

Do Ethics Laws Work?

As legislatures continue to strengthen their ethics laws, policymakers and the public wonder about the results.

By Peggy Kerns and Ginger Sampson

Since New York passed the country's first major ethics law in 1954, an extensive patchwork of such statutes has unfolded across the nation. Today, all 50 states regulate the conduct of public officials. States, coupled with the federal government, have arguably constructed the most detailed set of ethics laws that exists anywhere in the world.

"What has emerged, however, is not a clear system of rules, but an inconsistent and confusing patchwork," says Elder Witt in *Essentials of Government Ethics*. The result is a Byzantine array of public integrity rules and regulations that vary tremendously from state to state and even between the two houses of Congress.

Calvin Mackenzie, author of *Scandal Proof*, a new book examining the effects of ethics laws on government, says attempts to legislate ethics actually have weakened political accountability. "The law is too blunt an instrument to define or ensure proper behavior," he says. "Public employees act ethically when they adhere to high standards of conduct and when they possess sensitivities that cannot all be etched in law.

"In creating an ethical government, the hard part is accomplishing what the law cannot guarantee," he says. "Ethics laws and regulations are designed to make government scandal proof, but no institution can be made scandal proof through regulation alone."

LOSS OF TRUST

"One of the reasons we pass ethics laws is to assure people we're ethical," says Kansas Senator Lana Oleen.

Peggy Kerns heads NCSL's Center for Ethics in Government. Ginger Sampson is a former NCSL writer and researcher who specializes in ethics.

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

—JAMES MADISON, THE FEDERALIST 51

Ironically however, the proliferation of ethics laws has not translated into a high level of public trust. The biennial poll by the American National Election Studies asks citizens about their trust in government. The results indicate a steady decline in confidence from more than 60 percent in the early 1960s to less than 30 percent by the year 2000.

"There is a colossal loss of trust in our institutions, public and private," says Rushworth Kidder, founder of the Institute for Global Ethics. "We can't run a democracy this way.

Few, if any, empirical studies prove a correlation between ethics regulations and the behavior of public officials and trust in

government. In fact, if based on conclusions of opinion polls, it appears that public skepticism increases as government enacts more ethics laws. When trust in government was at its highest in the early 1960s, there were no major ethics laws in the states.

So should we be asking what good have the statutes achieved? Has this accumulation of stricter laws actually resulted in more ethical behavior by government officials? If the answer is no, should we keep passing them to appease the public and create an ethical appearance? Or if laws do not make people more ethical, what does?

ETHICS AND ETHICS LAWS

There is a difference between being an ethical person and following ethics laws.

"Ethics is concerned with moral obligations. It refers to standards of conduct that indicate how one should behave based on moral duties and virtues," says Michael Josephson, founder and president of the Josephson Institute of Ethics.

"Ethics is rooted in moral character and anchored in ethical values and principles," says Carol W. Lewis, professor of political science at the University of Connecticut.

Ethicists say that one cannot discuss ethics without discussing values. Legislators agree. "Ethics is searching one's self for true behavior," says Senator Oleen. "It's being grounded in what is the right thing to do."

Indiana Senator Robert Garton adds, "It's about character, about what remains when others leave the room."

"Laws, on the other hand, establish standards of behavior that may or may not correlate with individual conscience," Josephson says. "Laws coerce from the outside, ethics control from the inside."



SENATOR
LANA OLEEN
KANSAS



SENATOR
ROBERT GARTON
INDIANA

"Ethics laws are misnamed," says Lewis. "These are laws that forbid you from doing the last thing that someone else did. They are better described as codes of conduct, and they come into play 'post-hoc,' after the fact. They're a list to clean up dirty laundry."

Lewis urges public officials to understand that there are two kinds of ethical decisions, moral choice and moral judgment. "Moral choice is about right and wrong. Moral judgment is about conflicting duties and principles. Codes and laws can address only moral choice. That's their limitation: They don't address the gray areas where someone has to rely on personal will and integrity."

LAWS HAVE THEIR PLACE

Laws do have a place in creating an ethical environment. "Laws are important because they provide guidelines, and we need them in this political environment," Senator Garton says.

Stuart Gilman, president of the Ethics Resource Center, calls these laws a baseline for behavior, much like the foundation of a house. "They are not what makes someone a decent person, but these laws can provide a structure that affects behavior."

Mackenzie believes that legislation is required for "some aspects of government's efforts to ensure that its employees perform honestly and that its processes are protected from bias and inappropriate influences." He says that laws should prohibit the serious violations: bribery, embezzlement, self-dealing or other genuine crimes. How else can the serious harm done by these crimes be acknowledged, he asks?

"What laws do best is to help change the culture of the legislature," says Alan Rosenthal, professor of public policy at Rutgers University. He cites Florida and Kentucky as two states where tougher restrictions on gifts and strong disclosure

ETHICS—PUTTING THE PRINCIPLES ON PAPER

The people of Georgia want it. The people of Georgia are going to get it" were the words of Sonny Perdue, Georgia's new Republican governor, speaking in support of his comprehensive ethics reform package on the final eve of the 2003 Georgia legislative session.

Previous attempts to strengthen Georgia's ethics laws by his predecessor, Roy Barnes, and legislators had failed. And this year turned out to be no different. Georgia's Ethics in Government Act made it to a joint House/Senate committee, but failed to get to the governor's desk.

Georgia's proposed reforms were one of several ethics measures on state legislative agendas during the 2002-03 legislative sessions. The efforts crossed both political and state boundaries. Elected officials are feeding off a movement to restore public confidence in state governments beset with negative publicity resulting from real and perceived misdeeds.

Typically, states enact ethics legislation using a piecemeal approach—changing policy incrementally. A new trend emerged this year. Ethics reforms that simultaneously pushed for tougher disclosure laws, further restricted campaign contributions, added voting restrictions and addressed other conflicts of interest were introduced in Texas, Michigan, Hawaii, New Jersey and Georgia. Pass or fail, attempts to reform state ethics codes are here to stay.

Although there is no "one-size-fits-all" model, there are trends:

◆ **Ethics training.** More than 40 states now include ethics training in their new member orientation programs with at least 10 making it mandatory.

◆ **Whistle blower protection.** All 50 states have laws protecting certain employees from retaliation. Nearly all states provide for reinstatement with back pay, reinstatement of full fringe benefits and seniority rights, and reasonable attorney fees.

◆ **Financial disclosure.** Legislators and lobbyists in all 50 states must disclose their financial interests.

◆ **Lobbyist contingency fees.** At least 37 states prohibit contingency fee payments

to lobbyists.

◆ **Gift restrictions.** Thirty-three states specify a monetary limit on gifts ranging up to \$500, with certain exceptions. The remaining 17 restrict the gift only if it influences official action, often legally interpreted as bribery.

◆ **Campaign contribution limits outside of session.** Thirty-seven states limit the amount that individual political parties and PACs can give to candidates. For legislative candidates, the limit averages about \$1,200 per primary or general election, compared to \$3,500 for a gubernatorial candidate. All but five states also regulate corporate contributions.

◆ **Campaign contribution limits during session.** Twenty-seven states restrict legislators receiving and lobbyists giving campaign contributions during the legislative session.

◆ **Honorariums.** Twenty-three states prohibit honorariums if they are offered in connection with a legislator's official duties.

◆ **Revolving door.** Twenty-seven states restrict to various degrees former legislators from lobbying after they leave office, typically a one- or two-year restriction.

◆ **Nepotism.** Nineteen legislatures uphold laws, either through statute or by constitution, prohibiting or restricting a legislator from hiring a relative.

◆ **Enforcement.** Thirty-nine states fund external oversight of their government through an ethics commission. Internal enforcement by an ethics committee is an option in all states.

Many states address other areas of potential conflicts of interest, including abstaining from voting, representing others before government, contracting with government, holding dual elected or paid public positions and using public resources for campaigns or personal gain.

Thus, the trend of building legal walls to protect the public interest from the self-interest of elected officials continues. Georgia's Governor Perdue vows to continue his fight either later this year in special session or in next year's session.

laws have changed the general tone of the legislature. “These legislatures were too inbred, ‘clubby’ and gift-oriented,” he says.

Rosenthal cites no-cup-of-coffee and disclosure laws and gift bans as examples that can curb the appearances of abuses by legislators.

Garton also includes guidelines for conflict of interest. “Conflicts are inherent in the legislative process,” he says. “We come from different perspectives and occupations, so the appearance of a conflict can be as serious as an actual conflict.”

This concern was reflected in a 2002 survey of state ethics commissions and committees by the National Conference of State Legislatures’ Center for Ethics in Government. In noting that 98 percent of state legislators are ethical public servants, the respondents observed that lawmakers recognize they need to confront the appearance of conflicts of interest in their private and public duties. Enacting and enforcing ethics laws is, at the very least, one way to do this.

NEGATIVE ASPECTS OF LAWS

Ethics codes passed in reaction to scandals may be more detrimental than the scandals themselves because they seem to announce that the organization only now has decided to become ethical, Josephson says.

And often laws may not have the desired effect, says Rosenthal. “Legislators sometimes try to out-ethics each other,” he says. “Some of the laws being enacted may cause more problems than they solve.”

As more and more restrictions and rules are enacted, the less lawmakers concern themselves with what is right and rely too much on the restrictions in the law. They may abdicate their own responsibility to act ethically. “You can’t coerce people to virtue. In fact, whenever you have an ethics law it encourages people to substitute the law for conscience,” Josephson says.

That reliance on law for decision making concerns lawmakers. “Of course we must obey the law,” says Garton. “However, sometimes we must do something, not because there may or may not be a law, but because it’s the right thing to do.”

Lawmakers often find themselves in this quandary. For example, a state’s law may allow a legislator to accept gifts up to a certain value. But if the gift is a ticket to the skybox to watch a professional football team—a perquisite that may not be available to the general public—and the owner of the team has legislation he wants passed, it does not matter to the public what the law is. The action may be legal, but it seems unethical to the public.

“Legislators must be true to their own ethical standards, in addition to those required by law,” says Hawaii Representative Marcus Oshiro. “There is always a point where our public role as an elected official collides with our nonpublic role as a private citizen. New legislators, especially, need mentoring when they confront this collision—laws don’t always help in that situation.”

The public probably would agree that laws might not go far enough, Senator Oleen says.



REPRESENTATIVE
MARCUS OSHIRO
HAWAII

"If people on the street were to give advice to a legislator on how to behave ethically, they would say, 'Don't take money from special interests that want your vote, don't lie. And be a truthful person who votes responsibly.'"

THE ROLE OF LEADERSHIP

Legislative leadership is paramount to building an ethical institution. A person's ethical standards are shaped by culture, upbringing and values. In the same vein, the ethical standards of organizations are shaped by the values of the leaders and the group.

"It's the responsibility of leadership to set an ethical tone," says Senator Garton, who is president pro tem. "Leaders, not the law, establish an expectation that members have to behave ethically."

"I deal a lot with 'frayed ends,'" says Oleen. "That's a big part of my responsibility as Senate majority leader. Sometimes a legislator has a lack of good judgment, but has not committed a blatant unethical act and may need counseling and advice." Both leaders emphasize trust and accountability as two essential ingredients in an ethical legislature.

WHERE DO WE GO FROM HERE?

Kidder of the Institute for Global Ethics wants legislators to be prepared for the enormous new ethical quandaries that are ahead in the 21st century, challenges especially in technology, immigration, privacy and race relations.

"Ethics for elected officials become a matter of communicating the ethics that are already there," says Kidder. "Legislators forget to emphasize their ethical side. It's working with each other, staff and constituents through an ethical beam. It's understanding what motivates you as a legislator and relating it back to your core values and those of your constituents."

Rosenthal also takes a larger view of ethics in the statehouse. "Legislators have to take ethics seriously and assume responsibility for them," he says. "One of the major ethical issues facing legislators is not about accepting a meal from lobbyists or whether their occupations outside the legislature pose a conflict," says Rosenthal. "Rather, it relates to their commitment to the Senate, the House and the legislature.

CREATING THE PATCHWORK

States enacted their first major ethics laws in the mid-1950s, beginning with New York's statute addressing conflicts between public officials' private interests and their public duties.

Then came the Watergate scandals of the 1970s. Congressional response was to enact an onslaught of laws regulating the behavior of public officials. The centerpiece was the Ethics in Government Act of 1978. States followed the federal lead. "Ethics became the rallying cry of the time," says Calvin Mackenzie in *Scandal Proof*.

States continued to expand their ethics statutes over the next three decades, including passing the first revolving door restrictions that regulated when former legislators and state employees could start lobbying the institution. Legislators began to think twice before hiring their most trusted and often least expensive people—family members. The first conflict-of-interest restrictions began on post-government employment, gifts and honorariums, representation of clients before state agencies, and campaign finance, and personal and business financial disclosure requirements.

The wave of ethics reforms spread in the 1990s. Often the impetus was a scandal. The Kentucky General Assembly established an ethics code in 1993 after several House members were indicted on federal charges of bribery following an FBI sting. There was "Phonagate" in Minnesota and stings in Arizona and California. All resulted in more laws to curb bad behavior.

Wyoming was an exception to the scandal first, law second rule. A large state with a small population, Wyoming is a place where a handshake is a commitment, and there are few ethical problems. Until 1998, the only provisions governing behavior for legislators was a section in the constitution stating that a member who had a personal or private

interest in a bill disclose the fact, and not vote. Rules in both houses provided for the declaration of a conflict.

Following a failed attempt by a group of citizens to get a comprehensive ethics package on the ballot, House and Senate leadership introduced the Ethics and Disclosure Act that restricted gifts of meals and beverages over a certain amount and prohibited trips to conferences. Some legislators said it was unnecessary, according to Mark Quiner, assistant director of the Wyoming Legislative Services Office. One legislator called it "an insult to our honor."

The following year, the Legislature exempted food and beverages and trips to conferences. "The legislation became much more workable and useable, and it definitely created a cultural change in the state," Quiner says.

During the 1990s, one of every three states adopted some significant ethics laws. States actively took enforcement into their own hands by establishing independent ethics commissions or legislative ethics committees.

During 2003, legislatures continued to strengthen or tweak their ethics laws. Indiana, Iowa, Maryland, Utah and Minnesota are among the states that either passed or considered further restrictions on reporting by lobbyists. Kentucky created a crime of abuse of public trust and set penalties. Wisconsin lawmakers are considering legislation to outlaw "pay to play" tactics and to set up a new system of election and ethics monitoring. Introduced in May, the bills are in response to an ethics scandal in which four top leaders and an aide were indicted for demanding campaign donations for key votes and assigning tax-paid caucus staff to work on campaigns. Hawaii attempted to mandate ethics training for legislators, but the bill failed.

Legislators have an obligation to maintain the well-being of their institution and to leave it in as good, or better, shape when they depart as they found it when they arrived."

What sounds like a grandiose goal is a simple one for some. "People come and go,

but the institution remains. It's bigger than our moment in time. Nothing we do here should diminish the esteem of the legislature," said Hawaii's Representative Oshiro. In that regard, he says, "How do I stay ethical? I follow what I learned in grade school. Be honest, truthful and forthright." ■