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District of Columbia Board of Ethics and Government Accountability
Public Hearing on Best Practices
Testimony of V. David Zvenyach, General Counsel to the D.C. Council
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Good afternoon, Mr. Chairman, and members of the Board of Ethics and Government Accountability. My name is V. David Zvenyach, and I am the General Counsel to the Council of the District of Columbia. Thank you for the invitation to testify before you today.

As General Counsel, my role typically involves legislative matters, advising members, committees, and staff about measures pending before the Council. I also serve as the Council's Ethics Counselor. In that capacity, I have had a unique view into some of the strengths and weaknesses of the District's ethics framework.

I recognize that the main purpose of today's hearing is to gather information necessary to present the Council with recommendations concerning current best practices and potential reforms to the current ethics framework. Because my role is to provide politically neutral guidance to the Council, I am not in a position to offer an opinion on many of those recommendations.

But in keeping with the spirit of today's hearing—to consider best practices—I have two conceptual recommendations for the Board to help guide its effort to promote a culture of ethical behavior throughout the District government. These recommendations, although by no means exhaustive, are based on my own experience as Ethics Counselor to the Council and, I must emphasize, are not necessarily those of the Council of the District of Columbia.

I. TAKING ETHICS SERIOUSLY: ENFORCE AND ADVISE

In recent years, much attention has been paid (and rightly so) to enforcement of the District's ethics laws. Indeed, the Board's very existence is the product of a crisis of confidence in the ability of the District to enforce those laws. It is therefore important that the Board dedicate considerable attention to investigating and enforcing ethical breaches. Nevertheless, if the Ethics Board only enforces the rules in place, that would not be enough. A narrow enforcement role would represent a significant opportunity lost. That opportunity is for the Board to embrace a robust, proactive advisory role.

In my experience, ethical situations tend to occur along two axes. Along one axis is the complexity of an existing ethics rules. Along the other axis is the predictability of the event giving rise to the situation.

In many situations, the ethics rules are straightforward and the precipitating event is highly predictable. It is obvious, for instance, that a person who routinely conducts campaign activities on a government computer would be violating the District's ethics laws.

In other situations, ethical dilemmas confronting District officials and employees are complex and largely unpredictable. In one unusual situation, a Council employee was invited by a person at a nonprofit organization to make a site visit to a facility in another jurisdiction. The person at the nonprofit organization offered the employee a car ride to that facility. Of course, the employee could have used government resources to make the trip, but the employee decided to share a ride instead. Ultimately, the employee reimbursed the person for gas and mileage. That sort of situation is something that does not come up all that often at the Council and we spent several hours trying to determine the appropriate course of action (particularly concerning the valuation of the gift).

Yet, a surprisingly large number of ethical dilemmas are highly predictable but involve complex rules. That is because many ethics rules are highly fact specific. In such cases, the factors that should be considered may be well-known to an ethics advisor, but are less accessible to front-line staffers. For example, determining whether a *bona fide* personal relationship exists between a government employee and a prohibited source requires a multifaceted analysis, and ethics counselors should have ready access to those factors, even if a District employee does not.

In the "easy" cases, where a rule is clear and the event is predictable, the Board should exercise its enforcement authority swiftly and decisively. In "hard" cases, where the rules are complex and the situation unpredictable, the Board should exercise its advisory role through the issuance of formal advisory opinions. Yet, in cases where the rules are complex but the circumstances are predictable, the Board should not wait until it is asked. Instead, in those cases, the Board should endeavor to provide proactive advisory opinions and guidance.

	Predictable	Unpredictable
Straightforward	Enforce	Enforce
Complex	Proactive Advice	Reactive Advice

Figure 1. Simplified Decision Matrix

By way of illustration, in the run-up to the 2012 Presidential Election, the Office of Special Counsel promulgated a special advisory opinion answering the question: "Now that President Obama is a candidate for reelection, may federal employees display his picture in their offices?" [Answer: Depends]. In December, the Office of Government Ethics released guidance about acceptance of gifts related to the upcoming inauguration.¹ Two weeks ago, the United States House of Representatives Committee on Ethics issued a "pink sheet" summarizing the House's rules prohibiting use of one's official position for personal gain. Such advisory opinions not only serve as useful reminders to employees who are already aware of their ethical obligations, but also become a useful reference for employees who may not be aware so that they may conform their actions to the ethics rules.

To fully realize its potential, the Board should keep its finger on the pulse of emerging issues within the District's ethics ecosystem. By listening to employees and the public, anticipating common or emergent situations, and tackling difficult but predictable ethical dilemmas, the Board will do a great service to the District.

A strong proactive advisory role has several discrete benefits. First, it creates greater awareness about the existing ethics rules. Second, it makes enforcement easier because ignorance of the rules would be a harder excuse to plausibly make. Third, it creates opportunities for feedback to employees and ethics advisors in real-time, and spur additional thinking about other emergent situations. And finally, it reduces the transaction costs associated with deciding an appropriate course of action by promoting uniformity in the application of ethics rules.

Fortunately, the Board's structure is conducive to a strong proactive advisory role. With 6-year terms, Board members should have the time to go beyond the basics of ethics rules, and confront the harder questions concerning ethics in the District. This is a significant advantage to more transitional boards, which may have less opportunity to develop a rich body of common law. If, coupled with strong enforcement, the Board assumes a robust, proactive advisory role, ethics in the District will greatly benefit because employees can perform their jobs more certain that they will avoid unanticipated ethics pitfalls and because the public will have confidence that employees have adequate notice of their ethical duties under the law.

¹ Office of Government Ethics, Legal Advisory 12-10, Presidential Inaugural Events (Dec. 20, 2012).

II. THE CODE OF CONDUCT

Related to the idea that employees should have clear guidance about the ethics rules, it is also important to make sure the rules themselves are accessible and uniformly applied. Unfortunately, the status quo leaves much to be desired, which I learned first-hand in early 2011.

As the newly minted Ethics Counselor, one of my early tasks was to survey the universe of ethics laws and rules applicable to Council employees. Suffice to say, it was a nightmare. The Council's "Code of Official Conduct" at the time stated that:

Councilmembers and Council staff shall take full responsibility for understanding and complying with the letter and spirit of all laws and regulations governing standards of conduct for District public officials, including those relating to conduct, conflicts of interest, gifts, disclosures, campaign finance, political activity, and freedom of information. This includes understanding and complying with Council Rules 201a and 202; D.C. Official Code § 1-615.51 (whistleblower protection); D.C. Official Code § 1-618.01, et seq., and 6 DCMR, Chapter 18 (Standards of Conduct); District of Columbia Campaign Finance and Conflict of Interest Act (D.C. Official Code § 1-1104.03 (Constituent Services Funds); D.C. Official Code § 1-1105.06(a) and (b) (Lobbying); D.C. Official Code § 1-1106.01 - 1-1106.02, and D.C. Municipal Regulations, Title 3, Chapters 33 and 37 (conflict of interest); D.C. Official Code § 1-1106.51 (use of government resources); Official Correspondence Regulations (D.C. Official Code § 2-701 et seq.)(Official Mail); and all applicable federal conflict of interest and ethics rules and regulations: the Hatch Act (5 U.S.C. §§ 7321 7326)(partisan political activity); 5 U.S.C. § 3110 (nepotism); 18 U.S.C. § 201(b)(2) (bribery); 18 U.S.C. § 207 (post-employment restrictions); 18 U.S.C. § 208 and 5 CFR Part 734 (conflict of interest).

You would be forgiven if your eyes just glazed over or if your head hurts. Assuming you could track down all of the citations, you might be dissuaded from continuing the effort when you learned that some of these provisions did not apply to the Council (such as lobbying) or that the agencies responsible for enforcing some of these rules did not interpret others (e.g., Office of Campaign Finance and 18 U.S.C. § 208). To make matters worse from an administrative standpoint, the Council and the Executive adopted broad "principles" so vague as to be utterly unenforceable.

Confronted with this situation, a few Council offices and I convened an internal working group to adopt a Code of Official Conduct. The Code was developed with an eye toward establishing, in a single accessible location, understandable ethics rules that conform to federal and local laws and rules. In certain respects, the Code hews closely to the District Personnel Manual's Standards of Conduct. In other respects the Code broke from the DPM, particularly where the DPM was hopelessly outmoded. On November 1, 2011, the Council formally adopted the Code of Official Conduct.

The adoption of the Code of Official Conduct represented an enormously positive shift for ethics administration in the Council. Now, when new Council employees are brought on board, they can receive copies of the light blue Code of Official Conduct and turn to it whenever they have a question about what they can and cannot do. And my attorneys no longer have to hunt through the dense underbrush to render advice about what is permissible. Having worked with this Code of Official Conduct for a little more than a year, though, it is fair to say that it remains a work-in-progress. A primary challenge with the Code of Official Conduct is that we are the only body to which it applies. As such, there is limited "common law" governing the hard cases.

That limitation could be remedied by having the District adopt a Code of Conduct that is universally applicable. A universal Code of Conduct could promote uniform application of ethics rules across agencies, reduce administrative costs, and improve the administration and enforcement of the Ethics Rules. But, if a Code of Conduct is to be applied universally, the Board should take steps to avoid vague rules or rules that are overly restrictive or burdensome.

For instance, I find the DPM's gifts rules to be hopelessly absurd. They are almost contemptible toward District employees, ensuring that all of them will break the rules, even if they act in good faith. That sort of "gotcha" is unacceptable for ethics rules, particularly where it is the result of bureaucratic inertia.

If the Board recommends a universal Code of Conduct, the Board should take care to regularly review the Code and make improvements, refinements, and otherwise keep pace with new developments. I also respectfully suggest that the Board consider a baseline Code of Conduct and allow agencies to adopt more restrictive or unique supplemental standards. Such supplemental standards would afford agencies the ability to manage their own affairs for personnel-management purposes, but would not amount to violations of the Code of Conduct enforceable by the Board. That way, the Board could provide universal guidance and enforcement, but agencies would have the additional

authority and flexibility to administer and prevent ethical breaches within their particular domains.

III. CONCLUSION

In the end, I recognize that the Board has much to do. Handling the straightforward duties of processing financial disclosure statements and providing training sessions is a significant task. Add in investigations and enforcement and the Board will have its hands full. But, if the Board can make it a priority to scan the horizon for opportunities to provide proactive guidance, the District government will be the better for it. And, if the Board can develop a Code of Conduct that is accessible and universal, employees will be better armed to perform their duties.

Thank you again for the opportunity to testify. I am available to answer any questions you might have and stand ready to assist the Board in any way I can.

