



Everyday Ethics for Local Officials

Taking Chances with Ethics Laws: A High Stakes Gamble

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QUESTION

In your September column, you presented a chart titled "Potential Consequences of Violating Federal or State Ethics Laws," which detailed the penalties for violating various ethics-related laws. Some of the potential penalties caught my attention, but I am wondering whether the chart tells the whole story. For example, what are the odds of getting caught and prosecuted for violating these laws? Furthermore, if it's a first offense, aren't the authorities likely to go easy on public officials?

ANSWER

You are quite right that the penalties chart tells only a partial story. Let's try to fill in some of the missing pieces.

The Odds of Getting Caught

It's difficult to provide a numerical figure for the cost of getting caught and being prosecuted. However, the reality of being a public official is that you are most likely going to have detractors - political opponents, those who disagree with you or even gadflies.

For example, anyone can file a complaint with the Fair Political Practices Commission (FPPC) if the violation in question relates to the Political Reform Act. The FPPC will decide whether to investigate and prosecute a case based on its analysis of whether the case can be *successfully* prosecuted and whether it *should be* prosecuted.

Former FPPC Chairperson Karen Getman, whose firm specializes in political law, believes that a high percentage of FPPC cases are generated by detractors and political opponents. She notes that the FPPC is obliged to look into each complaint it receives, and the FPPC's response is itself under a microscope when it makes a decision to prosecute or not.

Even if the FPPC does not prosecute, the Political Reform Act allows a private party to bring a civil action after presenting a written request for prosecution to the FPPC, and the FPPC declines to pursue the action in 120 days. This can lead to a "bounty hunter" dynamic. In one extreme case, for example, an individual asked the FPPC to prosecute a series of violations totaling 931 cases in 120 days. When the FPPC could not do so, the individual filed civil actions against hundreds of defendants. The FPPC has asked the Legislature to amend the Political Reform Act to prevent what might be considered abuses of the process.

Enhanced Enforcement

The FPPC has also instituted stream lined procedures to expedite enforcement of some kinds of violations. For example, in 2000 the FPPC initiated a fast-track enforcement process for officials who do not file Statements of Economic Interests (SEIs). The fast-track program features streamlined paperwork and procedures, standardized fine schedules and special outreach efforts to alert affected filers to approaching filing deadlines. The FPPC reports that the program has brought improved compliance levels and speedier processing of such cases. The FPPC has fast-track programs relating to campaign reporting laws as well. These programs mean the FPPC can bring more enforcement actions.

Of course, the FPPC is not the only entity enforcing ethics-related laws. A number of district attorneys' offices have individuals assigned to investigate and prosecute public integrity issues on a full-time basis. For example, the Los Angeles County District Attorney's Office of Public Integrity actively investigates and prosecutes ethics law violations.

In terms of the idea that prosecutors will "go easy" on public officials, Jim Sepulveda of the Contra Costa District Attorney's Office said that his office fully, fairly and expeditiously investigates every complaint it receives. He emphasized, however, that his job is *not* to prevent political fallout, protect the public entity's image or prevent embarrassment of individuals.

Penalties Are Only a Small Part of the Cost

It's important to understand that once a public official becomes the target of an investigation and enforcement action, the prospect of a fine is only part of the costs he or she will incur. First, the public official will likely hire an attorney to advise and represent them. Attorneys interviewed for this column estimated a minimum of \$3,000 to \$5,000 for attorneys' fees in FPPC enforcement actions, but fees of \$25,000 to \$30,000 are not uncommon. In fact, it can be a real challenge to keep the fees *below* the fine amounts.

If an individual decides to seek judicial review of an adverse FPPC enforcement action, attorneys' fees can be upward of \$100,000.

Paying Attorneys' Fees: Not as Easy as You Might Think

Some local officials may be under the mistaken impression that if they are charged with unlawful activity in connection with their public service, their agency will pay for their defense. It's true that, under some circumstances, an agency will pay for the defense of an individual official or employee. However, if the charge involves violation of civil or criminal ethics laws, it's highly risky to expect the agency to pick up the tab.

First, it's important to remember that the agency's attorney is not *your* attorney. His or her obligations and the attorney-client privilege relating to confidentiality extend to the entity as a whole, not individuals.

Furthermore, for the public entity to provide a defense of an individual within the organization, the governing body must find that the act or omission at issue in the litigation was in the scope of the individual's duties as a public servant (the statute specifically refers to "scope of his employment as an employee of the public entity")¹ The courts use such phrases as "fairly regarded as typical of or broadly incidental to" the public agency's business.² Of course, your colleagues may not want to conclude that an allegedly improper practice is "typical" for the agency.

The entity may refuse a request for a defense if the conduct at issue involved "actual fraud, corruption or actual malice."³

The law is clear that an agency is not obliged to provide a defense in a criminal proceeding or removal-from-office proceedings. If it does, it must find, among other things, that providing a defense would be in the best interest of the public entity. It must also find that the person acted in good faith, without actual malice and in the apparent best interests of the public entity.⁴

There can be strong political pressures against providing a defense to charges of wrongdoing at taxpayer expense. It's also important to keep in mind that, for a variety of reasons, the pressures are strong for elected officials and others to repudiate alleged unlawful conduct.

Public officials may use campaign funds to pay for attorneys' fees and fines,⁵ although it can be a challenge for local officials to raise money for these kinds of purposes. Elected officials and candidates for elective office may create and fund raise for "legal defense funds."⁶

Then where do people get the money to defend themselves? For those without resources, there may be legal services available through either the state or federal public defenders' offices. For more middle-class defendants, the options may include taking out a mortgage on their home, cashing out retirement plans or saving accounts, borrowing from relatives and sometimes a combination of all of the above.

Not surprisingly, defense costs in criminal cases are even higher. Matt Jacobs, a former federal prosecutor whose Sacramento-based private practice now includes white-collar criminal defense, explains that the fees are likely to vary with the client's goals. For example, he estimates that if an official is under investigation for a federal criminal offense and wants to admit wrongdoing, the fees could be in the neighborhood of \$15,000 to \$20,000. Fighting the charges through a federal jury trial, on the other hand, can cost upwards of \$1 million or more, depending on the complexity of the case.

In fact, just to open the case file *after an individual has been charged* is likely to cost \$50,000 up front. This is in part because of the milestone that occurs when an attorney makes an appearance on behalf of a criminal defendant once the defendant has been charged: A judge may not let that attorney withdraw from representing that defendant.

But all attorneys consulted for this column emphasized that the personal costs to those who are the object of an enforcement effort are the most significant. Chip Nielsen, who has been advising clients on ethics law issues for decades, says that his clients describe the proceedings as being "one of the most unhappy experiences and periods of their lives," and they never, ever want to go through it again. Nielsen attributes this to the emotional toll of being under the cloud of an investigation.

Getman and Jacobs echo the sentiment. Jacobs describes the experience of being the target of a criminal investigation as "emotionally devastating." He also notes that the effort to vindicate oneself can become an all-consuming focus. Getman notes that the negative publicity associated with being under investigation creates a terrible stress on public officials and their families. This can be exacerbated by the financial stress associated with drawing down one's savings and retirement accounts and/or going into debt to pay for one's defense.

Another element of stress is the realization that, because of the strict liability nature of most ethics laws, good intentions, honest mistakes and, of course, ignorance of the law can count for virtually nothing in enforcement proceedings. Attorney James Harrison observes that, "'I didn't mean it' doesn't make an FPPC charge go away; at best it may mean that there's no enhancement of the fine." Harrison practices political law and represents clients in FPPC enforcement actions.

Former FPPC Chair and city attorney Liane Randolph summarizes the FPPC's thinking this way:

As the saying goes, ignorance of the law is no excuse. As a practical matter, it is very difficult for us to tell if a violation was genuinely inadvertent, the result of inattention or if the person flouted the law entirely. And legally, all three of those situations are considered violations of the law. So while the level of intent may affect the amount of fines or whether we resolve the case with a warning letter, the bottom line is that a violation is a violation and will be prosecuted. Taking the

time to learn the ropes and ask for help is a far wiser use of resources than trying to guess the rules or walking close to the line in the hopes of beating the system.

The humiliation factor can be high as well. One can go from being a respected pillar of the community to an object of community and media scorn. Some officials have even chosen to move out of the area.

Successful prosecutions can affect public officials' very livelihoods. Lawyers can lose their licenses to practice law. Others can lose their jobs if their employers feel it reflects badly on them to have someone accused of corruption on their payrolls. And, of course, it may not be possible to hold a job open for someone serving jail time.

And what about the prospects for successfully defending oneself? Drawing on his experience in federal corruption cases, Jacobs notes that jurors tend not to be familiar with many commonplace - and even lawful - political activities (for example, fund raising). His experience is that jurors can be deeply offended by practices that are perfectly lawful. This kind of juror adverse reaction can make conduct that is even close to the legal line very risky.

Conclusion

In short, playing fast and loose with ethics law compliance issues is indeed like rolling the dice. At some point, the odds catch up with you. While one transgression may go unobserved, sooner or later someone - a political opponent, the media or enforcement officials - is likely to start looking for things. When they do, you don't want them to find anything.

One city attorney shared how glad he was that he was scrupulously careful with both big and little ethics law issues in his own conduct as a public servant because when a question was raised about one issue, *all* his activities were then put under a microscope. He was ultimately vindicated of any wrongdoing, but the experience was nonetheless stressful, and it would have been more so if he had cut corners.

Former FPPC Chairperson Getman sums it up well: "When it comes to ethics laws, an ounce of prevention is truly worth a pound of cure."

This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.

Endnotes:

¹ Cal. Gov't Code section 995.

² See *Farmers Insurance Group v. County of Santa Clara*, 11 Cal. 4th 992, 1003 (1995).

³ Cal. Gov't Code section 995.2.

⁴ Cal. Gov't Code section 995.8.

⁵ See Cal. Gov't Code sections 89514, 89513(c)(2); FPPC Advice Letter A-97-144 (April 21, 1997).

⁶ Cal. Gov't Code sections 85304, 85304.5; 2 Cal. Code Regs. section 18530.4.