



3.19.14

Commentary

The Public Affairs Research Council of Louisiana

Louisiana's Ethics Policies

PAR says some changes needed – and some not – in Ethics Code

Louisiana's ethics laws form an important foundation for establishing appropriate standards of conduct for public officials regarding conflicts of interest, cronyism and fair contracting practices. The Public Affairs Research Council of Louisiana has in the past suggested a number of important changes to the state's ethics system, many of which have been implemented. As further changes in the law are considered, PAR reviews here a few key issues and offers some general policy guidance.

Fix the recusal law

Elected officials and appointed members of boards and commissions, state and local, at times may wish to avoid a violation of the Code of Ethics by recusing themselves from voting and participating in a discussion. For example, it is not unusual to see even a member of the Board of Ethics recuse himself or herself from an action during a meeting, with no explanation or indication of what issue or which people or relationship might be the source of the potential conflict in the case. Recusals should be allowed; however, the pre-2008 disclosure requirements for elected officials should be reinstated. The same should be required for appointed boards and commission members. These steps would provide transparency as to the conduct of the business of the public at the state and local levels and help ensure that the public interest is first. This change can be made without returning to the pre-2008 dilemma that forced commission members to resign rather than recuse themselves from a vote. Elected and appointed public servants wishing to recuse themselves should be required to:

- Verbally disclose the nature of the potential conflict prior to participation in the discussion and prior to the vote that is the subject of the discussion or debate.
- File a written statement with the appropriate official of the public body describing the matter in question and the nature of the conflict or potential conflict. Post the statement on the agency web site.

See the endnote for more background on this issue. (1)

Don't allow gifts to elected officials and public employees

State ethics law prohibits elected officials and government employees from accepting gifts for the performance of their duties. They also cannot receive gifts from those they regulate or those seeking a contract with their agency. A prohibited gift is a "thing of economic value" such as money or any other thing having economic value, except promotional items having no substantial resale value. There are exceptions,

such as flowers for funerals and for limited food and drink. Overall, this law has tended to encourage a positive culture in which gifts for favors are seen as an inappropriate currency in government operations.

A bill has been filed this session, with the support of the Board of Ethics, to allow gifts to elected officials and public employees up to \$25, and up to an aggregate value of \$75 for all gifts from any one person in a calendar year. PAR questions the real wisdom of this proposal and sees in it a fundamental reversal from an established ethic of not allowing gifts to a new ethic of endorsing the practice of giving gifts to politicians and government employees. The change would contribute to a new culture in which gift-giving to government employees and elected officials becomes a standard expectation.

If the purpose of the legislation is to allow students or library patrons to engage in specific customary and de minimis acts of appreciation, such as dropping off an apple for a teacher or a plate of cookies to the local library during the holidays, then the legislation should be more limited and targeted toward that purpose.

Here are some reasons to think twice about creating a \$25 gift privilege. The American retail market is an amazing place; you can buy a lot of cool and desirable stuff for \$25, as many consumer columnists will attest. Also, there will be a strong temptation to increase the arbitrary \$25 and \$75 thresholds, or to index them for annual inflation. Some ethics board members might argue the current law creates awkward decisions for them over petty gifts, but the proposed change will likely deliver complicated or confusing situations. What is the true value of a piece of merchandise or a service? Is the value the same as the price, and what about things that are “discounted” or a special offer? Will this require the Board of Ethics to find receipts and examine bank and credit card statements to pursue enforcement?

We should not change the ethics law if the main reason is to make the job of the Ethics Board a little easier (which this bill would not do anyway). Meanwhile, the current standard used by some ethics board members is a good one: “If it’s something you actually want, it’s probably a gift.” That’s a reasonable enough starting point for those who would give or take gifts. The Board of Ethics should use its own mature judgment of these matters rather than ushering in a new generation of across-the-board lower ethical standards.

Don’t exempt an entire profession from the ethics code

A number of professions have tried to seek an exemption from the ethics code in order to avoid problems when contracting to provide services for the government. PAR does not want to see the state burden businesses with complicated or contradictory regulations but is opposed to the exemption of an entire category or profession from the ethics code. More limited solutions may be available.

In an age of privatization of local and state government operations, which may be beneficial, care must be taken to ensure public accountability when government authority and responsibility are delegated to private entities. Whether we are talking about state functions such as prisons or local functions such as municipal management, we would not want to create an environment ripe for unintended consequences.

Prior attempts to enact a blanket exemption tried to exclude certain entire professions from the definition of “public employee” in the ethics law. Public employees include those engaged in the performance of a “governmental function” or those under the supervision or authority of an employee of a governmental entity. An outright professional-class exclusion is too broad a remedy and invites too many possibilities for abuse of good ethics standards. Furthermore, the exclusion of one profession can only invite the interest of

other professions seeking similar treatment, resulting in the further erosion of ethics laws intended to hold accountable those who conduct the public's business.

Good policy should prevent a situation in which a state or local government would be able to contract with private firms for the purpose of running a government program or operation without accountability. Likewise, we would like to avoid situations in which a government is hiring new employees under the guise of a "contract" with individuals for the purpose of evading the ethics law.

PAR has noted before that the state does not have a definition of "governmental function" in law or rules for the Board of Ethics, although a number of board advisory opinions over the years have offered guidance. At best, the current law is too vague. A definition of governmental function could be adopted that might address the private sector's most legitimate concerns while preserving the integrity of the state's ethics laws.

Other current issues for discussion

During this session the Legislature might confront an issue regarding restrictions on state contracting. State law prohibits certain elected and appointed officials, and in some cases their companies, from taking state contracts. A list of the various affected positions was provided in the law during the 2008 ethics overhaul. Among those positions are all members of the state Board of Elementary and Secondary Education. The current elected representative for the 5th District of BESE is a part-owner in a company with a large contract through the state's Office of Community Development. This contract, which was publicly bid and disclosed, was made before the representative took office and therefore is not prohibited. The contract is unrelated to education. However, the Louisiana Board of Ethics has advised that the contract is not renewable while the representative remains in office and for one year after leaving office. Generally, some may think the current law appropriately prevents potential conflicts of interest and improves the state's image for ethical behavior. Others may think the law in some instances such as this one is overly broad and creates a disincentive for business and professional people to run for office or offer public service with a board appointment. The Legislature should weigh these legitimate competing arguments if it wishes to revisit the law.

Another issue is a quirk in the state's campaign finance law. Under current law, a political action committee contributing to a political candidate is sometimes supposed to file an additional report if the candidate later decides to seek a different office. Although a PAC's contribution to an individual is publicly documented for the first office sought, another PAC report may be required if the individual runs for a different office, even if the PAC has made no new donations to the candidate. The candidate is not obligated to inform the PAC about the new election bid.

When infractions of this law occur, the Board of Ethics has determined it is a violation but has been lenient in assessment of penalties. Discussions during board meetings indicate some members think this reporting requirement should be reconsidered by the Legislature as an extraordinary burden on the contributor.

PAR has recommended in the past that the law should prohibit the use of contributions in a campaign for office other than the one for which the contribution was made. Any money left over would be returned to donors or given to charity. The use of the same corpus of campaign funds for seeking multiple offices is an entrenched part of Louisiana's political scene, although it is not allowed in some states. If the Legislature is not prepared to make this change, it ought at least to consider whether a contributor is getting fair and practical consideration under the current law when a politician switches ambitions to a different elected office.

1. Endnote on recusals.

Elected Officials: Before 2008, if an elected state or local official faced a vote on a matter which could present a conflict between the public interest and a personal and substantial economic interest (and thus a possible ethics code violation), the official was required to recuse himself from voting. However, the official was not required to recuse himself if he filed a written statement with the public body describing the matter in question and the nature of the conflict or potential conflict. The statement also had to explain the reasons the elected official would be able to cast a vote which is fair, objective, and in the public interest, despite the conflict. The statement was required to be recorded in the official record of the body. And the law also required that the statement be filed with the appropriate ethics body.

Today, the Code of Ethics (R.S.42:1120, after Act 8 of the First Extraordinary Session of 2008 and Act 159 of the Regular Session of 2008) provides that if such a potential conflict arises, the elected official shall recuse himself from voting. If the official merely "discloses" his conflict or potential conflict as a part of the record of his agency prior to his participation in the discussion and prior to the vote that is the subject of discussion, then he is not prohibited from participating in the discussion concerning the matter.

Appointed State and Local Officials on Boards and Commissions: Before 2008, generally, an appointed state or local official serving on a board or commission could not recuse himself from voting. If such a member had a personal, substantial economic interest in a vote, resignation was the only option to avoid an ethics law violation. Many were concerned that this too frequently meant that members had to resign even when a potential conflict was remote. Such resignations caused significant disruption of important activities on some boards where it seemed difficult to find people with needed experience. The Board of Commerce and Industry was thought to be such a board. There were attempts to enact various recusal laws to avoid the problem but most were rejected by the legislature as unwise.

Today, the Code of Ethics (R.S.42:1120.4, after Act 685 of the Regular Session of 2008) provides that any appointed member of a board or commission, in the discharge of a duty or responsibility of his office or position, who would be required to vote on a matter which could be in violation of the ethics code must recuse himself from voting and refrain from participating in discussion and debate concerning the matter. But, there is no requirement for the member to describe the matter in question or the nature of the conflict or potential conflict. Thus, today, such an official can merely announce in the meeting he will recuse and then simply refrain from voting and participation in discussions without even leaving the meeting.

Recommendation: If Louisiana continues to allow such public officials to recuse themselves from voting on a matter due to a possible personal conflict, the public should have a right to know and understand the circumstances and decide whether the public interest is at the forefront. The legislature should reinstate the pre-2008 disclosure requirements for elected officials and also require the same for appointed boards and commission members to provide appropriate transparency as to the conduct of the business of the public at the state and local levels and help ensure that the public interest is first.

Elected officials and appointed members of boards and commissions, state and local, wishing to avoid a violation of the Code of Ethics by recusal of themselves from voting and participating in a discussion should be required to:

- Verbally disclose the nature of the potential conflict prior to participation in the discussion and prior to the vote that is the subject of the discussion or debate;
- File a written statement with the appropriate official of the public body describing the matter in question and the nature of the conflict or potential conflict. The statement should be recorded in the official record of the body.

For more information contact: Robert Travis Scott, President, 225-926-8414 ext.221
robertscott@parlouisiana.org
P O Box 14776 Baton Rouge, LA 70898-4776 Phone: (225) 926-8414 Fax: (225) 926-8417
Web Site:www.parlouisiana.org