davies, *Conflicts*, *supra* note 48, at 1322.

<sup>59</sup> Cf. *People v. Gnass*, 125 Cal. Rptr. 2d 225, 237 (Ct. App. 2002) (stating, in connection with a criminal prosecution, that “our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. . . . They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer’s undivided and uncompromised allegiance. . . . Their objective “is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official’s decision . . . .”); Cox, *supra* note 28, at 291 (“Unless used with care, the term ‘appearance standard’ is misleading. In part, the term is a euphemism sparing those who violate the principle the full opprobrium heaped upon one who consciously takes a

A. *Improper Economic Benefit*

A rule prohibiting the representatives of government from deriving improper economic benefit from their official conduct is the heart of any government ethics code.<sup>60</sup> Officials and employees should be prohibited from taking any official action that would affect their personal financial interests in a manner distinguishable from the action's effect on members of the public in general.<sup>61</sup> For purposes of stating this prohibition, the term "official action" should be defined to include affirmative acts within the scope of (or in violation of) the official or employee's duties, as well as failure to act when there is a duty to act.<sup>62</sup>

In cases where the city official or employee's personal economic interests would be affected, the city official or employee should be required to step aside and allow another representative of government to make a disinterested decision on the matter in question.<sup>63</sup> To ensure that the substitution of an unbiased decision-maker is effective, the disqualified city official or employee should be required

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bribe. But the case is not simply one of deceptive appearances condemning one who appears to do wrong when in fact he is innocent.”).

<sup>60</sup> Cf. Feerick, *Historical Overview*, *supra* note 41, at 1 (“Theodore Roosevelt noted that “[t]he first requisite on the citizen who wishes to share the work of public life . . . is that he shall act disinterestedly and with a sincere purpose to serve the whole commonwealth.”); Broder, *supra* note 29, at A1 (quoting U.S. attorney Carol C. Lam as stating that the worst thing an elected official can do is enrich himself through his position).

<sup>61</sup> See *infra* note 254 and accompanying text. One recent Pennsylvania case raised an issue relating to what might be called the differential-impact requirement. In *Kraine v. Pennsylvania State Ethics Commission*, 805 A.2d 677 (Pa. Commw. Ct. 2002), a state ethics law provided that there was no conflict of interest,

[if the official action in question affected] to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

*Id.* at 681. Because the defendant county controller's husband “received the same payment as all other members of his occupation for performing autopsies,” there was no preferential treatment and her signature on checks to her husband did not violate the ethics rules. *Id.* at 682.

<sup>62</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(v) (similar provision).

<sup>63</sup> An ethics code might even require a city official or employee to arrange his or her affairs (e.g., investments) so as to minimize the need for recusal. However, city ethics codes generally have not taken that course, presumably because the duty could be onerous and difficult to enforce. *But see* 5 C.F.R. § 2635.101(b)(2) (2004) (stating as a general principle that federal executive branch employees “shall not hold financial interests that conflict with the conscientious performance of duty”); CODE OF JUDICIAL CONDUCT, Canon 4(D)(4) (2004) (providing that a “judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified”).

to refrain from any further participation in the matter.<sup>64</sup> This is sometimes referred to as “recusal.” The disqualified or “recused” individual should be required to refrain from participating in any discussion about the matter with any city officials or employees who will make the decision or provide advice relevant thereto.<sup>65</sup> In order to ensure procedural fairness, the recused official or employee should also not attend any meeting at which the matter is discussed by other decision-makers, for the individual’s presence may intimidate or bias the others.<sup>66</sup>

To enable neutral third persons to scrutinize whether the terms of the rule against improper economic benefit are being observed, the disqualified city official or employee should be required to file a written statement that is available to the public and the press as an official city document.<sup>67</sup> The statement should disclose the nature of the relationship that prohibits the official or employee from acting on the matter in question. This formal disclosure of the “conflict of interest”<sup>68</sup> will help to ensure that city officials and employees act with an appropriate level of seriousness in observing the recusal provisions of the ethics code. The statement will also enable third persons to evaluate whether the prohibition against improper economic benefit, and related recusal provisions, are being, or have been, properly observed.

To be optimally effective, a rule against improper economic benefit must be drafted broadly.<sup>69</sup> It must prohibit official action that

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<sup>64</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(b)(1) (discussing recusal).

<sup>65</sup> Similarly exacting standards are followed in other areas of the law. See James P. Hill, *Scaling the “Chinese Wall”: Rethinking the Conflict of Interest Regulations of the Clean Water Act*, 74 MICH. B.J. 910, 911 (1995) (“The EPA consistently invokes the ‘Chinese wall’ approach . . . that requires individuals with . . . [a] conflict of interest to be fully insulated from all . . . decision-making, and insists that it be strictly and vigorously enforced.”).

<sup>66</sup> Cf. Markowitz, *supra* note 48, at 603–04 (asserting that, to ensure procedural fairness, it is “the ethical responsibility of municipal officials . . . to conduct proceedings and to fulfill their other duties with openness and objectivity and to treat all that come before them equally”).

<sup>67</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(b)(2) & (4) (discussing disclosure).

<sup>68</sup> “A conflict of interest develops when [an] official has a second interest which appears to be, or actually is, incompatible with the faithful performance of his or her official duty.” See Debra S. Weisberg, Note, *Eliminating Corruption in Local Government: The Local Government Ethics Law*, 17 SETON HALL LEGIS. J. 303, 304 (1993).

<sup>69</sup> See Cox, *supra* note 28, at 287 (“We speak of public office as a ‘public trust’ because the same principle lies behind the fiduciary obligations of all private trustees. The trustee has undertaken to act for the benefit of others; therefore, he must avoid *any situation* that would or might cause trust decisions to be influenced by anything other than the welfare of the beneficiaries. Because public officials have undertaken



affects not only the personal economic interests of the official or employee, but also the economic interests of persons or entities closely connected to the official or employee. This group would presumably include: close relatives;<sup>70</sup> other household members (or domestic partners); outside employers (either of the city official or employee or of persons closely connected to the city official or employee); businesses in which the city official or employee (or a closely connected person) owns an interest; and non-profit entities for which the city official or employee serves in an officer, director, or other high-level policy making position.<sup>71</sup>

It is easy to envision that a city official or employee might misuse official power to further chances of lucrative business opportunities or subsequent employment in the private sector. The rule against improper economic benefit should therefore also prohibit official action that would benefit the interests of a person or business entity from which the city official or employee (or a closely connected person) has recently sought or received an offer of an employment or other business relationship.<sup>72</sup>

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to act for the common good, they too must exclude conflicting concerns.” (emphasis added)).

<sup>70</sup> See generally Christopher R. McFadden, Comment, *Integrity, Accountability, and Efficiency: Using Disclosure to Fight the Appearance of Nepotism in School Board Contracting*, 94 NW. U. L. REV. 657, 658 (2000) (discussing the problems created by appointment of relatives and asserting that “[t]he appearance of impropriety—even when none exists in fact—can weaken the public’s confidence in its government”).

<sup>71</sup> See generally SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(a) (specifying a list of persons or entities considered closely connected to the official or employee). A New York model ethics law contains a provision that would expand the list of persons with respect to whose economic interests a city official or employee would not be permitted to take official action to include substantial campaign contributors. See Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61, 69 (1993) [hereinafter Davies, *Model Local Ethics Law*] (“[An] officer or employee shall not use his or her official position . . . in a manner which . . . may result in a personal financial benefit for . . . (f) a person from whom the officer or employee has received election campaign contributions of more than \$1000 in the aggregate during the past twelve months.”). Such a rule would be good ethics and bad politics. Presumably, this type of provision will be difficult to enact into law. Cf. Editorial, *Tom Suozzi’s Friends*, N.Y. TIMES, Nov. 7, 2004, § 14LI, at 23, available at 2004 WLNR 6563623 (urging support for a bill to forbid county officials from soliciting political donations from companies doing business with the county).

<sup>72</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(a)(9) (stating rule). Similar provisions are found in federal law. See 18 U.S.C. § 208(a) (2000) (providing, with limited exceptions, that certain federal officers and employees may not act on a matter affecting the financial interests of a person with whom the officer or employee is “negotiating or has any arrangement concerning prospective employment”).

A model rule against improper economic benefit, reflecting the concerns discussed in this section, is set forth in Part A-1 of this Article's Appendix.

*B. Unfair Advancement of Private Interests*

The rule against improper economic benefit (discussed above) reaches the most egregious cases of misuse of public authority for private benefit. Undoubtedly, it is useful to state those prohibitions in the clearest terms (by explicitly banning a city official or employee, for example, from taking official action that will economically benefit a close family member). However, the underlying ethical principle is broader than the specific cases addressed by the improper economic benefit rule. A city official should be prohibited not merely from acting in a manner that affects the economic interests of himself or herself, or closely related persons or entities. The official or employee should also be prohibited from exercising official power to grant *any person* any form of special advantage beyond what is lawfully available to all persons.<sup>73</sup> This does not mean that no one may be granted a benefit by government (e.g., awarded a government contract). Rather, it means that all persons should have the right to compete for the benefit on the same terms (e.g., by submitting a bid to win a contract in a process where all bids will be evaluated on their merits).

To put this somewhat differently, “[t]he village clerk may, for example, issue a fishing license to her brother”<sup>74</sup> and “when a resident complains to a town board member that the town highway department blocks the resident’s driveway with snow, the board member . . . [may] pursue that complaint with the proper town authorities.”<sup>75</sup> Everyone has the right to apply for a fishing license or to request ordinary “constituent services”<sup>76</sup> from elected representatives. In contrast, it would be improper for an official to direct the city streets department to pave a constituent’s driveway, because that

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<sup>73</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-44 (stating rule).

<sup>74</sup> Davies, *Model Local Ethics Law*, *supra* note 71, at 79.

<sup>75</sup> *Id.* at 80.

<sup>76</sup> *But see* THOMPSON, *supra* note 18, at 152 (“[P]olitical scientists have shown . . . [that] constituent service is not a wholly beneficial practice even when legitimately performed. . . . One danger is that as constituent service becomes such a prominent part of the job, legislative duties suffer. . . . Another danger is that by concentrating on righting wrongs against individual citizens, constituent service can favor particular remedies over general reforms. . . . Yet another danger is that to the extent that incumbents gain electoral advantage through constituent service, new members who might bring fresh policy views or offer new criticisms of government performance are less likely to make their way into the legislature.”).

would involve the advancement of private interests by rendering services that are not available to the general public. Similarly, when a mayor performs marriages and donates the resulting fees to a charitable organization, that conduct is arguably improper because it involves the use of public power for the advancement of particular private interests.<sup>77</sup>

This underlying ethics principle against unfair advancement of private interests should be expressed clearly and expansively, for it is the ethical foundation for the idea that there should be a level playing field in public life and that public business should be conducted in a manner conducive to confidence in government.<sup>78</sup> The rule should prohibit not only granting special treatment to any person, but also conduct that attempts to do so. The rule should not only bar efforts to advance private interests unfairly, but also conduct that denies (or attempts to deny) any person the same rights that are accorded to others. Language in an ethics code that prohibits the unfair advancement of, or interference with, private interests helps to ensure that all persons deal with government on equal footing and that no one is unfairly advantaged or obstructed.<sup>79</sup>

In connection with the prohibition of unfair advancement of private interests, it may be useful to articulate special subsidiary rules to address certain types of problems that routinely arise in local gov-

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<sup>77</sup> *Keller v. State Ethics Comm'n*, 860 A.2d 659, 660, 668 (Pa. Commw. Ct. 2004) (holding that a borough mayor violated a state conflict of interest law when he received payments for performing marriages, deposited those funds into his personal bank account, and ultimately donated those funds to a charity).

<sup>78</sup> *E.g.*, *Bd. of Selectmen of Avon v. Linder*, 227 N.E.2d 359, 360 (Mass. 1967) (holding that a statute providing that a member of the board of selectmen shall not “use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others or give the appearance of such action” was intended “as much to prevent giving the appearance of conflict as to suppress all tendency to wrong-doing”).

<sup>79</sup> However, the appointments process creates a risk that favoritism will still play a role in public decisions. Persons who hold positions in government must be willing to act in furtherance of the common good, rather than for the benefit of private interests. See Laura Mansnerus, *A Shadowy Web of State Agencies and Developers*, N.Y. TIMES, July 24, 2005, § 14NJ, at 1, available at 2005 WLNR 11581247 (“Over the years an emerging pattern has fed the already-strong impression that New Jersey’s ethics are built on shifting sand: the boards of many independent agencies are populated largely by real estate developers, building contractors and representatives of engineering and architecture firms and of energy and utility companies. And as private money intertwines more and more with ambitious redevelopment projects, government watchdog groups are growing increasingly suspicious and see the appointment process as forging connections between state government and private enterprise. ‘We put developers on boards who take care of other developers who sit on other boards who then take care of them,’ said Jeff Tittel, the director of the state chapter of the Sierra Club . . .”).

ernment. These problems include official action which anticipates the reward of a reciprocal favor,<sup>80</sup> involves the appointment<sup>81</sup> or supervision<sup>82</sup> of relatives, or relates to private acquisition by a city official or employee of a property interest that is likely to be affected (presumably, made more valuable) by impending city action.<sup>83</sup> Each of these types of conduct should be wholly or generally prohibited.

A model rule against unfairly advancing or impeding private interests is set forth in Part A-2 of this Article's Appendix. The rule states the general ethical principle and includes provisions addressing the special cases noted above.

### C. Gifts

There are two dangers created by gifts given to current city officials and employees. One risk is that the gifts will, in fact, distort the discharge of official duties by biasing officials or employees in favor of the interests of the gift givers.<sup>84</sup> The other danger is that the gifts will be perceived by the public as having a prejudicial effect on the performance of city duties, regardless of whether the discharge of duties is actually affected.<sup>85</sup> Any rule on gifts must take careful note of

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<sup>80</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-44(b)(2) (prohibiting an "agreement or understanding" that amounts to a reciprocal favor).

<sup>81</sup> See *id.* § 2-44(b)(3) (prohibiting appointment of relatives).

<sup>82</sup> See *id.* § 2-44(b)(4) (prohibiting "supervision of a relative within the third degree of consanguinity or second degree of affinity" and providing for reassignment or other arrangements to enforce the policy).

<sup>83</sup> See *id.* § 2-44(b)(1) (prohibiting acquisition of an interest if the "official or employee knows, or has reason to know, that the interest will be directly or indirectly affected by impending official action").

<sup>84</sup> See Cox, *supra* note 28, at 291-92 (quoting PAUL H. DOUGLAS, ETHICS IN GOVERNMENT 44 (1952)) ("What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process the official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes. He will assert that the favors were given and received on the basis of pure friendship unsullied by worldly considerations. He will claim that the decisions, on the other hand, will have been made on the basis of the justice and equity of the particular case. The two series of acts will be alleged to be as separate as the east is from the west. Moreover, the whole process may be so subtle as not to be detected by the official himself.").

<sup>85</sup> See Laura Jesse, *Firefighters Face Hearing on Gifts*, SAN ANTONIO EXPRESS-NEWS, Jan. 11, 2006, at 1B (quoting the president of a union as stating, in connection with a hearing into whether fire department officials violated the city ethics code, "[w]e continue to this day to have radio problems, and it gives rise to the question of whether we got the best equipment or if this company was chosen because they had the better gifts").

this latter point, for the appearance of impropriety is often as destructive of public confidence in government as impropriety itself.

To be effective, a rule relating to gifts must define the term “gift” so that it covers not merely benefits conventionally thought of as “gifts,” but the transfer of anything of value.<sup>86</sup> Otherwise it will be simple for anyone who is intent on giving a gift (or a bribe) to circumvent the narrow terms of the prohibition.<sup>87</sup> However, once the term “gift” is broadly defined,<sup>88</sup> the rule regulating gifts must clearly specify which types of “gifts” are unobjectionable, for many transfers of money or other things of value are perfectly acceptable. No ethical principle is violated when a city official or employee receives a small gift from a close family member on a special occasion (e.g., a birthday or holiday), or qualifies for a loan from a lending institution on the same terms as other members of the public, or accepts a modest protocol gift, not for personal use, but on behalf of the city. Similarly, there is no reason to bar an official or employee from accepting free admission to an event, such as a neighborhood association gathering, that is appropriate for the official to participate in with respect to official duties.

The drafting of a rule relating to gifts requires the exercise of considerable care, for questions relating to whether a public official or employee may accept gifts (broadly defined) arise in a large city on an everyday basis.<sup>89</sup> There is a risk that language flexible enough to

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<sup>86</sup> Cf. *Scaccia v. State Ethics Comm’n*, 727 N.E.2d 824, 830 (Mass. 2000) (holding that golf and meals were either “entertainment” or “anything of value,” and were therefore within the broad definition of “gifts” under a state statute).

<sup>87</sup> See 2005 N.Y. Op. Att’y Gen. No. 10, 2005 N.Y. AG LEXIS 11 (Apr. 12, 2005) (interpreting the term “gift” under a state ethics law to include donations given to a city alderman to pay the legal expenses he incurred by bringing a legal proceeding in his individual capacity against another city official).

<sup>88</sup> A “gift” might be defined in the code as “a voluntary transfer of property (including the payment of money) or the conferral of a benefit having pecuniary value (such as the rendition of services or the forbearance of collection on a debt), unless consideration of equal or greater value is received by the donor.” SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(q). There is reason to be concerned with even small gifts. “Too many politicians figure they can get away with little things because everyone knows you can’t be bought for a free dinner or a plane ride. That’s how it starts. . . . If we all shrug our shoulders and look the other way, the consequences can be dire.” Editorial, *Sweat the Cheesy Stuff*, N.Y. TIMES, Mar. 28, 2004, § 4, at 12, available at 2004 WLNR 5584133. See also Sewell Chan, *Transit Leader to Pay Fine in Ethics Case*, N.Y. TIMES, Aug. 27, 2005, at B1, available at 2005 WLNR 13492174 (reporting that New York City Transit “adopted a 44-page code of ethics that established a ‘zero-tolerance policy’ toward employees who receive gifts from companies and individuals conducting business with the authority” following “a string of alleged ethical lapses”).

<sup>89</sup> Cf. Steven M. Levin, Note, *Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case*, 33 LOY. L.A. L. REV. 1813, 1814 (2000) (noting that gift-

apply to a broad range of situations may invite abuse. In the United States, some ethical provisions relating to gifts create an exception for “ordinary social hospitality,” reasoning that such courtesies are not improper.<sup>90</sup> However, other codes decline to embrace that language, fearing that it provides far too little guidance as to what is permitted and that the vagueness of the terms will countenance or encourage undesirable practices.

In addition, it is important to consider carefully how far the rule against gifts should reach. Presumably, a city cannot impose gift-acceptance restrictions on the city official or employee’s family members or outside business associates. However, it may be wise to require the city official or employee to use his or her best efforts to persuade closely related persons or entities not to accept benefits that would be improper for the city official or employee to accept. It may also be desirable to oblige officials and employees to disclose to the city knowledge of gifts accepted by other closely related persons or entities that were given with actual or apparent intent of influencing official action.

A model rule relating to gifts for city officials and employees is set forth in Rule A-3 of this Article’s Appendix.

#### *D. Representation of Private Interests*

Questions frequently arise as to whether it is ethically appropriate for a city official or employee to represent himself or herself, or some third person, before other city decision-makers or decision-making bodies.<sup>91</sup> Such representation poses a risk that the party being represented will receive more favorable treatment than is accorded to other persons, or at least that others will think that the party has an unfair advantage.

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giving rules can impact the “everyday interaction between public officials and the corporations and individuals they represent”). See also Seth D. Zinman, *Judging Gift Rules by Their Wrappings—Towards a Clearer Articulation of Federal Employee Gift-Acceptance Rules*, 44 CATH. U. L. REV. 141, 142 (1994) (“Writing . . . [ethics] rules is not an easy task. It is not enough that ethics rules reflect sound, wise, and practical value judgments. The success of the entire enterprise depends upon the skill with which authors draft these rules.”).

<sup>90</sup> See MODEL CODE OF JUDICIAL CONDUCT, Canon 4(D)(5)(c) (2004).

<sup>91</sup> As a result, provisions addressing these issues are found in many city ethics codes. See, e.g., MILWAUKEE, WIS., CODE OF ETHICS § 303-5(7.a) (2006), available at <http://cc-codenew.milwaukee.gov/code/volume3/ch303.pdf> (regulating compensated representation); MINNEAPOLIS, MINN., CODE OF ETHICS § 15.60(d) (2006), available at <http://www.ci.minneapolis.mn.us/boards-and-commissions/docs/Ethics-in-Government.pdf> (same).

It seems clear that no city official or employee should ever appear as an advocate (for himself or herself, or anyone else) before the governmental board, commission, or office of which he or she is a member. The appearance of favoritism, special advantage, and impropriety is far too great in such cases. In addition, formal appearance<sup>92</sup> by a city officer or employee as a representative of private interests before other city decision-makers should normally be rare. There is substantial risk that, in acting as a private representative, the city officer or employee will improperly lend the prestige of his or her public position to the advancement of private interests. If there are cases where such representation is appropriate, they might include situations where a city official or employee is acting pro se<sup>93</sup> (for his or her own benefit, rather than on behalf of another) in the same way that all persons are allowed to petition the government on their own behalf. Examples of this type of conduct include a personal application for a building permit, a zoning change, or business license.

A related question concerns whether it is appropriate for a city official or employee who is a lawyer to represent private interests in litigation against the city.<sup>94</sup> Is this type of conduct a violation of some duty of loyalty to the government? In resolving this issue, it may be useful to differentiate elected government officials and paid employees, on the one hand, from volunteer members of city boards and commissions, on the other. Persons in the latter group typically are neither paid for their services nor expected to work full-time for the government. It is reasonable to expect a higher degree of loyalty from one who is elected to city office or on the payroll than from a person who has merely agreed to donate a few hours of service to the work of the government on an occasional basis by serving on a board or commission. The rules applicable to citizen-volunteers should be crafted carefully so as not to discourage persons from assisting the work of government by accepting unpaid, part-time government positions. A lawyer engaged in the private practice of law, who could bring insight to the work of a board or commission as a volunteer,

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<sup>92</sup> There is a difference between formal representation and informal assistance. There is ordinarily nothing wrong with an elected official, or his or her staff, performing routine "constituent services" by making a request to a city department to act on some request by a constituent. It is an entirely different matter for the elected city official to formally appear before a board or other city body as the designated representative of a private individual.

<sup>93</sup> "Pro se" is a Latin term which means "[f]or oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

<sup>94</sup> Some codes contain provisions specifically directed toward representation by attorneys. See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-47(d) (addressing representation in litigation adverse to the city).

might well turn down an offer of appointment if doing so means that the lawyer, or his or her professional colleagues,<sup>95</sup> must decline representation of clients in matters affecting the interests of the city that are wholly unrelated to the work of the board. A city's legitimate expectation of loyalty from a citizen-volunteer generally extends no further than the scope of the volunteer's official duties.

Reasonable minds may differ as to the precise contours of a rule to regulate representation of private interests before government decision-makers or in litigation that might have an adverse impact on the government. Nevertheless, it is essential that a city articulate clear<sup>96</sup> expectations with respect to these matters because disputes over what course of conduct is appropriate arise frequently. It is important for persons serving as city officials and employees to know what is expected of them. It is equally important for a consistent standard to be applied to the review of allegations of misconduct.

A model rule offering one possible version of provisions governing the representation of private interests is set forth in Rule A-4 of this Article's Appendix.

#### *E. Conflicting Outside Employment*

If a city official or employee were permitted to accept outside employment relating to his or her official duties, there would be a risk that the outside employer would have, or would be perceived to have, an advantage in terms of access to information about government affairs or an ability to influence government decisions. For these reasons, city officials and employees should ordinarily be prohibited from providing services to an outside employer related to their city duties. In addition, any form of outside employment that could reasonably be expected to adversely affect the official or employee's independence of judgment or faithful performance of city duties should be banned.<sup>97</sup>

A model rule addressing these concerns is set forth in Rule A-5 of this Article's Appendix.

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<sup>95</sup> Under the usual rules of professional conduct, a law firm is treated as a single attorney and if one lawyer has a conflict, no lawyer in the firm can handle the matter in question. See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003).

<sup>96</sup> See Feerick et al., *supra* note 45, at 110 ("Clear and consistent standards are as important for local public officials as they are for statewide public officials.").

<sup>97</sup> SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-48 (stating rule). See also 5 C.F.R. § 2635.101(b)(10) (2004) (stating that federal executive branch employees "shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.").



*F. Prohibited Contractual Interests*

Certain ethics codes contain language prohibiting some or all city officials and employees from holding a financial interest in city contracts.<sup>98</sup> In terms of their effect, these rules go far beyond the improper economic benefit rule.<sup>99</sup> The latter type of rule provides that a city official or employee may not personally take official action economically benefiting the official or employee or a closely related person or entity. In contrast, a prohibited contractual interest rule provides, in effect, that no one in the city may consummate a contract in which a city official or employee personally holds a financial interest. Such a rule is not designed to identify which officers or employees must step aside, but rather which types of transactions may never take place.<sup>100</sup> There is a world of difference between saying that a particular person may not participate in a transaction and saying that a particular transaction may never occur.

The difficulty with a prohibited contractual interest rule is that it may make it inconvenient or expensive for the city to do its business.<sup>101</sup> A large city may have so many officials and employees that, if all or many of them fall within the scope of the rule, their far flung financial interests may make it impossible for the city to engage in transactions with a wide range of commercial enterprises.<sup>102</sup> Similar problems can arise in small towns:<sup>103</sup>

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<sup>98</sup> See, e.g., AUSTIN, TEX., CITY CODE § 2-7-62(L) (2006), available at <http://www.amlegal.com/library/tx/austin.shtml> (“No salaried City official and certain City employees . . . [specified], and the spouse of each of the above, shall solicit nor propose on a contract, enter into a contract or receive any pecuniary benefit from any contract with the City. This prohibition does not include any employment contract which may be authorized for the official, a contract of sale for real property or a contract for services which are available to all citizens.”).

<sup>99</sup> See *supra* Part II-A (discussing the improper economic benefit rule).

<sup>100</sup> One model code contains language that illustrates the rule. The provision states that:

No [County, City, Town, or Village] officer or employee shall have an interest in a contract with the [County, City, Town, or Village] . . . Any contract willfully entered into by or with the [County, City, Town, or Village] in which there is an interest prohibited by that section shall be null, void, and wholly unenforceable, to the extent provided by . . . law.

Davies, *Model Local Ethics Law*, *supra* note 71, at 81.

<sup>101</sup> See Davies, *Myths*, *supra* note 11, at 183 (“One town in New York had to truck its bulk trash (like old washing machines) to another state because the local landfill was owned by a member of the town board.”).

<sup>102</sup> In San Antonio, which has more than 11,000 city officials and employees, the contractual-interest prohibition is embodied in expansive language contained in the City Charter. See CHARTER OF THE CITY OF SAN ANTONIO (TEX.) § 141 (2006) (effective Jan. 1, 1952), available at <http://www.sanantonio.gov/clerk/charter/charter.htm> (“No officer or employee of the city shall have a financial interest, direct or indirect,

In many small, rural communities, members of the legislative body, or other elected or appointed officials, may well own the only hardware store, gas station, or snow plowing service in the area. The municipality must then either ignore the prohibition against contracts with municipal officials or obtain the goods and services at a significantly higher price from distant vendors.<sup>104</sup>

Local contractors may also have a better understanding of the municipality's needs or greater willingness to handle small contracts.<sup>105</sup>

In addition, in communities that are economically struggling, citizens may prefer that public money is spent in a way that supports local merchants, rather than those doing business in some other town.

It may reasonably be asked whether a prohibited contractual interest rule is a necessary component of an ethics code. In terms of substance, perhaps not, if the other rules on improper economic benefit and unfair advancement of private interests are followed. However, there is still the problem of bad appearances, especially if a visible, high-level official or employee has a substantial stake in a contract with the city. Observers may believe that the transaction is corrupt, even if it is wholly legitimate. In that sense, the rule on prohibited contract interests avoids the appearance of impropriety. In addition, such a rule may also be convenient. When a city attorney is approached by a council member or other city official or employee asking whether a business in which that person holds an interest can enter into a contract with the city, it may be useful to flatly answer "no." This may be more efficient than giving a more equivocal response saying that the answer depends on what other city decision-makers will decide in light of the various rules governing actual or apparent impropriety in public affairs. However, some cities have framed a rule which allows the answer to turn on advance disclosure of the nature and extent of the financial interest,<sup>106</sup> rather than

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in any contract with the city, or shall be financially interested, directly or indirectly, in the sale to the city of any land, materials, supplies, or service . . ."). The city ethics code contains elaborate provisions which construe the charter language and effectively confine its reach within manageable bounds by stating that it applies only to financial interests of certain high-level employees and that only certain types of investments in entities create a financial interest in the contracts to which the entities are parties. SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-52.

<sup>105</sup> See Markowitz, *supra* note 48, at 603 ("In smaller towns, a municipality would have a particularly difficult time trying to find volunteers for its boards if service required volunteers to sever all employment and business connections with the municipality.").

<sup>104</sup> Davies, *Model Local Ethics Law*, *supra* note 71, at 82.

<sup>105</sup> Feerick et al., *supra* note 45, at 114.

<sup>106</sup> See MILWAUKEE, WIS., CODE OF ETHICS § 303-5(6) (2006), available at <http://cc-codeweb.milwaukee.gov/code/volume3/ch303.pdf> ("No official or other city [employee], member of an official's or other city [employee's] immediate family, nor

broadly prohibiting contracts in which an official or employee has a financial interest. In those cities,

[u]nder the flexible principles of transactional disclosure and recusal, as long as municipal officers or employees publicly *disclose* the nature and extent of their interests in a contract *and recuse* themselves from taking *any* action on it to obtain a benefit for themselves or related persons, the contract may be executed and their companies may receive payment.<sup>107</sup>

### G. Other Provisions

A city ethics code does not operate in a vacuum. Rather, it stands against a backdrop of numerous other provisions that constrain the conduct of government officials and employees. Those provisions typically include laws that impose civil and criminal liability for various forms of inappropriate activity, such as fraud and theft, and personnel rules that guide everyday practices in public life. In addition, laws enacted at a state level to deal with issues such as conflicts of interest may be expressly or implicitly applicable to city officials or employees.<sup>108</sup>

A city ethics code may include provisions that go beyond the rules discussed above (improper economic benefit, unfair advancement of private interests, gifts, representation of private interests, conflicting outside employment, and prohibited contractual interests). The code may, for example, address such topics as confidentiality of government information,<sup>109</sup> use of public facilities and re-

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any organization with which the official or other city [employee] or a member of the official's or other city [employee's] immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than \$3,000 within a 12-month period, in whole or in part derived from city funds, *unless the official or other city [employee] has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department involved in regard to the contract or lease.* Any contract or lease entered into in violation of this subsection may be voided by the city . . . ." (emphasis added).

<sup>107</sup> Feerick et al., *supra* note 45, at 115.

<sup>108</sup> See *infra* note 194 and accompanying text.

<sup>109</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-46 (stating rule). A city ethics code can define confidential information by reference to the state's open records and open meetings laws or the Freedom of Information Act. See *id.* § 2-42(k) ("'Confidential government information' includes all information held by the city that is not available to the public under the Texas Public Information Act and any information from a meeting closed to the public pursuant to the Texas Open Meetings Act, unless disclosure is permitted under the Open Meetings Act."). Even some early government-ethics codes recognized the importance of confidentiality. See *The City Manager's Code of Ethics*, 27 NAT'L MUNICIPAL REV. 546 (1938) (quoting the 1938 revision of a 1924 code as stating that "personal aggrandizement or personal profit

sources,<sup>110</sup> political activity by officials and employees (on the job or off-duty),<sup>111</sup> or supervision of subordinates (to ensure that their conduct, too, complies with applicable ethical standards).<sup>112</sup> Model rules addressing these concerns are set forth in Rules A-6 to A-9 of this Article's Appendix. Whether an ethics code needs to address any of these or other subjects<sup>113</sup> depends upon whether the matters in question are adequately covered by other existing laws and personnel regulations.

An issue of particular importance is the question of whether an ethics code should include provisions to deal with discrimination.<sup>114</sup> A city official or employee who manifests discriminatory bias or prejudice in official conduct brings the city into disrepute, and the conduct may deny the victim equal treatment by the government. A decision on whether a building permit will be issued or police protection will be provided should not depend upon whether the citizen in need is black, or Jewish, or Hispanic, or elderly, or gay, or poor, or an immigrant. It is fair to argue that because a city should observe the highest ethical standards in the performance of official duties, an anti-discrimination provision should be included in a city ethics code. One early aspirational (rather than legally enforceable) city manager's code of ethics contained such language.<sup>115</sup> However, most city ethics codes today contain no provision against discrimination. Pre-

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secured by confidential information or by misuse of public time is dishonest"). The use of confidential government "information for private gain usually means that taxpayers will pay more than they should to procure supplies and services." Feerick et al., *supra* note 45, at 125.

<sup>110</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-49.

<sup>111</sup> See, e.g., *id.* § 2-50. See also Davies, *Model Local Ethics Law*, *supra* note 71, at 75 ("Political solicitation of subordinates by an official fosters the appearance, if not the reality, of coercion.").

<sup>112</sup> SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-53 (stating rule relating to contract personnel).

<sup>113</sup> Some city ethics handbooks contain provisions relating to software use and e-mail policies. See THE CITY OF PHOENIX ETHICS HANDBOOK 10-11 (2005), available at <http://phoenix.gov//AGENCY/PHXPERSON/ethics.pdf>. While it may be appropriate to include those subjects in educational materials for city officials and employees, they may not need to be addressed in a city ethics code, since personnel rules typically cover such matters.

<sup>114</sup> The rules applicable to federal executive branch employees provide that "[e]mployees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap." 5 C.F.R. § 2635.101(b)(13) (2004).

<sup>115</sup> *The City Manager's Code of Ethics*, *supra* note 109, at 546 ("The city manager handles all matters of personnel on the basis of merit. Political, religious, and racial considerations carry no weight in appointments, salary increases, promotions, and discipline in the municipal service.").

sumably, this is because discrimination is now extensively addressed by other laws and personnel regulations. The City of Houston is a notable exception; its ethics code contains a brief anti-discrimination rule.<sup>116</sup> If an anti-discrimination provision was to be included in a city ethics code, it might be patterned on anti-discrimination rules found in the Model Code of Judicial Conduct.<sup>117</sup> Of course, that would set a very high standard, for judges are subject to what are typically the most demanding ethical standards in American public life.<sup>118</sup>

Presumably all ethics codes should contain provisions imposing on city officials and employees (and others) duties that relate to the

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<sup>116</sup> HOUSTON, TEX., CODE OF ORDINANCES § 18-3(a)(7) (2006), available at <http://www.houstontx.gov/codes/chapters16to20.html> (providing that no city official shall “[e]ngage in or promote ideas and/or actions that would demean and defame any particular ethnic group, racial minority group, special interest group and/or religious group”).

<sup>117</sup> See MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(5) & (6) (2004). Borrowing from those provisions, an ethics rule on discrimination might read:

(a) General Rule. City affairs must be conducted without bias or prejudice. A city official or employee shall not, in the performance of official duties, manifest by words or conduct bias or prejudice toward any person, group, or entity, including bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit others subject to his or her direction and control to do so.

(b) Exceptions. A city official or employee is not liable under subsection (a) for: (1) conduct undertaken in good faith (i) to implement an existing city policy or (ii) to carry out the direction of a superior; or (2) conduct involving the legitimate advocacy of a position relating to race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status (i) in litigation or similar proceedings or (ii) incidental to the formation of city policy.

(c) Definitions. For purposes of this section:

(1) “Words or conduct” manifesting “bias or prejudice” includes, but is not limited to, physical abuse, verbal abuse, threats, intimidation, harassment, coercion, assault, stalking, hate speech, and other conduct that threatens or endangers the health or safety of any person.

(2) “Good faith” means that the city official or employee has a reasonable basis for believing, and does believe, that the conduct in question is lawful and not discriminatory.

(3) “Legitimate advocacy” means that the position espoused is not frivolous.

In 1997, the Mayor’s Task Force on Ethics in Government unanimously endorsed the inclusion of this language in the San Antonio Ethics Code. However, in the political process leading to the adoption of a new code in 1998, the language was deleted on the ground that other city rules adequately addressed these concerns.

<sup>118</sup> Keasler, *supra* note 40, at 992 (“There are many reasons why judges should be held to a . . . higher standard than other public officials, and it has to do with what judges do. . . . [W]e pass judgment on other people.”).

conduct of others.<sup>119</sup> Those rules should prohibit anyone from assisting or inducing another to violate the code, for such forms of concerted action typically give rise to concerted-action liability in other areas of the law.<sup>120</sup> The rules should also ban a government official or employee from seeking to accomplish what is forbidden by the code by acting through the conduct of another.<sup>121</sup>

A model rule imposing liability on city officials or employees for conduct relating to the actions of others is set forth in Rule A-10 of this Article's Appendix. The provisions relating to conduct of ordinary citizens should be stated in a part of the ethics code not limited to the obligations of current city officials and employees.<sup>122</sup>

### III. FORMER CITY OFFICIALS AND EMPLOYEES

#### A. *Representation of Private Interests*

Citizens are often deeply cynical when former city officials and employees represent private interests in dealings with the city government.<sup>123</sup> The citizens suspect, sometimes rightly, that the former city officials and employees are trading on their connections with those still in government service, and that the private interests they represent will have an unfair advantage in achieving the results they seek.<sup>124</sup>

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<sup>119</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-51 (stating rule).

<sup>120</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 876 (1979) (discussing concerted-action liability in tort law).

<sup>121</sup> Similar provisions can be found in other ethics codes. See MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2002) (providing that it is professional misconduct for a lawyer to violate the rules "through the acts of another").

<sup>122</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-72 (providing that "[n]o person shall intentionally or knowingly induce, attempt to induce, conspire with, aid or assist, or attempt to aid or assist another person to engage in conduct violative of the obligations imposed" by various provisions of the code).

<sup>123</sup> See Feerick et al., *supra* note 45, at 127 ("Such behavior . . . raises questions about the true motivations behind the official acts of a public servant. Were his votes and actions taken while in office prompted by the best interests of the government or by a desire to attract future employment and clients?").

<sup>124</sup> E.g., Editorial, *The Capitol's Revolting Door*, N.Y. TIMES, Nov. 4, 2005, at A26, available at 2005 WLNR 17834711 (discussing "Washington's ever-whirring carousel for business lobbyists and government appointees, who spin back and forth between the private and public sectors in a blur of opportunism").

To preserve confidence in local government,<sup>125</sup> a city ethics code must address the issue of when and under what circumstances a former city official or employee may represent private interests before the government. However, such rules must be written with particular care. The rules should not be so stringent that they discourage persons from entering government service in the first place.<sup>126</sup> The rules should also not demand an unrealistically high degree of continuing “loyalty” from persons who served the government. A rule broadly prohibiting a former city official or employee from using any skills or non-confidential knowledge acquired while in government service would certainly go too far.<sup>127</sup> That type of provision would discourage qualified persons from ever working for the government.<sup>128</sup> The rules governing conduct by former city officials and employees should prohibit only those forms of post-government-service conduct that pose a serious risk of real or apparent unfair advantage.<sup>129</sup>

In drafting rules limiting the conduct of former city officials and employees, it is important to consider several variables. The first consideration is whether the prior government service was rendered by a person who was (a) an elected official, (b) an employee, or (c) an unpaid volunteer. Presumably, a higher degree of continuing loyalty can be expected from a former elected office-holder, or perhaps even a former paid employee, than from a mere former volunteer. One might also conclude that it is fair to impose greater obligations on former full-time employees than on former part-time employees,<sup>130</sup>

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<sup>125</sup> See Cox, *supra* note 28, at 288 (“The public will not give the necessary trust to those who present government as the place where one feathers his own nest, exchanges favors with friends and former associates, and takes good care of those who will reward them.”).

<sup>126</sup> This is especially true in rural settings. See Davies, *Myths*, *supra* note 11, at 181 (“[S]mall communities depend heavily upon volunteers for municipal officials, who meet only monthly, who are independent but sometimes not terribly sophisticated, who are known by everyone in the community, [and] who cherish their privacy . . . .” (footnote omitted)).

<sup>127</sup> Similar broad restrictions on the conduct of lawyers after leaving a law firm have been held to be invalid. See Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. Pitt. L. Rev. 1, 113 n.514 (1988) (discussing a District of Columbia ethics opinion).

<sup>128</sup> Davies, *Myths*, *supra* note 11, at 181 (“[B]road ‘revolving door’ restrictions will probably keep some of the best people out of local government . . . .”).

<sup>129</sup> *Id.* at 181 (noting that when “ethics laws become so onerous . . . [they] foster bad government”).

<sup>130</sup> Feerick, *Historical Overview*, *supra* note 41, at 4 (quoting a report stating, with respect to federal government ethics rules, that “it is safe, proper and essential from the viewpoint of recruitment, [that] the statutes should differentiate in treatment between regular employees and citizens who serve the Government only intermittently, for short periods, as advisors and consultants.”).

although apparently few codes have drawn such a distinction. A former unpaid volunteer should have a less restrictive duty of continuing loyalty than one who was previously elected to office or on the city payroll.

A second variable is the nature of the conduct in which the former city official or employee will engage after leaving government service. Thus, it is appropriate to ask whether the subsequent representation of private interests is (1) *pro se*, (2) on behalf of others, but unremunerated, or (3) on behalf of third persons who pay for the services. Self-representation may not be highly objectionable, particularly if other persons in the community have the same right. In contrast, compensated representation of private interests, particularly if it occurs frequently, may pose a great risk to public confidence in government because it may appear that the former official or employee is deriving improper economic benefit from connections to persons still in government. Unremunerated subsequent representation of private interests as a volunteer would seem to be less objectionable than compensated work, but it may still pose an appearance of impropriety on the ground that the persons being represented seem to have (or actually do have) an advantage based on the former city official or employee's real or perceived relationship to current city decision-makers or special knowledge about how to obtain successful results.

A third relevant variable is the amount of time that has elapsed since the former city official or employee was in government service. It might, for example, be highly objectionable for a former city council member to begin representing private interests to the government immediately after leaving public service. However, as the years pass, the real or perceived connections of the former public servant to those who represent the government often diminish (although that is not always true).<sup>131</sup> Therefore, it may be appropriate to design a prohibition imposing limitations on post-government representation of private interests that expires after a certain number of years have elapsed. Of course, there is no easy answer to the question of whether such a prohibition should last one year, two years, five years, or seven years, as opposed to ten years, twenty years, or a lifetime.

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<sup>131</sup> Cf. Beth Barrett, *Calendars Show Frequent Private Meetings with Reps*, DAILY NEWS OF L.A., Jan. 8, 2006, at N21, available at 2006 WLNR 484681 (discussing a former councilman who had "long friendships with the council members" and was part of "an interconnected web of influence at City Hall").



Most cities seem to impose a one- or two-year limitation.<sup>132</sup> Such a brief restriction is only a small step toward preserving citizen confidence in government and may be more a reflection of what is politically feasible, than what is desirable. A rule that contains a time limitation will obviously be subject to debate on the issue of whether the period of time is too long or too short for the purpose of ensuring fairness and a level playing field in city government decision-making processes.<sup>133</sup>

Finally, it may be appropriate to consider the closeness of the connection between the subject matter of the former official or employee's prior responsibilities in government service and the subsequent representation of private interests.<sup>134</sup> Presumably, the closer the connection, the greater the risk that the private party will be perceived to have (or actually will have) an unfair advantage, and the greater the justification for banning such work. A rule that focuses on the nexus between the prior government service and the subsequent representation will inevitably impose a wide range of limitations on persons who previously exercised broad authority for the city, such as a mayor or city council member, and a lesser range of limitations on persons who previously played a minor role in city affairs. That may be appropriate. State and federal laws commonly prohibit former public servants from "lobbying former agencies on matters in which the official or employee was involved."<sup>135</sup>

Aside from the foregoing general considerations, there is another issue relating to government ethics rules that purport to constrain the conduct of attorneys. In *Shaulis v. Pennsylvania State Ethics Commission*,<sup>136</sup> the Pennsylvania Supreme Court considered a state ethics law which provided that "[n]o former public official or public

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<sup>132</sup> See Jennifer Medina, *Officials Laud New Ethics Code in Yonkers*, N.Y. TIMES, Nov. 14, 2005, at B6, available at 2005 WLNR 18365889 (discussing a new city ethics code approved by the voters which "prevents former city officials from lobbying for one year after they leave office" and "bars former officials from lobbying at all on issues they worked on while in office"); SAN JOSE, CAL., MUNICIPAL CODE §12.10.030 (2006), available at [http://www.amlegal.com/sanjose\\_ca/](http://www.amlegal.com/sanjose_ca/) (one-year restriction); SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-56(a) and (b) (stating two-year restrictions).

<sup>133</sup> See, e.g., Christopher Anderson, *Majority Backing Ethics Proposals*, SAN ANTONIO EXPRESS-NEWS, Jan. 16, 1998, at 7B (describing a council member who questioned whether proposed two-year and seven-year limitations were too restrictive).

<sup>134</sup> Cf. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2002) (limiting former-client conflict-of-interest restrictions on attorneys to cases where the new matter is the same or "substantially related" to the prior representation of a different client).

<sup>135</sup> Huddleston & Sands, *supra* note 44, at 142-43.

<sup>136</sup> 833 A.2d 123 (Pa. 2003).

employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.”<sup>137</sup> The court held that as applied to attorneys, the provision was unconstitutional under the state constitution, which provides that the state supreme court has the exclusive authority to regulate the conduct of an attorney insofar as it constitutes the practice of law.<sup>138</sup> Whether other

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<sup>137</sup> *Id.* at 124 n.1 (quoting Public Official and Employee Ethics Act, 65 PA. CONS. STAT. ANN. § 1103(g) (West 2000)).

<sup>138</sup> *Id.* at 132. The court wrote:

The provision seeks to prevent a former government employee from representing any person before his or her government employer for one year after the termination of their employment relationship. The Ethics Act defines “represent” as “[t]o act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.” While it is conceivable that a non-attorney could engage in such “representation” and, therefore, Section 1103(g) is not strictly limited in scope to attorneys, it nonetheless targets the practice of law.

Accordingly, we find Section 1103(g) of the Ethics Act unconstitutional, as violative of Article V, Section 10 of the Pennsylvania Constitution, to the extent that Section 1103(g) applies to former government employees who are also attorneys. We do not question the policy underpinning Section 1103(g). We recognize the sound rationale for prohibiting a former government employee from “represent[ing] a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.” However, the state legislature is not the body vested with the power to enact such a restriction; that authority lies with this Court through the promulgation of the Pennsylvania Rules of Professional Conduct.

*Id.* (internal citations omitted). The Pennsylvania Supreme Court’s determination that the limitations on an attorney’s subsequent representation would be defined by the code of ethics applicable to attorneys has the potential for entirely changing the analysis of what types of conduct are permissible when an attorney leaves government service. For example, state ethics codes regulating the conduct of attorneys who previously served as public officers or employees do not frame limitations on subsequent representation in terms of the passage of time. For example, the applicable Pennsylvania rule provides that:

Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.

PA. RULES OF PROF’L CONDUCT R. 1.11. The rule is broader than the challenged state ethics rule in lacking a time limitation, but narrower in terms of imposing a “personally and substantially” participated requirement. The *Shaulis* decision leaves many unanswered questions and creates the possibility that Pennsylvania attorneys may en-

courts would reach the same conclusion is doubtful. Decisions in New York<sup>139</sup> and Florida<sup>140</sup> have reached contrary results. Nevertheless, it is important to note that such separation-of-powers considerations may limit the reach of a government ethics code that purports to constrain an attorney's subsequent representation of private interests.

As the preceding paragraphs suggest, the formulation of a rule governing whether it is permissible for former city officials and employees to represent private interests after leaving government service is one of the greatest challenges in writing an ethics code. Moreover, if the code is adopted at the city level (rather than imposed on the city by a higher governmental body),<sup>141</sup> there will be great resistance to enacting demanding rules to govern the conduct of former officials and employees because those rules will presumably apply to the persons who vote on them once they leave government service.<sup>142</sup> A model rule offering one possible version of provisions governing the representation of private interests is set forth in Rule B-1 of this Article's Appendix.

#### *B. Employment Relating to a City Contract*

Similar issues arise concerning whether it is permissible for a former city official or employee to be employed by a private party to

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gage in the type of representation of private interests that would be deemed to create an impermissible appearance of impropriety, if engaged in by other persons.

<sup>139</sup> *Forti v. N.Y. State Ethics Comm'n*, 554 N.E.2d 876, 885 (N.Y. 1990) (explaining that New York's revolving door law "is not directed specifically at admitted attorneys but rather is aimed at all former executive branch employees [and] [i]ts effect on the practice of law is, thus, merely incidental").

<sup>140</sup> *See Howard v. State Comm'n on Ethics*, 421 So. 2d 37, 39 (Fla. Dist. Ct. App. 1982) (in finding that a state statute prohibited a lawyer from serving as school board attorney, the court stated that "[t]he [revolving door] statutes enacted by the legislature merely supplement the Canons of Professional Responsibility adopted by the Supreme Court. When an attorney decides to accept public employment, he does so subject to the legislative proscription on his conduct.").

<sup>141</sup> *See infra* note 194 and accompanying text.

<sup>142</sup> Of course, it would be possible to draft a rule that would be applicable only to officials first elected or appointed after the effective date of the new provisions. But no official with sufficient character to champion tighter ethics rules would vote for such delayed implementation, and any official who did would be risking well founded public criticism. When San Antonio adopted a new ethics code in November 1998, it took effect on January 1, 1999, except as to former city officials and employees whose official duties terminated before that date. *SAN ANTONIO ETHICS CODE*, *supra* note 16, § 2-93(b). Between the passage of the law and its effective date, city officials and employees were given notice that if they did not want to be bound by the more stringent provisions of the new code, they needed to leave government service before January 1, 1999. *Id.*

perform work relating to a contract between the private party and the city. If there is a close connection between the former city official or employee's previous duties and the contract, and if only a short time has passed, it may appear that the official or employee has "switched sides,"<sup>143</sup> to the government's detriment. Perceptions of side-switching create a risk that a private party will be viewed as having an unfair advantage in dealing with the government. For example, a person who, while in government service, participated in the negotiating, drafting, or awarding of a contract may know what weaknesses the document contains with respect to protecting the government's interests. Former city officials and employees should, therefore, be prohibited from performing work relating to a contract they helped to negotiate, draft, or award, at least until a certain period of time has elapsed.<sup>144</sup>

A model rule governing work relating to a city contract is set forth in Rule B-2 of this Article's Appendix.

### C. Other Provisions

It may be appropriate for a city ethics code to contain other provisions relating to the conduct of former city officials or employees. For example, if the code contains a confidentiality rule applicable to current city officials or employees, it should indicate to what extent those confidentiality obligations carry forward after the official or employee leaves government service.<sup>145</sup>

Rule B-3 of the Appendix contains a provision establishing a continuing duty not to use or disclose confidential information obtained while working for the government.

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<sup>143</sup> "Side-switching" is deplored in many areas of the law. See Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 517 (1998) (discussing side-switching) (citing Timothy D. Howell, *So Long "Sweetheart"—State Farm Fire & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 66-70 (1997)) (discussing how shifting positions of parties distort litigation). In Texas, for example, a lawyer may not challenge the validity of a document he or she drafted. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.09(a)(1), as reprinted in TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A-1 (Vernon Supp. 2005) (stating that a lawyer shall not question "the validity of the lawyer's services or work product for the former client"). In Washington, legal malpractice claims cannot be assigned because assignment would risk encouraging collusion with respect to stipulation of damages in the underlying litigation and would condone "abrupt and shameless shift of positions." *Kommavongsa v. Haskell*, 67 P.3d 1068, 1077 (Wash. 2003).

<sup>144</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-56 (a)-(b) (containing a two-year limitation).

<sup>145</sup> *E.g.*, *id.* § 2-55 (stating rule).

## IV. DISCLOSURE REQUIREMENTS

A. *Periodic Reporting by City Officials and Employees*

The enforcement of ethics rules applicable to current city officials and employees may be greatly aided by imposing an obligation on some subset of high-level city decision-makers to file (and, when necessary, update) annual reports containing information relating to the various provisions of those rules.<sup>146</sup> For example, reporting requirements mirroring provisions in the improper economic benefit rule<sup>147</sup> may require the filer to disclose: the names of closely related persons; other household members; outside employers; businesses in which the filer (or a closely related person) holds an economic interest; other affiliated businesses; and persons from whom the filer has received or sought an offer of employment or business opportunities. The requirement may also mandate the revelation of the filer's sources of outside income (above a threshold amount), the addresses of real property owned by the filer (or by a closely related person) in the city (or, perhaps, in the county or state), the names of any person or entity to whom the filer is indebted (above a threshold amount), the name of any person from whom the filer received a gift (above a threshold amount) and perhaps the gift's estimated fair market value, and information related to any gift received by the filer on behalf of the city.<sup>148</sup>

If the reported information is a public record available to the press and other interested parties, and if violation of the reporting rules are backed by appropriate sanctions, it is likely that accurate information will be disclosed. The reporting requirements' periodic

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<sup>146</sup> *Id.* § 2-74 (detailing contents of financial disclosure reports); Davies, *Model Local Ethics Law*, *supra* note 71, at 90–97 (discussing various disclosure requirements).

<sup>147</sup> *See supra* Part II-A.

<sup>148</sup> Although the improper economic benefit rule should be drafted so as to prohibit official action that is likely to affect the economic interests of clients, *see supra* Part II-A, it is probably best not to require disclosure of the names of clients in an annual disclosure form. That requirement might be unduly burdensome because of the number of persons who qualify as clients and because of the difficulty (or at least tediousness) of distinguishing “clients” with whom one has a “highly personalized” relationship, *see* SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(c)(2), from mere customers. In addition, it might be argued that outside professionals (such as attorneys) who serve as volunteer board members, and who owe their clients fiduciary duties of disclosure, would have a duty to inform their clients that their identity was being disclosed on a city document that would become a public record. *See generally* Vincent R. Johnson, “*Absolute and Perfect Candor*” to Clients, 34 ST. MARY’S L.J. 737 (2003) (discussing disclosure obligations of lawyers). In some instances, under applicable professional standards, the identity of the client might be confidential.

nature will mean that, in many instances, the information will be reported at a time when there is no special reason to hide the information, since the annual deadline for filing the report may not be the moment when the filer is tempted to take official action that would result in economic benefit to a related person or entity. Furthermore, the obligation to report periodically in a public document information related to enforcement of the ethics rules will remind the filer of the obligations imposed by the rules.<sup>149</sup> That reminder may reduce the number of instances of inadvertent non-compliance with the code.<sup>150</sup> Annual disclosure also makes it easier for other parties to monitor whether ethics rules are being observed.<sup>151</sup> Compliance with the periodic reporting rule can itself be ensured by providing that a designated city office shall notify filers of the deadline, provide suitable reporting forms, and make appropriate reports of non-compliance.<sup>152</sup>

The burdens related to collecting and distributing reported information can be minimized by limiting the reporting obligation to city officials and employees who hold high-level positions, rather than imposing those obligations on all city officials and employees.<sup>153</sup> In addition, the burden on the individual filer can be reduced by allowing the filer to submit a short form report in a reporting period for which there have been few or no changes to previously requested information.<sup>154</sup> Care must be taken to ensure that filing requirements are not so burdensome or intrusive into private affairs as to discourage persons from entering public service.<sup>155</sup> Thus, for example, while it may make sense to require disclosure of offers of employment or business opportunities that were received or accepted during the prior reporting period, it might be unrealistic to require disclosure of

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<sup>149</sup> See Feerick et al., *supra* note 45, at 117 (suggesting that disclosure requirements prompt public officials to remove themselves from matters of self-interest).

<sup>150</sup> Davies, *Myths*, *supra* note 11, at 178 (“[T]he vast majority of conduct that is unethical under the law results from employees’ ignorance of what the law is.”).

<sup>151</sup> See Feerick et al., *supra* note 45, at 118 (discussing an instance where an annual disclosure requirement would have established whether a supervisor in fact was a partner of a consultant who was awarded a contract).

<sup>152</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-73(e) (imposing such duties on the City Clerk and indicating that a report of non-compliance shall be forwarded to the Ethics Review Board for appropriate action).

<sup>153</sup> *E.g.*, *id.* § 2-73(a) (discussing persons required to file; the list includes candidates for city council).

<sup>154</sup> *Id.* § 2-75 (discussing short form annual report).

<sup>155</sup> See Davies, *Myths*, *supra* note 11, at 185 (“In New York State almost 300 county volunteer board members resigned when lengthy financial disclosure became effective.”).

instances in which the city official or employee solicited an offer of employment or a business opportunity.<sup>156</sup> Similarly, while it might be reasonable to require disclosure of the names of parents, children, siblings, or a spouse on an annual form, requiring disclosure of the name of every relative within the second degree of consanguinity or affinity might impose an unwarranted data assembly burden. Reasonable disclosure requirements do not significantly hamper the ability of government to attract qualified persons to public service.<sup>157</sup>

The effectiveness of periodic reporting requirements depends upon public and governmental scrutiny of the reported information. The information should be maintained in a systematic fashion and must be available to interested persons on a timely basis. Ideally, a web-based format should be used for collecting information from filers and allowing it to be accessed and searched by the public.<sup>158</sup>

#### *B. Disclosures by Persons Doing Business with the City*

Compliance with substantive ethical rules may also be facilitated by requiring persons doing business with the city to disclose relevant information. For example, a party seeking to be awarded a discretionary contract<sup>159</sup> may be obliged to provide to the city information about the identity of any individual or entity that would be a party to the contract<sup>160</sup> or any facts known by the bidder which make it reasonably likely that any particular member of a board or other city body would violate the improper-economic-benefit rule by participating in official action relating to the contract bid.<sup>161</sup> These obligations

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<sup>156</sup> Cf. SAN ANTONIO ETHICS CODE, *supra* note 16, §§ 2-43(a)(9), 2-74(g) (requiring recusal from matters involving persons from whom the official or employee solicited employment during the prior year, but not revelation of that information on the annual financial disclosure report).

<sup>157</sup> Feerick et al., *supra* note 45, at 116 (discussing testimony indicating that New York municipalities that required annual disclosure “found no . . . wide-scale loss of people interested in public service”); *id.* at 117 (concluding that “experience shows that there has been no deterrent effect on employees of local government” because of disclosure requirements in various states).

<sup>158</sup> Cf. Davies, *Myths*, *supra* note 11, at 186 (“Electronic filing is . . . not merely the wave of the future; it is the only future for annual disclosure.”). However, identity theft is an increasing social problem, and there may be reasons not to store certain types of personal information on computers connected to the web. See generally Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255 (2005) (discussing identity theft).

<sup>159</sup> A “discretionary contract” is “any contract other than those which by law must be awarded on a low or high qualified bid basis. See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(m).

<sup>160</sup> *Id.* § 2-59 (requiring disclosure of parties, owners, and closely related persons).

<sup>161</sup> *Id.* § 2-60 (requiring disclosure of association with city officials or employees).

can then be enforced through codified provisions stating that the violator may be barred from future contracting with the city (presumably for a period of years)<sup>162</sup> or that a contract awarded to a party who violated the disclosure obligations may be voided at the city's option.<sup>163</sup>

## V. ENFORCEMENT

### A. *Review of Complaints*

An effective ethics code must provide an administrative mechanism for reviewing complaints of allegedly unethical conduct and determining whether a sanction should be imposed.<sup>164</sup> Some have also argued that “[e]thics laws for municipal officials must be enforced locally”<sup>165</sup> because the “principles of home rule, the limits of the State budget, and the greater knowledge of local officials and citizens about their own needs mandate that the State intervene in the enforcement of ethics laws only when local enforcement fails.”<sup>166</sup>

Enforcement procedures may take many forms.<sup>167</sup> However, three considerations are critical. First, the accused must be given notice of the charges and a fair opportunity to respond. Second, the ultimate decision-maker must be insulated from political and other inappropriate pressures. Third, the process must operate with sufficient transparency that the public may be confident that the process is legitimate.

Due process concerns relating to notice and hearing<sup>168</sup> might be satisfied in any number of ways. Whether the accused should enjoy a right to representation by legal counsel, to direct confrontation of his

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<sup>162</sup> *Id.* § 2-87(f)(3) (discussing disqualification from contracting).

<sup>163</sup> *Id.* § 2-87(f)(4) (discussing voiding or ratification of a contract).

<sup>164</sup> Davies, *Conflicts*, *supra* note 48, at 1343–44 (“A municipality is well advised to exercise its home rule powers to establish an independent ethics board with members having fixed terms and the power and duty to investigate violations of the local code of ethics, hold hearings, impose civil fines, issue advisory opinions, give advice on the code, and supervise proper ethics training for all officers and employees of the municipality.”).

<sup>165</sup> State of N.Y., Temp. State Comm’n on Local Gov’t Ethics, *Final Report*, 21 FORDHAM URB. L.J. 1, 7 (1993).

<sup>166</sup> *Id.*

<sup>167</sup> See generally SAN ANTONIO ETHICS CODE, *supra* note 16, §§ 2-80 to -91 (discussing the city’s ethics review board); Davies, *Model Local Ethics Law*, *supra* note 71, at 106–21 (similar discussion of ethics review board).

<sup>168</sup> See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”).



or her accuser, or to cross-examination of witnesses are matters as to which reasonable minds may differ. City governments typically operate on tight budgets, and the resources available for the review of ethics complaints may be scarce.<sup>169</sup> Moreover, to the extent that the process depends upon the assistance of citizen-volunteers to staff what might be called an ethics review board, it is imperative to remember that the time they can devote to such matters may be limited, even though the matters are highly important to the city. In designing the procedures relating to the conduct of hearings, there may be good reason to favor a streamlined European inquisitorial form of proceeding over the more elaborate, and potentially more time consuming and expensive, American model of adversarial justice.<sup>170</sup> By the same token, it may be more efficient to allow a large ethics review board to operate in panels of three or five board members,<sup>171</sup> rather than in an en banc format in which every member of the board participates in the hearing and disposition of every case. In some situations, the use of joint or regional review boards may be appropriate.<sup>172</sup> In many respects, making an enforcement process efficient means that it must be “inexpensive and flexible.”<sup>173</sup>

Charges of ethical wrongdoing by city officials or employees obviously take place in a highly political context. Politics, however, is not conducive to the fair and impartial resolution of ethics complaints. It is therefore of the highest importance to vest final<sup>174</sup> decision-making authority in persons who are insulated from political

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<sup>169</sup> But see Davies, *Conflicts*, *supra* note 48, at 1344 (“[A] comprehensive ethics compliance program need not cost much, and the advantages of protecting public servants against unjustified attacks and in increasing public confidence in the integrity of municipal government can be substantial.”).

<sup>170</sup> For a comparison of the inquisitorial and adversarial models, see *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (“What makes a system adversarial rather than inquisitorial is not the presence of counsel . . . but rather, the presence of a judge who does not (as the inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”).

<sup>171</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-85 (providing for ethics panels).

<sup>172</sup> State of N.Y., Temp. State Comm’n on Local Gov’t Ethics, *supra* note 165, at 8 (suggesting also that in some cases it may be appropriate to cast the administrative burden on the state).

<sup>173</sup> *Id.* at 8.

<sup>174</sup> Although for purposes of the city’s involvement the decision may be “final,” the person found to have violated the code may have a right to judicial review of the decision. Davies, *Model Local Ethics Law*, *supra* note 71, at 119 (containing a “model” provision indicating that “[a]ny person aggrieved by a decision of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York”).

pressures to as great an extent as possible.<sup>175</sup> Ideally, the ethics review board should be composed of persons who are chosen for membership based on their intelligence, integrity, and independence, and who are then immune from retribution for the decisions they make.<sup>176</sup> It is preferable that these persons be “outsiders”—persons who do not otherwise hold city positions,<sup>177</sup> who have no substantial ties to city officials,<sup>178</sup> and who are not engaged in business transactions with the city. As James Madison wrote:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.<sup>179</sup>

Once appointed to the ethics review board, members should not be subject to removal from office except upon a clear showing of “good cause.”<sup>180</sup> To ensure that decisions are based upon a fair presentation of the evidence, *ex parte* communications with the board must be

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<sup>175</sup> See Huddleston & Sands, *supra* note 44, at 143 (arguing that “[c]odes backed by independent boards . . . are more likely to win respect.”); Bob Warner et al., *Our 10 Ways to Reform Government: Hit Politicians Where it Matters . . . in Their War Chests*, PHILA. DAILY NEWS, Dec. 2, 2004, at 4, available at 2004 WLNR 19174837 (discussing weak enforcement of ethics rules in Philadelphia and the need for an independent ethics board).

<sup>176</sup> Under American law, government officials and employees are generally immune from liability for discretionary acts within the scope of their employment. This is particularly true of government actors who perform judicial or quasi-judicial functions. See generally VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 849–52 (3d ed. 2005) (discussing the immunity of federal and state officials and employees).

<sup>177</sup> SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-81(d) (“No member of the Board shall be: (1) a salaried city official or employee; (2) an elected public official; (3) a candidate for elected public office; (4) an officer of a political party; . . . [or] (9) a lobbyist required to register under . . . this ethics code.”); Davies, *Model Local Ethics Law*, *supra* note 71, at 108 (proposing a model rule restricting municipal officials from serving on ethics board in order “to ensure that the board is as free as possible from pressure from other officials—co-workers and superiors alike” and stating that “[t]he restriction on the political make-up of the board aims to strengthen both the perception and the reality of a board that is nonpartisan”).

<sup>178</sup> See Feerick et al., *supra* note 45, at 118 (noting “the need for municipal ethics boards to function independently of local government . . .”).

<sup>179</sup> THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

<sup>180</sup> E.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-81(e) (“Members of the Ethics Review Board may be removed from office for cause by a majority of the City Council only after a public hearing at which the member was provided with the opportunity to be heard. Grounds for removal include: . . . substantial neglect of duty; gross misconduct in office; inability to discharge the powers or duties of office; or violation of any provision in this code of ethics . . .”).

prohibited.<sup>181</sup> Of course, members of the ethics review board should be required to recuse themselves from participation in any case in which their impartiality might reasonably be questioned.<sup>182</sup> If an attorney from the city's staff normally serves in a prosecutorial role in presenting complaints to the ethics review board, special independent outside counsel should be appointed to substitute as the prosecutor in difficult cases, such as where a complaint is filed against the mayor, a city council member, or a department head.<sup>183</sup>

The ethics review board should have jurisdiction<sup>184</sup> over all alleged violations of the ethics code and the power to impose sanctions.<sup>185</sup> "Historically, ethics boards possessing only the authority to

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<sup>181</sup> *Id.* § 2-85(d) ("It is a violation of this code: (1) for the complainant, the respondent, or any person acting on their behalf to engage or attempt to engage, directly or indirectly, in *ex parte* communication about the subject matter of a complaint with a member of the Ethics Panel, any other member of the Ethics Review Board, or any known witness to the complaint; or (2) for a member of an Ethics Panel or any other member of the Ethics Review Board to: (A) knowingly entertain an *ex parte* communication prohibited by Subsection (1) of this rule; or (B) communicate directly or indirectly with any person, other than a member of the Ethics Review Board, its staff, or the Ethics Compliance Officer, about any issue of fact or law relating to the complaint."). For similar reasons, American law prohibits *ex parte* communications with judges. See Johnson, *Ethical Foundations*, *supra* note 40, at 1016 ("It is difficult to overstate the importance of the rules against *ex parte* communication. The rules help to ensure that a judge's decision is based on nothing other than law and evidence. Without such provisions, it would be impossible for parties to effectively address the factual assertions and legal arguments placed before judges. Moreover, public confidence in the judicial process would be undermined because the citizenry would be deprived of the information that emerges from an open and transparent litigation process. Indeed, the public would not even know the identity of the persons who are making arguments that may prove critical in the resolution of pending matters.").

<sup>182</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-81(g) (stating the general recusal rule). In San Antonio, the ethics review board consists of eleven members. The mayor and ten members of the city council nominate one member each, who then must be confirmed by a majority vote of the city council. *Id.* § 2-81(b). A member of the ethics review board is automatically disqualified from participating in any case that involves charges against the member of city council who nominated him or her. *Id.* at § 2-81(g)(2).

<sup>183</sup> *Id.* § 2-84(b) (discussing outside independent counsel).

<sup>184</sup> An ethics review board should not be deprived of jurisdiction to review a complaint relating to a city official or employee merely because the accused individual leaves office. See Editorial, *Giving Ethics the Slip*, N.Y. TIMES, Mar. 6, 2005, § 14LI, at 13, available at 2005 WLNR 3426518 (condemning a New York law which deprived the state ethics commission of jurisdiction when an employee leaves the payroll as an "extraordinary grant of immunity" equivalent to "racing the cops to the county line").

<sup>185</sup> See *Putting Yonkers on the Level*, *supra* note 47, at 13 (praising a "serious" reform effort to "[o]verhaul the city's ethics code and replace its Board of Ethics with a new body with sharp teeth and a broad mission to investigate complaints, conduct its own inquiries and punish those who break the rules").

issue advisory opinions have accomplished little.”<sup>186</sup> Making ethics rules, but not enforcing them, breeds public cynicism<sup>187</sup> and destroys confidence in government.<sup>188</sup>

In reviewing charges of misconduct, the board must operate with sufficient transparency that the public is assured that complaints are being taken seriously and that, when necessary, appropriate sanctions are being imposed. This does not mean that every aspect of the process must be open to public scrutiny.<sup>189</sup> Even if the ethics code contains penalties for initiating frivolous charges,<sup>190</sup> it is likely that some complaints will be determined as baseless. The early dissemination of public information about such complaints may attract more attention in the press than will be given to the ultimate vindication of the accused. To prevent unnecessary harm to the reputation of innocent city officials or employees that may result from dissemination of information relating to charges that ultimately prove meritless,<sup>191</sup> a city may wish to provide that the process’s initial stages be conducted in a confidential manner.<sup>192</sup> Confidentiality might extend either to the point where there is an initial determination by the board that the complaint plausibly has merit or perhaps to the point where there is a determination as to whether a violation has occurred. Of course, once a final determination has been made regarding a com-

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<sup>186</sup> Davies, *Conflicts*, *supra* note 48, at 1341–42.

<sup>187</sup> See Huddleston & Sands, *supra* note 44, at 143 (noting that cynicism flows from “codes that are clearly unenforceable, either because the standards are stated so vaguely or because no enforcement mechanism . . . is in place”).

<sup>188</sup> See Vincent R. Johnson, Editorial, *Current City Ethics Code Lacks Enforcement*, SAN ANTONIO EXPRESS-NEWS, Mar. 6, 1998, at 5 (“[C]ynicism about whether ethics rules are enforced destroys confidence in government.”). Nevertheless, some authorities have suggested that ethics review boards should have the authority to grant waivers of some types of ethics rules, such as recusal requirements. See Feerick et al., *supra* note 45, at 155–56.

<sup>189</sup> See THOMPSON, *supra* note 18, at 140 (“Democratic accountability does not require unconditional publicity in the conduct of democratic government. Secrecy of various kinds is sometimes justified and even desirable in a democracy. But it is justified only under carefully specified conditions, which ensure that the secrecy itself is subject to democratic accountability.”).

<sup>190</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-83(d) (providing sanctions for frivolous complaints).

<sup>191</sup> Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (“[T]he individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’”).

<sup>192</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-83(e) (“No city official or employee shall reveal information relating to the filing or processing of a complaint except as required for the performance of official duties.”).

plaint's validity, news of that finding should be made available to the public, along with sufficient information for the public to understand the nature of the charges and the basis for the decision.<sup>193</sup>

*B. Imposition of Sanctions*

An ethics code will be effective only if violations are penalized by the imposition of appropriate sanctions. However, if ethics regulations are adopted at the city level (rather than, for example, imposed on the city by the state),<sup>194</sup> the nature of the sanctions that may be levied will be a function of the limited (i.e., less than sovereign) powers of the city government. There are restrictions on the power of a city to declare that conduct constitutes a crime or gives rise to a civil action for damages. In appropriate cases, however, an ethics code may provide that if it appears that some other criminal law has been violated, the ethics review board will refer the matter for possible prosecution.<sup>195</sup>

The range of sanctions should be clearly stated in the code. Enforcement mechanisms<sup>196</sup> may include: disciplinary action;<sup>197</sup> liability for damages or injunctive relief;<sup>198</sup> civil fines;<sup>199</sup> prosecution for per-

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<sup>193</sup> See *id.* § 2-87(a)-(b) (providing that the ethics review board shall issue an opinion stating its findings and forward a copy of the opinion to the city clerk who shall make the opinion available to the public as authorized by law).

<sup>194</sup> The New Jersey Local Government Ethics Law, for example, imposes certain obligations on municipal officers and employees. See N.J. STAT. ANN. § 40A:9-22.1-.22 (West 1993); see also TEX. LOC. GOV'T CODE ANN. § 171.004 (Vernon's 1999) (providing that, with limitations, "[i]f a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation . . ."). Cf. Davies, *Conflicts*, *supra* note 48, at 1321 (discussing a New York state statute regulating the "conflicts of interest for municipal officers and employees"). States sometimes mandate that local governmental entities promulgate a code of ethics. See *id.* at 1339 (discussing the requirement under New York law). See also Michael A. Lawrence, *The Proposed Michigan Government Ethics Act of 1999: Providing Guidance to Michigan Public Officials and Employees*, 76 U. DET. MERCY L. REV. 411, 451 (1999) (discussing a proposed state conflict of interest law that would offer cities an opt-out option); Markowitz, *supra* note 48, at 582 (discussing ethical standards for Vermont municipal officials found both in the federal and state constitutions and in Vermont statutory law and case law).

<sup>195</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(g) (discussing referral for prosecution).

<sup>196</sup> See generally Davies, *Model Local Ethics Law*, *supra* note 71, at 98-99 (discussing penalties in the nature of disciplinary action, civil fine, damages, civil forfeiture, and misdemeanor).

<sup>197</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(f)(1) (discussing disciplinary action).

<sup>198</sup> See *id.* § 2-87(f)(2) (discussing damages and injunctive relief).

jury<sup>200</sup> or other crimes;<sup>201</sup> voiding of a contract;<sup>202</sup> disqualification from future contracting with the city;<sup>203</sup> and forfeiture of improper financial benefits.<sup>204</sup> The availability of non-criminal sanctions may be important, for imposition of criminal penalties may, in some cases, be thought too “time-consuming and often overly harsh.”<sup>205</sup>

If the violator is a current city employee who is subject to personnel rules and procedures, the code may provide that the ethics violation may be punished in accordance with those provisions.<sup>206</sup> In the case of other city officials and employees, disciplinary action may take the form of public or private notification, warning or reprimand, suspension of duties, or removal from office or employment by the appointing authority.<sup>207</sup>

In the United States, cities do not have the power to say that a party who has been harmed by an ethics violation may sue for damages or injunctive relief.<sup>208</sup> However, a city may set the stage for an American court, exercising its inherent common-law powers, to entertain such a lawsuit. A court may determine that a legislative enactment, which does not expressly discuss civil liability, and which provides only for criminal liability, constitutes the standard of care for a civil cause of action.<sup>209</sup> In determining whether the law is well

<sup>199</sup> See *id.* § 2-87(f)(5) (discussing civil fines).

<sup>200</sup> See *id.* § 2-87(g) (discussing perjury).

<sup>201</sup> See *id.* (discussing criminal prosecution).

<sup>202</sup> See *id.* § 2-87(f)(4) (discussing voiding of a contract).

<sup>203</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(f)(3) (disqualification from contracting).

<sup>204</sup> See Feerick et al., *supra* note 45, at 120 (proposing civil forfeiture up to three times the value of any financial benefit received as a result of unethical conduct).

<sup>205</sup> Feerick, *Historical Overview*, *supra* note 41, at 5 (discussing ethics in government at the federal level).

<sup>206</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(f)–(g) (discussing disciplinary action).

<sup>207</sup> See *id.* § 2-87(f)(1) (discussing types of disciplinary sanctions).

<sup>208</sup> See JOHNSON & GUNN, *supra* note 176, at 846 (“While municipalities (like other political subdivisions of states) exercise some government functions, they are not “sovereigns”—they cannot, for example, adopt rules of tort liability . . . .”) (citing *Mich. Coalition for Responsible Gun Owners v. City of Ferndale*, 662 N.W.2d 864, 872 (Mich. Ct. App. 2003) (holding that a city could not enact and enforce ordinances that made local public buildings gun-free zones); Davies, *Model Local Ethics Law*, *supra* note 71, at 100 (“A municipality may not by local law create a new cause of action.”)).

<sup>209</sup> See *Hoosier v. Lander*, 17 Cal. Rptr. 2d 518, 521 (Ct. App. 1993) (holding that violation of gun-control laws supported a civil cause of action against a gun dealer); see also *Zeni v. Anderson*, 243 N.W.2d 270, 276 (Mich. 1976) (“In a growing number of states, the rule concerning the proper role of a penal statute in a civil action for damages is that violation of the statute which has been found to apply to a particular set of facts establishes . . . a prima facie case of negligence . . .”).

sued to that purpose, the court typically asks whether the statute was intended to protect the class of persons of which the plaintiff was a member from the type of harm that occurred.<sup>210</sup> If the court answers both of those questions in the affirmative and finds no other obstacles,<sup>211</sup> such as legislative obsolescence or vagueness,<sup>212</sup> the court may elect to embrace the standard as a basis for civil liability. If an ethics code expressly states that it was intended to protect the city and members of the public from economic losses caused by non-compliance,<sup>213</sup> there is a clear invitation for a court to recognize a cause of action for damages.

A city may have the power to impose civil fines only in a low monetary amount. However, in some contexts, it may be possible for a city to circumvent that type of limitation. In the case of a violation of reporting provisions, a code may specify that each day of non-

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<sup>210</sup> Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 14 (Proposed Final Draft No. 1, 2005) (“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”).

<sup>211</sup> A court should not adopt a statute as setting the standard of care for a civil cause of action if the legislature intended that the specified penalty be the exclusive sanction for an infraction, or if there is other evidence that the legislature intended to bar use of the statutory standard in tort cases. Cf. *Hoosier*, 17 Cal. Rptr. 2d at 521 (rejecting an argument that state and federal gun-control laws are intended only to impose criminal penalties).

<sup>212</sup> A court may refuse to embrace a vague statute as setting the standard of care. See *Hosein v. Checker Taxi Co., Inc.*, 419 N.E.2d 568 (Ill. App. Ct. 1981) (involving a statute requiring bulletproof shields in taxicabs which had been declared unconstitutionally vague in a prior criminal action); *Perry v. S.N.*, 973 S.W.2d 301, 304 (Tex. 1998) (holding that a child abuse reporting statute, which imposed a reporting requirement on any person having “cause to believe” that a child was being abused, was not an appropriate standard, in part because the statutory standard was not clearly defined); *La.-Pac. Corp. v. Knighten*, 976 S.W.2d 674 (Tex. 1998) (involving an “assured clear distance” statute that required the driver of a vehicle following another vehicle to exercise “due regard” for the relative speed of the vehicles).

<sup>213</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(f)(2). Section 2-87(f)(2) states that:

This code of ethics has been enacted . . . to protect the City and any other person from any losses or increased costs incurred by the City or other person as a result of the violation of these provisions. It is the intent of the City that this ethics code can and should be recognized by a court as a proper basis for a civil cause of action for damages or injunctive relief based upon a violation of its provisions, and that such forms of redress should be available in addition to any other penalty or remedy contained in this code of ethics . . . or any other law.

For example, if a party who is awarded a city contract violated the ethics rules during the bidding process, such that the contract is then voided, the city and other bidders should be able to recover the costs they incur incidental to a second bidding process.

compliance after a filing deadline has passed constitutes a new violation.<sup>214</sup> The aggregate penalty may add up to a substantial sum.

The predicate for a perjury prosecution may be established by requiring that certain written statements be sworn under oath. This obligation may be imposed by rules stating financial disclosure requirements for city officials and employees,<sup>215</sup> or persons doing business with the city, or by the rules governing complaints<sup>216</sup> or responses<sup>217</sup> filed with the ethics review board.

In cases in which ethics rules are violated by persons doing business with the city, penalties might include loss of a contract that has already been awarded<sup>218</sup> or being banned from doing business with the city in the future.<sup>219</sup> These sanctions may constitute a serious deterrent to unethical conduct. It is important to consider carefully the remedial options relating to an ethics review board finding that there has been a violation of the rules relating to the awarding of a contract. An ethics code could provide that the contract is automatically void. However, voiding the contract may not always be in the best economic interests of the city. Moreover, if the contract turned out to be disadvantageous to the violator, voiding it would allow the violator to profit from its own wrongdoing.<sup>220</sup> The rules might alternatively say that in such cases the city may elect to void the contract. However, there is some risk that such weak language might invite a city with poor leadership to ignore the ethics violation—to sweep the breach “under the rug.” The better course is probably for the code to state that if the ethics review board finds that there has been a vio-

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<sup>214</sup> See *id.* § 2-87(f)(5) (discussing civil fines).

<sup>215</sup> See *id.* § 2-73(a)(1) (requiring that financial disclosure reports filed by city officials and employees be sworn).

<sup>216</sup> See *id.* § 2-83(a) (requiring that a complaint must be sworn).

<sup>217</sup> See *id.* § 2-83(f)(1) (requiring that a response to a complaint must be sworn).

<sup>218</sup> See, e.g., *id.* § 2-87(f)(4) (discussing voiding or ratification of a contract procured incidental to a violation of the ethics code).

<sup>219</sup> See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-87(f)(3)(c) (discussing disqualification from contracting and expressly providing that, notwithstanding the sanction, nothing in the section “shall be construed to prohibit any person from receiving a service or benefit, or from using a facility, which is generally available to the public, according to the same terms”).

<sup>220</sup> The principle that a person should not profit from his or her own wrongdoing runs throughout the law. See, e.g., SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) (“The paramount purpose of enforcing the prohibition against insider trading by ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing.”).



lation of provisions relating to the awarding of a contract, the city must vote on whether to ratify or void the contract.<sup>221</sup>

## VI. ETHICS EDUCATION

### A. *Training*

It is just as important to educate city officials and employees about their ethical responsibilities as it is to detect and punish violations of those norms. An ethics code should therefore be clearly written because “[o]fficials cannot obey an ethics law they do not understand.”<sup>222</sup> Once a code is adopted, it should be posted and circulated widely, and should be available prominently on the city’s website, along with other related information,<sup>223</sup> including guidance on how persons can file a complaint. In some circumstances, it may be appropriate for the city to appoint an ethics ombudsman to assist members of the public in navigating the ethics enforcement process.<sup>224</sup> Obviously, a city must invest adequate resources in publicizing the requirements of an ethics code and training personnel to recognize, and deal with appropriately, issues relating to standards of conduct.

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<sup>221</sup> See generally *City of San Diego v. Furgatch*, Nos. D038587, D038751, D038879, 2002 WL 1575109, at \*12 (Cal. Ct. App. July 17, 2002) (holding that a city could ratify tainted contracts relating to a redevelopment project and major league baseball park because a city council member’s resignation removed the disability relating to conflict of interest which might have made the contracts invalid).

<sup>222</sup> Davies, *Myths*, *supra* note 11, at 178–79 (“[W]henver possible, ethics codes should contain bright-line rules and never three-armed lawyer gobbledygook—that is, *on the one hand this, on . . . the other hand that, and on the third hand something else*. Yet, one New York State ethics provision contains fifteen exceptions, with exceptions to the exceptions. No ethics provision should require fifteen exceptions.”).

<sup>223</sup> The city of San Antonio’s current website has an easy to locate ethics section which contains, among other things, the city code of ethics, information on filing a complaint, ethics forms, the ethics review board annual report, information about requesting an advisory opinion, opinions previously issued, campaign finance rules and reports, and various training materials and manuals. The campaign finance information is particularly impressive. Simply type in the name of the contributor or candidate and information about campaign contributions is immediately available. City of San Antonio, Campaign Finance Electronic Filing System Search Page, <https://epay.sanantonio.gov/campfin/search.aspx> (last visited Feb. 13, 2006). See also City of San Antonio, Links to Ethics, Campaign Finance, and Lobbyist Information for the City of San Antonio, <http://www.sanantonio.gov/ecfl/> (last visited Feb. 13, 2006).

<sup>224</sup> See Huddleston & Sands, *supra* note 44, at 145 (“Most ombudsmen perform the role of impartial investigator of complaints filed by those who are traditionally underrepresented. . . . [T]his office not only acts as a bureaucratic watchdog, but . . . tries to . . . make bureaucracy more approachable.”).

An ethics code is typically a complex legal document.<sup>225</sup> In many cases, the code must be “translated” into more reader-friendly language for training and everyday use.<sup>226</sup> This type of user manual should be made widely available to city officials and employees,<sup>227</sup> along with the caution that the manual is merely a guide to the ethics code, not a substitute for its provisions. All city officials and employees should be required to participate in an annual ethics training session, and such training should be part of the orientation of every new official or employee.<sup>228</sup> In addition, city leadership, through public statements and example, must reinforce the idea that ethics in government is a top priority.<sup>229</sup>

### B. Ethics Opinions

It is important that city officials and employees who have ethics questions obtain prompt<sup>230</sup> and reliable answers. A city should have a designated ethics officer whose job is to respond to such requests.<sup>231</sup>

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<sup>225</sup> Cf. Davies, *Conflicts*, *supra* note 48, at 1323 (discussing a New York statute regulating conflicts of interest of municipal officials and employees that was “sufficiently complicated to puzzle experienced municipal attorneys” and “to a lay person . . . virtually unintelligible”).

<sup>226</sup> Some recommend a different approach. They propose that an ethics code read as a short clear document, essentially like the Ten Commandments. See Davies, *Model Local Ethics Law*, *supra* note 71, at 85 (urging that “the first section of an ethics law should be a code of ethics” and that “substantive provisions should not be buried in intricately drafted definitions”). Yet if a code is to be enforced as a legal document and serve as the basis for legal sanctions, it must contain precise guidance as to how far an official or employee’s duties extend. It is better to create a code that is a detailed document accompanied by a training manual that is simplified, rather than to simplify the code and lose necessary details in commentary or by reason of deletion.

<sup>227</sup> A good example is the *City of Phoenix Ethics Handbook*, *supra* note 113. See also U.S. OFFICE OF GOVERNMENT ETHICS, A BRIEF WRAP ON ETHICS (2000), available at [http://www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/booklets/bkbriefwrap\\_00.txt](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/booklets/bkbriefwrap_00.txt) (an ethics pamphlet for executive branch employees). Cf. Davies, *Myths*, *supra* note 11, at 177 (“Governmental ethicists must . . . demythologize . . . [ethics laws]. They must separate the wheat of first principles from the chaff of political realities, public pressure, and bureaucratic inertia.”).

<sup>228</sup> See generally Patricia E. Salkin, *Ten Effective Strategies for Counseling Municipal Clients on Ethics Issues*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR, *supra* note 41, at 296 (discussing ethics training).

<sup>229</sup> See Huddleston & Sands, *supra* note 44, at 143 (arguing that government ethics codes “clearly embraced by top agency management and embedded in an ethical organizational culture are more likely to win respect”).

<sup>230</sup> See Davies, *Myths*, *supra* note 11, at 180 (“Public servants do not want analysis but answers; and, whenever possible, they want those answers not next month or next year but immediately, or at least within a few days.”).

<sup>231</sup> Cf. Sewell Chan, *M.T.A. Adopts Ethics Code Curbing Gifts to Employees*, N.Y. TIMES, May 26, 2005, at B4, available at 2005 WLNR 8310982 (discussing adoption of a

Many inquiries will be informal and will simply call for oral “off the cuff” answers. Other inquiries will be of a more serious nature and necessitate a higher level of assurance as to the appropriate course. The city ethics code should contain procedures clearly detailing the process for requesting a written ethics opinion.<sup>232</sup> A person who reasonably and in good faith acts in accordance with an advisory opinion issued by the city at his or her request should be immune from being found to have violated his or her ethical obligations. Of course, this should be true only if the person fairly and accurately disclosed all relevant facts when requesting the opinion.<sup>233</sup> In addition, it may be appropriate for an opinion to state that a party may not rely on its continuing validity if more than a certain period of time (perhaps two years or five years) has elapsed since its issuance.<sup>234</sup>

If advisory opinions about ethical obligations are issued by a city officer or employee (as opposed to an independent ethics review board),<sup>235</sup> and if reliance on an opinion can grant effective immunity from prosecution, there is a risk that the issuer of the opinion may be pressured to approve a questionable course of conduct. There may be considerable pressure to write an opinion favorable to the party making the request, if, for example the issuer is an employee terminable at will and the party seeking the opinion is a high-level official or employee with power to influence whether the issuer continues to be employed. To minimize the risk of abuse, the ethics opinion issuance process should be fully transparent. When the opinion is issued, it should be available to the public, preferably on the city website, not only because other persons may find its guidance useful, but because third persons should be able to scrutinize the legitimacy of the opinion and the process through which it was issued.

## VII. THE COSTS AND BENEFITS OF ETHICS IN GOVERNMENT

Building an effective legal regime for regulating ethics in city government is a task that is neither simple nor inexpensive. Indeed,

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transportation authority code which “identifies an ethics officer for each of the authority’s subsidiaries and provides a toll-free ethics hotline . . .”).

<sup>232</sup> See Davies, *Model Local Ethics Law*, *supra* note 71, at 117–19 (discussing advisory opinions).

<sup>233</sup> See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-89(b)(2)(A)(ii) (stating limitation).

<sup>234</sup> See *id.* § 2-89(b)(2)(A)(iii) (imposing five-year limitation).

<sup>235</sup> See *id.* §§ 2-84(a)(2), 2-89(b) (providing for some opinions to be issued by the Office of the City Attorney, although others are issued by the independent ethics review board).

not only is the task difficult,<sup>236</sup> and one requiring continual attention,<sup>237</sup> it is an endeavor which cannot even ensure good government.<sup>238</sup> If the persons who hold public positions are unwilling to aspire to high standards and act in furtherance of the common good, no ethics code can fully substitute for that lack of moral ambition.<sup>239</sup>

Yet the enactment and enforcement of a good ethics code can be an important step in treating individuals fairly by ensuring an equal opportunity to enjoy the benefits that government provides.<sup>240</sup> An ethics code can also be good for business because a city that conducts its affairs in accordance with high standards is more likely to enjoy the confidence of investors<sup>241</sup> and to derive economic benefits attributable to that confidence. At a more basic level, a city that places a priority on ethics is a healthier institution than one that does not.<sup>242</sup> A healthy democratic body is more capable of withstanding the winds of change and better able to respond to new demands. Indeed, “a democratic system of government cannot function properly if the

<sup>236</sup> See Feerick, *Historical Overview*, *supra* note 41, at 10 (noting “considerable resistance to the idea of ethics reform”).

<sup>237</sup> *Id.* at 10 (“It is of paramount importance that governmental ethics be constantly evaluated and reexamined . . .”).

<sup>238</sup> See Cox, *supra* note 28, at 300 (“[W]e cannot establish high ethical standards by legislation alone. The personal code by which each . . . public official judges himself or herself . . . will do more to govern individual performance than all the statutes and executive orders on the books.”).

<sup>239</sup> Cf. Marx, *supra* note 38, at 440 (stating that “in public ethics no less than in private ethics it is the individual’s responsible moral judgment that must serve as the compass of decision”).

<sup>240</sup> See MARSHALL EDWARD DIMOCK & GLADYS OGDEN DIMOCK, PUBLIC ADMINISTRATION 127 (4th ed. 1969) (opining that a professional code of ethics is one means of “securing openness and fair treatment”); Cox, *supra* note 28, at 300 (“We need . . . professional codes, statutes, and executive orders, both to express our moral sense and to sharpen awareness of its applications.”); Vincent R. Johnson, Editorial, *Ethics Code Part of Good Government*, SAN ANTONIO EXPRESS-NEWS, Oct. 2, 1998, at 5B (explaining how provisions in a proposed city ethics code, which would prohibit the exercise of official power on the basis of personal connections, would tend “to ensure that ‘equal justice under law’ is the rule, not the exception”). See also Zinman, *supra* note 89, at 142 (arguing that while “[g]ood ethics rules do not ensure good government, . . . they are a crucial prerequisite”).

<sup>241</sup> Cf. Mary Ann Feldheim and Xiaohu Wang, *Ethics and Public Trust: Results from a National Survey*, 6 PUBLIC INTEGRITY 63, 63 (Winter 2003–04) (“[T]here are higher perceptions of trust in cities where there are high perceptions of ethical behaviors.”).

<sup>242</sup> See Feerick et al., *supra* note 45, at 129 (“In a democracy, distrust can be as damaging as corruption itself.”); Martin Painter, *Contracting, the Enterprise Culture and Public Sector Ethics in ETHICS IN PUBLIC SERVICE FOR THE NEW MILLENNIUM*, *supra* note 1, at 165, 166 (arguing that “[t]he barometer of public sector ethics is the health and robustness of the public institutions within which officials hold their offices. When such institutions are routinely corrupted . . . moral agents within them are frequently rendered powerless . . .”).

public believes its officials are corrupt.”<sup>243</sup> Finally, the adoption and enforcement of a sound ethics code “increase[s] the influence of the large majority of people to whom a high standard of official conduct is a self-evident necessity.”<sup>244</sup> For all of these reasons—fairness to individuals, encouragement of business, institutional strength, and empowerment of the citizenry—it is appropriate for a city to spend valuable resources on adopting and periodically revising an ethics code, teaching officials and employees about their responsibilities, and enforcing high standards for the conduct of public affairs.

#### APPENDIX: SELECTED LOCAL GOVERNMENT ETHICS CODE PROVISIONS<sup>245</sup>

##### *Part A. Current City Officials and Employees*

##### **Rule A-1. Improper Economic Benefit**<sup>246</sup>

(a) **General Rule.** A city official or employee shall not take any official action that he or she knows is likely to affect the economic interests<sup>247</sup> of:

<sup>243</sup> Davies, *Myths*, *supra* note 11, at 178.

<sup>244</sup> See Marx, *supra* note 38, at 441 (quoting the report of a government ethics commission).

<sup>245</sup> Provisions similar or identical to the ones found in this Appendix appear in the *Ethics Code of the City of San Antonio*. In turn, some of the provisions in the *San Antonio Ethics Code* were based on language found in the ethics codes of other American cities (e.g., Austin, Tex.; Dallas, Tex.; Houston, Tex.; Indianapolis, Ind.; Milwaukee, Wis.; Phoenix, Ariz.; San Jose, Cal.; Seattle, Wash.), on provisions found in the American Bar Association’s *Model Code of Judicial Conduct*, and on other sources, including Davies, *Model Local Ethics Law*, *supra* note 71, at 69–71. While the language here tracks the *San Antonio Ethics Code*, the Author of this Article has deleted or altered language which, in his opinion, is unnecessarily complex for model purposes or which reflected weakness in the *San Antonio Ethics Code* that developed during the political process of winning adoption of the code.

<sup>246</sup> This provision is based on SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43; see also DALLAS, TEX., CODE OF ORDINANCES Ch. 12A, § 12A-3 (2006), available at <http://www.amlegal.com/library/tx/dallas.shtml> [hereinafter DALLAS ETHICS CODE].

<sup>247</sup> The term “economic interest” should be defined in the city ethics code. A possible definition is:

“Economic interest” includes, but is not limited to, legal or equitable property interests in land, chattels, and intangibles, and contractual rights having more than de minimis value. Service by a city official or employee as an officer, director, advisor, or otherwise active participant in an educational, religious, charitable, fraternal, or civic organization does not create for that city official or employee an economic interest in the property of the organization.

Ownership of an interest in a mutual or common investment fund that holds securities or other assets is not an economic interest in such

- (1) the official or employee;
- (2) his or her parent, child, spouse, or other family member<sup>248</sup> within the second degree of consanguinity<sup>249</sup> or affinity;<sup>250</sup>
- (3) his or her outside client;
- (4) a member of his or her household;
- (5) the outside employer of the official or employee or of his or her parent, child, or spouse;<sup>251</sup>
- (6) a business entity in which the official or employee knows that any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest;
- (7) a business entity which the official or employee knows is an affiliated<sup>252</sup> business or partner<sup>253</sup> of a business entity in

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securities or other assets unless the person in question participates in the management of the fund.

SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(n).

<sup>248</sup> It might be desirable to expand this section to impose the same obligations with respect to unmarried domestic partners. Subsection (4), which deals with household members, will cover some domestic partners. However, depending on how the term is defined, the designation “domestic partner” might encompass a person maintaining a separate residence.

<sup>249</sup> “Consanguinity” means relationship by blood. An individual’s relatives within the second degree by consanguinity are the individual’s: (1) parent or child (relatives in the first degree); and (2) brother, sister, grandparent, or grandchild (relatives in the second degree). *See* TEXAS GOV’T CODE ANN. § 573.023 (Vernon 2004).

<sup>250</sup> “Affinity” means relationship by marriage.

A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

*Id.* § 573.025(a). Thus, the term second degree of affinity includes: a spouse’s grandfather, grandmother, grandson, or granddaughter; a spouse’s brother or sister; and a brother or sister’s spouse.

<sup>251</sup> As the years pass, ethics codes sometimes become riddled with exceptions which, to serve some private purpose, are enacted into law when there is little or no public attention. When the *San Antonio Ethics Code* was passed in November 1998, it contained a rule prohibiting official action that was likely to affect substantially the economic interests of “the outside employer of the official or employee or of his or her parent, child, or spouse . . . .” At some later date, language was inserted into the code so that the provision now speaks of “the outside employer of the official or employee or of his or her parent, child (*unless the child is a minor*), spouse . . . .” SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-43(a)(5) (emphasis added). Obviously, it makes no sense to be able to affect the economic interests of a child’s employer just because the child is a minor. One of the reasons that ethics codes must be periodically reviewed and revised is to detect and purge such ill-advised amendments.

<sup>252</sup> The term “affiliated” may be defined by stating that: “Business entities are ‘affiliated’ if one is the parent or subsidiary of the other or if they are subsidiaries of the same parent business entity.” SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(b).

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which any of the persons listed in Subsections (a)(1) or (a)(2) holds an economic interest;

(8) a business entity or nonprofit entity for which the city official or employee serves as an officer or director or in any other policy making position; or

(9) a person or business entity:

(A) from whom, within the past twelve months, the official or employee, or his or her spouse, directly or indirectly has (i) solicited, (ii) received and not rejected, or (iii) accepted an offer of employment; or

(B) with whom the official or employee, or his or her spouse, directly or indirectly is engaged, or within the past twelve months engaged, in negotiations pertaining to business opportunities.

(b) **Recusal and Disclosure.** A city official or employee whose conduct would otherwise violate Subsection (a) must recuse himself or herself. From the time that the conflict is, or should have been recognized, he or she shall:

(1) immediately refrain from further participation in the matter, including discussions with any persons likely to consider the matter; and

(2) promptly file with the City Clerk the appropriate form for disclosing the nature and extent of the prohibited conduct.

In addition:

(3) a supervised employee shall promptly bring the conflict to the attention of his or her supervisor, who will then, if necessary, reassign responsibility for handling the matter to another person; and

(4) a member of a board shall promptly disclose the conflict to other members of the board and shall not be present during the board's discussion of, or voting on, the matter.

(c) **Definitions.** For purposes of this rule:

(1) An action is likely to affect an economic interest if it is likely to have an effect on that interest that is distinguishable from its effect on members of the public in general or a substantial segment thereof;<sup>254</sup> and

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<sup>253</sup> The term "partner" may be defined as follows: "A 'partner' is someone who engages in an activity or undertaking with another, including a venture that has shared benefits and risks. The term 'partner' includes, but is not limited to, partners in general partnerships, limited partnerships, and joint ventures." See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(y) (similar provision).

<sup>254</sup> This provision means, for example, that an elected official is not prohibited from voting on a proposal that would raise or lower taxes for everyone in the com-

(2) The term *client* includes business relationships of a highly personalized nature, but not ordinary business-customer relationships.<sup>255</sup>

#### **Rule A-2. Unfair Advancement of Private Interests**<sup>256</sup>

(a) **General Rule.** A city official or employee may not use his or her official position to unfairly advance or impede private interests, or to grant or secure, or attempt to grant or secure, for any person (including himself or herself) any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other persons. A city official who represents to a person that he or she may provide an advantage to that person based on the official's position on a board or commission violates this rule.

(b) **Special Rules.** The following special rules apply in addition to the general rule:

(1) **Acquisition of Interest in Impending Matters.** A city official or employee shall not acquire an interest in, or affected by, any contract, transaction, zoning decision, or other matter, if the official or employee knows, or has reason to know, that the interest will be directly or indirectly affected by impending official action by the city.

(2) **Reciprocal Favors.** A city official or employee may not enter into an agreement or understanding with any other person that official action by the official or employee will be rewarded or reciprocated by the other person, directly or indirectly.

(3) **Appointment of Relatives.** A city official or employee shall not appoint or employ, or vote to appoint or employ, any relative within the second degree of consanguinity<sup>257</sup> or

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munity. However, if only a small number of persons in the city, including the city official, own restaurants, the city official would be disqualified from voting on a proposal to raise or lower taxes on restaurants.

<sup>255</sup> Under this provision, a city official who owns a coffee shop would not have to abstain from participation in a matter relating to one of the many hundreds of customers who occasionally buy a cup of coffee at the shop because the relationship is not "highly personalized." However, a city official who is a lawyer engaged in the practice of law would have to abstain from participating in a matter relating to a client represented by the lawyer in a pending lawsuit because the lawyer-client relationship is highly personalized.

<sup>256</sup> This provision is based on § 2-44 of the SAN ANTONIO ETHICS CODE, *supra* note 16. See also DALLAS ETHICS CODE, *supra* note 246, § 12A-4 (containing similar and related provisions).

<sup>257</sup> See *supra* note 249.



affinity<sup>258</sup> to any office or position of employment within the city.

(4) **Supervision of Relatives.** No official or employee shall be permitted to be in the line of supervision of a relative within the second degree of consanguinity<sup>259</sup> or affinity.<sup>260</sup> Department heads are responsible for enforcing this policy. If an employee, by reason of marriage, promotion, reorganization, or otherwise, is placed into the line of supervision of a relative, one of the employees will be reassigned or other appropriate arrangements will be made for supervision.

(c) **Recusal and Disclosure.** A city official or employee whose conduct would otherwise violate Subsection (b)(3) of this Rule shall adhere to the recusal and disclosure provisions provided in Rule A-1 (Improper Economic Benefit).

### **Rule A-3. Gifts**<sup>261</sup>

(a) **General Rule.** A city official or employee shall not solicit, accept, or agree to accept any gift or benefit for himself or herself or his or her business: (1) that reasonably tends to influence or reward official conduct; or (2) that the official or employee knows or should know is being offered with the intent to influence or reward official conduct.<sup>262</sup>

<sup>258</sup> See *supra* note 250.

<sup>259</sup> See *supra* note 249.

<sup>260</sup> See *supra* note 250.

<sup>261</sup> This provision is loosely based on § 2-45 of the SAN ANTONIO ETHICS CODE, *supra* note 16, with significant variations. See also DALLAS ETHICS CODE, *supra* note 246, § 12A-5 (containing a similar general rule and some similar exceptions). The San Antonio rule, unlike the Dallas rule, contains a “wining and dining” exception which allows persons doing business with the city and lobbyists to pay for the meals of public officials “in an individual expense of \$50 or less at any occurrence, and no more than a cumulative value of \$500 in a single calendar year from a single source.” SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-45(a)(2)(C)(ii). From the viewpoint of government ethics, this is not a wise exception. However, the exception may illustrate how failure to pay employees a decent salary—in any profession—leads to questionable practices. In San Antonio, city council members receive no salary for performing what is more than a full-time job and are compensated \$20 for attending each council meeting. See Vincent R. Johnson, Editorial, *A Well-Run City Worth the Cost*, SAN ANTONIO EXPRESS-NEWS, May 9, 2004, at 5H (supporting a proposed city charter amendment providing a salary for members of city council; the amendment later failed to pass).

<sup>262</sup> It may be possible to mount a constitutional attack against this type of language. In *People v. Moore*, 377 N.Y.S.2d 1005, 1008 (Fulton County Ct. 1975), the court considered a state statute which prohibited a municipal officer or employee from accepting a gift having a value of more than \$25 “under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or

(b) **Special Applications.** Subsections (a)(1) and (a)(2) do not include:

(1) a gift to a city official or employee relating to a special occasion, such as a wedding, anniversary, graduation, birth, illness, death, or holiday, provided that the value of the gift is fairly commensurate with the occasion and the relationship between the donor and recipient;

(2) reimbursement of reasonable expenses for travel authorized in accordance with city policies;

(3) a public award or reward for meritorious service or professional achievement, provided that the award or reward is reasonable in light of the occasion;

(4) ordinary social hospitality;

(5) a loan from a lending institution made in its regular course of business on the same terms generally available to the public;

(6) a scholarship or fellowship awarded on the same terms and based on the same criteria that are applied to other applicants;

(7) admission to an event in which the city official or employee is participating in connection with official duties or in connection with his or her spouse's duties;

(8) any benefit solicited by the city official or employee on behalf of a civic or charitable organization, which is promptly delivered to the organization;

(9) ceremonial and protocol gifts presented by a government or organization, accepted on behalf of the city for the use of the city, and properly reported to the city; or

(10) admission to a charity event provided by the sponsor of the event, if the offer is unsolicited by the city official or employee.

(c) **Campaign Contribution Exception.** The general prohibition on gifts stated in Subsection (a) does not apply to a lawful campaign contribution.

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was intended as a reward for any official action on his part." *Id.* at 1007. The court found that the language was "vague and without any standard or guidelines whatsoever" and accordingly unconstitutional under the due process and equal protection clauses of the state and federal constitutions. *Id.* at 1008. However, another (higher) New York court upheld disciplinary action imposed for a violation of a rule in a town ethics code that contained similar language without addressing the constitutional question. *See Merrin v. Town Board of Kirkwood*, 369 N.Y.S.2d 878, 881 (App. Div. 1975) (involving the demotion of an employee who accepted a stereo from a chemical supplier and in return used that supplier's chemicals).

(d) **Gifts to Closely Related Persons.**

(1) A city official or employee shall take reasonable steps to persuade (A) a parent, spouse, child, or other relative within the second degree of consanguinity or affinity or (B) an outside business associate not to solicit, accept, or agree to accept any gift or benefit that reasonably tends to influence or reward the city official's or employee's official conduct, or that the official or employee knows or should know is being offered with the intent to influence or reward the city official's or employee's discharge of official duties.

(2) If a city official or employee required to file an annual financial disclosure report knows that a gift or benefit triggering the reasonable-steps obligations under Subsection (d)(1) has been accepted and retained by a person identified in that subsection, the official or employee shall promptly file a report with the City Clerk's office disclosing the donor, the value of the gift or benefit, the recipient, and the recipient's relationship to the official or employee filing the report.<sup>263</sup>

(e) **Definitions.**

(1) For purposes of this rule, a person is an "outside business associate" if both that person and the city official or employee own, with respect to the same business entity: (A) ten (10) percent or more of the voting stock or shares of the business entity, or (B) ten (10) percent or more of the fair market value of the business entity.

(2) For purposes of this rule, a "sponsor" of an event is the person or persons primarily responsible for organizing the event. A person who simply contributes money or buys tickets to an event is not considered a sponsor.

**Rule A-4. Representation of Private Interests**<sup>264</sup>

(a) **Representation by a Member of a Board.** A city official or employee who is a member of a board or other city body shall not represent any person, group, or entity: (1) before that board or body; (2) before city staff having responsibility for making recommendations to, or taking any action on behalf of, that board or body; or (3) before a board or other city body which has appellate

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<sup>263</sup> Telling the relative that there is a duty under Subsection (d)(2) to disclose the gift may persuade the relative not to accept the gift in the first place. In addition, the existence of the disclosure obligation may dissuade would-be gift givers from offering improper gifts.

<sup>264</sup> This provision is based on § 2-47 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-5 (similar provision).

jurisdiction over the board or body of which the city official or employee is a member.

(b) **Representation Before the City.**

(1) **General Rule.** A city official or employee shall not represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, before the city.

(2) **Exception for Board Members.** The rule stated in Subsection (b)(1) does not apply to a person who is classified as a city official only because he or she is an appointed member of a board or other city body.

(3) **Prestige of Office and Improper Influence.** In connection with the representation of private interests before the city, a city official or employee shall not: (A) assert the prestige of the official's or employee's city position for the purpose of advancing private interests; or (B) state or imply that he or she is able to influence city action on any basis other than the merits.

(c) **Representation in Litigation Adverse to the City.**

(1) **Officials and Employees Other than Board Members.** A city official or employee, other than a person who is classified as an official only because he or she is an appointed member of a board or other city body, shall not represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, in any litigation to which the city is a party, if the interests of that person, group, or entity are adverse to the interests of the city.

(2) **Board Members.** A person who is classified as a city official only because he or she is an appointed member of a board or other city body shall not represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, in any litigation to which the city is a party, if the interests of that person, group, or entity are adverse to interests of the city and the matter is substantially related to the official's duties to the city.

(d) **Definition.** "Representation" encompasses all forms of communication and personal appearances in which a person, not acting in performance of official duties, formally serves as an advocate for private interests, regardless of whether the representation is compensated. Lobbying may be a form of representation. Representation does not include appearance as a fact witness or expert witness in litigation or other official proceedings.

**Rule A-5. Conflicting Outside Employment**<sup>265</sup>

(a) **Impairment of Judgment or Performance.** A city official or employee shall not solicit, accept, or engage in concurrent outside employment which could reasonably be expected to impair independence of judgment in, or faithful performance of, official duties.

(b) **Relationship to Official Duties.** A city official or employee shall not provide services to an outside employer related to the official's or employee's city duties.

**Rule A-6. Confidential Information**<sup>266</sup>

(a) **Improper Access.** A city official or employee shall not use his or her position to obtain official information about any person or entity for any purpose other than the performance of official duties.

(b) **Improper Disclosure or Use.** A city official or employee shall not intentionally, knowingly, or recklessly disclose any confidential information gained by reason of the official or employee's position concerning the property, operations, policies or affairs of the city. This rule does not prohibit: (1) any disclosure of information that is no longer confidential by law; or (2) the confidential reporting of illegal or unethical conduct to authorities designated by law.

**Rule A-7. Public Property and Resources**<sup>267</sup>

A city official or employee shall not use, request, or permit the use of city facilities, personnel, equipment, or supplies for private purposes (including political purposes), except: (a) pursuant to duly adopted city policies, or (b) to the extent and according to the terms that those resources are lawfully available to the public.

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<sup>265</sup> This provision is based on § 2-46 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-6 (similar provision).

<sup>266</sup> This provision is based on § 2-46 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-6 (similar provision).

<sup>267</sup> This provision is based on § 2-49 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-9 (similar provision).

**Rule A-8. Political Activity**<sup>268</sup>

(a) **Influencing Subordinates.** A city official or employee shall not, directly or indirectly, induce or attempt to induce any city subordinate of the official or employee: (1) to participate in an election campaign, contribute to a candidate or political committee, or engage in any other political activity relating to a particular party, candidate, or issue; or (2) to refrain from engaging in any lawful political activity.<sup>269</sup> A general statement merely encouraging another person to vote does not violate this rule.

(b) **Paid Campaigning.** A city official or employee shall not accept anything of value, directly or indirectly, for political activity relating to an item pending on the ballot, if he or she participated in, or provided advice relating to, the exercise of discretionary au-

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<sup>268</sup> This provision is based on § 2-50 of the SAN ANTONIO ETHICS CODE, *supra* note 16. In a rule on political activity, it may be appropriate to consider whether an exception should be created to permit solicitation of city employees who are political appointees. See Davies, *Model Local Ethics Law*, *supra* note 71, at 75.

Some cities seek to prevent public officials from using the prestige of public office to assist other candidates for election. See, e.g., DALLAS ETHICS CODE, *supra* note 246, § 12A-10 (“In any election, except his or her own, a city official shall not: (1) use the prestige of the city official’s position with the city on behalf of a candidate, political party, or political committee, except that: (A) a city official is not prohibited from lending his or her name so long as the office held with the city is not mentioned in connection with the endorsement; and; (B) a city council member is not prohibited from lending his or her name and official city title in connection with any election for public office or in connection with any election ordered by the city of Dallas on a proposition or measure . . .”). The efficacy and wisdom of such provisions may be questioned. The provisions appear to be ill-advised attempts to transplant language from a code of judicial ethics, which prohibits using the prestige of judicial office for the advancement of private interests, into a government ethics code. See MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (2004). Generally speaking, while we do not want judges to act politically, we expect a wide range of public officials to do so, including mayors and members of city councils. While the Dallas rule does not prohibit private-citizen-style endorsements, it may, in reality, be impossible for an elected city official to make an endorsement as a private citizen without implicitly asserting the prestige of public office, even if the office is not mentioned. In addition, the use of the prestige of public office for the advancement of another candidate for public office is not always undesirable, as when a city official speaks out against a candidate who advocates policies that would hurt the city. It makes no sense to force the mayor to pretend that he is not the mayor when he endorses or opposes another candidate.

<sup>269</sup> Issues may arise as to whether a political mass mailing that unintentionally reaches a subordinate violates the rule. Presumably the word “induce,” as used in the rule, denotes conduct of a more intentional nature. Thus, while an inadvertent contact by means of mass mailing would not violate the rule, a targeted mailing would run afoul of the provision. Some codes address this problem by banning only “knowing” political solicitation. See Davies, *Model Local Ethics Law*, *supra* note 71, at 75 (“Inclusion of the word ‘knowingly’ means that neither an official nor his or her campaign committee need cull the names of municipal officials from voter registration lists.”).

thority by a city body that contributed to the development of the ballot item. For purposes of this rule, “anything of value” does not include a meal or other item of nominal value the city official or employee receives in return for providing information about an item pending on the ballot.

(c) **Official Vehicles.** A city official or employee shall not display or fail to remove campaign materials on any city vehicle under his or her control.

#### **Rule A-9. Supervisory Duties**<sup>270</sup>

A city official or employee who has direct supervisory authority over another person who provides services relating to the business of the city shall make reasonable efforts to ensure that the conduct of the supervised person is reasonably compatible with the obligations imposed on city officials and employees by this code of ethics.

#### **Rule A-10. Actions of Others**<sup>271</sup>

(a) **Violations by Other Persons.** A city official or employee shall not knowingly assist or induce, or attempt to assist or induce, any person to violate any provision in this code of ethics.

(b) **Using Others to Engage in Forbidden Conduct.** A city official or employee shall not violate the provisions of this code of ethics through the acts of another.

### *Part B. Former City Officials and Employees*

#### **Rule B-1. Subsequent Representation of Private Interests**<sup>272</sup>

(a) **Representation by a Former Board Member.** A person who was a member of a city board or other city body shall not represent any person, group, or entity for a period of two (2) years after the termination of his or her official duties: (1) before that board or body; (2) before city staff having responsibility for making recommendations to, or taking any action on behalf of, that board or body; or (3) if any issue relates to his or her former duties, before a board or other city body which has appellate juris-

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<sup>270</sup> This provision is a very substantial variation and expansion of a provision in the *San Antonio Ethics Code* dealing with city council contract personnel. See SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-53.

<sup>271</sup> This provision is based on § 2-51 of the SAN ANTONIO ETHICS CODE, *supra* note 16. See also DALLAS ETHICS CODE, *supra* note 246, § 12A-11 (similar provision).

<sup>272</sup> This provision is based on § 2-56 of the SAN ANTONIO ETHICS CODE, *supra* note 16. See also DALLAS ETHICS CODE, *supra* note 246, § 12A-14 (similar, but imposing only a one-year, rather than a two-year, limitation on representation before the city).

diction over the board or body of which the city official or employee was a member.

(b) **Representation Before the City.** A former city official or employee shall not represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, before the city for a period of two (2) years after termination of his or her official duties. This subsection does not apply to a person who was classified as a city official only because he or she was an appointed member of a board or other city body. In connection with the representation of private interests before the city, a former city official or employee shall not state or imply that he or she is able to influence city action on any basis other than the merits.

(c) **Representation in Litigation Adverse to the City.** A former city official or employee shall not, absent consent from the city, represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, in any litigation to which the city is a party, if the interests of that person, group, or entity are adverse to the interests of the city and the matter is one in which the former city official or employee personally and substantially participated<sup>273</sup> prior to termination of his or her official duties.

#### **Rule B-2. Employment Relating to a City Contract<sup>274</sup>**

A former city official or employee shall not, within two (2) years of the termination of official duties, perform work on a compensated basis relating to a contract with the city, if he or she personally and substantially participated<sup>275</sup> in the negotiation or awarding of the contract.

#### **Rule B-3. Continuing Confidentiality<sup>276</sup>**

A former city official or employee shall not use or disclose confidential government information acquired during service as a city

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<sup>273</sup> According to the SAN ANTONIO ETHICS CODE, *supra* note 16, § 2-42(z), “personally and substantially participated” means: “to have taken action as an official or employee through decision, approval, disapproval, recommendation, giving advice, investigation or similar action. The fact that the person had responsibility for a matter does not by itself establish that the person ‘personally and substantially participated’ in the matter.”

<sup>274</sup> This provision is loosely based on § 2-57 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-15(c) (similar provision, but imposing only a one-year, rather than a two-year, limitation).

<sup>275</sup> *See supra* note 273 (defining “personally and substantially participated”).

<sup>276</sup> This provision is based on § 2-55 of the SAN ANTONIO ETHICS CODE, *supra* note 16. *See also* DALLAS ETHICS CODE, *supra* note 246, § 12A-13 (similar provision).



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official or employee. This rule does not prohibit: (a) any disclosure or use that is authorized by law; or (b) the confidential reporting of illegal or unethical conduct to authorities designated by law.