

Recommendations to the D.C. Board of Ethics and Government Accountability

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My name is Robert Wechsler. I am the Director of Research for [City Ethics](#), Inc., a nonprofit, nonpartisan organization that provides information and advice on local government issues nationwide. I am also author of the free online/downloadable resource book, [Local Government Ethics Programs](#), the only book on the topic.

I recommend that, before considering the seven issues listed in the ethics code, the board consider the essential elements of a local government ethics program the District currently lacks. These best practices should be instituted before considering changes or additions to ethics provisions. Here are the essential elements of a local government ethics code as listed by Mark Davies, longtime director of New York City's Conflicts of Interest Board and America's leading authority on local government ethics:

- (i) that it be clear and comprehensive, providing clear guidance to city officials, employees, contractors, and citizens;
- (ii) that it provide for three kinds of sensible disclosure of interests: an annual disclosure statement, disclosure when a conflict arises (transactional disclosure), and disclosure when someone bids for business or requests a permit (applicant disclosure); disclosure is the democratic way of letting people know about possible conflicts of interest;
- (iii) that it provide effective administration, featuring an independent ethics commission with teeth, which gives swift advisory opinions, which has a monopoly on interpreting and enforcing the code, which can give waivers for exceptions, and which provides training for all city officials and employees, as well as for everyone who does business with the city; and

(iv) that it provide whistle-blower protection so that city employees (the people who know what's going on) and others will be able to report violations without endangering their jobs and pensions.

Ethics Board Independence

The most important element of a local government ethics program is the ethics board's independence, real and perceived. The BEGA's members are selected by high-level elected officials under its jurisdiction. Therefore, whenever the board dismisses a complaint against the mayor, a council member, or one of their colleagues or allies, or provides advice allowing such an official to engage in certain conduct, the perception will be that the board is protecting or helping those who appointed them. And when it finds a violation against a member of an opposition party or faction, or provides advice prohibiting such an official from engaging in certain conduct, the perception will be that the board is hurting or hindering those who oppose the individuals who appointed them.

No one can question as political the decisions of a truly independent ethics board. The trend in local government ethics is toward the selection of ethics board members by community organizations. This is done in such cities and counties as Atlanta, Miami-Dade County, Milwaukee, Nashville, Jacksonville, New Orleans, Houston, Kansas City, KS, and Palm Beach County, FL.

Another problem with officials selecting ethics board members actually occurred in the District: a failure to select members on a timely basis, whether intentionally or not, can hamper the board's work and cause a serious scandal.

The other important element of ethics board independence is a guaranteed budget. Ethics commission budgets are guaranteed, in various ways, in such cities as Philadelphia, Los Angeles, San Diego, and New Orleans. Where budgets are not guaranteed, there is a tendency for councils to reduce ethics board budgets when they are not happy with its decisions.

Monopoly on Interpreting and Enforcing the Ethics Code

Another exceptionally important element of an ethics program is giving this independent ethics board a monopoly on ethics advice and enforcement. A monopoly on ethics advice is a best practice that is followed in every good local ethics program in the U.S. However, the District Ethics Manual says that officials and employees should seek advice from their supervisor, their Agency Ethics Counselor, the D.C. Ethics Counselor (the Attorney General), or the BEGA.

One important consideration is consistency. Advice should be given consistently, or it will be seen to be biased, will be considered unfair, and will not provide clear guidance. This seriously undermines trust in an ethics program, both by the public and by government officials and employees.

With respect to the A.G.'s office, an office that represents officials should not be allowed to provide ethics advice (1) because this allows officials to forum shop, that is, go to whoever they feel will give them the answer they want, and (2) because attorneys in the office have developed special relationships with officials that make it difficult for them to deal neutrally (or be seen to have dealt neutrally) with these officials' conflict situations. In addition, the A.G. is an elected official, with political allies and opponents, and therefore advice from his office will be seen as biased.

Nor should the A.G.'s office be involved in providing waivers. Waivers are simply another form of ethics advice, and should be provided only by the BEGA, in a process that is open to the public.

Supervisors have no training in government ethics and are usually not in a position to provide neutral advice, because they are conflicted in two ways: (1) they have special relationships with their subordinates and (2) they have a special interest in protecting their department or agency, which might lead to poor advice that is harmful to subordinates.

As long as Agency Ethics Counselors have good ethics training, realize the limitations of what they should provide advice about and refer other issues to the BEGA, take into account advisory opinions and informal advice given by the BEGA, and report their advice to the BEGA, their advice can be useful in answering the majority of ethics questions, which are relatively simple, without undermining the BEGA's monopoly on advice. However, these counselors should not be agency heads or counsel, or others who have relationships with staff or interests that may conflict, or appear to conflict, with the District's interest in having its officials and employees deal responsibly with conflict situations.

It is also worth noting that it is unusual and very limiting to have the BEGA and its director only provide formal advisory opinions that say "whether a specific transaction or activity inquired of would constitute a violation." The best and common practice is to provide formal and timely informal advice that goes beyond whether conduct would be a violation (which is what enforcement does) to consider whether conduct, even if possibly legal, would create an appearance of impropriety and, therefore, should not be engaged in. Ethics laws are minimum requirements. The District ethics code treats them as maximum requirements with respect to advice, which is the most important part of an ethics program. The result will be the allowance of conduct, as legal, that will lead to scandals and undermine the public trust.

As for investigation and enforcement, the BEGA shares its authority with agency heads, ethics counselors, the Inspector General, the Attorney General, and the U.S. Attorney. This will mean not only a waste of District and federal resources, due to multiple investigations and enforcement proceedings regarding the same conduct, but also a range of interpretations of the ethics code that will make it impossible for officials to know what conduct is appropriate. It is important to recognize that an ethics code is interpreted not only by advice, but also by waivers, decisions to investigate or not, dismissals, settlements, and enforcement decisions.

The worst part of this sharing of enforcement authority is that ethics laws may be enforced administratively by these offices (except by the U.S. Attorney) and may be enforced criminally by the Attorney General and the U.S. Attorney. Even basic conflict violations may be criminally enforced. The arguments against this are too numerous to be included here. Please read the section of my book *Local Government Ethics Programs* on this topic (at http://www.cityethics.org/files/lgep1-0 - Robert%20Wechsler.htm#Criminal_Enforcement).

Clear and Comprehensive Guidance

The third essential element of an ethics program that is missing in D.C. is a consolidated, comprehensive ethics code that provides clear guidance. The District Ethics Manual starts its section on conflicts of interest, the core ethics provision, with the sentence, “District employees are subject to several different conflict of interest standards.” This is unacceptable. I found seven different standards when I reviewed the ethics code for the District Council back in 2009. No government official should be subject to multiple conflict standards.

The worst way to consolidate an ethics code would be to follow federal ethics laws, which are almost unreadable. The District’s ethics provisions should be either rewritten from the ground up or be heavily edited and re-organized so that there is clarity and consistency. An effort should be made to have those federal ethics laws that apply to the District be stricken as part of the creation of a comprehensive District ethics code that covers the areas of the stricken provisions.

It is my understanding that the BEGA was required to consolidate the District’s ethics laws within 240 days. That is too short a period of time.

Disclosure

The District’s ethics program has only two of the three kinds of disclosure that are essential to an ethics program: annual and transactional disclosure. And there is no guidance in the District Ethics Manual regarding transactional disclosure, which is the

disclosure of a possible conflict situation at the time it arises.

The third essential type of disclosure, “applicant disclosure,” is not required by the ethics code. Applicant disclosure is the disclosure of possible conflicts by those who apply for something significant from the local government, such as a contract, a land use permit, a job, or a grant. Just as annual disclosure provides a check on transactional disclosure, alerting the public to possible conflicts before they become a problem, applicant disclosure provides a check on both annual and transactional disclosure. It also brings applicants into the ethics program, making it less likely that they will act in ways that lead to conflict situations or that allow conflict situations to be handled irresponsibly.

Reporting Misconduct and Whistle-Blower Protection

The D.C. Ethics Manual does not mention whistle-blower protection, another of the essential elements of an ethics program. The program does require that employees (but not officials?!) report misconduct, which is a good practice. However, it is unfair and fruitless to do this without providing whistle-blower protection.

In addition, all ethical misconduct should be reported to the BEGA, not to the Inspector General or anyone else. It is better for a centralized office to refer reports than to leave it up to employees to decide where to go (and others to handle the referrals). And there needs to be more clarity about reporting misconduct that is not within the ethics program’s jurisdiction.

Size of the Ethics Board

Not a single respected ethics program in the U.S. has a three-person ethics board. Three is a bad number for an ethics board because (1) any substantive communication between two members must be a public meeting, (2) it prevents the creation of committees; (3) it requires too much work from each member; and (4) there is little room for error (for example, if one seat is empty, every vote must be unanimous and one member’s conflict or sudden problem means there is no quorum).

In addition, it can be helpful to have one or two alternate members. This allows individuals to learn about government ethics before they become regular members, and it also provides backup when members have conflicts, when seats are empty and, during the summer, when it can be difficult to get a quorum.