

Drafting Municipal Codes of Ethics

by Alan Bojorquez

*Texas City Attorneys Association Summer Conference
June 15, 2018
Bastrop, Texas*


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TABLE OF CONTENTS

About the Author -----	3
A. Introduction -----	4
B. Ethics Explained -----	5
C. Approaching the Task -----	5
1. Problem Identification-----	5
2. Authority-----	5
3. Applicability-----	7
4. Values-----	8
5. Approach-----	8
D. Contents of a Code -----	9
1. Duplicate or Exceed-----	9
2. City Restrictions-----	10
E. Advisory Opinions -----	12
F. Oversight -----	12
G. Training -----	17
H. Support Staff -----	18
1. Who is the Client-----	18
2. Role of the City Attorney-----	19
3. Role of Special Counsel-----	19
I. Conclusion -----	19
Attachment “A” LARIAT Summary-----	21
Attachment “B” LARIAT Ethics Ordinance Drafting Checklist-----	22
Attachment “C” Texas Center for Municipal Ethics-----	25

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A. INTRODUCTION

This paper is offered as a resource for municipal lawyers asked to draft or amend municipal codes of ethics. It is not exhaustive. Instead, it is intended to address the issues most commonly addressed in the process of drafting, amending, and implementing. Before engaging in such an endeavor, it is wise to come to terms with why the city is going through this exercise.

There are many reasons to expend time and effort preparing local guidelines for promoting a culture of integrity at city hall. First, a strong ethics program can boost public confidence, which is a worthy goal. A 2017 survey by the Pew Research Center found that the public's trust in the federal government continues to be at historically low levels. Only 19% of Americans today say they can trust the government in Washington to do what is right "just about always" (3%) or "most of the time" (16%). Of registered voters, 27% say they think of government as "an enemy". Just 50% say ordinary citizens can influence the government in Washington, if they are willing to make the effort, while about (47%) say there's not much ordinary citizens can do to influence the government.¹

Perhaps city officials can consider it good news that a Gallup poll in 2016 confirmed that for the previous 15 years, Americans expressed more confidence in their local government than their state government to handle problems.²

With that lack of trust, we should look to city hall as a great place to foster ethics in government. Not only do city officials have broad authority over a wide range of matters that affect the daily health, safety and welfare of the public, but we also influence the economy and the natural environment. Furthermore, public servants who begin their careers at the local level often progress to other positions in state and federal settings.³

In addition to helping extend ethical conduct up through the higher echelons of public service, a worthy code of ethics can deter the type of bad behavior that draws the ire of the news media (and the citizen journalists populating the ranks of social media). "The press loves a good scandal, and reports issued by an investigative body of alleged waste, fraud, or abuse usually provide enough fodder for the local media to create significant attention and pressure on municipal officials and senior officers.... A municipal lawyer may be the least prepared for these ethical dilemmas and yet may be the most called-upon to navigate his or her way out of these potential traps in a manner that preserves the client's interest while maintaining his own integrity and reputation."⁴

¹ Pew Research Center, <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>

² 71% trust local government, compared with 62% for state. Gallop, <http://news.gallup.com/poll/195656/americans-trusting-local-state-government.aspx>

³ Johnson, Vincent R., *Ethics in Government at the Local Level*, 36 Seton Hall Law Review, 715 at 727 (2006).

⁴ Yates, Katherine S., *An In-House Lawyer's Perspective on Ethics*, 68 Tex.B.J. 920 (2005).

B. ETHICS EXPLAINED

In order to proceed, we need a good working understanding of what we're talking about. "Ethics" refers to well-based standards of right and wrong that prescribe what humans ought to do, usually in terms of duties, principles, specific virtues, or benefits to society.⁵ We can break the term down into three companion definitions:

- (1) Ethics are the moral guide we choose for our behavior. They are the sum of the ideas, experiences, information, and beliefs that guide us toward doing whatever we believe to be the next right thing.
- (2) Ethics are the rules we choose to follow even when no one is looking. In other words, ethics are not the rules; rather, ethics are what we chose to do with the rules.
- (3) Ethics are our internal moral compass.⁶

There are about 1,200 cities in Texas, all varying in ethical challenges and administrative capabilities. Thus, there is no single model code of ethics that will serve as an appropriate fit for every city, town or village.

C. APPROACHING THE TASK

- 1. Problem Identification.** When drafting regulations, such as a code of ethics, it is wise to begin with problem identification. What is the impetus for going down this path? To establish the nature of the *negative* to be prevented, or the *positive* to be encouraged. When it comes to writing codes of ethics, it is prudent to consider recent happenings that could be fueling the discussion. The enactment of ethical codes is often reactionary. Leadership is responding to pressure as a result of a scandal. The city attorney should be aware of what prompted efforts to devise or modify a code of ethics in order to be aware of the political, legal or social context.
- 2. Authority.** Once a need for a code of ethics has been identified, the next step is to locate the municipality's legal ability to regulate. Some states, such as New York, have specific enabling legislation:

*The governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them.*⁷

We do not have such an enabling statute in Texas. Here, the source of authority can be broad, general, and may depend on the type of municipality.

⁵ Svava, James, *The Ethics Primer for Public Administrators in Government and Nonprofit Organizations*, Jones & Bartlett Publishers, p. 10 (2007), citing Andre and Velasquez (1987).

⁶ Bauer, Christopher, *Better Ethics Now: How to Avoid the Ethics Disaster You Never Saw Coming*, 2nd, p. 26 (2008).

⁷ New York Consolidated Laws, General Municipal Law §806(1)(a).

- (a) **Home-Rule** municipalities have the full power of local self-government.⁸ Generally a home-rule municipality may exercise any power not prohibited by the Constitution or laws of the State of Texas, which is lawfully conferred by its charter.⁹

In the City of Denton, the November 2017 ballot included Proposition D:

Shall Sections 14.04 and 14.05 of the City Charter be repealed and replaced with a provision requiring the adoption of an ethics ordinance by the city council in accordance with Texas law and adheres to certain minimum standards?

The majority of voters (87%) approved the proposition, thus triggering the process of drafting and approving an ethics ordinance.

In the City of San Antonio, charter mandates council appointment of an 11-member Ethics Review Board (name of board? citation?)

- (b) **General-Law** municipalities look not to charters, but to state statutes as sources of regulatory authority.¹⁰ They may enact a regulation that is for the good of government, peace or order of the municipality, and is necessary or proper for carrying out a power granted to the municipality or to an officer of the municipality (provided the regulation is not contrary to the constitution or state law).¹¹ Perhaps a city attorney will find these statutes to be sufficient authority.

(1) **Type A** general-law municipalities may adopt ordinances, acts, laws, or regulations, not inconsistent with state law, that are necessary for the government, interest, welfare, or good order of the municipality as a body politic.¹²

(2) **Type B** general-law municipalities may adopt ordinances that are not inconsistent with the laws and Constitution of Texas, as it deems proper for the government of the municipality.¹³ Type B municipalities can prescribe a fine for the violation of an ordinance.¹⁴ Type B municipalities can take any other action necessary to carry out a provision of the Texas Local Government Code applicable to the municipality.¹⁵

(3) **Type C** general-law municipalities of 201 to 500 inhabitants have all authority and duty as conferred upon the city council of a Type B municipality unless the authority or duty conflicts with provisions of the Texas Local Government Code relating specifically to Type C municipalities.¹⁶ The city council of Type C municipalities of

⁸ Tex. Loc. Gov't Code §51.072.

⁹ *Bland v. City of Taylor*, 37 S.W.2d 291, (Tex. Civ. App. - Austin 1931) affirmed 67 S.W.2d 1033, (Tex. 1934); see also Tex. Loc. Gov't Code Ch. 9.

¹⁰ Brooks, David, "Municipal Law and Practice," Texas Practice §3.03 (p. 205).

¹¹ Tex. Loc. Gov't Code §51.001.

¹² Tex. Loc. Gov't Code §51.012.

¹³ Tex. Loc. Gov't Code §51.032(a).

¹⁴ Tex. Loc. Gov't Code §54.002.

¹⁵ Tex. Loc. Gov't Code §51.032(b).

¹⁶ Tex. Loc. Gov't Code §51.051(b).

501 to 4,999 inhabitants have all authority and duties as conferred upon the city council of a Type A municipality unless the authority or duty conflicts with provisions of the Texas Local Government Code relating specifically to Type C municipalities.¹⁷

3. Applicability. To whom will the ordinance apply? That is a threshold question for any drafter of a code of ethics. Will the city council enact something that only applies to the city council? Will the city council approve personnel policies that apply only to staff? How does the city intend to address:

- the city council?
- the city manager?
- department heads?
- volunteers?
- citizen board members?
- independent contractors?
- vendors?
- former city officials?
- lobbyists?

It has been suggested by some ethicists that, to be effective, a municipal code of ethics must have a broad reach by applying not only to elected officials, but to all public employees and citizen volunteers (such as board's and commission members).¹⁸

One issue, is whether city council can adopt a code of ethics that delegates to a board of ethics the authority to evaluate the conduct of employees who are under the supervision of a city manager in a community that has adopted the City Manager Form of Government (by election on the manager form, or through election of a home-rule charter).¹⁹ In these situations, councils are required to deal with department heads and other employees solely through the city manager, except for information inquiries. If a council member is not satisfied with the manager's response to an expressed concern about an employee, the next step is another conference with the manager.²⁰

The City of Dallas applies its code of ethics to "all city officials, employees, and persons doing business with the city,..."²¹ In El Paso, the code of ethics applies to the city council, boards, committees, and commissions, employees, candidates, and volunteers.²²

Conversely, the City of Richardson's code of ethics does not apply to employees (full-time, part-time or internship basis) or independent contractors of the City. The standards of conduct for employees are governed by the city's personnel policies and the charter.

Richardson's code of ethics applies to members of all City boards, committees or commissions, including the city council.²³

¹⁷ Tex. Loc. Gov't Code §51.051(a).

¹⁸ Johnson, Vincent R., *Ethics in Government at the Local Level*, at 727 (2006).

¹⁹ Tex. Loc. Gov't Code Chs. 9 or 25.

²⁰ Blodgett, Terrell, *Texas Home Rules Charters* p. 51 (2010), citing City of Missouri City, *Code of Ordinances* [Prohibitions].

²¹ City of Dallas, *Code of Ordinances*, §12A-1(c).

²² City of El Paso, *Code of Ordinances*, §2.92.

²³ City of Richardson, *Code of Ordinances*, §2-2.

4. **Values:** For some, ethical standards may seem arbitrary and fashioned of thin air. For others, they are purely relative in a random *in the eye of the beholder... I know it when I see it* sort of way. For purposes of municipal governance, I've identified four common sources of ethics:

- (a) **Duties:** behaviors expected of persons who occupy certain roles (i.e., obligations of a professional position).
- (b) **Virtues:** qualities that define what a good person is; ideas, objects, practices, or almost anything we attach worth to (e.g., thrift, piety, charity, courage, or benevolence).
- (c) **Principles:** fundamental truths that form the basis of behavior (i.e., kinds of behavior that are "right" or "good"). A principle is a prescription for action.
- (d) **Societal Benefits:** actions that produce the greatest good for the greatest number (i.e., good consequences).²⁴

What are the values most espoused by municipal leaders?

- Justice?
- Fairness?
- Representation?
- Responsiveness?
- Inclusiveness?
- Efficiency?
- Effectiveness?
- Innovation?
- Frugality?
- Safety?
- Prosperity?
- Objectivity?
- Accountability?
- Transparency?

5. **Approach.** There are three (3) common approaches to creating an ethics programs for organizations such as municipalities.

- 1) **Compliance Approach.** The most common means of addressing the subject of ethics relies on a system of rules and procedures that establish limitations on behavior and mandates conduct designed to keep individuals out of trouble. Rules are enacted, behavior is monitored, infractions are detected and investigated, and admonishment are administered accordingly. Compliance relates to the structures, controls, and oversights that organizations put into place to assure legal and ethical behavior.²⁵

Perhaps it is because of the very nature of municipal government that we, as city administrators, are more comfortable with rules, processes, and outcomes and less likely to embrace the importance of virtues, values, and principles—regarding them as too touchy-feely.

- 2) **Integrity Approach.** Conversely, efforts to instill integrity in a public sector organization involve a value-driven methodology that focuses on awareness, leadership, inspiration, and culture. The integrity approach is more positive and less punitive. It is

²⁴ Svara, *The Ethics Primer for Public Administrators in Government and Nonprofit Organizations*, p. 10 (2007); see also Menzel, Donald C., *Ethics Moments in Government: Cases and Controversies*, American Society for Public Administration p. xv, and 3 (2010).

²⁵ Bauer, *Better Ethics Now: How to Avoid the Ethics Disaster You Never Saw Coming*, 2nd, p. 47 (2008).

more likely to incentivize reaching lofty goals than to admonish for crossing a line. If a city's code of ethics follows this approach, its mandates and prohibitions are more aspirational than mandatory (and thus difficult to enforce, if at all, with few actual consequences beyond political and public relations concerns).

- 3) **Hybrid Approach.** Modern ethicists promote a fusion model through which an organization incorporates both approaches. Ethical behavior is usually seen as the absence of wrongdoing. Ethics codes and training seldom say much about how an ideal public servant should behave.²⁶

It is simply not possible to formulate a rule for every ethical dilemma that will be faced. Organizational cultures that reinforce values, virtues, and principles provide guidance to fill the gaps. Fostering Integrity in Public Service is about more than achieving compliance with written codes. Ethics is more about identifying and preventing fraud, waste, and abuse.

D. CONTENTS OF A CODE

1. **Duplicate or Exceed:** A threshold decision that must be made early in the process of drafting a code of ethics is whether the locally-enacted rules would mirror standards already enacted in state law, or go beyond state regulations.
- (a) **Preemption:** Preemption is not an issue that arises with any frequency when preparing codes of ethics, but it warrants addressing. When a city passes an ordinance that seems inconsistent with a state statute, the preemption analysis falls into one of three (3) general categories: (1) express preemption, (2) field preemption, or (3) conflict preemption. The appropriate preemption doctrine depends entirely on the language in the statute. Sweeping, strong, and exclusionary statutory language tends to make preemption of the conflicting ordinance more likely. Specific language, or silence on the issue, lends itself to upholding the ordinance. Despite these general rules, courts increasingly take a case-by-case approach and weigh other factors, blurring the distinctions between the categories.²⁷
- (b) **State Law:** There are many statutes that are often characterized as being ethics laws, which collectively comprise the rules of conduct city officials must conform to absent the enactment of local codes of ethics.
- Conflicts of Interest. Tex. Loc. Gov't Code Ch. 171.
 - Conflicts of Interest- Plats. Tex. Loc. Gov't Code Ch. 212.
 - Conflicts of Interest- Banks. Tex. Loc. Gov't Code Ch. 131.
 - Nepotism. Tex. Gov't Code Ch. 573.
 - Financial Disclosures. Tex. Loc. Gov't Code 145 & 176
 - Honoraria. Tex. Pen. Code §36.07

²⁶ Newell, Terry, "Beyond Ethics: Honor and Public Service," PA Times, American Society for Public Administration (December 13, 2016).

²⁷ Goho, Shaun A., *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, Plan. & Env'tl. L., July 2012, at 3.

- Gifts. Tex. Pen. Code §36.08.
- Transportation or Lodging. Tex. Pen. Code §36.07.
- Bribery. Tex. Pen. Code §36.02.
- Coercion. Tex. Pen. Code §36.03.
- Misuse of Information. Tex. Pen. Code §39.06.
- Abuse of Office. Tex. Pen. Code §39.02.
- Obstruction or Retaliation. Tex. Pen. Code §36.06.

When setting out to create or modify a code of ethics, the municipal lawyer must explore these state statutes with city officials and determine if they are sufficient, or whether similar local rules are necessary. Some argue that these topics must also be addressed locally because state standards do not go far enough and demand stricter standards. Others assert that local district attorneys are reluctant to enforce state law, and thus want a local board of ethics in hopes it will be more diligent and aggressive.

(c) Charter: The home-rule charters of many Texas cities include provisions that touch on ethics topics. Over 78% of charters prohibit councilmembers from having any personal or financial interest in any contract with the city. Those charter provisions are more stringent than state law.²⁸ For example, the City of Beaumont charter speaks specifically regarding “Personal Interest” as follows:

*No officer or employee of the City shall have a financial interest direct or indirect or by reason of ownership of stock in any corporation, in any contract with the City, or be financially interested directly or indirectly in the sale to the City of any land, materials, supplies, or services except on behalf of the City as an officer or employee; provided, however, that the provisions of this section shall only be applicable when the stock owned by the officer or employee exceeds 1% of the total capital stock of the corporation.*²⁹

Neptotism prohibitions are found in 79% of charters, although these prohibitions are typically less stringent than state law.³⁰ Restrictions on the acceptance of gifts appear in 59% of charters. Many cities, only prohibit gifts received from the holder of a franchise.³¹

2. City Restrictions: There are five (5) types of regulations that typically appear in municipal code of ethics: (1) improper economic benefit; (2) unfair advancement of private interests; (3) gifts; (4) representation of private interests; and (5) conflicting outside employment.³² Below is a sampling of the differing approaches taken on this topics by various cities.

²⁸ Blodgett, *Texas Home Rule Charters*, p. 91 (2010).

²⁹ City of Beaumont, *Code of Ordinances*, §16.9.

³⁰ Blodgett, *Texas Home Rule Charters*, p. 91 (2010).

³¹ *Id.*

³² Johnson, *Ethics in Government at the Local Level*, at 728 (2006).

- (a) Conflicts through Nonprofits:** In the City of Laredo, service by a city official or employee as an official, 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.³³ Taking a contrary approach, in the City of Bastrop one has a conflicting interest if the city official serves on the board of directors, or as an Officer of a nonprofit corporation, or an unincorporated association, unless the city official was appointed to that position by the city council.³⁴
- (b) Gifts:** No officer of the City of Farmers Branch or a relative thereof shall accept any gift from any person that might reasonably tend to influence such officer in the discharge of such person's official duties.³⁵ In the City of El Paso, an officer or employee shall not solicit, accept, or agree to accept for themselves or a relative any gift from any lobbyist ..., of which the known or readily apparent value for each separate gift exceeds ten (\$10) dollars in value.³⁶
- (c) Representation of Others:** No officer of the City of Farmers Branch or a relative thereof shall represent or appear in behalf of private interests of others before the city council, or any agency, board, commission, corporation, or committee of the city, nor shall represent any private interests of others in any action or proceeding involving the city, nor voluntarily participate on behalf of others in any litigation to which the city is, or might be, an adverse party (with certain exceptions).³⁷ Similarly, in San Antonio a city official or employee shall not represent for compensation any person, group, or entity, other than himself or herself, or his or her spouse or minor children, before the city.³⁸
- (d) Improper Influence:** For City of Houston elected officials, it is unlawful to use or attempt to use the official's position to influence or attempt to influence a contractor or a recipient of grant money administered by the city to utilize the goods, labor, or services of any person for the private gain or advantage of the official or others.³⁹
- (e) Voice of Reason:** When crafting local codes of ethics, it can be easy to go too far. The city attorney is in an excellent position to try to interject reason and practicality into the process. It has been observed that some cities have such stringent requirements regarding business ownership and financial disclosure that individuals with small businesses who

³³ City of Laredo, *Code of Ordinances*, §1.02(o).

³⁴ City of Bastrop, *Code of Ordinances*, §1.15.9(3)(F).

³⁵ City of Farmer's Branch, *Code of Ordinances*, §2-279.

³⁶ City of El Paso, *Code of Ordinances*, §2.92.040.

³⁷ City of Farmer's Branch, *Code of Ordinances*, §2-279.

³⁸ City of San Antonio, *Code of Ordinances*, §2-47.

³⁹ City of Houston, *Code of Ordinances*, §18-3.

might otherwise make excellent council members choose not to run for the council because they do not want to disclose the names of their clients.”⁴⁰

Some states have conflict of interest statutes that perhaps go too far in prohibiting interests in contracts such as, “no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee....”⁴¹ Such a rule was widely criticized as being unclear, confusing and unfair because it applied regardless of disclosure, recusal, or competitive bids, and resulted in the contract being void *ab initio* and unratifiable.⁴²

Another example is that some counties have considered rules forbidding county officials from soliciting political donations from companies doing business with the county, but “such a rule would be good ethics and bad politics.”⁴³

E. ADVISORY OPINIONS

By written request to the city attorney, any officer in the City of El Paso may request an advisory opinion from a panel of the ethics review commission regarding whether the officer’s proposed actions or conduct would violate the code of ethics.⁴⁴ The San Antonio City Attorney’s Office shall issue advisory opinions to city officials and employees about the requirements imposed by the ethics laws.⁴⁵ The San Marcos ethics commission must render advisory opinions on potential conflicts of interest or violation of the code of ethics at the request of a public official or employee regarding an action proposed to be taken by the person requesting the opinion.⁴⁶

In San Antonio, a person who reasonably and in good faith acts in accordance with an advisory opinion issued by the Ethics Review Board [or the city attorney] may not be found to have violated the ethics laws by engaging in conduct approved in the advisory opinion, under certain conditions.⁴⁷

F. OVERSIGHT

1. Separate Board: Will a city’s code of ethics be enforced by anyone, or is it purely aspirational? If there is enforcement, who will oversee and administer that process? For the City of Houston, there is an ethics commission charged with administering and implementing the code of ethics.⁴⁸ In the City of Plano, a violation of the city’s standards of conduct by a member of the city council can constitute grounds for a reprimand by the city council.⁴⁹

⁴⁰ Blodgett, *Texas Home Rules Charters* p. 91 (2010).

⁴¹ New York Consolidated Laws, General Municipal Law §801 (with certain exceptions).

⁴² Davies, Mark, *How Not to Draft an Ethics Law*, Municipal Lawyer Vol. 24, No. 4 (Fall 2010).

⁴³ Davies, Mark, *Keeping the Faith: A Model Local Ethics Law*, 21 Fordham Urb. L.J. at 69 (1993).

⁴⁴ City of El Paso, *Code of Ordinances*, §2.92.030.F.

⁴⁵ City of San Antonio, *Code of Ordinances*, §2-84.

⁴⁶ City of San Marcos, *Code of Ordinances*, §2.443.

⁴⁷ City of San Antonio, *Code of Ordinances*, §2-89.

⁴⁸ City of Houston, *Code of Ordinances*, §18-11.

⁴⁹ City of Plano, *Code of Ordinances*, §2-105.

- 2. Membership:** In the City of Baytown, the ethics commission consists of five (5) members appointed by the city council from among the membership of the Bay Area Ministerial Alliance.⁵⁰ In San Marcos, the ethics review commission is composed of seven (7) members who are residents.⁵¹ In the City of Fort Worth, the ethics review commission residents of the city who are at least 18 years of age. At least one (1) member of the ethics review commission shall be an attorney licensed to practice in the State of Texas. As nearly as is reasonably possible, the membership of the ethics review commission shall be fairly representative of all of the several economic, religious, cultural, ethnic and racial groups that comprise the population of the city. The city council may solicit community, civic and professional organizations in the city to make suggestions for appointments to the ethics review commission.⁵²
- 3. Procedures:** It is commonly thought that, to be effective, a code of ethics must have an administrative (or quasi-judicial) mechanism for filing, reviewing, and adjudicating allegations of ethical infractions. While enforcement can take many forms, there are three (3) common elements that tend to comprise the staples of processing complaints: 1) Notice of the charges and an opportunity to be heard; 2) insulation from political pressures; and 3) transparency.⁵³ Due process may be satisfied in a number of ways, with opinions varying about such aspects as the right to counsel, direct confrontation of the accuser, and cross-examination of witnesses. Regardless of how the oversight function of a code of ethics is organized, when a person's good name, reputation, honor or integrity is at stake because of what the government is doing, due process is essential.⁵⁴

Common procedural issues to be addressed include:

- Contents of Complaint
- Filing of Complaint
- Initial Review
- Notice to Accused
- Scheduling Hearings
- *Ex Parte* Communications
- Procedural Rules
- Evidentiary Rule

- (a) Prescreening:** Will there be a methodology for conducting a preliminary, initial review of a complaint to determine if it warrants moving forward in the process? In the City of El Paso, the city attorney's office is charged with reviewing complaints to determine if the matter described is within the purview of the ethics review commission. The city attorney is authorized to: (1) return complaints to the complainant for correction or completion; (2) refer complaints to a panel of the ethics review commission; (3) refer complaints to the ethics review commission for a hearing; or (4) dismiss complaints that do not relate to a person subject to the jurisdiction of the ethics review commission, or

⁵⁰ City of Baytown, *Code of Ordinances*, §2-590.

⁵¹ City of San Marcos, *Code of Ordinances*, §2.441.

⁵² City of Fort Worth, *Code of Ordinances*, §2-240.

⁵³ Johnson, *Ethics in Government at the Local Level*, at 754 (2006).

⁵⁴ *Wisconsin v Constantineau*, 400 U.S. 433, 437 (1971).

that contain allegations that (if true as alleged) do not as a matter of law constitute a violation of the code of ethics.⁵⁵

In the City of Galveston, the ethics commission hears challenges to whether a complaint is defected as to form, or whether the complaint is sufficient in that it alleges the existence of reasonable grounds to believe there has been a violation of the code of ethics.⁵⁶ The City of Plano opted to provide for the appointment of four (4) “independent private” attorneys to serve as an “investigating attorney” on a rotating basis to explain in detail all of the facts, findings, and conclusions in support of the attorney’s opinion as to whether a violation of the code of ethics occurred.⁵⁷

(b) Transparency: To what extent will the code of ethics balance: (a) the goal of improving the conduct of city officials, (b) the requirement to provide some form of due process, and (c) with the need to avoid involving the city in defaming accused officials who are innocent until proven guilty? Depending on the role and functions that makeup the board of ethics, the group could constitute a “governmental body” under the Texas Open Meetings Act.⁵⁸ Regardless, the documentation related to an ethics complaint is subject to the Texas Public Information Act.⁵⁹

A balancing act is required to craft a code of ethics in a manner that is open so to maintain the public’s trust and assure the public that complaints are taken seriously, but at times be discrete so as to avoid involving the city in what could someday be characterized as defamation. Being transparent in administering a code of ethics does not mean that every aspect of the process must be open to public scrutiny.⁶⁰ To prevent unnecessary harm to the reputation of innocent city officials or employees that may result from dissemination of information relating to charges that ultimately prove meritless, a city may wish to provide that the process’s initial stages be conducted in a confidential manner.⁶¹

(c) Investigations: In the course of processing complaints filed under a municipal code of ethics, it may be necessary for the city attorney to conduct some form of internal investigation. Ethics investigations should be structured in a manner similar to other

⁵⁵ City of El Paso, *Code of Ordinances*, §2.92.080(G).

⁵⁶ City of Galveston, *Code of Ordinances*, §2-57.

⁵⁷ City of Plano, *Code of Ordinances* §2-104(d).

⁵⁸ Tex. Gov’t Code Ch. 551.

⁵⁹ Tex. Gov’t Code Ch. 552.

⁶⁰ Johnson, *Ethics in Government at the Local Level*, at 754 (2006); citing Dennis F. Thompson, *Restoring Responsibility: Ethics in Government, Business and Healthcare*, at 1 (2005)(“Democratic accountability does not require unconstitutional publicity in the conduct of democratic government. Secrecy of various kinds is sometimes justified and even desirable in a democracy. But it is justified only under carefully specified conditions, which ensure that the secrecy itself is subject to democratic accountability”).

⁶¹ Johnson, *Ethics in Government at the Local Level*, at 758 (2006); citing *Gertz v Robert Welch, Inc.*, 418 U.S. 341 (1974), quoting *Rosenblatt v Baer*, 383 U.S. 75, 92 (1996)(“[T]he individuals 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.’”)

internal investigations, following similar rules. Following are legal concerns and practices that are often addressed during internal investigations within municipalities.

- (1) **Garrity Warning:** It is often wise to inform the interviewee that they are being questioned as part of an official investigation by the city. Let them know they will be asked questions specifically, directly and narrowly related to performance of their official duties or fitness for office. They are entitled to all the rights and privileges guaranteed by the law and the Constitution of the United States, including the right not to be compelled to self-incriminate. A municipal lawyer may further wish to advise the interviewee that if they refuse to testify or to answer questions relating to the performance of their official duties or fitness for duty, they could be subject to discharge. If they do answer, neither their statement, nor any information or evidence which is gained by reason of such statement, can be used against them in any subsequent criminal proceedings. However, these statements may be used against them in relation to subsequent disciplinary actions.⁶²

- (2) **Brady Rule:** Another interesting twist to processing ethics complaints can be the expectation that city officials are required to disclose materially exculpatory evidence in the government's possession to the accused/ respondent based on some configuration of the Brady Rule.⁶³

- (3) **Upjohn Warning:** During witness interviews as part of an internal investigation, attorneys and investigators working at their direction usually give an "*Upjohn* warning."⁶⁴ Interviewees should be told "*whom*" the attorney represents (the municipality, and not the employee individually), that the attorney-privilege belongs to the municipality, and that the city may waive the privilege and disclose the substance of the interview to third parties. If such a warning is not given, the interviewee may believe the attorneys represent him or her, and that they will not reveal anything the interviewee says. This can result in litigation if the organization later decides to disclose the interviewee's testimony. Interview notes should reflect that the warning was given.

- (4) **Disavow the Privilege:** When conducting an internal investigation, a municipal lawyer must exercise caution to avoid creating a misunderstanding between the attorney and the city official. It can sometimes be unclear if the municipal lawyer is representing the elected leader, volunteer, or employee, or conversely representing the municipality (which may have interests that are not aligned with the interviewee). The lack of clarity can be particularly troublesome when the lawyer has in the past been a legal advisor to the interviewee.

The determination of whether there is a meeting of the minds in creating an attorney-client relationship, in order to establish an attorney-client privilege, must be based on objective standards of what the parties did and said and not on their alleged subjective

⁶² *Garrity v. New Jersey*, 385 U.S. 493 (1967).

⁶³ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶⁴ See *Upjohn v. United States*, 449 U.S. 383 (1981).

states of mind. The attorney-client privilege applies not only to legal advice, but attaches to complete communications between an attorney and the client.⁶⁵ The subject matter of the information contained in an attorney-client communication is irrelevant when determining whether attorney-client privilege applies.⁶⁶ Thus, when conducting an internal investigation (such as an ethics inquiry), the municipal lawyer must be mindful of the lawyer's conduct and whether a reasonable person being interviewed would believe the lawyer represented the interviewee.⁶⁷

(5) Maintain the Privilege: A final concern to address when an attorney is conducting ethics-related investigations is whether the products of those investigations will be confidential / privileged. Depending on the municipal attorney's role and intentions for the report and related paperwork, it may be necessary to structure the investigation upfront to address: (1) purpose of the investigation; (2) need for attorney/client privilege protection; (3) acts or omissions of the attorney; (4) relationship of the attorney; and (5) public concerns.⁶⁸ In one case, the federal trial court held that any investigation by an attorney that involved mixed purposes (business and legal) would not be protected by the attorney-client privilege. In reversing the trial court, the appellate court held: (1) It is not required that an internal investigation be directed or conducted by outside counsel; (2) interviews can be conducted by non-attorneys at the direction of in-house attorneys; (3) the entity is not required to use any "magic words" letting employees know that this is a legal department-driven investigation; and (4) the attorney-client privilege can apply to mixed-motive investigations.⁶⁹

In Texas, when evaluating application of the Public Information Act, the attorney-client privilege does not always apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public.⁷⁰ However, if an attorney is retained to conduct an independent investigation in her capacity as attorney for purpose of providing legal services and advice, the attorney's entire report is protected by the attorney-client privilege and excepted from public disclosure to the newspaper under the Public Information Act, even though the attorney detailed the factual findings in discrete portion of report apart from legal analysis and recommendation.

(d) Sanctions: While some codes of ethics may be purely aspirational, it is widely held that in order to be effective the code must provide that violations shall be penalized through specified sanctions. The range of sanctions should be clearly stated in the code, and typically include some variation of the following: (a) disciplinary action; (b) damages or

⁶⁵ *State v. Martinez*, 116 S.W.3d 385, 392 (Tex. App. 2003).

⁶⁶ *State v. Martinez*, 116 S.W.3d 385, 392 (Tex. App. 2003), citing Texas Rules of Evid., Rule 503.

⁶⁷ *Moore v. Yarbrough, Jameson & Gray*, 993 S.W. 2d 760 (1999).

⁶⁸ Slater Elza, Matt Wade, and Audie Sciumbato, *Ethical Dilemmas with Advising City Officials*, Texas City Attorney Association Fall Conference p. 8 (Houston 2014).

⁶⁹ *In Re Kellogg Brown and Root, Inc.*, 756 F.3d 754 (2014).

⁷⁰ *Harlandale Independent School Dist. v. Cornyn*, 25 S.W. 3d 328 (Tex.App.-Austin 2000).

injunctive relief; (c) civil fines; (d) prosecution for perjury or other crimes; (e) voiding contracts; (f) disqualification from future contracts; (g) forfeiture of benefits; (h) removal from official position; or (i) some form of public or private reprimand.⁷¹ Reprimands often are listed in an ascending matter of degrees, such as: (a) letter of warning; (b) letter of admonishment; (c) letter of reprimand.

For the City of San Marcos, sanctions are listed as: a letter of notification, A letter of admonition, A reprimand, A recommendation of suspension from office or employment, A recommendation for recall or removal from office or employment. The commission may recommend to appropriate authorities that a person be prosecuted for a violation of the code of ethics or a state conflict of interest law.⁷²

G. TRAINING:

Rules can be useful guidelines and enforcement can achieve compliance. However, if a municipality is serious about fostering a culture of ethics at city hall and avoiding unethical decision-making, training is a crucial component of any municipal ethics program. Educational intervention to broaden ethical thinking can increase the use of ethical reasoning.⁷³ Most useful in raising the level of moral reasoning are techniques that include the active involvement of students in learning. Considering cases that present moral dilemmas and relating the levels of moral development to resolving these dilemmas help students recognize how one reasons at a higher level.

In addition to training in the traditional sense, there are municipal professional organizations who provide networking with a peer group that shares and reinforces their values and principals. Sometimes these groups actually play a role in self-policing and enforcement (e.g., Texas City Management Association and the State Bar of Texas).

At a minimum, the code of ethics should mandate routine training in the code's mandates and restrictions. In the City of Baytown, city officials must be furnished with a copy of the code of ethics within thirty (30) days of commencing the official duties of the position.⁷⁴ All employees are obligated to attend training on the code of ethics at least once every other calendar year. All elected or appointed officials in the City of Plano must receive training as to the code of conduct within sixty (60) days following their initial election or appointment. The training shall be conducted annually by either video or live presentation, whichever is most convenient for the official.⁷⁵ In El Paso, officers and employees must receive refresher training at least every three (3) years.⁷⁶

⁷¹ Johnson, *Ethics in Government at the Local Level*, at 760 (2006).

⁷² City of San Marcos, *Code of Ordinances* §2.444(e).

⁷³ Svava, *The Ethics Primer for Public Administrators in Government and Nonprofit Organizations*, pg. 21 (2007).

⁷⁴ City of Baytown, *Code of Ordinances*, §2-808.

⁷⁵ City of Plano, *Code of Ordinances*, §2-100.

⁷⁶ City of El Paso, *Code of Ordinances*, §2.92.120.

H. SUPPORT STAFF

In the City of El Paso, the ethics review commission shall be assigned support staff by the city manager to assist in its duties, as the city manager deems necessary. The city attorney's office has specific functions in regards to reviewing complaints and advising the ethics review commission.⁷⁷ In the City of Fort Worth, the city attorney shall provide such assistance to the ethics review commission except in cases involving a complaint filed (in which case the city council must provide independent outside legal counsel upon request).⁷⁸ In the City of San Antonio, both the compliance auditor and the city attorney play roles in supporting the ethics review board.⁷⁹

1. Who is the Client: When determining the proper role of the city attorney in the ethics process, the lawyer must go through the process of clarifying who the client is. The question of exactly who the government attorney's client is has been addressed numerous times in the past. Three (3) major models have been formulated in an attempt to answer the question and give guidance: 1) the Client is the Public Interest; 2) the Client is the Whole Government; and 3) the Client is the Government Agency that Employs the Lawyer. It has been suggested that the final option is the most workable because it allows the lawyer to narrow the meaning of client; however, a city attorney doesn't fall into any of these models because there is not a highest policy making authority because the mayor and council have little control over one another and when these group diverge, this creates a problem for the city attorney. Thus, it has been suggested that home-rule charters should provide for city councils to have independent counsel separate and apart from the city attorney.⁸⁰

When a lawyer is employed or retained to represent an organization, the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organizations decision-making procedures. The lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.⁸¹ There is no universal definition of a client for a governmental lawyer. Those who speak for the governmental client may differ from one situation or representation to another. The preferable approach is to regard the respective agencies as the clients and to regard the lawyers working for those agencies as subject to the direction of the officers authorized to act in a matter involved in the representation.⁸² A lawyer who represents a governmental official in the person's public capacity must conduct the representation to advance public interests as determined by the appropriate governmental officers and not, if different, the personal interests of the occupant of the office.⁸³

⁷⁷ City of El Paso, *Code of Ordinances*, § 2.92.030.3.D.

⁷⁸ City of Fort Worth, *Code of Ordinances*, §§ 2-242 and 2-248.

⁷⁹ City of San Antonio, *Code of Ordinances*, §2-84.

⁸⁰ Kimmel, Heather E., *Solutions to the City Attorney's Charter-Imposed Conflict of Interest Problem*, 66 Ohio St. L.J. 1075 (2005).

⁸¹ Restatement (3rd) of the Law Governing Lawyers, §96 (2000).

⁸² Restatement (3rd) of the Law Governing Lawyers, §97 (2000), Comment (c).

⁸³ Restatement (3rd) of the Law Governing Lawyers, §97 (2000), Comment (f).

- 2. Role of City Attorney:** A city attorney’s representation of a municipality can become further complicated when the city attorney is also designated by ordinance to advise the board of ethics. What is the ability of a city attorney to advise the board of ethics in regards to complaints filed against the city council? In one such instance, the Texas Supreme Court’s Professional Ethics Committee ruled that, although the city attorney does not represent individual city council members, the lawyer may not render legal services to the board of ethics concerning an investigation or determination of a complaint against a majority of the members of the city council. The rationale was that, because the city attorney by charter serves at the discretion of the city council and receives compensation as set by the city council, in that instance the representation reasonably appeared to be or become “adversely limited ... by the lawyer’s own interests.”⁸⁴
- 3. Role of Special Counsel:** The City of San Marcos’ home-rule charter states that the “city attorney shall be the legal advisor and counsel for the city, all city officers and administrative units; provided, that the city council may retain special counsel at any time it deems appropriate and necessary.”⁸⁵ The code of ethic calls for an independent outside attorney approved by the city council, who does not otherwise represent the city, shall be retained to serve as special counsel to the ethics review commission in the following situations:
- (a) When a complaint is filed alleging that the mayor or a member of the city council, or the city manager, city attorney, city clerk or municipal court judge violated this article or a state conflict of interest law.
 - (b) When an advisory opinion is requested ... by the mayor or a member of the city council, or by the city manager, city attorney, city clerk or municipal court judge.⁸⁶

I. CONCLUSION

Cities vary in terms of the problems, public relations, politics, size, resources, complexity and goals. Thus, there is no single model of a code of ethics that is appropriate for every city. It is therefore incumbent on the municipal lawyer to evaluate the client’s situation and help craft a code of ethics that fits. To have any chance of affecting the culture at city hall and yielding ethical behavior, the code must be understandable, enforceable, and reflect local priorities and values. It must be capable of being implemented.

When engaged in crafting a code of ethics, municipal attorneys are urged to resist attempts by others to build a program that allows hostile parties to use ethics as a weapon. It has become increasingly common to see ethics complaints that seek resolutions to what would otherwise simply be political disputes (e.g., candidates filing complaints against one another in an effort to score political points or disqualify (or at least distract) their opponent).

⁸⁴ TX Eth. Op. 567 (Feb. 2006), citing Texas Disciplinary Rules of Professional Conduct, Rule 1.06(b)(2).

⁸⁵ City of San Marcos, *Code of Ordinances*, Charter §4.04.

⁸⁶ City of San Marcos, *Code of Ordinances*, Sec. 2.445.

Also for some, an ethics commission (aka, “board of ethics”) is viewed as some catch-all court of last resort. When an employee or citizen fails to find satisfaction in other tribunals, they sometimes file an ethics complaint hoping to launch an investigation and punish the offender. We must not allow the mechanisms we create to nourish ethical environments to be degraded to a complaint desks, where any and all unsatisfied customers are welcome to lodge complaints that have more to do with dissatisfaction with service or political disputes, and less to do with right and wrong.

Attached are three (3) resources to provide additional assistance, two (2) of which are based on the author’s LARIAT principle of designing a municipal code of ethics. LARIAT is a guide to crafting or amending an ethics ordinance (or policy, procedure manual, executive order, etc.). Because public management is such a practical profession, it was prudent to convey to the audience an organized means of structuring the deliberations that go into drafting rules.

The third (3rd) attachment is a reference to an online resources that’s available for those seeking to further the cause of municipal ethics.



This paper is provided to the public as general education material, and does not constitute legal advice. The suggestions offered in this paper are informational, only, and do not give rise to an attorney – client relationship. City officials interested in acting on the tips outlined above are encouraged to consult with their city attorney.



1. **Leadership:** Inspiring the troops and role-modeling by the top brass. Leaders not only play a symbolic role in setting the tone and the agenda, they also are crucial when it comes to resource allocation and prioritization of tasks. For an organization to truly embrace ethical decision-making (and rise above mere rule following), the top executives must lead by example and, when necessary, cheerlead.
2. **Administration:** Modifying routines and procedures for daily implementation of policies to ensure equity, fairness, and procedural justice. Evaluate how the organization provides services, processes permits, awards contracts, and makes employment decisions. Procedures are not just a means to an end; in terms of ethics, fair procedures are an end themselves.
3. **Regulation:** Enacting rules that require certain actions and prohibit specific behavior, accompanied by the requisite oversight and enforcement. Adopting and following rules is not enough, but it is a legitimate component of a broader ethical program.
4. **Instruction:** Facilitating ongoing training that provides information, and promoting networking opportunities that reinforce shared norms. Educational events and professional memberships are vital to changing organizational culture and nourishing a community of ethical decision-makers.
5. **Accountability:** Assuring that there will be consequences for unwelcomed behavior, either internally or at the ballot box. There should be a system of rewards and punishments. Incentivize positive behavior and look for examples that can inspire good governance. Provide a means of reprimanding those who exhibit poor behavior and deviate from established norms.
6. **Transparency:** Promoting Open Government through not just adherence to the mandates of Open Meetings and Open Records laws, but by also nurturing a culture that favors disclosure. For citizens to more fully participate in government and trust their public servants, the citizens need to have greater access to data and the decision-making process.

Ethics Ordinance Drafting Checklist TM



The following questions are designed to help city officials articulate their goals and preferences. This tool is intended to assist in amending an existing code of ethics or in crafting new ethics rules and procedures.

- 1. Impetus:** What happened? What recent actions prompted this exercise?

- 2. Enactment:** Which is the appropriate means of adopting the ethics program?
_____ **Resolution:** A policy statement by the city council.
_____ **Ordinance:** A legislative act by the city council establishing rules.
_____ **Charter:** Approval of language by the voters through an election.
- 3. Aspirations:** Can you identify the lofty, big picture goals the ethics program is meant to achieve? _____

- 4. Values:** Can you articulate the values, virtues, and principles that are paramount to the city, and serve as the philosophical basis for having an ethics program?

- 5. Prohibitions:** Will the ethics program restrict or forbid certain acts or behaviors?
(a) _____ **Repeat State Law:** The program will mirror any aspects of state law.
(b) _____ **Exceed State Law:** The program supplements state law (is stricter, broader).

6. **Mandates:** Does the ethics program require certain actions?
 (a) _____ **Disclosures:** Will the program require the filing of certain reports?
 (b) _____ **Repeat State Law:** The program will mirror any aspects of state law.
 (c) _____ **Exceed State Law:** The program supplements state law (is stricter, broader).
7. **Applicability:** To whom will the ethics program apply?
 (a) _____ Mayor and Council (d) _____ Volunteers
 (b) _____ Staff (e) _____ Vendors
 (c) _____ Boards & Commissions (f) _____ Lobbyists / Salespeople
8. **Penalties:** What form of punishment (if any) will result from ethics violations?
 (a) _____ **Admonishment:** To reprimand or censure.
 (b) _____ **Discharge:** To sever employment, relieve of a volunteer position or terminate a professional services agreement (subject to any contract.
 (c) _____ **Ineligibility:** Preclude future appointments, engagement, contracts.
 (d) _____ **Other:** _____
9. **Oversight:** Will anyone be charged with monitoring conduct and acting upon allegations of ethics infractions?
 (a) _____ City Staff (d) _____ Terms of Office
 (b) _____ Board or Commission (e) _____ Selection Process
 (c) _____ Size and Composition
10. **Range of Transparency:** To what degree will the ethics program balance a need to avoid defamation and protect confidentiality, but allow the citizenry to be informed?
 (a) **Open Meetings Act:** Gatherings, discussions, decisions and actions: _____
 (b) **Public Information Act:** All data: _____
 (c) **Records Retention Act:** All data: _____
11. **Role of City Attorney:** What role will the city's primary legal advisor play?
 (a) _____ Advisory (e) _____ Adjudicatory
 (b) _____ Investigatory (f) _____ Recusal
 (c) _____ Educational (g) _____ Role of Outside Counsel
 (d) _____ Pre-Screening
12. **Role of City Staff:** What role will senior staff play?
 (a) City Secretary: _____
 (b) City Manager: _____
 (c) City Auditor: _____
 (d) Other: _____
13. **Procedural Rules:**
 (a) Level of Formality: _____ (e) Notice: _____
 (b) Forms: _____ (f) Pre-Screen: _____
 (c) Complaints: _____ (g) Fact-Finding: _____
 (d) Where file: _____ (h) *Ex Parte* Communications: _____

- (i) Hearing: _____
- (j) Determination: _____
- (k) Waiver: _____
- (l) Reconsideration: _____
- (m) Appeal: _____
- (n) Timeline: _____

14. Evidentiary Rules: How will the city handle evidence?

- (a) Submission of Evidence: _____
- (b) Authentication of Evidence: _____
- (c) Examination: _____
- (d) Cross-Examination: _____

15. Leadership: Will there be active support of the ethics program from the top?

- (a) _____ **Mayor:** Will the mayor champion it?
- (b) _____ **Council:** Will the governing body allocate the resources to support it?
- (c) _____ **City Manager:** Is the chief administrative officer likely to embrace the program, encourage and reward others, and role-model behavior?

16. Instruction: Continuing education is vital to success. Will there be ethics training?

- (a) Mandatory or Voluntary: _____
- (b) Instructor(s): _____
- (c) Frequency (upon election, hiring or appointment; refresher): _____
- (d) Curriculum (local rules, state law, other): _____

17. Administration: Will the city evaluate its routine, day-to-day procedures to ensure objectivity and fairness? Are there means of achieving *Procedural Justice*?

- (a) _____ Purchasing
- (b) _____ Permitting
- (c) _____ Code Enforcement
- (d) _____ Human Resources
- (e) _____ Parks & Rec
- (f) _____ Budget & Finance
- (g) _____ Police
- (h) _____ Other: _____

18. Transparency Overall: Can you improve how the city approaches Open Government, generally, on an organization-wide basis?

- (a) Open Meetings: _____
- (b) Open Records: _____
- (c) Records Retention: _____

This document is provided as a planning tool for structuring a conversation about enacting or revising an ethics program for a municipality. It is intended as educational material, only, and does not constitute legal advice. Answers to the questions listed above should be discussed with the city's legal advisor.





www.TexasEthics.com

The Texas Center for Municipal Ethics is a 501(c)(3) nonprofit corporation founded in 2015. It provides training and an online resource for city officials interested in furthering ethical behavior and fostering a culture of ethics at city hall.