REVIEW OF THE EXISTING ETHICS STRUCTURE
FOR BROWARD COUNTY AND ITS MUNICIPALITIES

INTRODUCTION

The Broward Office of the Inspector General (OIG) has now completed its review of the existing ethics structure for Broward County and its municipalities. This report details the analysis, observations, and conclusions reached by the OIG as a result of this review. In summary, we found that certain deficiencies exist in the current operation of Broward’s ethics system, particularly a demonstrated lack of uniformity in the interpretation of the prevailing ethics laws. Accordingly, this report also contains recommendations for meaningful reform of Broward County’s ethics structure. Specifically, the OIG recommends centralization of ethics guidance and application, rather than allowing that function to be parceled out to 32 attorneys across the county, as is presently the case.

Background

In November 2010, the residents of Broward County approved three Charter amendments relating to ethics: one establishing an independent Inspector General, and two others permitting the implementation of a county-wide ethics code for all elected officials. On January 2, 2012, Sec. 1-19 of the Broward County Code of Ordinances, the Broward Code of Ethics for Elected Officials (the Code), was made applicable to all municipal elected officials. Since then, the OIG has been tasked with investigating possible violations of this county-wide code. As discussed below, because the Code contains some fundamental ambiguities and is subject to an inefficient and occasionally contradictory advisory system, this task has been a challenging one.

From its inception, Broward’s approach to ethics has omitted a widely accepted component of effective ethics structures, namely, the existence of a central or independent entity that is responsible for ethics guidance and application. In fact, Broward’s ethics structure is the only formal public ethics structure in Florida that lacks this component. Initially, the OIG undertook to compensate for this absence by promoting awareness and compliance with the Code by elected officials through voluntary efforts. In light of the Code’s newness, the OIG has initiated compliance reviews designed to promote and effect the Code’s intent, rather than to punish elected officials’ inadvertent failures to comply. The OIG has also made available its internal handbook containing interpretations of key sections of the Code in an attempt to increase transparency and efficiency in our investigations, and to promote a consistent interpretation of the Code’s provisions. In addition, the OIG has initiated free training courses and provided training materials directly related to the Code1 to ensure the availability of a cost-free, relevant training option for local elected officials. Nonetheless, difficulties in application of the Code’s provisions have persisted.

1 We included in our training those provisions of the State Ethics Code, Fla.Stat. §§ 112.311 to 112.326, that should be considered in applying the Code.
Methodology

Every concern expressed in this report has been thoroughly considered from the OIG’s perspective as the sole agency with any enforcement responsibility involving the Code. As part of our review, the OIG collected approximately 972 advisory opinions issued by the local government attorneys to Broward’s 174 elected officials. We also surveyed a variety of public integrity structures throughout the country. We discussed issues we identified as a result of our review with, and sought input from, Broward local government attorneys, Broward elected officials, national ethics experts, and ethics officials from other jurisdictions in Florida. We listened to their concerns and ideas. We determined that the current system suffers from a lack of uniformity, lack of clarity, and a lack of public confidence. Thereafter, we worked diligently to craft some potential improvements to the existing Broward ethics structure that address these issues, taking into consideration all of the concerns expressed.

Needed Reforms

What has evolved from the OIG’s comprehensive review process is the reform package recommended herein. While effective and meaningful, the recommended reforms are not novel or complicated. They are outlined on a single page, attached as Appendix A. The OIG has merely compiled a number of best practices from a variety of sources, identified the aspects of their ethics structures that function most effectively, and combined them to address the needs of Broward County.

Indeed, we found that a single reform could achieve the objectives of clarity, uniformity, objectivity and increased public confidence: centralizing the function of ethics guidance and application. This sole reform, implementing a practice used in all other enforceable ethics structures we surveyed, will increase the public’s perception of an ethical local government culture, increase the public’s understanding of when an official’s conduct is proper under the Code—and thus reduce the stigma of behavior erroneously thought to be misconduct. Centralizing the function of ethics guidance and application can be accomplished in a variety of ways. This review discusses the various options and arrives at a specific recommendation that evolved from the concerns and ideas that were expressed to us during our review, to wit: the establishment of (1) an “ethics officer” who would uniformly interpret the Code and provide precedential advisory opinions to those who must live by it, and (2) a panel to comprehensively review ethics issues. However, we urge from the outset that the specific method of centralizing the function of ethics guidance recommended herein is not the only route for achieving the necessary objectives. It is our hope that this report will prompt a public consideration of the existing public integrity structure that will spur remedial action by those empowered to undertake it.

Finally, it bears noting that this review does not discuss the policies underlying the Code. It is the position of the OIG that, regardless of any issues with vagueness and substance in its rules, a discussion about the policies themselves would be pointless and unproductive if the system designed to promote and enforce those policies remained defective. Therefore, the recommendations herein contemplate a two-phased approach. In the first phase, the public integrity structure would be improved to ensure consistent and impartial guidance, training, and enforcement. An ensuing phase would then contemplate periodic, independent, and public consideration of the policies themselves and any necessary substantive corrections or revisions to the Code.
COMPOSITION OF THE EXISTING ETHICS STRUCTURE

The Code articulates a statement of policy, definitions, standards of conduct, and training requirements intended to raise the level of actual and perceived ethical conduct among the elected officials to which it applies. The Code initially applied only to the Board of County Commissioners, but was expanded in January 2012 to also apply to the members of the governing boards and mayors of the county’s 31 municipalities.

Applicability

The Code states that it applies to “elected officials,” defined as members of the Board of County Commissioners, members of the governing boards of the municipalities, and the municipal mayors. The Charter of Broward County (Charter) provides that constitutional officers are subject to the Code.

Standards of Conduct

Generally, the Code’s standards of conduct prohibit elected officials from accepting gifts, of any value, from lobbyists, vendors, and contractors; accepting gifts, valued at over $50, given in their official capacity; lobbying local government entities within Broward; depriving residents of honest services; improperly soliciting funds for charity; improperly soliciting funds for other candidates; and serving on, participating in, or interfering with procurement selection committees. The Code also requires the disclosure and internet posting of outside or concurrent employment and remuneration, lobbyist contacts, charitable fundraising, fundraising for other candidates, and statements of financial interest (State Commission on Ethics Forms 1 and 6). It further requires four hours of specified training for new elected officials, eight hours of public service ethics training annually for all officials, and annual certification of meeting these training requirements.

Legal Advisory Opinions

If an elected official has a question about how the Code applies to her situation, she may submit a signed and written request to her governmental entity’s attorney (or the attorney’s designee). If the written request includes all material facts necessary for the local government attorney to provide a complete opinion, the resulting opinion is binding on the conduct of the official. If the official then relies on the opinion, she may not be found to have made a Code violation.

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2 Broward Co., Fla., Code § 1-19(a).
3 Broward Co., Fla., Code §§ 1-19(b)(3); 1-19(b)(9); 1-19(c).
4 Broward Co., Fla., Charter § 11.10. The constitutional officers are the county Sheriff, Property Appraiser, Supervisor of Elections, and Clerk of the Circuit Court.
5 Broward Co., Fla., Code § 1-19(c)(8). This provision only applies to Code violations, while the State of Florida Commission on Ethics renders binding advisory opinions solely in relation to the State’s Code of Ethics for Public Officers and Employees. Fla. Stat. § 112.322(3).
Investigation and Prosecution

The Charter created and established an independent OIG to investigate misconduct (defined as a violation of local, state, or federal law or conduct involving fraud, corruption, or abuse) and gross mismanagement (defined as material waste or significant mismanagement of public resources).\(^6\) The OIG’s authority extends over county and municipal officials, employees, and providers, and it may commence an investigation if there is good cause to believe that an official, employee, or provider is or was engaged in misconduct or gross mismanagement.\(^7\) Should the Inspector General find probable cause to believe that misconduct occurred but is not within the jurisdiction of another civil, criminal or administrative agency, he has the authority to bring a complaint in his name alleging civil infractions against the official, employee, or provider.

Hearings

As mandated by the Charter, the Inspector General shall bring misconduct cases before an administrative hearing officer who is randomly chosen from among the several selected by the OIG Selection and Oversight Committee.\(^8\) Hearing officers have the authority to schedule discovery and hearings, hold hearings, administer oaths, issue subpoenas for the attendance of witnesses and production of documents, decide the complaints, and enter orders consistent with their authority. Potential penalties are fines between $250 and $5,000 per violation; restitution or disgorgement; and public reprimand or censure. The hearing officers’ final orders are subject to judicial review.

Review

Apart from direct review from hearing officers’ final orders, there is no agency or process in place for appeals from binding advisory opinions, appeals from ethics misconduct decisions, or regular and independent review for necessary or desired changes to the existing Code and Charter.

DEFICIENCIES IN THE EXISTING ETHICS STRUCTURE

An effective government ethics law must rest upon three pillars, removal of any of which causes the entire structure to collapse: (1) A simple, comprehensive, and comprehensible code of ethics (conflicts of interest code); (2) Sensible disclosure; and (3) Administration by an independent ethics board.\(^9\)

\(^{6}\) Broward Co., Fla., Charter § 12.01.A.

\(^{7}\) Broward Co., Fla., Charter § 12.01.B.

\(^{8}\) This is the same Committee that selects and oversees the Inspector General. Broward Co., Fla., Charter § 12.01.E.

\(^{9}\) Mark Davies, Director, New York City Conflicts of Interest Board, Statement to the City of Chicago Ethics Reform Task Force (February 14, 2012), at p. 2.
Vague Terms in the Code and the Need for Consistent Ethics Application

The deficiencies in the current ethics structure became apparent as soon as the OIG attempted to ascertain compliance with the new code in 2012. It was obvious to the OIG—as well as to officials and attorneys who communicated with us—that key terms in the Code were, and continue to be, imprecise. For example, while the Code requires officials to submit disclosures annually, it does not specify when the disclosures would be due. Also, although the Code requires officials to disclose their remuneration from “outside employment,” it does not define which types of activities are classified as outside employment.

But the deficiency in the structure is not the mere imprecision of the Code. The legal system has long accepted that laws require interpretation and application. The mere fact that the Code contains terms that would benefit from more definitive analysis is not fatal to the Code’s purpose. In fact, one would expect that any definition of a term such as “employment” would continue to evolve as we as a community must apply the term to varying situations, each requiring a specific analysis of the facts then at hand.

The deficiency in the structure is that there exists no mechanism to arrive at a single, uniform application that could guide all of the elected officials and the OIG as the enforcement agency. Because of this deficiency, something as typical as an imprecise term is converted into a gateway to multiple, differing applications of the same code. As the agency charged with enforcing these provisions, the OIG’s task is made more difficult where there is not a clear understanding of the rules. From an official’s perspective, when the rules are not uniformly clarified, it is difficult to determine what your conduct should be and difficult to defend lawful conduct from undue public scrutiny.

Ultimately it is the public that is most harmed by a system which contains ambiguities, yet provides no mechanism for uniform resolution. What good are disclosures if the public cannot know the scope of what is being disclosed? As the current system stands, the public would have to review and analyze a disclosure against all advisory opinions from the local government attorney relating to the terms of the disclosure, merely to understand the scope of the disclosure. If this sounds complicated and convoluted, it is. It also undermines the purpose of an easily accessible public disclosure.

Protective Ethics Guidance

The OIG’s survey of ethics structures around the country revealed that Broward is unique in its approach to the provision of binding advisory opinions. Broward County is the only governmental entity that permits multiple parties, each employed by a different governmental entity, to interpret an ethics code in a binding manner that also functions to protect the official. Moreover, there currently exists no library or compilation of these opinions, other than the result of collection efforts undertaken by the OIG. The opinions are not published, and there is no arrangement to share the opinions in any readily accessible database.¹⁰

¹⁰ The OIG wrote to all of Broward’s municipal attorneys in December of 2012, asking for feedback on a proposal for us to provide a clearinghouse for all the entities’ ethics opinions to (1) allow the OIG to understand the common ethics issues and
The OIG also undertook to observe the actual application of the Broward ethics model. We obtained, cataloged, and sampled the approximately 972 advisory opinions issued since the Code’s initial passage. As more fully discussed below, we discovered that Broward local government attorneys have issued protective opinions at a rate that far surpasses any other formal ethics structure in Florida. Further, while the vast majority of opinions we sampled were well-grounded in fact and law, we discovered opinions that:

- provided conflicting interpretations of the same conduct;
- provided conflicting interpretations of the same Code rules;
- repeatedly opined on the same issue and general set of facts;
- sanctioned past conduct;
- were not grounded in facts as submitted by the requester; and
- did not appear to subordinate the official’s interest to the public’s interest.

In combination, all of these observations have led us to conclude that the ethics guidance system is not fully serving its purpose. Following is a more specific analysis of the greatest sources of OIG concern:

1. **The Number of Protective Opinions as a Symptom of the Problem**

   The concept of binding advisory guidance is not, in and of itself, an issue. The purpose of a well-constructed ethics code is not to trap officials, but to keep them on the right path. Providing them with protective, good-faith guidance is often incorporated into ethics structures, as with the State of Florida Code of Ethics. However, the OIG observed in May of 2013 that the rate of issuance of the protective opinions was far outpacing any of the other ethics structures in the state. Our first request for opinions in April yielded approximately 503 opinions for the first year of the Code’s application to municipal elected officials. By the end of October 2013, another approximately 353 opinions had been issued. In total, as of the end of October 2013, approximately 972 legal opinions had been issued by 29 of the 32 authorities.

   This is in sharp contrast to the other ethics structures in Florida, and even nationwide, which issue far fewer binding advisory opinions. The table below reflects the number of binding legal advisory opinions issued, regarding that governmental entity’s ethics code, issued in calendar year 2013:
In order to fairly assess the pace of the issuance of the opinions, we also took into account that the Broward Code was newly implemented. Nonetheless, we found that elected officials in Broward County were far more likely to obtain a protective advisory opinion than officials have required when confronted with a new Code elsewhere in Florida:

As illustrated in the table above, not even the Florida Commission on Ethics came close to the number of opinions issued by Broward local government attorneys, even though the State Code

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11 2013 Annual Report of the Commission on Ethics (Florida), at p. 12; Miami-Dade Commission on Ethics and Public Trust website (opinions), ethics.miamidade.gov/opinions.asp; 2013 Annual Report of the Palm Beach County Commission on Ethics, at p. 16.
pertains to tens of thousands more individuals\textsuperscript{12} than the Code, which applies only to 174 elected Broward officials at any one time.

In light of the fact that these opinions contained conflicting interpretations, have no mechanism for higher review to correct misinterpretations, are issued by attorneys employed to represent the very officials requesting opinions, and potentially bar enforcement of the Code, the OIG has concerns about their impact on the ethics structure.

2. **Perceived Conflict of Interests – The Perception**

Public perception of an ethical local government is the primary objective of any public integrity structure, and the Code is properly rooted in this principle:

> It is the policy of Broward County that the Board of County Commissioners work for the benefit of the citizens of the County and elected officials of municipalities work for the benefit of the citizens of their respective municipalities…. It is the responsibility of each County Commissioner and elected municipal official to act in a manner that promotes public trust and confidence in government with complete transparency and honesty in their services, and to avoid even the appearance or perception of impropriety.\textsuperscript{13}

The public expects that, in order for it to be interpreted to effect its intent, the Code must be interpreted in a way that is consistent with the official’s duty to the public. This concept was specifically explained by a former member of the Broward Charter review panel:

> Basically, in promulgating the new ethics language, what we meant was if you, as a public official, face any situation in which your official involvement would even appear to suggest that your office is being used for personal gain, then your duty is to avoid that situation. This was done to expand the “actual conflicts” prohibition to include appearances as well. The purpose was to significantly bolster public trust in county government.\textsuperscript{14}

It is for this reason that perhaps the most significant of the faults we identified in Broward’s unique public integrity structure is that the source of binding legally advisory opinions is in the hands of thirty-two different individuals who each have an apparent conflict of interest in interpreting the Code. All of the ethics professionals we spoke to cited this single issue as the aspect of the Code that raised the greatest concern.

\textsuperscript{12} In 2013, there were 37,890 Florida public officers and employees who were required to file financial disclosures under the State Ethics Code. 2013 Annual Report of the Commission on Ethics, at pp. 19-20.

\textsuperscript{13} Broward Co., Fla., Code § 1-19(a).

\textsuperscript{14} Angelo Castillo, Pembroke Pines Commissioner, Member of the County Charter Review Commission 2000-2002, and former adjunct professor of business ethics at St. Thomas University, BrowardBeat.com (April 28, 2009).
When an attorney who serves the elected officials of his political subdivision is called upon to subordinate the interests of the elected officials to the public’s interests, the public becomes skeptical that the outcome can be fair to it. When an opinion permits an official to do something that the official wants to do, even when the opinion is issued in good faith, well-reasoned, and well-grounded in the law, skepticism may turn to cynicism and outright distrust.

Academic and professional government ethics experts we spoke to invariably agreed with this observation. The Executive Director of the Miami-Dade Commission on Ethics and Public Trust wrote,15

County and municipal attorneys are directly subject to the elected officials in their respective governmental units for their employment. Most will admit that they work for the elected officials who employ them, not for the public who actually pays their salaries. Their role is to defend the actions of those officials and assist them in carrying out the policies they want to implement within the bounds of the law. This perspective conflicts with the need to provide them with independent advice that, on some occasions, will require counseling them against taking actions that they may want to take as elected officials. This is not a reflection on the integrity or ethics of municipal attorneys. It is simply the reality with which every municipal attorney must live.

It is my opinion that effective, objective, meaningful advice … can occur only within a system that separates those providing the advice from those receiving it. Such advice, which often requires judgments that fly in the face of the desires and intentions of the recipients, must come from a source that has no agenda other than the promotion of ethical government, no loyalty other than to an authority charged with protecting the public against ethics violations by public servants.

The Director of Research for City Ethics, Inc., told us,16

In following local government ethics issues across the country for several years, I have found that the single most serious problem is the provision of ethics advice by local government attorneys. The reason this problem is so serious is that ethics advice is the most important element of a government ethics program. …Advice from government attorneys is seen as favoring the officials who are commonly seen as their clients… When a conflicted individual comes for advice, he has interests in the matter that are completely distinct from the interests of his agency, department, or body. … The

15 Letter from Joseph M. Centorino, Executive Director and General Counsel of the Miami-Dade Commission on Ethics and Public Trust, to the OIG on January 6, 2014, attached hereto as Exhibit 1.
16 Letter from Robert Wechsler, Director of Research, City Ethics, Inc., to the OIG on January 7, 2014, attached hereto as Exhibit 2.
government attorney is also appointed by and can be fired by some of the officials who will seek ethics advice. … Recognizing that ethics laws are the minimum requirements of individuals with a fiduciary duty to the community, an ethics adviser … does not interpret ethics code language so that it is most beneficial to his advisee’s interests.

3. Perceived Conflict of Interests – The Reality

Standing alone, the perception that attorneys might interpret laws for the benefit of their clients rather than the benefit of the community is sufficient to undermine the purpose of an ethics code, even if unfounded. However, the OIG has determined that the perception is not unfounded in Broward. To that end, we submit the following case study to illustrate our concerns.

The Code requires disclosure of outside or concurrent employment and “remuneration;” however, there is no definition of the term “remuneration” in the Code. This disclosure requirement was passed to let the county’s residents know who may hold influence over their elected officials and how compelling that interest might be. Knowing this allows the public to evaluate potential conflicts of interest.

Finding a definition for “remuneration” is not difficult; Black’s Law Dictionary defines it as “Reward; recompense; salary; compensation.” Florida Statutes also provides definitions for the term “remuneration,” for example:

“Remuneration” means salary, bonuses, and cash-equivalent compensation paid … by his or her employer for work performed, excluding health insurance benefits and retirement benefits.

Yet, there are several opinions, issued by different municipal attorneys, which—rather than rely on the readily available definitions of remuneration—rely on a definition of a completely different term: “regular rate” from the Fair Labor Standards Act (FLSA). These opinions

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17 The term is also not defined in the State Code of Ethics or the Broward Administrative Code. Broward Co., Fla., Code § 1-19(b); 1-19(c)(2)(b).
18 Fla. Stat. § 1012.885(1)(c). A simple word search in the Florida Statutes for the term “remuneration” brings up several definitions that are grounded within Florida law.
19 “Regular rate” defined
As used in this section the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include …
(1) … payments in the nature of gifts made at Christmas time or on other special occasions as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, … (3) sums paid in recognition of services performed during a given period if either (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer …or (c) the payments are talent fees … paid to performers, including announcers, on radio and television programs; … (5) extra compensation provided by a premium rate paid for certain hours worked by the employee …. (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the work weeks….” 29 U.S.C. § 207(g) (emphasis added).
conclude that remuneration shall not include payments for overtime, time off such as vacation or sick pay, and discretionary bonuses (among other types of pay). The practical effect of these opinions has been to shield municipal elected officials from fully complying with the intent of the Code’s financial disclosure requirements.

Although the opinions purport to rely on the FLSA to define “remuneration,” the FLSA does not contain a definition of “remuneration.” It only uses the term “remuneration” as part of the definition of “regular rate.” In fact, it appears from the definition of “regular rate” that the drafters of the FLSA may have felt all of the types of income excluded from “regular rate” could be considered “remuneration.” Nonetheless, the local government attorneys who have chosen to rely on the definition of “regular rate” have adopted all of its exclusions. No rationale is proffered to explain why this definition is appropriate in interpreting the use of “remuneration” in the Code.

The Code evinces no intent to exclude certain forms of compensation in its use of the term “remuneration.” A plain reading of the FLSA definition of “regular rate” reveals that its purpose has no correlation to the purpose of the term “remuneration” in the Code. The FLSA defines “regular rate” to establish the baseline for determining what “premium pay” is—such as overtime of one and one-half times the “regular rate” of pay for hours worked over eight in one day, over forty in one week, on the sixth and seventh day of a week, and on holidays. The purpose for this particular section of the FLSA is to ensure that employees are fairly compensated, to protect employees from the ill effects of overwork, and to foster fair competition by those employers who would otherwise obtain economic advantage by overworking employees, all through the economic disincentive of mandating increased pay. None of these purposes is shared by the Code.

The decision by local government attorneys to bypass readily available, albeit broad, definitions of a term for a definition of a completely different term, which coincidentally limits the amount of income their clients will have to publicly disclose, is disconcerting. Such opinions exhibit the very appearance of impropriety described to us by the ethics professionals who questioned Broward’s system of ethics guidance. The opinions do not appear to subordinate the officials’ interests to the interests of the public—in this instance, full disclosure of the financial sway an outside employer may hold over the elected official.

Recall that the Code’s primary precept is that officials should avoid even the appearance of impropriety. Whether conduct is within the law is just part of the question. Public trust, not mere adherence to the letter of the law, is of paramount importance. “The law is the floor, not

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20 It is a fair interpretation of the definition of regular rate that the term remuneration would ordinarily include those types of pay that are excluded from regular rate (such as overtime, vacation and sick pay, and discretionary bonuses) but for the language “but shall not be deemed to include.”
21 29 U.S.C. § 207(a) and (b).
23 WLRN Report: Why Privatizing City Functions in West Palm Beach is Raising Some Eyebrows (October 4, 2013) (quoting City Ethics President, Harvard University ethics fellow, and Jacksonville’s Director of Ethics Carla Miller).
the ceiling. Just because something is legal doesn’t mean it is ethical. It is critical to view ethics from a values-based perspective.”

A values-based approach, well accepted by ethics academics as the correct lens through which to analyze ethics problems, requires balancing principles and interests and determining what is proper under the spirit of the rules at issue.

Thus, to preserve the public’s trust, the Code must be interpreted in a way that avoids appearing to favor the officials at the expense of the public, even when the minimum standard of the Code would be served by a literal interpretation of it. But the system handed to us, where individual local government attorneys interpret and give meaning to Code terms, allows for any interpretation that satisfies the letter of the law and serves the elected officials’ interest. The opinions referenced here do not appear to uphold the intent of the Code. They provide officials with a mechanism, not contemplated in the Code, to exclude certain income from public scrutiny. The public’s confidence in government is not served by such an appearance.

As expressed in the letters by ethics professionals cited above, the attorneys are not to blame. The vast majority are not ethics subject-matter experts. Their ethics advice function is a minute portion of their overall responsibilities to their governmental units, and some receive very few requests for ethics help. Significantly, they also do not have the benefit of having an authoritative body of precedent from which to provide formal or informal advice. And finally, it is their job to serve their clients zealously within the bounds of the law.

4. Conflicting Opinions

Not all local government attorneys chose to rely on “regular rate” to define “remuneration.” Some have issued no opinions defining “remuneration” at all. Others have instructed their elected officials to disclose all compensation from employment, without exclusion. Thus, the publicly available disclosures do not provide the transparency they were intended to establish and lack the uniformity the framers and public envisioned at the time of the Code’s passage. As the system stands today, county commissioners would disclose compensation such as overtime pay and discretionary bonuses, while officials in several municipalities would not. And the county’s residents would never know the difference (that is, the exclusion) unless they compare several advisory opinions to the several disclosures across different governmental entities.

A sampling of the approximately 972 advisory opinions issued as of October 2013 reveals that there are several instances of conflicts. For example, in one municipality, attending a meeting where the Inspector General spoke constituted “training” pursuant to the advisory opinion, while in another municipality, that official was not permitted to consider his attendance at the same meeting as “training.” In another example, despite the fact that both cities leased land to their Chamber of Commerce, in one city the elected officials were required to pay for the food and drink at the Chamber’s event, while in another city, they were advised the Code did not require them to pay.

24 Judy Nadler, Senior Fellow, Government Ethics, Santa Clara University, Maguire Center for Ethics Blog, Cary M. Maguire Center for Ethics & Public Responsibility, November 1, 2011.
5. **Other Constituencies Have No Recourse**

The current system of ethics guidance omits several important groups. In the past year the OIG has observed first-hand that several groups have no mechanism for receiving ethics advice.

A potential candidate for elective office may be dissuaded from seeking to hold office where a provision of the Code appears to disallow conduct he is engaged in because there is no procedure to obtain reliable advice on the actual effect of the Code. The Code also specifies how, in some instances, elected officials may interact with lobbyists, vendors, contractors, non-profit charitable organizations, and other candidates. These individuals and organizations have no way to obtain advice on the conduct they may or may not engage in. Further, government employees including the County Administrator and municipal clerks have nowhere to turn for professional advice on Code-imposed ministerial responsibilities.

6. **No Mechanism to Appeal Advisory Opinion**

If an elected official sought an advisory opinion from his local government attorney, it is possible that he would be provided with an interpretation of the Code with which he did not agree. In fact, as discussed above, the elected official might even be able to cite to the conflicting opinion of another local government attorney. Nonetheless, the current structure provides no mechanism for appeal of advisory guidance and application.

**Training Availability and Standards**

While the Code establishes the minimum number of ethics training hours required of elected officials, it does not specify that any entity is responsible for ensuring that the right kind of training is made available. Thus, an official may obtain training by attending or listening to courses that have no relevance to their ethics obligations under the Code or the State Code of Ethics. There is also no mechanism in the Code to ensure that relevant training is available for the elected officials.  

**Independent Review of Opinions, Final Judgments and Code Reforms**

Ethics policies should evolve with the needs of the community. Currently, there is no entity charged with the objective evaluation of Broward’s existing ethics policies as expressed in the Code and Charter. We submit that the problems of the current system are far broader than the specific samples described here: the kind and source of gifts an official may receive; the frequency and timing of her contacts with lobbyists and contractors; whether she uses her office staff or resources to raise funds for charity and other political candidates; and her participation in procurement decisions are each subject to the same vagueness—and inadequate procedures for resolving vagueness—as we have detailed in our discussion above.

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26 In order to help minimize the effects of this deficiency, the OIG has directly provided free public service ethics training to Broward’s elected officials quarterly since February 2013 and informed officials through our website how to obtain low-cost government ethics training from other sources.
There should be a vehicle for recurring, independent, and objective assessment of the desirability and effectiveness of Broward’s ethics policies and substantive rules. This review should be periodic to ensure evolution of the Code. It should be independent through member selection without the involvement of the elected officials to whom the Code applies. In our survey of other public integrity structures, we found that this function is typically performed by ethics commissions that are independent of the legislative body that passes on ordinances and referendum proposals. The use of a panel of stakeholders and expert(s) can provide objectivity. Without such a vehicle, the OIG anticipates that vagueness and definition issues in the Code articulated above, as well as other concerns about substantive and procedural rules in the Code and Charter, will languish indefinitely.

OBJECTIVES FOR IMPROVEMENT
As a result of our review, the OIG has isolated several desirable objectives and considerations for the improvement of Broward’s public integrity structure. They are:

- application to all elected officials as intended by the county’s voters;
- well-articulated standards of conduct;
- the availability of quality ethics training;
- application of the Code in a way that promotes public trust;
- uniform, fair, and reliable ethics interpretations;
- independent, objective, reliable, timely and responsive ethics advice;
- providing ethics advice to other persons affected by the Code;
- independent, knowledgeable, and fair adjudication of misconduct complaints;
- a fair appeal process;
- a fiscally prudent structure; and
- a method for regular, independent, and effective review of the overall structure.

As indicated by the ethics professionals we consulted, a single reform presented the opportunity to obtain all of the objectives: centralization of ethics guidance and application. Below we discuss in detail some of the relevant considerations that informed the development of the OIG’s recommendations for reform.

Rejected Options for Centralization

When the Code was first enacted, binding, legal advisory opinions were issued by the County Attorney, the local governmental attorney serving the officials to whom the Code then applied—the County Commissioners. When the Code was expanded to apply to municipal officials, only three options could be considered under the existing structure: (1) the Inspector General could provide binding advisory opinions to all elected officials in Broward, (2) the County Attorney could provide binding advisory opinions to all elected officials in Broward, or (3) the County Attorney could continue providing opinions only to the County Commissioners and municipal attorneys could provide opinions to their own entity’s officials. Thus, we revisit the first two options here:
1. The Inspector General

As established by the Charter and described above, the Inspector General is responsible for investigating misconduct, which includes violations of the Code. At the conclusion of an investigation, the Inspector General must determine if there is probable cause to believe that the elected official in question violated the Code. If the Inspector General determines that probable cause exists, he then proceeds to prosecute that potential violation before an administrative hearing officer.

The Inspector General is not an independent source for binding advisory opinions. As he is the sole investigator and prosecutor for ethics misconduct, the Inspector General has an inherent conflict in issuing advisory opinions. Officials would understandably question his objectivity in denying them the right to engage in conduct they or others believe comports with the Code.

In practice, without a mechanism to prevent the Inspector General from using information submitted in a request for an advisory opinion, officials would not seek the opinion in the first place. But such a mechanism would result in a de facto protection from illegal conduct merely by providing the facts to the Inspector General under the guise of seeking a binding advisory opinion. Therefore, empowering the Inspector General would either cause a chilling effect that undermines the original purpose of the advisory opinions, or create a loophole that precludes investigation of self-reported violations.

2. The County Attorney

The County Attorney is an advocate for the county. In carrying out her general duties, the County Attorney occasionally finds the county to be an opposing party to a municipality (or municipalities) in litigation or in other legal matters where the county has interests that are contrary to the municipalities’ interests. On these matters, the County Attorney must act in the best interest of the government she was appointed to serve.

For this reason, it is inappropriate and undesirable for the County Attorney to provide binding advisory opinions to municipal officials. She would be required to “take off her hat” as County Attorney in order to provide binding advisory opinions to municipal officials and it may be difficult to demonstrate independence from the county in some cases where she must advise municipal officials what conduct the Code demands. Especially where the County Attorney has previously opined that a county official may take a course of action under the Code, if she is then presented with facts from a municipal official that justify an opposite result, the municipality’s officials or residents may question whether she was providing opinions that were merely serving the county’s interests. This promotes distrust by the officials as well as the public.

We have concluded that neither of these options is workable or desirable.
Efficiency

We considered recommending a full-scale ethics commission to issue legal advisory opinions, investigate and prosecute ethics complaints, and hold hearings on such complaints. Such a body works through consensus and reflects and manages different perspectives and values. Yet, responsiveness by such a commission is hampered by the need to coordinate the schedules of multiple volunteers with varied levels of ethics expertise and the use of a large and segregated support staff to conduct or coordinate the investigation, advocacy, opinion writing and hearing functions.

Responsiveness

In our conversations on how to improve the public integrity structure here, we heard elected officials emphasize the need for timely advice and expressed satisfaction with the quick responses they have received from their local government attorneys. Many expressed that they were comfortable with turning to their entity’s attorney for guidance, and expressed concern with the prospect of having to go to an unknown authority who knows little about the officials’ and their local governments’ circumstances, including more restrictive municipal ethics ordinances. A few told us that they felt assured that their local government attorneys would act in a way to help or protect them.

These attitudes are desirable to the extent that they promote the seeking of advice and therefore result in fewer inadvertent violations. Thus, when conceiving of how to change the advice function to a single source, we considered the need for ease, timeliness, and comfort balanced with independence. A solution that would require officials to obtain informal advice from an authority outside of their governmental unit or that would require that they wait for formal advice until the next scheduled meeting of a full-scale ethics commission may understandably be perceived as a step backward in responsiveness.

The OIG acknowledges that any change going forward must not interfere with the ability of officials to consult with their local government attorneys regarding the application of the Code. Such consultation, however, should not result in a binding opinion. Presently, there is little confidence in knowing how the Code would be interpreted by the fact finder in an enforcement action. Non-binding legal advice does not offer much comfort if there is no way to determine the likelihood that the advice is an accurate predictor of the application of the law. The fact that opinions are issued by as many as 32 attorneys also means that there is no body of precedent to guide legal interpretation. We conceive of a system that provides for a body of precedential authority from a single independent source that can be referred to by any attorney when providing non-binding legal advice. Thus, any attorney would be able to accurately resolve many of the questions raised by the officials without needing to seek a formal advisory opinion from the Ethics Officer. Furthermore, we are mindful that, should the need for formal advice arise, officials and their attorneys of choice, which may include their entities’ attorneys, should work together in drafting requests for opinions that sharpen the issues and disclose all relevant facts and special circumstances.

Our research into other jurisdictions revealed that there are also often two tracks for advice within a full-scale ethics commission: informal guidance from the director or other non-commission staff and formal
guidance from the commission itself. We have concluded that a system involving a single Ethics Officer as the primary source of authority for formal advisory opinions, coupled with counsel of choice to provide non-binding legal advice, fulfills the promise of an independent and effective ethics code while providing fiscally prudent and responsive ethics guidance.

**Hearings**

The current system is designed for hearing officers to hear complaints of misconduct that are not necessarily ethics-related. And, we presume that if hearing officers were required to be subject-matter experts in ethics, we would not find many persons qualified to serve. Because the rate of filed ethics misconduct complaints is vastly lower than the rate at which legal advisory opinions are issued, it is unlikely that a non-ethics expert hearing officer would soon become an ethics expert.

Thus, in conceiving of a system that includes a single Ethics Officer to issue legal advisory opinions, we reasoned that such an individual would be well suited to hear and decide ethics misconduct complaints. The Ethics Officer would be an individual selected in part for his or her subject-matter expertise and significant experience with legal analysis and writing. And, it would not take long for such an official to become well versed in the recurring and pressing ethics issues under the Code. To require this individual to adjudicate ethics complaints brought by the Inspector General would permit Broward to have a salaried subject-matter expert to adjudicate the hearings instead of hearing officers who are contracted on an hourly basis.

The OIG is also sensitive to the concern, expressed to us by a number of elected officials, that no one person should have the power to single-handedly determine the future of ethics enforcement and application in Broward County. In response to that concern, and the desire to incorporate multiple perspectives, we included in our proposed reforms a right of appeal to an ethics panel.

**RECOMMENDED REFORMS**

The OIG submits for consideration a more workable public integrity structure for Broward that includes an Ethics Officer as the central authority within the county to provide binding legal advisory opinions as requested, maintain a centralized and publicly searchable database of advisory opinions, adjudicate ethics misconduct complaints, ensure the availability of quality ethics training, create official disclosure forms, and provide ethics consultation as requested. In addition to the Ethics Officer, the OIG recommends an Ethics Review Panel for several limited, but significant functions. The Panel would review the Ethics Officer’s advisory opinions on appeal, review the Ethics Officer’s hearing decisions on appeal, conduct a periodic review of ethics policies and the ethics structure, and make recommendations for revisions to the Code or public integrity structure.

We believe this solution balances the need for uniform, timely, responsive and professional advice with the need to economize, the view of different stakeholders, and fairness. It is not the only solution available, but we hope it provides a constructive starting point for meaningful discussion.
Ethics Officer

We propose the consideration of an Ethics Officer, with staff support significantly less than that which would be needed to support a full-scale commission, to more economically and responsively provide the functions traditionally handled by such a commission. To ensure an independent entity, the current Selection and Oversight Committee, put in place by the Charter to select and oversee the Inspector General, could serve to also select and oversee the Ethics Officer. The functions would be:

- drafting and issuing formal advisory opinions on the Code;
- maintaining a publicly searchable opinion database;
- adjudicating complaints brought by the Inspector General;
- creating official forms for mandated disclosures;
- ensuring the availability of quality training; and
- ethics consultation as requested.

We recommend that the Ethics Officer should have the duty to provide formal, binding, legal advisory opinions not only to elected officials but also have the authority to formally interpret the Code’s meaning as requested by other affected persons, such as candidates for public office, public employees, lobbyists, contractors, vendors, and prospective lobbyists, contractors, and vendors.

In addition, the Ethics Officer and his or her staff would provide administrative support necessary for the Ethics Review Panel to convene and serve its limited functions.

Ethics Review Panel

We propose that the existing Selection and Oversight Committee select the panel members from among nominations from different stakeholders and include at least one ethics professional from outside the county.

This panel, comprised of volunteers, would have the responsibility to:

- hear appeals of the Ethics Officer’s formal legal advisory opinions;
- hear appeals from the Ethics Officer’s final orders in ethics misconduct complaint proceedings; and
- conduct biennial reviews of the county’s ethics policies and recommend necessary changes.

The Ethics Review Panel’s decisions on appeals of the Ethics Officer’s final orders on ethics misconduct complaints would be subject to judicial review, and all of its decisions should be made available on the publicly searchable database maintained by the Ethics Officer.

Neither the Ethics Officer nor the Ethics Review Panel would have investigative or prosecutive functions under this model. Those functions would remain with the Inspector General without change.
and thus at no additional cost. The Inspector General would have no authority over the work or administration of the Ethics Officer or the Ethics Review Panel but could seek a formal or informal advisory opinion from the Ethics Officer, to the same extent as other officials.

**Costs**

Our research revealed that the cost of maintaining a singular ethics agency varies from jurisdiction to jurisdiction. The costs can be as low as $180,000 annually for a volunteer commission and director or as high as multi-millions for commissions with dedicated investigative staff and segregated advocacy staff.

As submitted, this proposal contemplates the services of a full-time Ethics Officer, a second professional with legal or ethics training, and an administrative support staff member. Investigatory or advocacy staff would not be required.

We approximate that the cost of the proposal as submitted would require an annual budget of potentially $350,000 to $450,000. We note that this figure is solely an estimate based on a number of presumptions and a variety of factors may affect the actual cost. For example, the final number could be significantly reduced if a second professional is not deemed necessary due to the number of services requested. On the other hand, this estimate is based on the presumption that ethics investigations and prosecution will continue to be carried out under the auspices of the OIG. Adding a separate investigative or advocacy staff and supervisor for an ethics commission would significantly increase the cost. Thus, we presumed the avoidance of redundancy would result in a more efficient use of taxpayer funds.²⁷

This estimate could constitute a significant net reduction in the cost of ethics for Broward’s taxpayers. In the past two years, local government attorneys have issued approximately 972 written binding advisory opinions to Broward’s elected officials. Although the OIG has not yet attempted to ascertain the actual cost associated with the issuance of these opinions, it is safe to assume the services were not generally provided without the costs traditionally associated with the performance of attorney services. In contrast, the Florida Commission on Ethics, responsible for advising public officials statewide, issued only 26 advisory opinions in 2013. Between 1974 and 2013, the Florida Commission on Ethics issued only 2,539 formal opinions, an average of 64 opinions annually.²⁸

As reflected in the state’s system for centralized formal guidance, improving Broward’s system as recommended should have a dramatic effect on the number of advisory opinions issued. Once the Ethics Officer begins issuing formal opinions, the number of such opinions will decline over time. This is in part because the local attorneys’ understanding of the “official” interpretation of the Code would eliminate the need to obtain formal opinions. Having a single source of interpretation will mean that as soon as a common issue is clarified, the matter would be effectively settled as to all similarly situated

²⁷ In addition, certain agencies have identified a conflict of interest problem in a system where the ethics commission serves as both (1) investigator or prosecutor, and (2) adjudicator. Ethics commissions address this problem in different ways, such the segregation of its prosecutorial and hearing functions. But this, too, inevitably increases the financial burden of handling ethics misconduct complaints.

officials. Finally, as with the state’s Commission on Ethics, the publicly available repository of advisory opinions will also reduce the need for additional requests.

**Other**

Two additional issues remain to be addressed if the county’s residents are to achieve the uniform, regional ethics application they sought in 2010.

First, we recommend that the Code’s definition of elected officials be amended to include the constitutional officers, to effect the public’s intent as expressed in the Charter.

Second, the Charter currently provides that a county ethics ordinance will prevail over conflicting municipal ordinances, but makes no mention of municipal charters. Since the Code has become applicable to municipal officials, several municipal charters have been amended to exempt municipal officials from specific provisions of the Code. Conceivably, this mechanism could also be used to wholly opt out of the Code. In order to ensure that the Code remains regionally and uniformly applied to all of Broward County, the OIG recommends a Charter amendment to Sec. 11.01 that would countenance that county ordinances relating to ethics to prevail over ethics provisions in municipal charters. This amendment would provide the necessary legal basis to begin enforcement of all the Code’s provisions to all the municipalities.

**CONCLUSION**

The OIG does not intend this review to be an exhaustive examination of all Broward ethics issues; yet, the issues of varying interpretation and the available mechanism for how to resolve conflicts in interpretation apply to all the standards of the Code, whether they involve outside employment and remuneration, gift acceptance, lobbying contacts, fundraising, procurement, financial disclosure, or ethics training.

The OIG readily acknowledges its position, and thus perspective, as the county’s sole ethics enforcement agency. Indeed, our observations—and our recognition of the need to make them, and make them now—have been informed through the unique prism created by our function. Certainly, benefits of reform would accrue to the OIG: not increased jurisdiction, budget, or powers, but rather a clearer understanding of what standards of conduct are expected of our officials and thus a clearer understanding of how we can effectively investigate and prosecute potential ethical violations.

Accordingly, we have attempted to make these observations of the local public service ethics structure through the public’s eyes, and intend this report to reflect what the public sees today and envisions for its future. We expect that this community would benefit from more meaningful transparency and conduct that adheres to standards as they were intended to be. We expect that officials would benefit.

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29 Broward Co., Fla., Charter § 11.01.
30 These are the charters of Hillsboro Beach, Pompano Beach, Sea Ranch Lakes, and Wilton Manors. All purport to exempt their officials from the application of the Code’s rules regulating the lobbying of other governmental entities in Broward and the disclosure of outside employment and remuneration.
from a better understanding of what is expected of them, from the knowledge that all similarly situated officials are treated the same, and that binding advisory opinions, once issued and followed, would not be questioned. Thus, we hope that our review will spark public discourse and action by responsible Broward officials, stakeholders, and residents.
OIG 14-004

EXHIBIT 1
January 6, 2014

Carol "Jodie" Breece, Ethics Counsel
Broward Office of the Inspector General
1 N. University Drive, Suite 111
Plantation, FL 33324

Dear Ms. Breece:

You have inquired regarding my opinion concerning local government attorneys in Broward County providing binding ethics opinions to elected officials of their respective governmental entities, in accordance with Section 1-19, Broward County Code of Ordinances. Specifically, you have asked my opinion on the following two issues in connection with the aforesaid provision: 1) the requirement that ethics advisory opinions be issued by the Broward County Attorney and the attorneys representing the thirty-one municipalities within Broward County; 2) how that practice compares with advisory opinions being issued by a sole source of authority independent of the governmental entities to which the elected officials belong.

By way of background I have served as the Executive Director and General Counsel of the Miami-Dade Commission on Ethics and Public Trust since September 1, 2011. Prior to that time, I worked for twenty-five years in the Miami-Dade State Attorney's Office, most of which was spent as Chief of the Public Corruption Division. Before moving to South Florida in 1986, I served as an Assistant District Attorney in Essex County, Massachusetts, for several years and as an elected City Councilman in Salem, Massachusetts for four two-year terms.

In my professional capacities, I have had substantial experience in local government and in the enforcement of criminal and ethical legal provisions affecting public servants. I believe that I have a fairly comprehensive grasp of the internal dynamics that occur between local elected officials and their government attorneys. I have interacted with municipal attorneys as a client, as an investigator and prosecutor of their clients, and as an informal and formal adviser to them concerning the interpretation of applicable criminal statutes and ethical code provisions.

The system we have in Miami-Dade County regarding the interpretation of our ethics ordinances is markedly different from the one in Broward County. In Miami-Dade County, the Miami-Dade Commission on Ethics is the ultimate local authority for any binding interpretation of the Code
of Ethics Ordinance. While County and municipal attorneys are always free to provide ethics opinions to their clients, the Commission’s official interpretations of the County Ethics Code must be accorded deference by local elected officials and by their attorneys, unless they determine to challenge an interpretation of the Ordinance in Circuit Court.

The Miami-Dade Commission on Ethics is an independent body. Its independence is established by County Charter as a result of a Charter Amendment adopted by referendum in 1996. The County Ordinance enabling its operation provides for its members to be appointed by individuals and entities outside of the County government. Other than voting on the annual budget which the County Commission must approve for the Commission’s operations, no County official may direct or supersede the agency’s decision-making authority.

Due to the nature of its Home Rule Charter, and the fact that the Miami-Dade Conflict of Interest and Code of Ethics Ordinance is explicitly made applicable to the elected officials and employees of all municipalities within the County, the Commission on Ethics has, since its inception, enforced the Code of Ethics in both the County government and in all Miami-Dade County municipalities.

The Miami-Dade County Attorney’s Office is generally respectful of the authority of this agency, and often refers matters involving interpretation of the Code directly to the Ethics Commission. While we do have disagreements from time to time with municipal attorneys over the interpretation of the Code, we have over time gained the necessary respect and deference from them to enable us to fulfill our role. We have a solid working relationship with nearly all municipal attorneys who regularly consult us concerning the requirements of the Ethics Code.

While our system for dealing with ethics issues in Miami-Dade is far from perfect, I believe that overall it represents the best available system for handling these sensitive matters in a way that the public can understand and trust.

In my opinion, the practice of delegating the interpretation of the Ethics Code to the Broward County Attorney and the attorneys representing each of the 31 municipalities in Broward County is problematic and unworkable. It is important to the promulgation of any ethics code that purports to hold County and municipal officials to established standards of ethical behavior, that there be one code that is interpreted and enforced uniformly throughout the County.

Ethics code provisions by their nature are often subject to differing interpretations. Ethical precepts, unlike criminal statutes, are not easily encapsulated in clearly written language that effectively puts public servants on notice of their minimum requirements. Moreover, ethics advice that truly counsels public officials and protects the public trust must occasionally go further than pure legal interpretation. It must recognize when appearances detract from the public perceptions of the honesty of their public officials. It must direct the attention of public officials to those perceptions and appeal to their consciences to avoid them.

Ethics opinions provided in the form of opinions to public servants who may have questions about the interpretation of code provisions in connection with their own conduct is an ongoing and essential feature of ethics enforcement. Delegating this interpretation to 32 different
authorities who serve 32 different sets of elected officials is not a recipe for comprehensible and uniform interpretation. Rather, it is a system designed for confusion, contradiction and chaos.

County and municipal attorneys are directly subject to the elected officials in their respective governmental units for their employment. Most will admit that they work for the elected officials who employ them, not for the public who actually pays their salaries. Their role is to defend the actions of those officials and assist them in carrying out the policies they want to implement within the bounds of the law. This perspective conflicts with the need to provide them with independent advice that, on some occasions, will require counseling them against taking actions that they may want to take as elected officials. This is not a reflection on the integrity or ethics of municipal attorneys. It is simply the reality with which every municipal attorney must live.

It is my opinion that effective, objective, meaningful ethical advice to elected or unelected public servants can occur only within a system that separates those providing the advice from those receiving it. Such advice, which often requires judgments that fly in the face of the desires and intentions of the recipients, must come from a source that has no agenda other than the promotion of ethical government, no loyalty other than to an authority charged with protecting the public against ethics violations by public servants.

To maintain credibility with the public, ethics enforcement agencies must speak clearly and consistently and with an independent voice about these matters, not with a multiplicity of divergent official voices and influenced viewpoints that amount to a Tower of Babel. As someone who has dedicated much of his career to keeping government clean and free of corrupt influences, as well as a twenty-seven year resident of Broward County, I would like to see Broward County move in a direction that more credibly sustains and fulfills the mission of its Code of Ethics for the County and its municipalities.

Sincerely,

Joseph M. Centorino
Executive Director and General Counsel
Miami-Dade Commission on Ethics and Public Trust
19 W. Flagler Street, Suite 820
Miami, FL 33130
January 7, 2014

Carol Breece
Ethics Counsel
Broward Office of the Inspector General
1 N. University Drive, Suite 111
Plantation, Fla. 33324
CBREECE@broward.org

Dear Ms. Breece:

You have requested my opinion on (1) the requirement that ethics advisory opinions be issued by the county’s and the thirty-one municipalities’ attorneys (I will refer to them jointly as “government attorneys”), and (2) how that requirement compares with advisory opinions being issued by a sole source of authority independent of the governmental entities to which the elected officials belong (I will refer to this sole source of authority as an “ethics officer”).

Since 2006, I have been Director of Research for City Ethics, Inc., a nonprofit, nonpartisan organization that provides information and advice on local government ethics issues nationwide. I am the author of the book Local Government Ethics Programs, of the City Ethics Model Code, and of the only local government ethics blog in the United States.

In following local government ethics issues across the country for several years, I have found that the single most serious problem is the provision of ethics advice by local government attorneys. The reason this problem is so serious is that ethics advice is the most important element of a government ethics program. Ethics advice by government attorneys is problematic for several reasons:

1. Trustworthiness. Advice from government attorneys is seen as favoring the officials who are commonly seen as their clients. When such advice permits conduct that is considered to be inappropriate, it is not trusted by the public. This undermines trust in
government officials, in government attorneys, and in the government ethics program. When such advice is provided by an independent ethics officer, it may be seen as mistaken or limited by the laws, but it is not seen as untrustworthy.

2. Roles. The role of a government attorney is to advise and represent agencies, departments, and bodies, not individuals. When a conflicted individual comes for advice, he has interests in the matter that are completely distinct from the interests of his agency, department, or body. A government attorney is not advising an agency, department, or body when he is advising a conflicted individual. Therefore, such advice is not within the government attorney's role. On the other hand, ethics advice is central to an ethics officer's role.

3. Conflicts of Interest. A government attorney has multiple relationships with many of those who will seek ethics advice: personal, professional, partisan, and superior-subordinate. The government attorney is also appointed by and can be fired by some of the officials who will seek ethics advice. Relationships create conflicts of interest. These relationships also lead to “motivated blindness,” that is, the bias we have toward the individuals we work for. We want to make them happy, and it is in our personal interest to make them happy, because they affect our livelihood.

Government attorneys are also conflicted because they, their superiors, and their appointing authorities are subject to the ethics program’s jurisdiction. Every piece of ethics advice they give is relevant to their and their bosses’ conduct. Any precedent they create could allow them to engage in conduct that might otherwise be illegal.

4. Skill Set. Legal advice and ethics advice require different skill sets. A legal adviser sticks to the letter of the law, and is always on the lookout for loopholes that his client can take advantage of. Recognizing that ethics laws are the minimum requirements of individuals with a fiduciary duty to the community, an ethics adviser is not on the lookout for loopholes in an ethics provision and does not interpret ethics code language so that it is most beneficial to his advisee’s interests. In addition, few government attorneys are trained in providing ethics advice, and when it is a small part of their job, it will take years for them to gain the experience of an ethics officer.

5. Confidentiality/Transparency. Legal advice is generally considered to be confidential. In contrast, many cities and counties place their ethics advice on their website, so that it provides guidance not just to one official, but to all officials, as well as to the public. Publicizing advice also allows precedents to be created. Transparency is an important goal of government ethics. It is in the interest of the government and of the community for ethics advice to be public.
6. Best Practice. Ethics advice from government attorneys is typical of towns and small
counties that have limited resources, usually not even a full-time government attorney.
However, for cities and larger counties, it is not considered a best practice. I refer to it
as the Texas Approach, because of the 27 largest cities, 3 of the 6 cities where the city
attorney provides advice are in Texas. The other outliers are in Arizona, North
Carolina, and Indiana. The mayor and city attorney of San Antonio have proposed
taking ethics advice out of the hands of the city attorney, so soon there will be only 5
outliers among the largest cities.

7. Consistency/Fairness. Broward County’s ethics advice situation has another, very
serious problem. By allowing ethics advice to be provided by 32 offices, especially with
confidentiality, there can be no consistency in ethics advice. This leads to unfairness
and confusion. Consider the situation of a city official who is alleged to have violated
an ethics provision. It is in her interest to get the word out that it would be helpful to
her cause if another official would make public an advisory opinion that could be
interpreted as making her conduct legal. With dozens of untrained government
attorneys providing ethics advice, it is likely that such an opinion could be found. This
would be fair to the official, because she should not be charged with conduct that had
been determined to be legal, but it would undermine trust in the ethics program. In
fact, if done frequently, it could effectively undermine enforcement.

An ethics officer, on the other hand, provides consistent advice that is fair to officials,
provides clear guidance to them, prevents misconduct, allows for enforcement, and
gains the public’s trust.

For these reasons and more, including the application of the Rules of Professional
Conduct to the provision of ethics advice (see the relevant section of my book at
http://www.cityethics.org/files/lgep1-09%20-%20Robert%20Wechsler.htm#Local%20Go
erment%20Attorneys), it is far better for a local government ethics program to have
ethics advice provided solely by an ethics officer rather than by government attorneys.

Yours sincerely,

[Signature]

Robert Wechsler
Director of Research
City Ethics, Inc.
OUTLINE OF OIG ETHICS REFORM RECOMMENDATIONS

I. Creation of Ethics Officer
   • Responsible for:
     • Providing timely, binding advisory opinions to:
       o Elected officials
       o Public employees
       o Vendors or prospective vendors
       o Prospective candidates for elected office
     • Training: (Ensuring the quality and availability of ethics training)
       o Providing quality training relating to Broward Ethics Code
       o Certifying a variety of courses as appropriate training
     • Creating official forms for the required public disclosures
     • Maintaining a centralized publicly searchable database of disclosures
     • Maintaining a centralized publicly searchable database of advisory opinions
     • Adjudicating ethics complaints brought by the Inspector General

II. Creation of an Ethics Review Panel
    • Responsible for:
      • Review of advisory opinions only upon appeal
      • Review of ethics adjudications only upon appeal
      • Comprehensive review of ethics policies on a set basis (annual, biennial)
        o Empowered to make recommendations to the Commission for revision to the ethics code or structure.
      • Could be comprised from nominations by a variety of stakeholders to ensure adequate representation.

III. Ensuring Independence and Oversight
     • Both entities should be appointed by an independent panel of officials not subject to the oversight of the entities.
       o Potential consideration: Existing Oversight Committee in Art. 12 of the Charter.
     • Ethics Officer should be required to publish an annual report with review by an oversight panel.
     • Any quasi-judicial findings should be subject to review by the courts.