

ETHICS IN GOVERNMENT AT THE LOCAL LEVEL

Vincent R. Johnson*

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* Fulbright Senior Scholar, University of Bucharest, Spring 2005. Professor of Law, St. Mary's University, San Antonio, Texas, USA. During 1997 and 1998, Professor Johnson chaired the Mayor's Task Force on Ethics in Government in San Antonio, Texas, the eighth largest city in the United States. The work of the task force led to the adoption of a new city ethics code which comprehensively revised the standards applicable to more than 11,000 current city officials and employees, as well as former city officials and employees, persons doing business with the city and lobbyists. Preparation of this article was assisted by two students at St. Mary's University School of Law, Brenna Nava and Michael Norris.

I. Building Government Accountability

There is good reason to think that efforts to foster ethics in government should begin at the local, rather than the state or national, level. City officials and employees make a broad range of decisions that affect the welfare of citizens in many ways. Those actions—relating, for example, to licensing, zoning, contracting, and provision of basic city services—determine to a large extent whether, on an everyday basis, people have equal access to the benefits and opportunities that government provides.

In addition, officials who begin their careers in local government often progress to more important positions in state or national settings. If 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 may follow them when their careers move to a broader stage. However, if the officials start their careers under circumstances which tolerate unethical conduct, it will be difficult or impossible to change bad practices when the individuals move to other government positions.

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

This article offers a distinctly American perspective¹ on legal regulation of ethics in government at the local level. The article reflects a number of important assumptions that are widely embraced in the United States, but perhaps not so widely subscribed to in other countries.²

¹ There are other approaches to ethics in government. See Mark Davies, *Governmental Ethics Law: Myths and Mythos*, 40 N.Y. L. SCH. L. REV. 177, 187 (1995) (hereinafter cited as “*Myths*”) (briefly discussing the “German system of life tenure and high pay for government officials in return for stringent ethical standards”).

² See Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 720 (1999) (hereinafter cited as “*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).

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 undereducated, native and immigrant—should be treated equally by the government, and that no person should enjoy an advantage because he or she has a special relationship to those who exercise governmental power.³ In colloquial terms, Americans believe that everyone should stand before the

Americans should not assume that the American version of ethics in government is readily exportable. 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.” CONST. OF ROMANIA art. 4(2) (2003). Article 16 proclaims that “Citizens are equal before the law and public authorities, without any privilege or discrimination.” *Id.* at 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) (available at <http://www.globalcorruptionreport.org/download.html>) (last visited May 22, 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 Romania public integrity system.” *Id.* at 198. The United States, tied with Belgium and Ireland, ranked 17th on the Corruption Perceptions index. *Id.* at 235.

³ *Cf.* CODE OF ETHICS OF THE CITY OF SAN ANTONIO (Texas, USA) §2-41 (2005), available at <http://www.ci.sat.tx.us/atty/ethics> (hereinafter cited as SAN ANTONIO ETHICS CODE). 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 on “equal footing.” This expectation is deeply held by Americans, which is perhaps not surprising. The twentieth century in America was in large measure a search for equal opportunity. 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 racial minorities, to protect consumers from abusive business practices, and to welcome immigrants to the mainstream of American prosperity.⁴ It would be surprising if a country so dedicated to civil rights and social fairness was 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 can provide. If Americans fall short in their quests for equality or for ethics in government, it is not because the primacy of those ideals is doubted.

Second, America is a legally oriented culture that prefers for social problems to be addressed by the adoption and enforcement of laws.⁵ Not surprisingly, “[m]any 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.”⁶ Americans in general, and the American media in particular,⁷ strongly support the enforcement of ethics rules, not only by special review boards, but also, when necessary, by an independent judiciary.⁸ American judges are themselves heavily regulated by ethical standards that endeavor to ensure that special relationships and favoritism play as small a role as possible in court decisions.⁹

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.

⁴ See Johnson, *America's Preoccupation*, *supra* note 2, at 735-50 (1999) (discussing the search for social equality).

⁵ See *id.* at 752-53 (discussing statutory solutions).

⁶ See *id.* at 724.

⁷ See *id.* at 751 (discussing how “[n]ews reports about the shortcomings of public officials inevitably fuel calls for higher ethical standards and stronger enforcement of those norms”).

⁸ See Patricia E. Salkin, *Summary of 2000 Ethics Issues in Land Use*, SG021 ALI-ABA 199, 212 (2001) (stating that “[e]thics allegations continue to be made liberally in courts across the country”).

⁹ See generally American Bar Association, MODEL CODE OF JUDICIAL CONDUCT (2003); Judge Michael E. Keasler, *Ethical Issues in Judicial Campaigns*, 35 St. Mary's L.J. 991, 992 (2004) (stating that “[u]nder the leadership of Chief Justice William Taft and with the aid of

Yet Americans would probably be surprised, if not shocked, to learn that in many cities the ethics rules are not a clear and coherent document, but either non-existent or a tangle of disparate provisions that often appear to lack coherent themes. “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.”¹⁰ For this reason, 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 implemented.

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 addresses 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 period training and issuance of formal ethics opinions. Part VII concludes that the 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 the article contains selected ethics

Dean Pound of Harvard Law School, the American Bar Association (ABA) Canons of Judicial Ethics were promulgated in 1924”); Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URBAN LAW JOURNAL 1007, 1028 (2002) (arguing that 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) (stating that the ethical “standards differentiating permissible forms of [judicial] political activity from those which are forbidden are finely drawn”).

¹⁰ Mark Davies, *Article 18 of New York’s General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALBANY L. REV. 1321, 1340 (1996) (hereinafter cited as “*Conflicts*”) (stating that “[a]s 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 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) (hereinafter cited as “*Crisis*”) (stating that “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).

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,¹¹ 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 and commissions) who exercise the power of government.¹² 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.¹³

“[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.”¹⁴ 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)

¹¹ There are limits on what an ethics code can do to assure the observance of high standards of conduct. Among those limitations 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. See Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 25, 40-46 (2000). See also Markowitz, *Crisis*, *supra* note 10, at 598 (suggesting that “codes 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”).

¹² “[I]n many municipalities, unpaid officials, such as members of planning and zoning boards, wield the greatest power.” Davies, *Conflicts*, *supra* note 10, at 1324-25. See also Markowitz, *Crisis*, *supra* note 10, at 581 (stating that “Vermont’s local boards consist primarily of lay people who volunteer their time”).

¹³ For example, the term “city official” might be defined as including “the mayor, [other specified elected or appointed persons], and members of all boards, commissions, committees, and other bodies created by the city.” “City employee” might be defined as “any person listed on the city payroll as an employee, whether part-time or full-time.” See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-42 (containing more detailed definitions).

¹⁴ See Markowitz, *Crisis*, *supra* note 10, at 581.

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.”¹⁵ 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.

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. Officials and employees should therefore 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. 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.¹⁶

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. To ensure that the substitution of an unbiased decision maker is effective, the disqualified city official or employee should be required to refrain from any further participation in the matter.¹⁷ 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. The recused official or employee should also not be allowed to attend any meeting at which the matter is discussed by others, for the individual’s presence may intimidate or bias the decision makers.

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.¹⁸ 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

¹⁵ Davies, *Conflicts*, *supra* note 10, at 1322 (material in brackets added).

¹⁶ *See, e.g.*, SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-42(v) (similar).

¹⁷ *See id.* at §2-43(b)(1) (discussing recusal).

¹⁸ *See id.* at §2-43(b)(2) & (4) (discussing disclosure).

“conflict of interest”¹⁹ 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. It must prohibit official action which 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 relatives²⁰; 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.²¹

It is easy to envision that a city official or employee might misuse official power to further chances of lucrative subsequent employment in the private sector or business opportunities. 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

¹⁹ “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).

²⁰ See generally Christopher R. McFadden, *Integrity, Accountability, and Efficiency: Using Disclosure to Fight the Appearance of Nepotism in School Board Contracting*, 94 NW. 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”).

²¹ See generally SAN ANTONIO ETHICS CODE, *supra* note 3, at 2-43(a) (specifying list). 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 cited as “*Model Local Ethics Law*”) (stating that 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.

employment or other business relationship.²²

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

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 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.²³ 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”²⁴ 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.” Everyone has the right to apply for a fishing license or to request ordinary “constituent services” from elected representatives. In contrast, it would be improper for an official to direct the city streets department to pave a constituent’s personal driveway, because that would involve the advancement of private interests through rendering services that are not available to the general public.

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. The rule should prohibit not only granting special treatment to any person, but attempting to do so. The rule should not only bar efforts to advance private interests unfairly, but also efforts to deny (or attempt to deny) any person the same rights that are accorded to others. Such language in an ethics code helps to ensure that all persons are in a position to deal with the government on equal footing and that no one enjoys an unfair

²² See SAN ANTONIO ETHICS CODE, *supra* note 3, at 2-43(a)(9) (stating rule).

²³ See *id.* at §2-44 (stating rule).

²⁴ Davies, *Model Local Ethics Law*, *supra* note 21, at 79.

advantage.

It may be useful to address specifically through special subsidiary rules certain types of problems that routinely arise in local government. These problems, which arguably relate to the broader subject of unfair advancement of private interests, include official action that anticipates the reward of a reciprocal favor, involves the appointment or supervision of relatives, or relates to the 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.

A model rule against unfairly advancing or impeding private interests is set forth in Part A-2 of the Appendix to this article. The rule states the general ethical principle as well as 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. 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. Any rule on gifts must take careful note of 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. 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.²⁵ However, once the term “gift” is broadly defined,²⁶ 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 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

²⁵ *Cf.* 2005 N.Y. Atty. Gen. No. 10, 2005 WL 870806 (N.Y.A.G.) (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).

²⁶ 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 something of equal or greater value is received by the donor.” *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-42(q) (similar).

accepting free admission to an event, such as a neighborhood association gathering, that it 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. There is also a risk that language flexible enough to 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.²⁷ 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 it 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 by the city official or employee.

A model rule relating to gifts for city officials and employees is set forth in Part A-3 of the Appendix to this article.

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. 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.

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 addition, formal appearance²⁸ by a city officer or employee as a representative

²⁷ See MODEL CODE OF JUDICIAL CONDUCT Canon 4(D)(5)(c) (2003).

²⁸ 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

of private interests before other city decision makers should normally be rare. There is substantial risk that, in acting as 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*²⁹ (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. 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 devote full-time to the work of 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, might well turn down an offer of appointment if doing so means that the lawyer, or his or her professional colleagues,³⁰ 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 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 board or other city body as the designated representative of a private individual.

²⁹ “*Pro se*” is a Latin term which means “[f]or oneself; on one’s own behalf; without a lawyer.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³⁰ 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. CONDUCT R. 1.10 (2003).

A model rule offering one possible version of provisions governing the representation of private interests is set forth in Part A-4 of the Appendix to this article.

E. Conflicting Outside Employment

If a city official or employee were permitted to accept outside employment relating to the official or employee's 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 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.³¹

A model rule addressing these concerns is set forth in Part A-5 of the Appendix to this article.

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.³² In terms of their effect, these rules go far beyond the improper-economic-benefit rule.³³ The latter type of rule provides that a city official or employee may not personally take official action economically benefitting 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. A prohibited-contractual-interest rule is not designed to identify which officers or employees must step aside, but which types of transactions

³¹ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-48 (stating rule).

³² See, e.g., AUSTIN (TEX.) CITY CODE §2-7-62(L), available at [http://www.amlegal.com/austin_nxt/gateway.dll/Texas/Austin/title00019.htm/chapter00024.htm?f=templates\\$fn=altmain-nf.htm\\$3.0](http://www.amlegal.com/austin_nxt/gateway.dll/Texas/Austin/title00019.htm/chapter00024.htm?f=templates$fn=altmain-nf.htm$3.0) (last visited May 23, 2005) (stating that “[n]o 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”).

³³ See Part II-A, *supra* (discussing improper-economic-benefit rule).

may never take place.³⁴ 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.³⁵ A large city may have so many officials and employees that, if all 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.³⁶ Similar problems can arise in small towns.³⁷ “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.”³⁸

It may reasonably be asked whether a prohibited-contractual-interest rule is a necessary

³⁴ One model code contains language which illustrates the rule. The provision states that: “[n]o [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].” See Davies, *Model Local Ethics Law*, *supra* note 21, at 81.

³⁵ See Davies, *Myths*, *supra* note 1, at 183 (reporting that “[o]ne 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”).

³⁶ 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 (2005) (stating that “[n]o officer or employee of the City shall have a financial interest, direct or indirect, 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 3, at §2-52.

³⁷ See Markowitz, *Crisis*, *supra* note 10, at 603 (stating that 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”).

³⁸ See Davies, *Model Local Ethics Law*, *supra* note 21, at 82.

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” rather than give 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, rather than broadly prohibit contracts in which an official or employee has a financial interest, allow the answer to turn upon advance disclosure of the nature and extent of the financial interest.³⁹

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 conflict of interest may be expressly or implicitly applicable to city officials or employees.⁴⁰

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

³⁹ See CODE OF ETHICS OF MILWAUKEE (WIS.) §303-5(6) (2005), available at <http://www.city.milwaukee.gov/display/router.asp?docid=2285> (last visited May 23, 2005) (stating that “No official or other city employe, member of an official’s or other city employe’s immediate family, nor any organization with which the official or other city employe or a member of the official’s or other city employe’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 employe 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). The Milwaukee rule uses the spelling “employe” rather than “employee.”

⁴⁰ See note 91, *infra*, and the accompanying text.

may, for example, address such topics as confidentiality of government information,⁴¹ use of public facilities and resources,⁴² political activity by officials and employees (on the job or off-duty),⁴³ or supervision of subordinates (to ensure that their conduct, too, complies with applicable ethical standards).⁴⁴ Model rules addressing these concerns is set forth in Part A-6 to A-9 of the Appendix to this article. Whether an ethics code needs to address any of these or other subjects⁴⁵ 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. 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. However, most city ethics codes contain no provision against discrimination. Presumably, this is because discrimination is extensively addressed by other laws and personnel regulations. The City of

⁴¹ See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 3, at §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 Freedom of Information Act. See *id.* at §2-42 k (stating that “[c]onfidential government information” includes all information held by the city that is not available to the public under the Texas Open Records Act and any information from a meeting closed to the public pursuant to the Texas Open Meetings Act, regardless of whether disclosure violates the Act”).

⁴² See *id.*, at §2-49.

⁴³ See, e.g., *id.* at §2-50. See also Davies, *Model Local Ethics Law*, *supra* note 21, at 75 (stating that “[p]olitical solicitation of subordinates by an official fosters the appearance, if not the reality, of coercion”).

⁴⁴ Cf. SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-53 (stating rule relating to contract personnel),

⁴⁵ Some city ethics handbooks contain provisions relating to software use and e-mail policies. See THE CITY OF PHOENIX ETHICS HANDBOOK 10-11 (undated), available at <http://phoenix.gov//AGENCY/PHXPERSON/ethics.pdf> (last visited May 23, 2005). 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.

Houston is a notable exception; its ethics code contains a brief anti-discrimination rule.⁴⁶ If an anti-discrimination provision were to be included in a city ethics code, it might be patterned on anti-discrimination rules found in the Model Code of Judicial Conduct.⁴⁷ 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.

⁴⁶ CITY OF HOUSTON CODE OF ORDINANCES § 18-3(a)(7) (2005), *available at* <http://www.houstontx.gov/codes/chapters16to20.html> (last visited May 23, 2005) (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”).

⁴⁷ *See* MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(5) and (6) (2003). 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, 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.

Presumably all ethics codes should contain provisions imposing duties on a city official or employee that relate to the conduct of others.⁴⁸ Those rules should prohibit persons from assisting or inducing others to violate the code. 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.

A model rule imposing liability for conduct relating to the actions of others is set forth in Part A-10 of the Appendix to this article. In addition, a city ethics code should provide, although not necessarily in the section dealing with the duties of current city officials and employees, that the code imposes duties on members of the public to the extent that no person induce or assist another person to violate the code.⁴⁹

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. 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 private interests that are represented by former city officials and employees will have an unfair advantage in achieving the results they seek to obtain.

To preserve confidence in local government, 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.⁵⁰ The rules should also not demand an unrealistically high degree of continuing

⁴⁸ See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-51(stating rule).

⁴⁹ See *id.* at §2-72 (proving that no 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).

⁵⁰ This is especially true in rural settings. See Davies, *Myths*, *supra* note 1, at 181 (asserting that “small 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”). See also Helen W. Gunnarsson, *Ethics Overkill?*, 92 ILL. B.J. 288, 288 (2004) (discussing other 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

“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.⁵¹ That type of provision would discourage qualified persons from ever working for the government.⁵² 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.

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 officer holder, than from a former paid employee or a mere volunteer. One might also conclude that it is fair to impose greater obligations on former full-time employees than on former part-time employees, although apparently few codes have drawn such a distinction. A former unpaid volunteer should presumably have a less restrictive duty of continuing loyalty than one who was previously elected to office or on the city payroll.

A second variable that may be considered is the nature of the conduct the former city official or employee will engage in after leaving government service. Thus, it is appropriate to ask whether the subsequent representation of private interests be (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. Presumably that type of representation will occur only occasionally in the case of any given former city official or employee because individuals have only a limited need to petition the government. 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

of an ethics commission or appointment of an ethics officer”).

⁵¹ Similar broad restrictions on the conduct of lawyers after leaving a law firm have been held to be invalid. *See* District of Columbia Legal Ethics Comm., Op. 181, at 12-13 (undated), *summarized in* ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT at 901:2307 (finding invalid a restrictive covenant that prohibited the subsequent use of confidential information or general knowledge gained while working at a firm).

⁵² *See* Davies, *Myths*, *supra* note 1, at 181 (stating that “broad ‘revolving door’ restrictions will probably keep some of the best people out of local government”).

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 before 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 sometimes that is not true). 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. Most cities seem to impose a one- or two-year limitation. Such a brief restriction is only a small step toward preserving citizen confidence in government. 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.

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. 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.

As the preceding paragraphs suggest, the formulation of a rule to govern 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),⁵³ 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.⁵⁴ A model rule offering one possible version

⁵³ See note 29, *infra*, and the accompanying text.

⁵⁴ 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. *See* SAN

of provisions governing the representation of private interests is set forth in Rule B-1 of the Appendix to this article.

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 to perform for a private party 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,"⁵⁵ to the detriment of the government. 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 or drafting 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 or award, at least until a certain period of time has elapsed.⁵⁶

A model rule governing work relating to a city contract is set forth in Rule B-2 of the 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

ANTONIO ETHICS CODE, *supra* note 3, at §2-100. 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.

⁵⁵ "Side-switching" is deplored in many areas of the law. In Texas, for example, a lawyer may not challenge the validity of a document he or she drafted. *See* TEX. DISCIP. R. OF PROF'L CONDUCT R. 1.09(a)(1) (Westlaw current through Aug. 1, 2004) (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." *See* *Kommavongsa v. Haskell*, 67 P.3d 1068, 1077 (Wash. 2003).

⁵⁶ *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-56 (containing a two- year limitation).

service.⁵⁷ Part 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.

IV. Disclosure Requirements

A. Periodic Reporting by City Officials and Employees

The enforcement of the various 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.⁵⁸ For example, reporting requirements mirroring provisions in the improper-economic-benefit rule⁵⁹ 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 require the revelation of the filer's sources of outside income (above a stated 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 certain threshold amount); the name of any person from whom the filer received a gift (valued at above a certain amount) and the estimated fair market value of the gift; and information related to any gift received by the filer on behalf of the city.⁶⁰

⁵⁷ See, e.g., *id.* at §2-55 (stating rule).

⁵⁸ See *id.* at §2-74 (detailing contents of financial disclosure reports); Davies, *Model Local Ethics Law*, *supra* note 21, at 90-97 (discussing various disclosure requirements).

⁵⁹ See Part II-A, *supra*.

⁶⁰ 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* Part II-A, *supra*), 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 3, at §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. In some instances, under applicable professional standards, the identity of the client might be confidential.

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. Moreover, the periodic nature of the reporting requirements 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 improper economic benefit to a related person or entity. Furthermore, the obligation to periodically report in a public document information related to enforcement of the ethics rules will remind the filer of the obligations imposed by the ethics rules. That reminder may reduce the number of instances of inadvertent non-compliance with the ethics code.⁶¹ 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.⁶²

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.⁶³ 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.⁶⁴ 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.⁶⁵ 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 instances in which the city official or employee solicited an

⁶¹ *See id.* at 178 (stating that “the vast majority of conduct that is unethical under the law results from employees’ ignorance of what the law is”).

⁶² *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §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).

⁶³ *See, e.g., id.* at §2-73(a) (discussing persons required to file; the list includes candidates for city council).

⁶⁴ *See id.* at §2-75 (discussing short form annual report).

⁶⁵ *See* Davies, *Myths*, *supra* note 1, at 185 (reporting that “[i]n New York State almost 300 county volunteer board members resigned when lengthy financial disclosure became effective”).

offer of employment or a business opportunity.⁶⁶ Similarly, while it might be reasonable to require disclosure of the names of parents, children, siblings, or 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.

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.⁶⁷

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 contract⁶⁸ may be obliged to provide to the city information about the identity of any individual or entity that would be a party to the contract⁶⁹ 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.⁷⁰ These obligations can then be enforced through codified provisions that the violator may be barred from future contracting with the city (presumably for a period of years)⁷¹ or that a contract awarded to a party who violated the disclosure obligations may be voided at the option of the city.⁷²

⁶⁶ Cf. SAN ANTONIO ETHICS CODE, *supra* note 3, at §§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).

⁶⁷ Cf. Davies, *Myths*, *supra* note 1, at 186 (opining that “[e]lectronic filing is . . . not merely the wave of the future; it is the only future for annual disclosure”).

⁶⁸ A “discretionary contract” is any contract other than one which by law must be awarded on a low- or high-qualified bid basis. See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-42(m) (providing a similar, but more detailed, definition).

⁶⁹ See *id.* at §2-59 (requiring disclosure of parties, owners, and closely related persons).

⁷⁰ See *id.* at §2-60 (requiring disclosure of association with city officials or employees).

⁷¹ See *id.* at §2-97 (discussing disqualification from contracting).

⁷² See *id.* at §2-96 (discussing voiding or ratification of a contract).

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.⁷³ The precise nature of the procedures may take many forms.⁷⁴ 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 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 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 limited.⁷⁵ 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 stream-lined European inquisitorial form of proceeding over the more elaborate, and potentially more time consuming and expensive, American model of adversarial justice.⁷⁶ By the same token, it may be

⁷³ See Davies, *Conflicts*, *supra* note 10, at 1343-44 (stating that “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”).

⁷⁴ See generally SAN ANTONIO ETHICS CODE, *supra* note 3, §§2-80 to 2-91 (discussing the city’s ethics review board); Davies, *Model Local Ethics Law*, *supra* note 21, at 106-19 (similar)

⁷⁵ But see Davies, *Conflicts*, *supra* note 10, at 1344 (stating that “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”).

⁷⁶ “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

more efficient to allow the ethics review board to operate in panels of three or five board members,⁷⁷ rather than in an *en banc* format in which every member of a larger board participates in the hearing and disposition of every case.

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 final⁷⁸ decision making authority in persons who are insulated from political pressures to as great an extent as possible. 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.⁷⁹ It is preferable that these persons be “outsiders”—persons who do not otherwise hold city positions,⁸⁰ who have no substantial ties to city officials, 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 society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they

pro and con adduced by the parties.” *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

⁷⁷ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-85 (providing for ethics panels).

⁷⁸ 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. See Davies, *Model Local Ethics Law*, *supra* note 21, 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”).

⁷⁹ 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).

⁸⁰ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-81(d) (providing that “[n]o 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 (5) a lobbyist required to register under . . . this ethics code”); Davies, *Model Local Ethics Law*, *supra* note 21, 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”).

continue to hold the public trust.”⁸¹ Once appointed to the ethics review board, these persons should not be subject to removal from office except upon a clear showing of “good cause” for removal.⁸² To ensure that decisions are based upon a fair presentation of the evidence, *ex parte* communications with the board must be prohibited.⁸³ Of course, members of the ethics review board should be required to recuse themselves from participation in any case where their impartiality might reasonably be questioned.⁸⁴ 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

⁸¹ THE FEDERALIST No. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

⁸² See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 3, at 2-81(e) (providing that “[m]embers 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”).

⁸³ See *id.* at 2-85(d) (providing that “[i]t 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] 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 9, at 1016 (stating that “[i]t 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 the law and the evidence. Without such provisions, it would be impossible for parties to address effectively 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 not only of access to the information that emerges from an open and transparent litigation process, but also of knowledge of which persons are presenting communications that may prove material to resolution of pending matters”).

⁸⁴ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §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.* at §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).

where a complaint is filed against the mayor, a city council member, or a department head.⁸⁵ If these various conditions are observed, it is likely that the complaint-review process can inspire confidence in the citizenry.

The ethics review board should have jurisdiction over all alleged violations of the ethics code and the power to impose sanctions. “Historically, ethics boards possessing only the authority to issue advisory opinions have accomplished little.”⁸⁶ Making ethics rules, but not enforcing them, breeds public cynicism and destroys confidence in government.

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. Even if the ethics code contains penalties for initiating frivolous charges,⁸⁷ it is likely that some complaints will be found to be 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 to lack merit,⁸⁸ a city may wish to provide that the initial stages of the process shall be conducted in a confidential manner.⁸⁹ Confidentiality may 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 the validity of a complaint, news of that finding should be made available to the public, along with sufficient

⁸⁵ *Id.* at §2-84(d) (discussing outside independent counsel).

⁸⁶ Davies, *Conflicts*, *supra* note 10, at 1341-42.

⁸⁷ *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-83 (providing sanctions for frivolous complaints).

⁸⁸ *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) (stating that “the 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...’”).

⁸⁹ *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-83(e) (providing that no city official or employee shall reveal information relating to the filing or processing of a complaint except as required by official duties).

information for the public to understand the nature of the charges and the basis for the decision.⁹⁰

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),⁹¹ 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.⁹²

The range of available sanctions should be clearly stated in the code. Enforcement

⁹⁰ See *id.* at §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).

⁹¹ The New Jersey Local Government Ethics Law, for example, imposes obligations on municipal officers and employees. See N.J.S.A. 40A:9-22.1 *et seq.* (Westlaw current through L. 2005 c. 1 to 92); see also TEX. LOCAL GOVT. CODE §171.004 (Westlaw current through 2004 Fourth Called Sess.) (providing that, with certain 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 10, 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, *Crisis*, *supra* note 10, 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).

⁹² See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-87(g) (discussing referral for prosecution).

mechanisms⁹³ may include: disciplinary action⁹⁴; liability for damages or injunctive relief⁹⁵; civil fines⁹⁶; prosecution for perjury⁹⁷ or other crimes⁹⁸; voiding of a contract⁹⁹; and disqualification from future contracting with the city.¹⁰⁰

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.¹⁰¹ 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.¹⁰²

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.¹⁰³ However, a city may set the

⁹³ See generally Davies, *Model Local Ethics Law*, *supra* note 21, at 98-99 (discussing penalties in the nature of disciplinary action, civil fine, damages, civil forfeiture and misdemeanor).

⁹⁴ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-92 (discussing disciplinary action).

⁹⁵ See *id.* at §2-93 (discussing damages and injunctive relief).

⁹⁶ See *id.* at §2-94 (discussing civil fines).

⁹⁷ See *id.* at §2-95 (discussing perjury).

⁹⁸ See *id.* (discussing criminal prosecution).

⁹⁹ See *id.* (discussing voiding of a contract).

¹⁰⁰ See *id.*, *supra* note 3, at §2-97 (disqualification from contracting).

¹⁰¹ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-87(0(1) & 2-92 (discussing disciplinary action).

¹⁰² See *id.* at §2-92 (discussing types of disciplinary action sanctions).

¹⁰³ See JOHNSON & GUNN, *supra* note 79, at 846 (stating that “[w]hile 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 Michigan Coalition for Responsible Gun Owners v. City of Ferndale, 662 N.W.2d 864 (Mich. 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 21, at 100 (recognizing that “[a] municipality may not by local law create a new cause of action”).

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, sets the standard of care for a civil cause of action.¹⁰⁴ In determining whether the law is well suited 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.¹⁰⁵ If the court answers both of those questions in the affirmative and finds no other obstacles,¹⁰⁶ such as legislative obsolescence or vagueness,¹⁰⁷ 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,¹⁰⁸ there is a clear invitation for a court to recognize a

¹⁰⁴ See *Hoosier v. Landa*, 17 Cal. Rptr. 2d 518, 521 (Ct. App. 1993) (holding that violation 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) (stating that “[i] 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,”).

¹⁰⁵ Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 14 (P.F.D. No. 1, 2005) (stating that “[a]n 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”).

¹⁰⁶ 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 v. Landa*, 17 Cal. Rptr. 2d 518, 521 (Ct. App. 1993) (rejecting an argument that state and federal gun-control laws are intended only to impose criminal penalties).

¹⁰⁷ 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 (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); *Louisiana.-Pacific Corp. v. Knighten*, 976 S.W.2d 674 (Tex. 1998) (involving an assured-clear-distance statute which requires a vehicle which is following another vehicle to exercise “due regard” for the relative speed of the vehicles).

¹⁰⁸ See, e.g., SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-93. Section 2-93 states that:

cause of action for damages.

A city may have the power to impose civil fines only in a low monetary amount. 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-compliance after a filing deadline has passed constitutes a new violation.¹⁰⁹ 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 imposing disclosure requirements on designated city officials and employees¹¹⁰ or persons doing business with the city or by the rules governing written complaints¹¹¹ or responses¹¹² filed with the ethics review board.

In cases where ethics rules are violated by persons doing business with the city, the penalties of potential loss of a contract that has already been awarded¹¹³ or of being banned from doing business with the city in the future for a period of years¹¹⁴ may constitute a serious

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 legislative enactment 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.

¹⁰⁹ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-94 (discussing civil fines).

¹¹⁰ See *id.* at §2-73 (requiring that financial disclosure reports filed by city officials and employees be sworn).

¹¹¹ See *id.* at §2-83(a) (requiring that a complaint must be sworn).

¹¹² See *id.* at §2-83((f)(1) (requiring that a response to a complaint must be sworn).

¹¹³ See, e.g., *id.* at 2-96 (discussing voiding or ratification of a contract procured incidental to a violation of the ethics code).

¹¹⁴ See, e.g., *id.* at 2-97 (discussing disqualification from contracting and expressly providing that, notwithstanding the sanction, nothing in the section “shall be construed to

deterrent to unethical conduct. It is important to consider what provisions a city ethics code should contain to deal with situations where the ethics review board finds that there has been a violation of the rules relating to the awarding of a contract. An ethics code could provide that the contract would automatically be voided. 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.¹¹⁵ The rules might also 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 violation “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 violation of provisions relating to the awarding of a contract, the city must vote on whether to ratify or void the contract.

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 be clearly written because “[o]fficials cannot obey an ethics law they do not understand.”¹¹⁶ 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.¹¹⁷ Obviously, a city must invest

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”).

¹¹⁵ 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) (stating that “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”).

¹¹⁶ Davies, *Myths, supra* note 1, at 178 (stating also that “whenever possible, ethics codes should contain bright-line rules and never three-armed lawyer gobbledygook—that is, on the one hand this, on one 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”).

¹¹⁷ The city of San Antonio’s 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

adequate resources in publicizing the requirements of an ethics code and training officials and employees to recognize, and deal with appropriately, facts that raise issues as to the correct standard of conduct.

An ethics code is typically a complex legal document.¹¹⁸ In many cases, the code must be “translated” into more reader-friendly language for training and everyday use.¹¹⁹ This type of user manual should be made widely available to city officials and employees,¹²⁰ along with the caution that the manual is merely a guide to the ethics code, not a substitute for its provision. 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.

B. Ethics Opinions

It is important that when city officials and employees have questions about their ethical obligations they can promptly¹²¹ obtain reliable answers. A city should have a designated ethics

available.

The ethics section of the San Antonio website can be found at:
<http://www.ci.sat.tx.us/ecfl/index-ethics.asp> (last visited May 23, 2005).

¹¹⁸ Cf. Davies, *Conflicts*, *supra* note 10, at 1324 (discussing a New York statute regulating conflicts of interest of municipal official and employees that was “sufficiently complicated to puzzle experienced municipal attorney” and to a lay person “virtually unintelligible”).

¹¹⁹ Some persons recommend a different approach. They propose that an ethics code read as a short clear document, essentially like the Ten Commandments. *See id.* 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 that the code be a detailed document and that the training manual be simplified, than that the code be simplified and necessary details be either unavailable or lost in commentary.

¹²⁰ A good example is THE CITY OF PHOENIX ETHICS HANDBOOK, *supra* note 45. *See, e.g.,* THE CITY OF SAN ANTONIO ETHICS HANDBOOK (2001). Cf. Davies, *Myths*, *supra* note 1, at 177 (stating that “[g]overnmental ethicists must . . . demythologize . . . [ethics laws]. They must separate the wheat of first principles from the chaff of political realities, public pressure, and bureaucratic inertia”).

¹²¹ *See* Davies, *Myths*, *supra* note 1, at 180 (asserting that “[p]ublic 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”).

officer whose job it is to respond to such requests. While many inquiries may be informal and call for simple “off the cuff” answers, others will be of a more serious nature and will seek 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.¹²² 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.¹²³ 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.¹²⁴

If advisory opinions about ethical obligations are issued by a city officer or employee (as opposed to an independent ethics review board),¹²⁵ 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. Where the issuer is an employee terminable at will and the party requesting the opinion is an elected official with power to influence whether the issuer continues to be employed, this pressure to write an opinion favorable to the desires of the party making the request may be considerable. 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 and operating an effective legal regime for regulating ethics in city government is a task which is neither simple nor inexpensive. Indeed, not only is the task difficult, it is one which cannot even ensure good government, if the persons who hold public positions are unwilling to aspire to high standards in the conduct of a city’s affairs.

Yet the enactment and enforcement of a good ethics code can be an important step in

¹²² See Davies, *Model Local Ethics Law*, *supra* note 21, at 117-19 (discussing advisory opinions).

¹²³ See SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-89(b)(2)(A)(ii) (stating limitation).

¹²⁴ See *id.* at §2-89(b)(2)(A)(iii) (imposing five-year limitation).

¹²⁵ See *id.* at §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).

treating individuals fairly by ensuring that all persons have an equal opportunity to enjoy the benefits that government can provide. It can also be good for business, because a city that conducts its affairs fairly is also likely to enjoy the confidence of investors and to derive economic benefits attributable to that confidence. At a more basic level, a city that acts in an above-board, impartial manner is probably a healthier institution than one that does not. More specifically, “a democratic system of government cannot function properly if the public believes its officials are corrupt.”¹²⁶ A healthy democratic institution will presumably be more capable of withstanding the winds of change and better able to respond to new demands. For all of these reasons—fairness to individual citizens, conduciveness to business, and institutional strength—it is appropriate for a city to spend scarce resources on adopting a good 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 Provisions¹²⁷

Part A. Current City Officials and Employees

Rule A-1. Improper Economic Benefit¹²⁸

(a) **General Rule.** A city official or employee shall not take any official action that he or

¹²⁶ See Davies, *Myths*, *supra* note 1, at 118.

¹²⁷ Provisions similar or identical to the ones found in this Appendix appear in the Ethics Code of the City of San Antonio, Texas, USA. 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, Dallas, Houston, Indianapolis, Milwaukee, Phoenix, San Jose, Seattle), on provisions found in the American Bar Association Model Code of Judicial Conduct, and on other sources, including Davies, *Model Local Ethics Law*, *supra* note 21, at 69-71. Where 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.

¹²⁸ This provision is based on §2-43 of the San Antonio Ethics Code, *supra* note 3; see also DALLAS, TEXAS CODE OF ORDINANCES Ch. 12A, §12A-3 (2005), available at [http://www.amlegal.com/nxt/gateway.dll/Texas/Dallas/volume00000/chapter00022.htm?f=templates\\$fn=altmain-nf.htm\\$3.0#JD_12A-3](http://www.amlegal.com/nxt/gateway.dll/Texas/Dallas/volume00000/chapter00022.htm?f=templates$fn=altmain-nf.htm$3.0#JD_12A-3) (last visited May 23, 2005) (hereinafter cited as Dallas Ethics Code) (containing numerous similar provisions).

she knows is likely to affect the economic interests¹²⁹ of:

- (1) the official or employee;
- (2) his or her parent, child, spouse, or other family member¹³⁰ within the second degree of consanguinity¹³¹ or affinity¹³²;
- (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 spouse¹³³;

¹²⁹ 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 nominal 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 securities or other assets unless the person in question participates in the management of the fund.” *See* SAN ANTONIO CODE, *supra* note 3, at §2-42(n) (containing similar provisions).

¹³⁰ 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 words “domestic partner” might encompass a person maintaining a separate residence.

¹³¹ “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 §573.023 (2005).

¹³² “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.” TEXAS GOV’T CODE §573.025(a) (2005). 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. *See* SAN ANTONIO ETHICS HANDBOOK, *supra* note 120, at 37.

¹³³ 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

(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 affiliated¹³⁴ business or partner¹³⁵ of a business entity in 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 month 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:

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*), or spouse” San Antonio Ethics Code, *supra* note 3, at 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. The San Antonio Ethics Code underwent a major review in 2004, but aside from the addition of important campaign finance rules, the code remains largely as enacted in November 1998, with minor changes.

¹³⁴ 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 3, at §2-42(b).

¹³⁵ 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 3, at §2-42(y) (similar).

(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 thereof¹³⁶; and

(2) The term *client* includes business relationships of a highly personalized nature, but not ordinary business-customer relationships.¹³⁷

Rule A-2. Unfair Advancement of Private Interests¹³⁸

(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.

¹³⁶ 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 community. 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.

¹³⁷ 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.

¹³⁸ This provision is based on §2-43 of the SAN ANTONIO ETHICS CODE, *supra* note 3; *see also* DALLAS ETHICS CODE, *supra* note 128, §12A-4 (containing similar and related provisions).

(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 consanguinity¹³⁹ or affinity¹⁴⁰ 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 consanguinity¹⁴¹ or affinity.¹⁴² 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).

¹³⁹ See note 131, *supra*.

¹⁴⁰ See note 132, *supra*.

¹⁴¹ See note 131, *supra*.

¹⁴² See note 132, *supra*.

Rule A-3. Gifts¹⁴³

(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.¹⁴⁴

(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,

¹⁴³ This provision is loosely based on §2-45 of the SAN ANTONIO ETHICS CODE, *supra* note 3, with significant variations. *See also* DALLAS ETHICS CODE, *supra* note 128, §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 3, at §2-43(a)(2)(ii). From the viewpoint of government ethics, this is not a wise exception. However, the exception may illustrate how failure to pay persons a decent salary—in any profession—leads to questionable practices. In San Antonio, city council members receive no salary for performing what is a more than full-time job and are compensated \$20 for attending each council meeting. *See* Vincent R. Johnson, *A Well-Run City Worth the Cost*, May 9, 2004, SAN ANTONIO-EXPRESS-NEWS at 5H, col. 3-6 (supporting a proposed city charter amendment providing a salary for members of city council; the amendment later failed to pass).

¹⁴⁴ It may be possible to mount a constitutional attack against the type of language. In *People v. Moore*, 85 Misc. 2d 4 (N.Y. Co. 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 was intended as a reward for any official action on his part.” 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 state and federal constitutions. *Id.* at 7. 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 of Kirkwood*, 369 N.Y.S.2d 878, 881 (App. Div. 3d Dep’t 1975) (involving the demotion of an employee who accepted a stereo from a chemical supplier and in return used that supplier’s chemicals).

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 spouses duties;
- (8) any benefit solicited by the city official or employee on behalf of 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.

(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.¹⁴⁵

(e) **Definitions.**

(1) For purposes of this rule, a person is an "outside business associate" if both that

¹⁴⁵ 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.

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 Interests¹⁴⁶

(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 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.

¹⁴⁶ This provision is based on §2-47 of the SAN ANTONIO ETHICS CODE, *supra* note 3. See also DALLAS ETHICS CODE, *supra* note 128, §12A-5 (similar).

(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 Employment¹⁴⁷

(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 Information¹⁴⁸

(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.

¹⁴⁷ This provision is loosely based on §2-48 of the SAN ANTONIO ETHICS CODE, *supra* note 3. The parallel provision in the Dallas Ethics Code contains a puzzling, and presumably ill-drafted, exception. It says, in effect, that a city official or employee may engage in “concurrent outside employment that could reasonably be expected to impair independence of judgment in, or faithful performance of, official duties” if outside employment “is the official’s primary source of income.” DALLAS ETHICS CODE, *supra* note 128, §12A-8(a) and (b). Perhaps this means that the conflicting-outside-employment rule does not apply to part-time employees or, perhaps, highly paid “consultants” who are on the city payroll. Surely, it cannot mean that one may engage in conflicting employment if it is possible to make more money by doing so.

¹⁴⁸ This provision is based on §2-46 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-5 (similar).

Rule A-7. Public Property and Resources¹⁴⁹

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.

¹⁴⁹ This provision is based on §2-48 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-9 (similar).

Rule A-8. Political Activity¹⁵⁰

(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.¹⁵¹ A general statement merely encouraging another person to vote

¹⁵⁰ This provision is based on §2-50 of the SAN ANTONIO ETHICS CODE, *supra* note 3. 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 21, 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, TEXAS CODE OF ORDINANCES Ch. 12A, §12A-10 (2005), available at* [http://www.amlegal.com/nxt/gateway.dll/Texas/Dallas/volume00000/chapter00022.htm?f=templates\\$fn=altmain-nf.htm\\$3.0#JD_12A-10](http://www.amlegal.com/nxt/gateway.dll/Texas/Dallas/volume00000/chapter00022.htm?f=templates$fn=altmain-nf.htm$3.0#JD_12A-10) (last visited May 23, 2005) (hereinafter cited as Dallas Ethics Code) (providing that “[i]n 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 may 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, in a government ethics code. *See MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (2003)*. 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 probably makes no sense to force the mayor to pretend that he is not the mayor when he endorses or opposes another candidate.

¹⁵¹ Issues may arise as to whether a political mass mailing that unintentionally reaches a subordinate violates the rule. Presumably the word “induce,” as used 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

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 authority 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 Duties¹⁵²

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 Others¹⁵³

(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

address this problem by banning only “knowing” political solicitation. *See Davies, Model Local Ethics Law, supra* note 21, at 75 (stating that “[i]nclusion 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”).

¹⁵² 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 3, at §2-53.

¹⁵³ This provision is based on §2-51 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-11 (similar).

Rule B-1. Subsequent Representation of Private Interests¹⁵⁴

(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 jurisdiction 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 participated¹⁵⁵ prior to termination of his or her official duties.

¹⁵⁴ This provision is based on §2-56 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-14 (similar, but imposing only a one-year, rather than two-year, limitation on representation before the city).

¹⁵⁵ “‘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.” *See* SAN ANTONIO ETHICS CODE, *supra* note 3, at §2-42(z).

Rule B-2. Employment Relating to a City Contract¹⁵⁶

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 participated¹⁵⁷ in the negotiation or awarding of the contract.

Rule B-3. Continuing Confidentiality¹⁵⁸

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

¹⁵⁶ This provision is loosely based on §2-57 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-15(c) (similar, but imposing only a one-year, rather than two-year, limitation).

¹⁵⁷ *See* note 155, *supra* (defining “personally and substantially participated”).

¹⁵⁸ This provision is based on §2-55 of the SAN ANTONIO ETHICS CODE, *supra* note 3. *See also* DALLAS ETHICS CODE, *supra* note 128, §12A-13 (similar).