



# Toward Stronger Ethics

The Next Steps Forward for Louisiana's  
Ethics and Campaign Finance Laws

The Public Affairs Research Council of Louisiana



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## The Next Steps Forward for Louisiana's Ethics and Campaign Finance Laws



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## Executive Summary

Louisiana should have strong and effective laws to ensure high standards for ethics and campaign finance disclosures. The system should foster compliance by helping prevent infractions and promote clarity and confidence in the laws and their enforcement. Well-written statutes and clear rules for implementation — as well as good agency management — are among the components needed to achieve these goals.

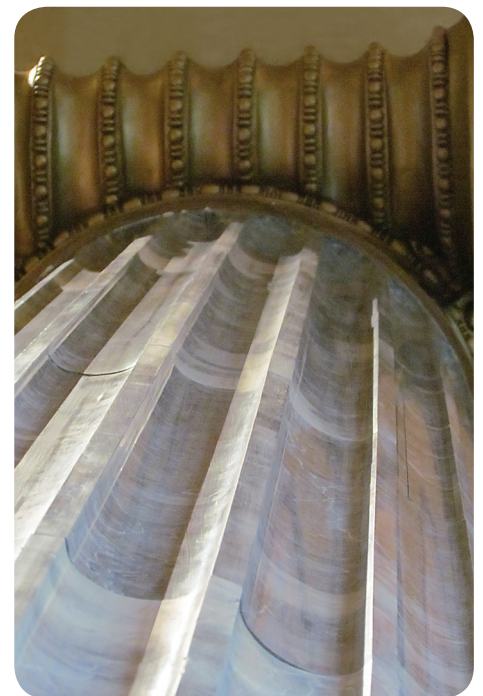
The state adopted significant ethics reform in 2008 with new reporting requirements for the disclosure of personal finances and government contracts by public officials. Further, a cap was placed on the value of meals purchased by lobbyists for lawmakers. These initiatives were laudable and earned Louisiana a high national ranking for its disclosure standards. Many of these reforms followed recommendations made by PAR. However, as with any reforms, the 2008 revisions warrant careful examination to identify areas of possible improvement.

Before 2008, the Board of Ethics acted as both prosecutor and judge in ethics cases. But the 2008 ethics reforms gave the role of judge to a newly created Ethics Adjudicatory Board, made up of panels of executive-branch administrative law judges. The separation of the prosecutorial and adjudicatory powers was a necessary step in furthering the cause of justice and fairness. A combined effort by the ethics board and its staff, the administrative law judges and the Legislature is overdue to address how the new system should work and how responsibilities should be allocated.

Now is the time for these parties to work together to clarify and clean up the ethics and campaign finance laws in areas where confusion exists and where the process of enforcement might be hindered by inconsistencies in language and disagreements over interpretation and administration of the law. Additionally, to pursue consistency further, the Board of Ethics should have certain rights to appeal unfavorable decisions by the Ethics Adjudicatory Board.

This report also targets other timely issues. PAR recommends an improved definition and restrictions for the “personal use” of campaign finance funds. And the state’s recusal law for elected and appointed board and commission officials should be strengthened to increase transparency.

As a long-term endeavor, the state should redraft the Code of Ethics with the goal of adopting a new version that retains the current code’s core aims and values while providing a more consistent and coherent process.





## SUMMARY OF RECOMMENDATIONS

This PAR report makes several recommendations for improvements to Louisiana’s ethics and campaign finance laws and their enforcement systems. These recommendations include refining the systemic changes made in 2008 as well as addressing other important issues. The recommendations are abbreviated here, with page numbers noted where the topics are addressed more fully in the report. Legislation has been introduced this session at the behest of the administration to address some of these issues.

**1** State law and administrative regulations should be improved to clarify which bodies – the Board of Ethics, the Ethics Adjudicatory Board, the district courts and the appeals courts — have jurisdiction over the various types of duties associated with administering and adjudicating the campaign finance law. PAR’s report offers specific suggestions. (Pages 11–13)

**2** The Board of Ethics and the Ethics Adjudicatory Board should act in concert to promulgate rules to implement the new system of dual boards handling ethics and campaign finance cases. The Legislative committees should firmly encourage this process and provide oversight. (Pages 13–14)

**3** References to the terms “board” and “panels” in state law are ambiguous and must be clarified. The law should distinguish which of the two boards is intended when the term “board” is used. A pre-2008 provision in the law that appears to require the Board of Ethics to utilize sub-panels in its decision-making process is outdated and has not been used by the ethics board, causing potential obstacles in the adjudication of cases. The law should clarify that panels are merely optional. (Pages 14–16)

**4** The Board of Ethics should be given a right to appeal unfavorable decisions by the Ethics Adjudicatory Board. These appeals should go to a state appellate court, which is the same avenue of appeal open to respondents who receive unfavorable judgments. This provides an extra check on the decisions of the Ethics Adjudicatory Board. (Pages 16–18)

**5** If the Board of Ethics is given a limited right of appeal, such as for “questions of law” only, the terms of the limited right to appeal should be made as clear as possible. The Administrative Procedure Act offers guidance in this regard. (Pages 16–18)

**6** Terms of service for members of the Ethics Adjudicatory Board panels should be staggered and extended from three years to five – the same as for members of the Board of Ethics – in order to increase the level of experience available on these important panels and to maximize the state’s investment in the growing knowledge base of these state civil service lawyers. (Page 18)

**7** The Board of Ethics should retain the authority to accept final consent opinions — in which respondents admit infractions and agree to penalties — and make them fully enforceable. (Pages 20–21)

**8** A new understanding must be reached regarding which investigatory records must be shielded or turned over by the Board of Ethics to a respondent facing charges. A deadlock between the Board of Ethics and the Ethics Adjudicatory Board on this issue recently resulted in a dismissed case and could affect many other cases in the future. (Pages 21–22)

**9** The state campaign finance law should be more restrictive for the “personal use” of campaign finance funds, or the Board of Ethics should achieve the same goal by issuing new rules supported by the Legislature. The U.S. law defining and restricting the personal use of campaign finance money for federal elected offices provides good guidelines for this Louisiana reform. (Pages 26–28)

**10** In limited circumstances the adjudicatory process should allow for the suspension of the time period required for the Ethics Board to bring charges against a respondent in a case. (Page 15)

**11** The Board of Ethics and the Ethics Adjudicatory Board should make public proceedings available by video online, both live and archived. (Page 28)

**12** The pool of candidates for nomination to the Board of Ethics could be enhanced by allowing a person who serves on another volunteer state board to leave that panel and be appointed to the ethics board without having to wait six months between assignments. (Pages 28–29)

**13** The state’s recusal law for elected and appointed officials on boards and commissions should be strengthened to require the officials to make statements about the reasons for a recusal from voting and participation on a particular matter. (Page 19)

**14** As a long-term endeavor, the state should develop and debate a new draft of the Code of Governmental Ethics with the goal of adopting a completely new version that retains the current code’s core aims and values while providing a more clear and consistent set of standards and process to increase compliance. (Page 32)



# Changes in Louisiana Ethics Laws

## INTRODUCTION

The Public Affairs Research Council of Louisiana is conducting an ongoing independent evaluation of the state's ethics laws and enforcement process. The work so far has included interviews of people with relevant experience and knowledge, a review of practices in other states and consideration of Louisiana case law. The purpose of this project is to identify ways to improve the system and to maintain and increase public confidence in Louisiana's administration of the ethics code, personal financial disclosures, campaign finance laws and lobbying regulations. This report covers some early findings and makes several recommendations. Its scope includes issues raised by significant changes in the state's ethics laws in 2008 as well as issues predating these initiatives. This report is by no means a full account of the range of issues that might be addressed in future research. It attempts to advance the discussion and suggest some steps forward.

The goals of a strong and effective ethics system should be to foster a culture in which the rules for compliance are highly valued and easily understood. Such a system would help prevent infractions, provide effective enforcement and do all this in a way that promotes clarity and confidence in both the law and the process. An additional goal of a good ethics system should be to prevent legal battles over how the process ought to be conducted and how the laws should be interpreted. These goals may be achieved through laws, but we should not underestimate the importance of good agency management and clear, cooperative rule making to guide the implementation of such laws.

PAR has long been a proponent of the adoption of a state code of ethics and the effective administration of ethics laws. At PAR's urging, the Legislature in 1964 created an ethics code for public servants and established a process for encouraging compliance and finding violations.

Since that time, the law has evolved to include numerous changes for new standards and forms of enforcement. Most recently, when Gov. Bobby Jindal took office in January 2008 he immediately called an extraordinary session of the Louisiana Legislature to overhaul the state ethics code with considerable support and input from key lawmakers. This 2008 revision did not come as the direct result of a specific scandal or public outcry—which has been the impetus for major reforms in some other states. Rather, the move was a central part of the governor's campaign promise to build a better image for the state and encourage businesses to locate in Louisiana. The changes included new reporting requirements for public officials' disclosure of personal finances and government contracts and for activities of lobbyists. Further, a cap was placed on the value of meals purchased by lobbyists for lawmakers.

**A strong ethics system should help prevent infractions, provide effective enforcement and do all this in a way that promotes clarity and confidence in both the law and the process.**



Attempts at some of these measures in previous years had fallen short, but the 2008 revisions passed overwhelmingly under the new governor. These initiatives were laudable and earned Louisiana a high ranking for its disclosure standards. Many of the reforms followed recommendations PAR had made repeatedly over the years. Nevertheless, there has been significant criticism of some of the changes and their effect on the administration and enforcement of the ethics laws. As with any reforms, the 2008 revisions warrant careful examination to weigh their impact and to identify areas of possible improvement.

### CHANGES IN ETHICS BOARD FUNCTIONS


The administration and enforcement structure of the state’s ethics laws has evolved over the years. A new system of holding hearings and deciding cases was created along with the other reforms in 2008. Of all the changes made that year, the splitting of the Board of Ethics’ responsibilities, along with disagreements over how certain cases should be adjudicated, has attracted the most public attention.

**WHERE TO FIND LOUISIANA ETHICS LAWS**

**State Constitution of 1974**  
Article III, Section 9, and Article X, Section 21

**Louisiana Code of Governmental Ethics**  
R.S. 42: 1101, et seq.

**Louisiana Campaign Finance Disclosure Act**  
R.S. 18: 1481, et seq.



These changes should be viewed with an understanding of what the Board of Ethics is and how it has conducted business. Compared to ethics agencies in other states, the Louisiana Board of Ethics has an unusually broad scope of responsibilities and coverage. It administers the ethics code and conflicts of interest, personal financial disclosures, campaign finance reports, lobbying and other related laws. The board and its staff also provide compliance training, prepare advisory opinions and conduct investigations of possible infractions. Its jurisdiction covers all elected officials and government employees and appointees both state and local, which total about 400,000, the ethics board estimates. In other states

these various duties and broad scope of mission are typically divided among separate agencies. The Board of Ethics was given authority to expand its personnel ranks in 2008 and now has approximately 40 staff members, a relatively high number compared to other states, but probably justifiable considering the board’s many responsibilities.

The citizen Board of Ethics has 11 members with geographic representation from around the state. They are nominated through a process conducted by the presidents of Louisiana’s independent colleges and universities. From the lists of nominees, the governor appoints seven members, one from each congressional district and at least three who shall have practiced law in Louisiana for at least eight years. The Louisiana House of Representatives and Senate each elect two members at large. Board members are volunteers who, if diligent, likely could spend several days of work each month preparing for and attending board meetings. A board chairman in particular might spend

considerable time meeting his responsibilities. The ethics code imposes many substantial limitations on members' activities prior to, during and following appointment. Member compensation is \$50 for each day of board work plus travel and lodging expenses. The per diem is less than half that earned by legislators.<sup>1</sup>

Until the changes in 2008, the ethics agency handled the dual roles of prosecutor and adjudicator, or judge. The Board of Ethics would receive and evaluate complaints and the staff would be requested to conduct investigations if warranted. Following investigations, the staff would present preliminary findings of ethical misconduct to the board. The board could reach an agreement or compromise (called a consent opinion) with the accused which stated that a violation had occurred and a fine, usually nominal, should be paid, without having to go through a public hearing process. Alternatively, the board could call a public hearing for the accused and vote on whether a violation had occurred. Essentially, the board would bring charges against an individual and then try them in a public hearing. Such decisions by the board could be appealed by the accused for judicial review to the Louisiana First Circuit Court of Appeal, located in Baton Rouge.<sup>2</sup>

**Louisiana's Board of Ethics differs from most states' in that it encompasses a broad range of responsibilities rather than dividing duties among different agencies.**

This type of system, in which a state board serves roles as both prosecutor and judge, has been challenged in the Louisiana courts. In a 1987 Louisiana Supreme Court case, *Allen v. La. Board of Dentistry*, the court stated that because the prosecuting attorney for the dentistry board had engaged in one-on-one discussions with the board and had assisted in drafting the board's findings of fact and conclusions of law, the entire process had been compromised due to the board's failure to guarantee the accused an unbiased forum. In the 1997 case of *Georgia Gulf Corp. v. La. Board of Ethics*, the Louisiana Supreme Court ruled that the Board of Ethics had allowed its dual roles to compromise the rights of the accused to be heard and judged fairly. The court stated that the ethics system violated the fundamental principles of due process because it did not offer the accused the right to an impartial hearing and the appearance of fairness. Other court cases involving ethics charges against a state legislator also reflected on the issue. In response to court decisions, the Board of Ethics created a form of administrative "firewall" whereby prosecuting attorneys for the board were prohibited from communicating one-on-one with the board or those other staff attorneys who were advising the board on their deliberations.

Defenders of this system, in which the ethics board served as both prosecutor and judge, say impartiality must have existed because the board did not always vote against the accused after a formal hearing was held. Still, the ethics board's system of enforcement before 2008 could be easily criticized as unfair to the accused and eventually may have encountered still further

successful constitutional challenges. Such a system, had it continued, seemed unlikely to give the accused or the public the appropriate level of confidence that a fair process was being conducted.

Various motivations have been asserted to explain why the Legislature removed the adjudicatory role of the ethics board in the 2008 revisions. The viewpoints cover a range of reasons, including a desire to create a fairer system, retribution by some lawmakers who were under ethics investigations or charges, and motivations to intentionally disrupt the ethics process. However, it is clear that, among past and present participants in the ethics process and other close observers, there is a broad consensus that further distance needed to be placed between the functions of prosecutor and adjudicator, which up until 2008 had both resided with the board. This conclusion was accepted even by some members of the former board who resigned after the 2008 changes were enacted. Most disagreements over the 2008 revisions hinge more on how those roles should be separated and who should handle them.

## **A NEW SYSTEM**

There are a variety of ways that the division of the functions of the Board of Ethics might have been achieved. One alternative might have been to assign the final decision-making authority to the judiciary, a separate branch of government. But the Legislature chose to remove the role of judging cases from the Board of Ethics and assign that duty to administrative law judges, who are classified civil servant employees in the state executive branch's Division of Administrative Law. The division was established in 1996 and is one of the lesser known units in state government, but it has had an important and expanding role in recent years as it has centralized the regulatory adjudication process for various state agencies under one roof.<sup>3</sup>

Known as ALJs, these officials are not judges in the popular notion of being appointed or elected to preside over a local or state court. Acting as something between hearing officers and judges, the ALJs are lawyers who handle a variety of disputes that arise between state agencies and the citizens they regulate. These disputes include license denials and civil money penalties for violations involving financial companies and healthcare benefit recipients.

As part of the 2008 ethics law revisions, a randomly selected group of seven ALJs was designated to hear ethics cases. Called the Ethics Adjudicatory Board, they are formed into a couple of three-member panels, with the seventh member used as an alternate. Decisions of the panels are made by a majority vote. The Board of Ethics retained its role in investigating cases

**The 2008 revisions created the Ethics Adjudicatory Board to make final decisions on ethics cases and gave the original Ethics Board the responsibility of bringing cases before the panel.**



and pressing charges, but the ethics board staff now has to prosecute its cases in hearings before the Ethics Adjudicatory Board panels.

For those who favored a board with diverse citizen representation to judge ethics cases, this move was unpopular. Also, the ethics board, with its staggered five-year terms and members often reappointed, had the long-term value of accumulating expertise in administering the ethics laws. The administrative law judges serve for only three years on the adjudicatory panels while simultaneously handling other types of administrative cases for other departments.



**The new adjudication panel brought to light inconsistencies and ambiguities in the ethics code and its implementation.**

Proponents of the change argued that the adjudication function of the board was the easier and more practical function to assign to another agency. Part of the argument was that the prosecutorial function is a staff-intensive job entailing investigation and many duties already embedded at the ethics agency, so this role was best left with the Board of Ethics rather than transferred to another government department or newly created agency.

The separation of the prosecutorial and adjudicatory powers was a necessary step to serve the cause and appearance of justice and fairness but it was almost inevitable that a split of these functions between two boards would create a need to coordinate the new ethics process, especially in the early stages as the new system would be worked out. Once this new separation of powers was put into law, steps were needed on several fronts to make

the new system work clearly and effectively. A combined effort by the ethics board and its staff, the Division of Administrative Law and the Legislature was needed to address the rules and details of how the new system would work. Unfortunately, at first, these players frequently were not on the same page and did not cooperate fully toward this goal. An element of distrust and disrespect between some of these parties may also have contributed to a slow start for implementation. To some extent, this lack of comfort included the relationship between the Board of Ethics and its own staff.

Although the ethics revamp was passed four years ago, there are still no Board of Ethics rules in place providing detailed guidance for the new process. Some of the problems in setting up the new system could have and should have been avoided through more collaborative and assertive management at the ethics board and with more forward thinking and better problem solving. In addition, the Ethics Adjudicatory Board claimed that some of the pre-existing rules for the Board of Ethics were inconsistent with statutory requirements. Some of the board's usual procedures were therefore challenged for the first time.

The Board of Ethics' administration suffered internal disruptions and some of the ethics agency staff were not sufficiently prepared for the significant cultural and procedural changes they faced after the 2008 law became effective. The board's long-time administrator had departed in 2007. A new administrator resigned after less than a year in the position and his temporary replacement left after several months. Several of the prior ethics board members protested the changes in law and all but one of them resigned in June 2008, immediately before the effective date of new personal financial disclosure requirements. All but one member of the new board had to be nominated and appointed, which meant five months would go by without an ethics board meeting, during which the workload of undecided business mounted.

In this challenging environment, the top deputy to these former administrators eventually took over the agency. The new administrator and the board chairman at times did not share the same management philosophy and understanding of the laws to be enforced. In addition, it soon became apparent that while the ethics board staff had deep knowledge of the law, some of them were insufficiently prepared for a new system in which they were required to prosecute cases in front of an outside panel of administrative law judges. Cases brought by the Board of Ethics were sometimes lost by a lack of basic evidence presented by the ethics staff prosecutors, who were on a steep learning curve to adjust to the expectations and new procedural rules of the administrative law panels.

All of the above events provide the context for understanding what next steps might be taken to improve and clarify some aspects of the new ethics system. In December 2011, the Louisiana House and Senate committees that oversee the ethics laws discussed some of these outstanding issues and directed the relevant agencies to cooperate fully in working out some of their procedures related to the campaign finance law. In January 2012, a new Legislature took office. Some of the new legislators will be dealing with these complex ethics issues for the first time, yet they also have the opportunity to bring a fresh, problem-solving perspective to their important roles in providing oversight of the state agencies and in creating effective and reasoned laws for the people of Louisiana.

Although the new system of ethics enforcement has run into some difficulties, the functions of the Board of Ethics continue to be fulfilled and the great bulk of the work handled by the board and staff continues to be done creditably. Monthly meetings routinely dispatch large volumes of advisory opinions, late filing fines and consent opinions, among other chores. Matters at the ethics administration could be improved but the duties required by law are being performed and are not in disarray as has been occasionally suggested. The Ethics Adjudicatory Board is moving cases through the process and fulfilling its function.

With these observations in mind, this report identifies specific issues related to the 2008 revisions and how they might be addressed. This report also reviews noteworthy issues that pre-date the 2008 laws. Lastly, the report concludes by noting additional, long-range issues worth further discussion. These suggestions are made in the spirit of encouraging an ongoing dialog about ways to create a culture of compliance, improved ethics enforcement and the enhancement of the public's confidence in the system.

### **NEW SYSTEM HAS RAMIFICATIONS FOR LEGAL APPROACH**

Prior to 2008, the ethics board usually heard arguments for an ethics case and made a decision with a public vote all in the same public sitting. Where appropriate, it would release a written confirmation afterward. Since 2008, the ethics board staff prosecutor presents the Board's case to a panel of three administrative law judges (ALJs) in a public hearing. The panel members do not vote at the hearing, but later issue a written majority ruling containing findings of fact and conclusions of law.

This new system implies a more studied and protracted legal analysis for all. The Board of Ethics conducts much of its business in closed executive sessions, presumably to discuss anticipated litigation as well as investigations. Although the administrative law hearings are public, the decision-making for adjudications is now private. The written rulings and rationales are now more detailed. The new system is a different decision-making process, and it therefore may have ramifications for increased use of lawyers, for the time needed to complete cases and other aspects of the process.

In principle, this more scrupulous review should result in more consistent and reliable decisions and improved due process for respondents. The new system could cause decisions on finer legal points as the ALJs deliberate after the hearing with the benefit of legal resources and time. The ALJ's decisions may be less subject to empathy that might more likely come to bear upon the decision-maker in the midst of a hearing. The result now is something quite different from the citizen panel approach that some think is intended in the Louisiana Constitution. Also, a stronger bent toward a more rigorous legal decision-making process could create the need for a more intensive legal defense and therefore more time and costs for attorneys and investigation staff on both sides. Those proposing revisions and improvements to the new system should keep these points in mind as these administrative hearings begin to take on more the appearance of civil trials than they did before 2008.



# Issues Related To the 2008 Changes

## ENFORCEMENT OF CAMPAIGN FINANCE LAW

For more than 30 years Louisiana law has required candidates for political office to report campaign contributions and how the funds are used. The handling of infractions related to campaign finance reporting provides an example of the enforcement problems that occurred after the 2008 laws. As the Board of Ethics and the new Ethics Adjudicatory Board sorted out their respective responsibilities, the proper forum for hearings on campaign finance disputes became unnecessarily muddled. Some of the solutions to the jurisdiction problems could have been anticipated earlier and managed on the agency level. Questions regarding respective duties and roles could be resolved with the adoption of appropriate new rules and minor changes in statute.

Two pillars of the state's public integrity laws are the Code of Governmental Ethics and the Campaign Finance Disclosure Act, the latter of which requires the timely and accurate filing of reports showing political campaign contributions for candidates and expenditures by campaigns. Prior to 2008, the Board of Ethics had full jurisdiction over both of these realms.<sup>4</sup> Under the campaign finance law, the Board of Ethics basically puts on a different hat and acts as a board called the Supervisory Committee. The ethics code and the campaign finance act provide somewhat different ways of handling cases, but the same panel of individuals handles both.

**Changes in statute and the adoption of new rules may help to clarify roles for hearing campaign finance disputes.**

For campaign finance enforcement, the board would levy fines for late filings and consider requests by late filers for leniency. The board also would file suit or bring charges for cases in which the campaign finance law may have been violated by improper reporting, failures to disclose transactions or unauthorized and prohibited campaign practices. The district courts were involved in some actions, such as rendering judgments to collect penalties.

The 2008 laws that created the Ethics Adjudicatory Board changed the Code of Ethics but did not amend the campaign finance act. However, many legislators may have intended that all adjudicative hearings — both for the ethics code and campaign finance law — would shift to the administrative law panels. Or, the Legislature may have intended that the Ethics Adjudicatory Board would handle only adjudications under the ethics code. It is also possible that the Legislature did not anticipate the ambiguity that would ultimately arise. Adding to the complexity of the issue, the campaign finance law states that late filing penalties are handled pursuant to the ethics code.

So, were all or just some types of hearings under the campaign finance law supposed to shift to the new adjudicatory boards? A coordinated answer

among the responsible agencies was slow in coming, resulting in confusion and a negative impact on the image of the enforcement process. Certainly, the Legislature could have made its intent more clear. The issue resulted in court cases over jurisdictional disputes.

The Board of Ethics deals with many cases of late reporting and failure to pay fines under the campaign finance law. The appropriate way of handling these cases would be for the ethics board staff to assess a final order without need for a hearing and, if not paid, go to district court to get a judgment for payment. A candidate disputing the infraction could file an appeal. After a district court began considering legal questions about jurisdictional issues, the ethics board started sending cases of late filing infractions directly to the Ethics Adjudicatory Board. That meant there were no orders for payment, and apparently no documented appeals of those orders. With some justification, the administrative law judges determined that they did not have jurisdiction for hearing late filing cases unless the cases were documented appeals. By the end of 2011, the adjudicatory board had dismissed more than 40 late filing cases for this reason, styled as a lack of subject matter jurisdiction. The entire process of enforcement for late filings of campaign disclosures had been thrown into limbo, creating confusion and doubt.

A constructive step would be to clarify which body — the Board of Ethics (acting as the Supervisory Committee) or the Ethics Adjudicatory Board — has jurisdiction over the various types of duties associated with enforcing the campaign finance law. The roles of the district courts and appeals courts also could be clarified.

The Board of Ethics staff should handle late filings by assessing fines in the prescribed amounts and issuing orders for payment. The fine would be collectable in the appropriate district court, if needed to compel payment. Legislation could help clarify that the ethics board staff has the authority to assess a fee and issue a valid final order. Although this may seem a small point, this clarification would ensure that the order would be recognized as a valid legal instrument and that it could be appealed.

If a late filer does not dispute that the campaign report was submitted late but seeks to have the fine reduced or eliminated, the filer could ask the Board of Ethics for a waiver of the penalty. When considering a waiver, the ethics board would not decide whether the filing deadline was met. Rather, the board would consider whether the filer should be given leniency due to financial stress, illness, or some other justifiable hardship. For many years the Board of Ethics has dealt with requests of this kind and has refined its guidelines in an attempt to maintain consistency in handling such requests. Consideration is given for personal situations, extreme weather conditions and past records of compliance with the law. A request for a waiver is not an adjudication of whether the law was violated. Indeed, the ethics board regularly considers such waiver matters at monthly meetings.

If someone accused of filing a late campaign finance report disputes that there was a violation, that person could appeal and the case would then be transferred to the Ethics Adjudicatory Board for a hearing. The terms “waiver” and “appeal” as used in this context should be clarified in the law and the rules.

**The roles of campaign finance rule enforcement and judgement of violations must be clearly defined and designated between the Board of Ethics and the Ethics Adjudicatory Board.**

Legislation should also make clear how other types of ethics board charges, such as inaccurate reporting, should be adjudicated and how board lawsuits should be handled. The district courts could continue to play the same role under current law.

This outline of how the process might work is consistent with the Ethics Adjudicatory Board and district court interpretation of existing law and is in the direction of where the Board of Ethics recently has been moving. The Legislature could play a constructive role by clarifying the campaign finance statute and by overseeing the rule-making process for these procedures. The governor’s office has recommended a solution along these lines and, in conjunction with legislative leaders, has announced support for bills for the 2012 legislative session to clarify this process.

## **RULE MAKING**

Under the Louisiana Constitution, the Legislature enacts the laws and delegates authority to specific agencies to implement and enforce them. Usually, along with that delegation the legislation authorizes the agency to promulgate and enforce rules. The rule-making process is the way state agencies, with oversight from legislative committees, furnish the details and procedures of how laws are implemented. The rules give direction to regulators on how to proceed in administering the law, and they give individuals and organizations who operate under the regulations a timeline and map of how to navigate the process of compliance. If clearly written and properly followed, rules can strengthen an agency’s enforcement mechanism and guard against appeals on procedural grounds.

After the 2008 changes to the state ethics laws, the Board of Ethics did not initiate a set of rules for how it or the Ethics Adjudicatory Board would implement the new regime of dual boards. The Board of Ethics cannot dictate rules to the Ethics Adjudicatory Board. However, a new elaboration of board rules could have begun to carve away at some of the questions and disputes that have hung over the revised system. The Ethics Adjudicatory Board viewed some of the Board of Ethics’ long-standing procedures as inconsistent with the statutes; a cooperative rule-making process might have identified and addressed these differences of opinion.

Under the law, the applicable legislative oversight committees can serve an important role in this process. They can stimulate action, encourage and demand

inter-agency cooperation, and provide feedback on drafts of new rules. The committees also should closely monitor whether the agencies are fulfilling the requirements for writing new rules and gaining the proper approvals from the Legislature for finalizing those rules.



**Unclear terms and ambiguous language that still exist in state ethics laws must be clarified.**

## DEFINITIONS OF TERMS IN THE LAW

Ambiguous and unclear terms in state ethics laws existed well before 2008. Definitions are important because rulings can turn on the interpretation of certain words or expressions in the law. Definitions of key terms are sometimes placed in statute in the form of a glossary, sometimes left unspecified and sometimes captured in a set of agency rules. The goal of having clear definitions should be to create a consistent legal system conducive to compliance and to avoid needless disputes at the board level and in the courts over the meaning of terms.

For instance, a term that deserves particular attention under the new system is the word “board.” Prior to 2008, the Code of Ethics expressly defined the term as Board of Ethics. In 2008, a new “board” was created, the Ethics Adjudicatory Board, yet the prior definition was not changed—and four years later it still has not been amended. The term “board” is now used in the ethics code to refer to both boards. Now that two boards are handling ethics enforcement, the law should be clarified as to whether a provision is referencing the Board of Ethics or the Ethics Adjudicatory Board. This is not an academic point. In at least one district court matter this ambiguity in the law

has created substantive confusion. The governor has announced support for legislation that has been filed this session to remedy this obvious issue.

Even before 2008, the Campaign Finance Disclosure Act has referred to a “Supervisory Committee” to administer and enforce that law. But at least since 1981 the law specifies that the Board of Ethics is tasked with administering those laws. The Board of Ethics has operated as one and the same as the Supervisory Committee, but the law leaves room for the two entities to be different. Any changes to the campaign finance law should avoid further confusion about the identities and responsibilities of the two boards.

Another problem arises from the concept of a “panel” that has been embedded in the ethics code since the 1990s. The law provides for the use of “panels of the Board of Ethics” to perform certain functions and make recommendations to the full board. The concept of panels was introduced due to a concern that the board’s workload might become onerous and therefore should be divided and delegated, but the panels were never implemented. In some provisions the law states that the panel shall be used, yet in other provisions of the law the decision on whether to utilize panels is left to the discretion of the board.



## TIME FRAME FOR BRINGING CHARGES NEEDS CLARIFIED OPTIONS

It is important for the effective administration of the law that potential ethics violations by state and local officials be enforced expeditiously. For both the public and the official under investigation, proceedings must not only be conducted fairly and efficiently, but also initiated and concluded without undue delays.

The time frame in which the Board of Ethics must decide whether to issue charges for a possible violation or dismiss the case altogether is a very important matter. The ultimate decision depends on the degree of evidence the board was able to obtain during the investigation phase and whether, in the board's judgment, that such evidence allows them to mount a viable case. Unfortunately, determining these exact time frames can be difficult, as the rules governing them are unduly complicated and uncertain.

Prior to the 2008 revisions, state law provided that no "action to enforce any provision of (the state ethics code) shall be commenced after the expiration of two years following the discovery of the occurrence of the alleged violation, or four years after the (actual) occurrence of the alleged violation, whichever period is shorter." In the 2008 revisions, the Legislature maintained the four-year outer limit, but effectively shortened the inner period to state that if the board "does not issue charges within one year from the date upon which a sworn complaint is received or, if no sworn complaint was received, within one year from the date the board voted to consider the matter, the matter shall be dismissed."

A major issue under either structure is whether the running of the time periods can be suspended by either the agreement of the parties or by an action of the court. There may be instances where a flexible approach to the running of these time periods would help further the efficient and effective administration of the system. For example, can a person under investigation for a possible violation agree to extend or suspend the period to allow more time for information sharing or negotiation? Surely we would want to encourage this type of cooperation by the accused and the ethics staff investigators and lawyers.

Conversely, what if a respondent tries to "run out the clock" by raising a variety of legal hurdles and obstructions in order to prevent the ethics staff from being able to collect enough evidence in time? Can the board in such a circumstance be granted additional time by the courts to properly complete its investigation before making a decision on whether to issue charges?

Unfortunately, there are no definite answers. Although the Louisiana Supreme Court has allowed for a suspension of time in a case of campaign finance disclosure, the court has not had the chance to rule whether the same is possible for ethics code violations. Arguably the two areas of the law are similar and thus merit the same treatment; however, the 2008 ethics code revisions have proven anything but certain, and it would be difficult to predict exactly what result would be reached if a court were presented with the question.

In light of these issues, it would be appropriate and helpful—as to both the Campaign Finance Disclosure Act and Ethics Code—for the Legislature to clarify as to which time frames can be waived or extended, and which cannot. Furthermore, the Legislature should clarify as to whether—under the appropriate circumstances dependent on the respondent's actions—a court could allow the board of ethics additional time to investigate and decide on the possible issuance of charges. Modifications and clarifications of this nature would help ensure a more efficient administration of the campaign finance disclosure and ethics laws, specifically with respect to the fairness and swiftness of their enforcement.



The ethics board traditionally has made itself synonymous with the panels, but apparently not everyone accepts this practice as the appropriate legal interpretation. In a recent decision by an Ethics Adjudicatory Board panel, one administrative law judge cited the provision in the ethics code stating that the ethics board shall use panels. The ALJ determined that the Ethics Board's failure to follow this particular procedure had denied the respondent appropriate process. The ALJ concluded that the case be dismissed for this reason. (The matter was dismissed although the majority did not express this reason for the dismissal.)

This view of the role of a "panel" in the ethics code is entirely at odds with the way the Board of Ethics has actually determined probable violations and brings charges in a case. If the point of view of this one ALJ were to prevail in other cases, the entire current operation of the Board of Ethics may need to be corrected and a potentially large number of pending cases could be seriously jeopardized. As potentially disruptive as this ALJ's view may be, it provides an example of how an ambiguous ethics code provision was brought to light once the adjudicatory functions were turned over to an independent body.

A proposed bill supported by the governor would make a simple and worthwhile change in the law by saying that the panels *may* be used rather than *shall* be used. As always, changes to these provisions should be considered thoroughly to avoid unintended side effects.



## **ETHICS BOARD APPEALS OF ADJUDICATORY DECISIONS**

Should the Board of Ethics be able to appeal a decision by an Ethics Adjudicatory Board panel? This is a difficult question that can only be answered by weighing a variety of competing values and priorities.

Under the old system of judging ethics cases, the Board of Ethics would decide for or against the accused person, referred to as the respondent. The respondent could appeal an unfavorable ruling to the state court of appeal.

Under this system, the ethics board would have no reason ever to appeal its own decision, so the matter of having a right to appeal was irrelevant for the board.

After the 2008 changes, a respondent can appeal an unfavorable decision by an Ethics Adjudicatory Board panel to the First Circuit Court of Appeal. But if the respondent wins a ruling, the Board of Ethics, as prosecutor, has no right to appeal the Ethics Adjudicatory Board's decision. In Louisiana this was the standard before and after 2008 for all state agencies that bring actions against an individual or organization in an administrative hearing. The lack of an agency's right of appeal is based partly on the concern that an agency has the resources and wherewithal to drag out a case unfairly, even when the agency has little realistic hope for a different result, and can thereby drain a respondent financially and emotionally.

There are good arguments against the right of agency appeal. The potential costs to a respondent in time, money, personal agony and reputation are real concerns. Although an agency appeal is not the same as so-called double jeopardy, which is constitutionally prohibited in criminal cases, some people have an understandable and visceral reaction against the idea that an agency would be able to put a respondent through two "trials" with the use of an appeal. Also, it may not be good practice generally speaking for the government to appeal its own decisions, even if that government is split between two boards.

There are also good arguments in favor of the right of an ethics board to appeal. If an Ethics Adjudicatory Board panel reaches a decision that is contrary to the law and the evidence, and that decision cannot be challenged, then justice is ill served in that instance. Such a decision, if left to stand, sends a poor message, provides unreliable guidance about the meaning of the law and undermines the ethics code. Ethics Adjudicatory Board panels make decisions not only about whether specific individuals are in violation of the law, but also about how the law should be interpreted. This is a large role for executive branch civil service employees. Two members voting as a majority on an Ethics Adjudicatory panel can irreversibly decide major issues of statutory interpretation differently than the 11 members of the ethics board.

An appeals process would tend to motivate the administrative law judges to be more thoroughly convincing in their decisions and analysis. It would also allow a state court to weigh in on critical matters of interpretation of the law and its terms, rather than leaving the final word on those vital decisions to the state employees on the Ethics Adjudicatory Board. Over the long term, the right of appeal for the Board of Ethics could provide more polish and predictability in the ethics enforcement system.

**If an Ethics Adjudicatory Board panel reaches a decision that is contrary to the law and the evidence, and that decision cannot be challenged, then justice is ill served in that instance.**



Even if one accepts the principle that an ethics board right of appeal is appropriate, the specific method and language of determining when and how an appeal can take place is not easy to articulate. Should every case be subject to appeal, and if not, how does one draw the line for limited appeals?

The governor supports giving the ethics board a limited right of appeal on “questions of law.” If suitably and clearly constructed, this initiative would be a step toward a stronger and more predictable ethics enforcement system. The meaning of “questions of law” should not be left to widely varying interpretations, however. The term could be clarified by borrowing a section of the Administrative Procedure Act that describes certain grounds of appeal. These grounds for appeal would make it easier for the courts to interpret what is meant by “questions of law.” (See R.S. 49:964(G)1-4)

The trigger for requesting an appeal should be a two-thirds or three-fourths majority vote of the Board of Ethics. The most preferred avenue of appeal would be to the same state court to which a respondent now has the right of appeal of an adverse ruling. That avenue is the one proposed by one of the bills supported by the governor.

## **LONGEVITY OF BOARD TERMS**

Members of the Ethics Adjudicatory panels are chosen at random from a pool of qualified administrative law judges and serve three-year terms, which are not staggered. To be eligible to serve on the Ethics Adjudicatory Board, an individual must have at least two years experience as an ALJ or 10 years experience practicing law.

Extending the terms of the adjudicatory board members to five years — which is the same term as members of the Board of Ethics — would increase the level of experience gained over time on these panels. Further, staggered terms would contribute to consistency. The ethics board, the respondents and the public deserve the most experienced and knowledgeable arbiters who are well versed in the ethics law and relevant case history. The state has invested in these government employees by placing them in this specialized role handling a complex subject matter, and therefore the state should get more out of its investment by keeping these individuals on the adjudicatory boards longer.

The Code of Ethics is complicated and prone to various interpretations. Lawyers who have spent much of their careers handling ethics cases profess to learn more about the ethics code with each new case. The Code of Ethics is not a routine set of rules with constantly evident boundaries. Greater experience on the adjudicatory panels would contribute to consistency in enforcement and confidence in the system that would contribute to improved compliance.



## CHANGE IN RECUSAL LAW WOULD CREATE BETTER TRANSPARENCY

### Elected State and Local 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:<sup>5</sup>

- 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 full in the official record of the body and with the Louisiana Board of Ethics.

## CONSENT OPINIONS

One of the vital functions of the Board of Ethics is to reach agreements or compromises with respondents that a violation has occurred and that a specific fine should be paid.<sup>6</sup> Such a procedure offers a speedy resolution of matters and reduces the use of state and private resources. These agreements—called consent opinions—contain explanations of the “facts” of a case, the applicable law, the violation and the penalty. The respondent must first sign and then the board must vote to accept a consent opinion to finalize the agreement.

Consent opinions sometimes are reached before charges are filed but more often are reached after the charges. In those cases when agreements are reached before charges are filed, the entire matter typically is kept secret until the name appears on the agenda of a Board of Ethics meeting. The agreement is not revealed until the board approves it at an open meeting.

Consent opinions are an example of a Board of Ethics practice that was passed down through the years but never entirely clarified in law. They work best only when the board is not heavily influenced by the staff attorneys, who have the primary task of negotiating the agreements. The board is supposed to consider whether the staff prosecutors may be either too eager to settle a case or too intimidating toward a respondent. Over the years the process used for consent opinions has not always been conducted with the highest standards of fairness and factual basis. The Legislature should consider ways that the consent opinion process could be improved and made more transparent.<sup>7</sup>

Before 2008, the Board of Ethics sometimes pursued consent opinions but was not required to consider such an offer. In 2008 the Legislature added the statutory requirement that the “board shall consider offering a consent opinion to each person who is the subject of an investigation.”<sup>8</sup> This provision would appear to leave the job of consent opinions with the Board of Ethics and not pass that responsibility to the Ethics Adjudicatory Board. Despite that provision, the Board of Ethics voted to request an opinion from the state attorney general about which party has the final decision on consent opinions going forward. As of March 23 the AG opinion had not been issued.

Following a practice that pre-dated the 2008 law changes, consent opinions state that their conclusions and penalties are “ordered, adjudged and decreed.” The Board of Ethics has raised the question: if we no longer adjudicate ethics cases, how can we order or judge a case with a consent opinion? The board’s concern is that the consent opinion may not be an enforceable judgment because it does not come from a recognized adjudicatory authority. The adjudication role went out the window in 2008. An opposing legal interpretation would be that the respondent, upon en-

**Assigning the final word on consent opinions to the Ethics Adjudicatory Board would eliminate the avenue for a simple settlement offered under the current system.**

tering into a consent opinion, does not want and has in fact waived the opportunity for an adjudicatory hearing. Also, state agencies generally have authority to reach decisions that are final orders for the purposes of enforcement or appeal even without an adjudication. The ethics board should be no different when entering consent opinions.

If the attorney general opines – or if the Board of Ethics decides on its own — that the law means that the board does not have jurisdiction over consent opinions, then the current system will be thrown into question and the law will need to be amended and clarified as soon as possible.

What would happen if the Ethics Adjudicatory Board had to judge and order consent opinions sent over by the Board of Ethics? Presumably the adjudicatory board could let a consent opinion stand or it could decide whether the penalty is too light or too heavy. The adjudicatory board might also find fault with the Board of Ethics' charges or interpretation of law and decide to dismiss the charges against the respondent. Although the respondent would have to bear the extra time and legal expense of an adjudicatory board hearing, the added venue would give the accused person the opportunity for a lesser penalty or even a ruling that there was no violation.

Assigning the final word on consent opinions to the Ethics Adjudicatory Board would eliminate the avenue for a simple settlement offered under the current system. A respondent willingly admitting fault would have to reach an agreement with three successive parties: the prosecuting attorneys, the Board of Ethics and then the Ethics Adjudicatory Board.

The Ethics Adjudicatory Board would be required to conduct a trial even if the respondent wanted to accept the charges and pay a penalty through a negotiated agreement with the prosecutor. The respondent likely would have to hire a lawyer to assist with the adjudicatory hearing even though the violation had been admitted and the penalty assessed. This outcome would be needlessly time-consuming and expensive for everyone involved.

## **INVESTIGATION DOCUMENTS**

In a recent case against St. Gabriel Police Chief Kevin Ambeau, the Board of Ethics was challenged by Ambeau to release its staff's investigative report and other documents and records concerning charges of violations of the Code of Ethics.<sup>9</sup> Transcripts of the ethics board's executive sessions were among the documents requested. The board refused, declaring that the documents were privileged work products protected and required under state law to be confidential.

The case went to the 19th Judicial District Court in Baton Rouge, which ordered that the documents be produced. Still the board did not comply. Responding to a motion by the respondent and noting the board's lack of compliance with the court order, the Ethics Adjudicatory Board dismissed the case.<sup>10</sup>

The impact of the Ambeau case could be profound. As long as this type of deadlock continues over the confidentiality of investigative records, every ethics case brought to the Ethics Adjudicatory Board eventually could be dismissed. One would expect attorneys aware of this situation to request the board's internal investigatory documents in all future ethics matters that they may handle.

A discussion is now warranted about what the law and policy in this area should be and whether the current law meets that standard. A starting point of this discussion is the long-held principle in Louisiana's ethics process that the name of a complainant and the complaint of violations delivered to the Board of Ethics should remain confidential; that principle was not disputed in the Ambeau case. The current question is how deeply a respondent may delve into the Board of Ethics records. The accused has a right to request information, the board has some rights and a statutory duty to shield its work product and the anonymous person making the complaint has the right to remain undisclosed. These issues require careful and reasoned analysis to arrive at a conclusion where the rights and obligations of all sides are addressed. Unless the ethics boards can come to some understanding on this issue quickly, the Legislature should provide a solution that will offer a clear and functioning enforcement system.





## THE NEW STANDARD OF EVIDENCE FOR JUDGING ETHICS CASES

Among the changes to the ethics laws in 2008 was the adoption of a new standard of evidence for determining whether a violation of the Code of Governmental Ethics has occurred. This change has been criticized by some observers as a step backwards for ethics code enforcement because of the concern that violations would be too difficult to prove. Now that the new adjudication system has had time to process a number of cases, a review of this issue is warranted.

**Among the cases that have received a final ruling by the Ethics Adjudicatory Board panels, the Board of Ethics has won favorable decisions in 13 cases and has lost 11 cases.**

In legal matters generally, the standard of evidence, or burden of proof, is a test of how convincing the prosecution's or the plaintiff's presentation of the facts must be in order to persuade a jury, judge or adjudicatory panel that a violation has occurred. The level is supposed to be high enough to be fair to the accused but low enough to make the laws enforceable. Too low a standard causes the law to be a bludgeon against those who are accused of violations; but too high a standard makes the law too difficult to enforce. The standard is supposed to be commensurate with the level of seriousness to which society attaches the alleged infraction and possible penalties.

The three most common standards are "preponderance of evidence," "clear and convincing evidence" and "evidence beyond a reasonable doubt." Of the three, preponderance is considered the least demanding standard to prove. It generally means that the evidence demonstrates a version of events that is more likely true than false. This is the standard used in civil cases, such as conflicts between parties and lawsuits over accidents, property rights and breach of contract. Preponderance is also the normal standard for state agency hearings under the Louisiana Administrative Procedure Act. (See R.S. 49:964(G)6)

The next step up is the clear and convincing standard, which implies a burden of proof more demanding than preponderance. This standard is used by the Louisiana Supreme Court for determining whether disciplinary action is justified against a lawyer for unethical conduct. The standard of beyond a reasonable doubt is yet a higher burden of proof. This is the United States Constitutional standard required for judges or juries to weigh the evidence in criminal cases, in which the accused might face incarceration or loss of liberty.

### Substantial evidence

Before 2008, the Board of Ethics judged cases based on yet another standard called "substantial evidence." Although legal literature has attempted to define this standard, interpretations of its meaning vary depending on the observer. Some liken it to preponderance. Others believe it could mean that a violation can be found if any significant, reliable piece of information is offered in a case, an interpretation that casts the standard as something less demanding than preponderance.

During the 2008 first special session on ethics, some state senators were critical of the "substantial evidence" standard and amended a key bill (Act 23) to change the burden of proof in ethics cases from "substantial" to "clear and convincing." So, when finally passed, the bill had moved the responsibility of judging ethics cases from the Board of Ethics, which had been using a standard of substantial evidence, to the newly created Ethics Adjudicatory Board panels comprised of administrative law judges, who would use the new standard of clear and convincing evidence.

Concerns were raised that the new standard was too high and that the Board of Ethics lacked the investigatory tools, such as subpoena authority for the seizure of private documents, that would be needed to meet the higher

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burden of proof. But a strong argument also was made that “substantial” evidence was both too unclear and too low a standard for judging ethics cases fairly, especially considering the potential serious impact on accused individuals’ reputations and careers.

Unfortunately, this change made on the Senate floor was at the near-final stage of the bill’s passage and therefore was done without the benefit of a committee discussion or much prior public discourse about the full meaning and potential ramifications. Few if any had expected this change and there was no pro-and-con public debate over its merit. Later that spring, the ethics administrator said that preponderance of evidence would have been similar to the ethics board’s understanding of substantial evidence. He also said that the change to “clear and convincing” had created too high a standard and would make the ethics laws unenforceable; he then resigned in June 2008. PAR also expressed concern around this time that the change might have weakened ethics law enforcement.

**The central problem with the change in the ethics standard of evidence had more to do with the way it was put into law – without appropriate and normally expected public discussion and education – than with the effect of the change.**

#### **Impact of the change**

Since then, much of the discussion about the change has revolved around whether the standard should have been set at preponderance instead of clear and convincing. But would it have made a difference?

Among the cases that have received a final ruling by the Ethics Adjudicatory Board panels, the Board of Ethics has won favorable decisions in 13 cases and has lost 11 cases, based on information as of March 12, 2012. Clearly the law has not become unenforceable, as some feared. The Board of Ethics also has “won” cases by reaching agreements (consent opinions) with respondents who admit to violations and pay fines. When such an agreement is reached after charges are filed, the Board of Ethics requests that a case be dismissed; at the Board of Ethics’ request, the Ethics Adjudicatory Board has dismissed 91 cases, including those that resulted in consent opinions. In all, 252 cases have been referred to the Ethics Adjudicatory Board. Of those, 164 cases have been closed for various reasons and 88 remain open.

Among some of the cases that the Board of Ethics lost, the Ethics Adjudicatory Board cited inadequate or poorly presented evidence by the prosecution. But in those cases it appears that the evidence presented by the prosecution would not have met any burden of proof, even a very low one.

In its decisions, the new adjudicatory panels have routinely cited the clear and convincing standard of evidence used to judge the cases. But none of the decisions have stated whether the Board of Ethics might have won a case if only the standard of evidence had been preponderance instead of clear and convincing. In some of the cases lost by the Board of Ethics, the decisions were based on the interpretation of the law rather than on the solidity of factual evidence. In other words, in many ethics cases both before and after 2008, the verdict has hinged not on whether certain facts occurred, but on whether such facts could be interpreted as a violation of the law.

Based on PAR’s interviews, there have been no cases so far in which the Board of Ethics has decided not to bring charges against a respondent because the ethics board believed it could not muster a clear and convincing case when it might have succeeded with the lower standard of preponderance of the evidence. The public would benefit from knowing if such decisions do occur in the future, although specific information about such cases would surely be confidential if no charges are made.

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Thus far, the 2008 change in the standard of evidence has had at most a minor and possibly no demonstrable impact. Even if it had made a difference in some cases, a good argument could be made that the new standard is a fairer and more appropriate one. The central problem with the change in the ethics standard of evidence had more to do with the way it was put into law – without appropriate and normally expected public discussion and education – than with the effect of the change. Further scrutiny of adjudicated cases in the future might shed new light on the overall effects of the new standard.

### **Additional issues**

Other factors likely have had a more significant effect on the enforcement process and the ability of the Board of Ethics to win cases. The most fundamental change brought by the new system is that the ethics board staff, acting as prosecutor, now has to take cases to an external body, the Ethics Adjudicatory Board. These cases are now more like trials, as opposed to the old system of somewhat less formal hearings in which the ethics board performed the function of evaluating whether its staff had adequately established a violation. Also, the Board of Ethics lost its most effective prosecutors when its chief administrator departed in 2007 and the subsequent administrator resigned a year later. When the new law went into effect in 2008, the Board of Ethics needed more prosecutorial expertise present on its staff to successfully navigate the new system.

The state's campaign finance law was not directly addressed in the 2008 changes to the Code of Ethics. The Legislature this session will consider bills intended to clarify the responsibilities and jurisdictions of the Board of Ethics (also acting as the Supervisory Committee to administer the campaign finance law), the Ethics Adjudicatory Board and the state courts with regard to the Campaign Finance Disclosure Act. In clarifying the law and the procedures, this new legislation could have the effect of setting the standard of evidence for campaign finance cases at the level of clear and convincing. This change ought to be debated by the committees considering the legislation so that decision-makers and the public are fully aware of the potential shift in the standard and what that might mean going forward.

# Other Ethics and Campaign Finance Issues

## PERSONAL USE

Louisiana’s campaign finance law prohibits current and past political candidates and office holders from using their campaign funds for purely personal expenditures. Money donated to a candidate who then uses the funds for personal enrichment or material items is, in principle, little different from the unlawful act of buying political influence with a substantially valuable gift. The state should guard its image and the integrity of this process — which is closely related to the values of fair and democratic elections — to ensure that the best standards are employed in law and practice in Louisiana.

The law applies to the use of money in campaign finance accounts, which can include funds held by candidates for elected office, current officeholders, those who lost elections and those who have retired from running for office, either temporarily or permanently. A number of losing or retired politicians still hold accounts even with no prospective future campaigns on their horizon.

State law says that campaign funds may be expended for any lawful purpose and for campaigns of other candidates and ballot propositions. Such funds shall not be used “for any personal use unrelated to a political campaign, the holding of a public office or party position.” The law also restricts payments to immediate family members. Donations to some charities and contributions to other political campaigns are permitted.

The definition of “personal use” is subject to interpretation, particularly when paired with the idea that campaign funds may be used if the expenses are related to the holding of public office. Various allowable expenses might be related to constituent service, for example. Much of what an officeholder does could reflect on that person’s re-election campaign, and therefore expenses related to office-holding activities can be difficult to parse from simple donations or obvious personal use.

**The law on the “personal use” of campaign funds for federal offices provides reasonable and tested guidelines for Louisiana reforms.**

Recently, a renewed public debate has focused on the use of vehicles and electronics equipment, and payments for entertainment, social occasions and social clubs. While arguments can be made that in some instances these could be legitimate campaign costs, they also provide examples of personal expenditures easily cloaked by ambiguous or loosely interpreted law. Campaign fund expenditures that enrich an individual’s lifestyle should receive intense scrutiny. Policymakers should focus on those types of expenditures that are vulnerable to being abused and take steps toward clarifying or changing state law to err on the side of a broad but practical interpretation of personal use. They also should consider the interpretation that is more likely to be consistent with the expectation of contributors.



In the past 20 years the Louisiana Board of Ethics, which administers the state campaign finance law, has issued nearly 100 advisory opinions requested by state and local politicians seeking clarity in what might be permitted in the way of campaign finance expenditures. According to those opinions, examples of prohibited expenditures have included clothes for a spouse, the purchase of a home, hearing aids, donations for birthday gifts and loans to a candidate's personal business. Expenses that were allowed included leases for vehicles exclusively for campaign and office holding, rent in the Baton Rouge area for lawmakers who live in other parts of the state and residential telephone expenses used for campaign and constituent purposes. The use of campaign money for participating in parades has been permitted depending on the expense involved.

The state law applies to state and local elected offices in Louisiana. Federal law regulates campaign finance expenditures for presidential and U.S. House and Senate campaigns. The federal law allows campaign funds to be used for "ordinary and necessary expenditures" connected to holding office. It says that funds "shall not be converted by any person to personal use" and goes a step further by trying to explain what that means. The expenditure may be prohibited if it is "used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of federal office." The federal law also supplies a list of prohibited expenditures, including payments for a home mortgage, clothing, non-campaign auto expenses, country club memberships, vacations, household food, tuition and tickets to sporting events and concerts.

These federal law provisions concerning "personal use" appear to be in the same spirit of the Louisiana law. But the Louisiana statute lacks any comparable attempt to give the term a better context, specifics or clarification. Past attempts by the Board of Ethics to press for more definition have been rebuffed by the Legislature, which has sent the message that the law is clear enough and no new rules are needed. Some members of the Legislature recently have said they will invite a study of the issue but do not expect to pursue legislation this session.

PAR recommends that improvements be made either through legislation or new rules and definitions crafted by the legislative committees and the Board of Ethics, which recently raised concerns about spending abuses and the lack of clarity in the law. As a starting point, the federal law provides reasonable and tested guidelines. A number of states have taken a similar approach. Louisiana's adoption of such guidelines would send a clear message that the state is prepared to value its reputation and the public trust above the occasional needs of some politicians to indulge too freely into their campaign funds for personal pleasure. Some past or present politicians might have to pay for football tickets, personal automobiles and home mortgages out of their own pockets. These restrictions are hardly a great sacrifice for the sake of ensuring public integrity and promoting confidence in the campaign finance system. (See Appendix.)

In addition to the lack of clarity related to candidates spending money on themselves, the campaign finance law also lends itself to widely varying interpretations of other types of expenditures, such as the legality of certain expenditures on constituents and the indigent. The law's standard is low and all but leaves the use up to the individual candidate or office holder.

## **PUBLIC ACCESS TO ETHICS HEARINGS**

The Board of Ethics should have its public proceedings made available by video online, both live and archived. The board holds a two-day meeting nearly every month in Baton Rouge. Most of the meeting time is held in sessions open to the public but a considerable amount of ethics board meeting time is held behind closed doors in executive session. The board makes public minutes of its open meetings.

Discussions and decisions of the board are of serious public interest. A video account of the board's meetings would provide an accessible record of why the board arrives at decisions, such as on advisory opinions, and how it puts the law into practice. This record would serve those covered by the law and provide reference and context for those researching board actions. Videography at state boards allows surveillance of meetings and affords the opportunity for anyone to monitor whether a public body is following the open meetings law and correct procedures in conducting its business.

Likewise, video records of Ethics Adjudicatory Board hearings also would be useful. These hearings are currently held on a case-by-case basis. The adjudicatory panels hear cases but do not make their decisions with votes in a public meeting. Their rulings are released in the form of a court document, usually days or weeks after the hearing.

**The Board of Ethics should have its public proceedings available by video online, both live and archived.**

A related issue is the ethics board's meetings in executive sessions, which are a necessary part of the board's process particularly when reviewing investigations. The legal justification of these closed-door sessions depends on the nature of the issues discussed and whether the board could be circumventing public discussion or votes. Closed-door sessions should be tightly limited. The Legislature and the public are well within their rights to monitor the use of executive sessions and to be told exactly the reasons for them.<sup>9</sup>

## **BOARD NOMINATION RESTRICTION**

The nomination process for members of the Board of Ethics might be improved by allowing a person serving on another state board or commission to leave that panel and to be appointed to the Board of Ethics without having to wait six months between the assignments. The law establishing the Board of Ethics prohibits a "public employee" from another part of the government being appointed to the board. It also prohibits past public employees from

service on the board within six months of their termination of employment. The term “public employee” has been interpreted to include part-time volunteer members of other boards and commissions and even of some advisory committees. This definition places an impractical and unnecessary restriction on the nomination of a member of a state board or advisory commission to the Board of Ethics. Legislation has been introduced at the current regular session to address this issue.



## Long-range Issues Worth Discussion

A number of ethics issues that deserve attention in the long term are not included in this report, which is intended to address a range of more immediate concerns. Several issues identified here below could be the subject of further discussion or research. PAR is not making recommendations on these issues at this time, but highlights them in the interest of promoting policy forethought.

**Advisory opinions.** The Board of Ethics issues advisory opinions when requested. The opinions address specific, prospective situations faced by public servants seeking guidance on the best way to be in compliance with the law. The opinions are drafted by the staff and sometimes changed by the ethics board before they are eventually voted upon by the board. Expedient processing of advisory opinions contributes to a culture of compliance. Perhaps some progress could be made in this area without compromising the importance and meaning of the opinions. Some ethics agencies in other states use a two-tiered system that allows routine questions to be answered quickly and succinctly while more complex questions and new issues are submitted to a more formal process with a board vote. Further discussion on this issue could be beneficial.

**Disclosures.** At some point in the future, policymakers may want to examine the impact of the personal financial disclosure process that was created in 2008. This very worthwhile law arguably acts as a deterrent to some who would use an office to seek personal gain or engage in conflicts of interest. A re-examination could look for loopholes in the reporting requirements and consider the effects on the state's recruitment of members for volunteer boards and commissions. For those elected officials whose terms end in mid-January but who must later submit a financial disclosure covering the entire year, a review of their reporting requirements may be warranted.

**Policymakers may want to examine the impact of the personal financial disclosure process that was created in 2008.**

**Contributor reporting quirk.** 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. Board members have said that the reporting requirement is an unfair and unnecessary burden on the contributor. This perplexing aspect of the law may deserve further scrutiny. 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.

**Board compensation.** Board of Ethics members must devote considerable time each month in preparation and attendance for board meetings. The compensation, at \$50 per day, is well below the per diem for state lawmakers. Policymakers might want to review the importance of the Board of Ethics, compare the compensation of other boards and discuss whether a re-evaluation of board member compensation is warranted.





## Conclusion

Louisiana’s Code of Ethics began its evolution nearly half a century ago. Since that time it has been repeatedly reformed with new aims and re-modeled enforcement structures. It has endured major changes and minor tweaks and has now become an accumulation of rules, terms and procedures that may be unnecessarily convoluted and difficult to understand. Remnants of outdated definitions and ways of doing business are still embedded in the law. These faults in the Code of Ethics have become more apparent through the creation of the Ethics Adjudicatory Board, which as an independent body has scrutinized inconsistencies and brought to light ambiguities in the law and its implementation.

As a long-term endeavor, the state should consider developing a draft of a complete new Code of Ethics. This could be accomplished by the Louisiana State Law Institute or by a special body created by the Legislature. The draft could be debated over a long period allowing for ample public and legal input. Such a draft might embody the principles and restrictions that we continue to value and may also create ethics standards and a system of enforcement that are clearer and contribute more strongly to a culture of compliance.

Until that time, the state should pursue changes in law and definitions that will contribute to a better ethics system offering clearer delineation of duties and consistent interpretations of the statutes. In that regard, the governor’s office has made several useful proposals for the current session that, if properly guided through the legislative process, deserve strong public support.



## ENDNOTES

<sup>1</sup> In R.S. 18:1511.1(B) the Supervisory Committee on Campaign Finance Disclosure “shall be paid the same per diem as members of the legislature for each day of attendance at committee meetings” plus expenses. The members of the Board of Ethics act as the Supervisory Committee but do not receive the higher per diem.

<sup>2</sup> R.S. 42:1142(A).

<sup>3</sup> Up until the legislative overhaul passed in the last session of the final term of Gov. Edwin Edwards and implemented during the administration of Gov. Mike Foster, each government department had its own administrative law judges to handle the adjudication of administrative and regulatory hearings for that particular department. After the overhaul, nearly all administrative law judges became housed in one central office—the Division of Administrative Law— and were assigned to conduct hearings for specific departments as needed. This was done, in part, in an effort to give the administrative law judges more independence and flexibility, but has, according to some critics, caused them to lose specialized knowledge.

<sup>4</sup> The Supervisory Committee on Campaign Finance Disclosure administered and enforced the Campaign Finance Disclosure Act and the Board of Ethics functioned as the supervisory committee. (R.S. 18:1511.1)

<sup>5</sup> The recommendations in this section are drawn from R.S. 42:1120, before and as amended by Act 159, Reg. Sess., 2008, and R.S. 42:1120, prior to Act 8, First Extra. Sess., 2008.

<sup>6</sup> “Regarding the importance of such consent opinions, see for comparison recent United States Supreme Court comments regarding the importance of plea bargains in the United States criminal justice system which is somewhat comparable in function to the civil ethics enforcement process. The Court said “... ours is for the most part a system of pleas, not a system of trials.... In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. ... The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.” (Missouri v. Frye, No. 10-444, pages 7-8, March 21, 2012, USSC)

<sup>7</sup> As an example of a situation that could occur, a matter concerning a political office holder which may be resolved using a consent opinion could be under active negotiation at the ethics board for an extended period, possibly during a campaign season, with no charges being filed and thus giving the public no idea of its existence until the matter appears listed on a board agenda.

<sup>8</sup> Act 128 of the 2008 Regular Session of the Legislature.

<sup>9</sup> In the Matter of Kevin Ambeau, Docket No. 2010-1695-Ethics-B, July 26, 2010. The EAB ruled that the respondent was entitled to the reports and records of the board compiled during the investigation not including the name of the complainant. With regard to any information compiled or created after completion of the investigation and the issuance of charges, the board “need not produce any information that reflects its work product, such as the mental impressions, conclusions, opinions, or theories authored by any of the personnel involved in litigating the Board’s case.”

<sup>10</sup>In the Matter of Kevin Ambeau, Docket No. 2010-1695-Ethics-B, January 24, 2012.

<sup>11</sup>Louisiana Constitution, Article XII, Section 3, mandates that: “(no) person shall be denied the right to observe the deliberations of public bodies ... except in cases established by law.” And R.S. 42:12 provides that “(It) is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of this Chapter (Louisiana Open Meetings Law) shall be construed liberally.”

# Appendix

## FEDERAL ELECTION CAMPAIGN LAWS COMPILED BY: THE FEDERAL ELECTION COMMISSION

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### CHAPTER 14—FEDERAL ELECTION CAMPAIGNS SUBCHAPTER 1—DISCLOSURE OF CAMPAIGN FEDERAL FUNDS

#### § 439a. Use of contributed amounts for certain purposes

(a) *Permitted uses.* A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual—

- (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
- (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
- (3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986;
- (4) for transfers, without limitation, to a national, State, or local committee of a political party;
- (5) for donations to State and local candidates subject to the provisions of State law; or
- (6) for any other lawful purpose unless prohibited by subsection (b) of this section.

(b) *Prohibited use.*

- (1) In general. A contribution or donation described in subsection (a) shall not be converted by any person to personal use.
- (2) Conversion. For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including—
  - (A) a home mortgage, rent, or utility payment;
  - (B) a clothing purchase;
  - (C) a noncampaign-related automobile expense;

- (D) a country club membership;
- (E) a vacation or other noncampaign-related trip;
- (F) a household food item;
- (G) a tuition payment;
- (H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and
- (I) dues, fees, and other payments to a health club or recreational facility.