



INTEROFFICE MEMORANDUM

Denise M. Nieman
County Attorney

P.O. Box 1989
West Palm Beach, FL 33402-1989
(561) 355-2225
Suncom: (561) 273-2225
FAX: (561) 355-4398
www.pbcgov.com

DATE: May 4, 2009
TO: Michael F. McAuliffe, State Attorney
THRU: Denise M. Nieman, County Attorney
FROM: Leonard Berger, Senior Assistant County Attorney
RE: Ethics Recommendations

**Palm Beach County
Board of County
Commissioners**

Jeff Koons, Chairman
Burt Aaronson, Vice Chairman
Karen T. Marcus
Shelley Vana
Steven L. Abrams
Jess R. Santamaria

County Administrator

Robert Weisman



*"An Equal Opportunity
Affirmative Action Employer"*

This is in response to your request for recommendations on improving ethical governance in Palm Beach County. By way of introduction, a word on what *not* to do: resist the impulse to heap additional layers of regulation atop what is already in place. This can add government costs to enforce and administer the regulations, and can increase confusion about how to follow applicable law. Even the best regulatory scheme reaches a point of complexity where it no longer effectively achieves its purpose—the truly ethical can violate the law through innocent mistake; the unethical can take advantage of loopholes created by the law's complexity. The better approach is to amend or even eliminate laws or policies where necessary to clarify standards of ethical conduct, and to provide more training for officials and employees at all levels of government to improve awareness and understanding of these standards. Oversight and deterrence are obviously essential to any regulatory framework, but provide no guarantee of compliance. The cost of providing any additional enforcement mechanisms must be carefully considered in light of the potential benefits they might bring.

The following are a few recommendations for changes to statutory requirements and local laws and policies.

- Amend Palm Beach County Lobbyist Registration Ordinance.** Amend the ordinance to require more detailed information on the lobbyist, principal, and nature of the representation. Currently, the regulations only require a lobbyist to update the registration annually and when a new principal is added. The law should require separate registration for each principal represented along with a statement signed by the principal confirming the representation, and prompt notice of termination of the relationship, also signed by lobbyist and principal.



2. **Provide Enhanced training.** Work with County Department and Division heads to design training programs more closely suited to the needs of particular groups of employees. Increase frequency of training sessions as appropriate for particular groups.

3. **Amend the Sunshine Law to clarify applicability to advisory boards and informal workgroups.** The Sunshine Law states in relevant part that all meetings of any board or commission of any county at which official acts are to be taken are declared to be public meetings open to the public at all times. The law ensures that the government decision-making is a public process, which is essential to democracy. The law has been broadly construed to effectuate its purpose, with courts explaining that the reach of the law covers every step of the decision-making process leading up to the ultimate decision. Based on this rationale, the law has been interpreted to cover advisory boards, staff committees, informal work groups, and even the subcommittees of these groups, when any of these gatherings could be considered a step in the decision-making process. While the principle sounds simple enough, arriving at a workable understanding of decision-making, especially when applied to virtually any gathering of appointees, volunteers or staff members, has not been easy.

Courts have attempted to distinguish government decision-making from the more routine work of government staff with far-reaching impact. For example, two court opinions involved government administrators who formed and worked with committees comprised of community and staff members to hire a particular official. In one case, the administrator along with the committee made the selection. Here, the court determined the Sunshine Law had been violated because the committee engaged in decision-making. In the second opinion, the administrator made the decision based on input from the committee. In this case, the court determined that the committee did not engage in decision-making, only in fact-finding, because the administrator alone made the decision. The distinction drawn by these two opinions while well reasoned, cannot hold up in practice. The two opinions may have accurately described the true function of the committees in question, but cannot address the endless variety of group dynamics generated by the countless advisory boards, committees, and subcommittees that engage daily in service to various government agencies. Simply declaring a committee to be "fact-finding" in nature to skirt the open meeting requirement does a disservice to the Sunshine Law. On the other hand, leaving a court to decide on a case by case basis places these thousands of committee members, mostly volunteers, in an untenable situation.

More troubling still, the law has been interpreted to prohibit any two members from discussing matters that may foreseeably come before their board. Many advisory board members are logically assigned to a board or committee because of their



Michael F. McAuliffe, State Attorney

May 4, 2009

Page 3

involvement or expertise in a particular field. As such, informal discussions outside of formal committee meetings to discuss professional matters are inevitable. And some of these discussions may overlap with business of the committee. In other words, people who are asked to volunteer their time and expertise to assist government risk penalty because of the uncertain status of the Sunshine Law's application to the committee, and face additional risk by informally discussing professional matters with fellow committee members outside of a formal committee meeting.

The Sunshine Law should be amended to limit this risk while keeping in place the assurances that *real* government decision-making is conducted in public. Courts have already recognized that Sunshine Law violations can be remedied as long as the final decision-making entity fully discusses the issue in public. With this in mind, it is worth exploring the following changes: 1) Continue to require all boards comprised of elected and appointed members to meet in public as currently required by statute; 2) Specify that the members of all boards with final decision-making authority cannot meet outside of a public meeting to discuss matters that may foreseeably come before their board (in other words, replace the judicial gloss with specific statutory language); and 3) Specify that individuals appointed to boards that are purely advisory in nature may communicate with other members of that board outside of a public meeting, provided that any data, reports, or other information resulting from such meetings be fully addressed and made a part of the record before the advisory board at its public meeting.

A change like this will minimize the risk of Sunshine Law violation that volunteers and lay people currently face, and will eliminate maneuvering that many government agencies go through today to try to comply with ever-changing case law on the subject. Any work done outside of the Sunshine Law will become part of the public discussion at the advisory board meeting and a second time at the meeting of the final decision-making body, leaving ample opportunity for public participation. The importance of this State's open government laws cannot be overstated and these recommendations should not be viewed as an attempt to limit them. Rather, amendments are needed because through judicial interpretation, the Sunshine Law has been stretched to the point that its outer reaches are no longer well defined.

4. **Establishment of an Independent Ethics Office.** Establishing an independent countywide ethics authority serving all government agencies in Palm Beach County would be ideal, but costly. Such an office should be independent of any single government entity, and funded by all government agencies in Palm Beach County, including all municipalities, the School District, and Independent Districts located entirely within the County. Such an office could provide training and advice on existing ethics regulations, enforce ethics regulations, or both. Laws already in



Michael F. McAuliffe, State Attorney

May 4, 2009

Page 4

place to address misuse of public office include the Federal Honest Services law, the state's bribery statutes, and state civil enforcement through the Commission on Ethics. The County can adopt local ordinances to also address similar misuse of office, but as indicated at the start of this memorandum, great care must be taken to avoid adding more complexity to what is an already complex regulatory field. Local ordinances can be prosecuted as second degree misdemeanors, which can be a harsh penalty unless the law in question is very clear. Legislative bodies at all governmental levels have attempted to establish clear rules for ethical conduct with mixed results.

Establishing an independent ethics office to serve countywide, and adopting and enforcing county ethics ordinances countywide, can be accomplished, but not without considerable challenge. The County Charter can be amended to include an office of countywide authority such as this. Charter amendments must be approved by referendum and would apply only in those cities where a majority of city voters approved it. In other words, an independent ethics office and the ordinances it would enforce, could apply countywide, but only in those cities whose voters approved the measure. It is theoretically possible for the amendment to apply countywide regardless of the vote in each city, but that would require an additional amendment to the Charter which would undo a provision Palm Beach County voters approved only last year. In addition, if the countywide ethics office were created by Charter amendment, the amendment could not compel local governments to fund it. This undertaking could also be accomplished through interlocal agreements among the government agencies in Palm Beach County. This would require the complete agreement between the County, the School District, 38 municipalities, and countless special districts. The prospect of achieving and maintaining agreement among all of these entities is theoretically possible, but very difficult in practice. The only way to ensure complete countywide authority and lasting economic viability would be to create the independent office, a method to fund it, and countywide laws through Special Act of the Legislature.

Thank you for the opportunity to comment on these issues. If you think it appropriate, please pass this along to members of your Grand Jury and please do not hesitate to contact me with any concerns or questions regarding this correspondence.

LB/jg