

## Introduction

Citizens must have confidence that their elected officials will handle the business of government in an ethical manner. The way in which officials make public decisions, such as the awarding of contracts, the management of public funds, and the hiring of staff, must be above reproach. Indeed, local officials and employees need to avoid even the appearance of misconduct.

In response to violations of the public trust by public officials, ethics laws and criminal statutes have been established to guide the conduct of officials and public employees. The Maryland Public Ethics Law begins with a policy statement that succinctly states its purpose:

“The General Assembly of Maryland, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and officers, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and officers will be maintained.”

In addition, municipal officials and employees are subject to many other local, state, and federal laws and regulations that are designed to control their ethical conduct. Some of these laws impose criminal sanctions and often seek to prevent certain overt misconduct. Other provisions are civil or criminal and may not only seek to prevent overt misconduct but also to avoid activities which give the appearance of misconduct. Finally, in addition to formal control of official conduct, public opinion and the media play a significant role in shaping the kind of conduct that a local community will expect.

## Ethics

**Public Ethics Requirements.** The State Government Article, Title 15, Subtitle 8, Part I of the *Annotated Code of Maryland* requires that all incorporated municipalities and counties in Maryland have ethics laws as required by the state for their employees and public officials. Regulations issued by the State Ethics Commission contained in Title 19A, subtitle 04 of the *Code of Maryland Administrative Regulations* (COMAR) outline the standards for compliance with these requirements. The regulations include model ethics code provisions for local governments to consider when adopting their laws.

The State Ethics Commission is responsible for approving or disapproving local governmental ethics codes and will provide technical assistance to local ethics boards. If a municipality changes all or a part of its required ethics law, the amendments must be submitted to the State Ethics Commission for review and approval. However, the Commission does not decide local ethics issues or investigate local officials.

The State Ethics Commission evaluates requests from small municipalities to determine whether they can be exempted from enacting all or part of an ethics law. The State Ethics Law provides that small municipalities may be exempted if the enactment of such a law would cause an unreasonable invasion of privacy, would significantly reduce the availability of qualified persons for public service, or would not be necessary to preserve the purposes of the state law. In deciding whether to grant a total or partial exemption, the State Ethics Commission considers population, town budget, number of employees, municipal functions, number of candidates, past history, and other factors. Most Maryland cities have been required to enact ethics laws, but many small towns in the state have been granted full or partial exemptions. From time to time, the Commission considers whether, due to changes in conditions, a town exemption status should be changed. This review is routinely conducted after each national census; however, the exemption status of a town can be reviewed by the commission at other times if the need arises.

**Public Ethics Suggestions.** Ethics codes address the basic situations and issues that face a city or town and its officials. However, in many situations the community will demand a higher standard. Successful city/town administrations will recognize and conform to these higher standards. One general guideline is to avoid doing those things that may be technically legal but would not reflect favorably on the town or the official if published on the front page of the local paper. Often, this means turning down attractive business opportunities or economic relationships that might damage the perceived quality of town government and its officials.

**Ethics Codes and Administration.** The goals of a sound ethics program are to promote public confidence in the city and its officials, to maintain fairness and impartiality in rendering municipal services, and to avoid the appearances of impropriety.

Ethics programs need to be designed to avoid conflicts and appearances of conflict by the use of established standards of conduct and procedures for financial disclosure. Large cities need to supplement these components by requiring lobbyists to register and submit reports. Ethics codes not only provide a mechanism for dealing with misconduct but, more importantly, they provide government officials and employees with a road map for acceptable behavior.

**City/Town Ethics Check-Up.** Municipal officials should periodically evaluate the local ethics program to determine if any action is needed to improve the law or its administration. The following steps should be part of this review:

1. The city's/town's ethics code should have been approved by the State Ethics Commission or if the town does not have a code, the Commission should have exempted it from this requirement.
2. If the town has been exempted from enacting a formal ethics law, it may be appropriate to enact some minimal ethics provisions anyway, either by ordinance or administrative regulation.
3. The city/town should have appointed an ethics board, and the board should understand its mandate and have the resources to perform its assigned tasks.
4. The city/town ethics board should have established programs of disclosure, advice, employee education, and enforcement.
5. Employees and public officials should understand the requirements of the law, that these standards of conduct are supported by the city or town, and that their compliance is expected.

## Criminal Misconduct

**Criminal Misconduct in Office.** There are instances in which public officials and employees have been prosecuted for committing acts that are corrupt. Although many state and federal laws have an impact on the conduct of local officials, the common law crime of misconduct in office is the significant enforcement tool that prosecutors use in dealing with office misconduct.

Misconduct in office is generally defined as “corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of office.” This definition is also found in case law, and there are no statutory penalties prescribed in Maryland for this offense. Therefore, misconduct in office is, at common law, a misdemeanor. Punishment for the offense is entirely within the discretion of the judge subject to constitutional proscription against cruel and unusual punishments.

**Applicability.** The crime of misconduct in office can only be committed by a public officer or official and the commission or omission of the alleged acts must be in the performance of duties related to the office held by the offender. If a public officer commits a crime unrelated to the duties of his office, such as theft in a private matter, he cannot be charged with misconduct in addition to the theft charge.

The fact that a person is employed by the State or local government does not, by itself, establish that person as a public officer. Maryland law has no clear definition of what constitutes a public officer, but five factors have been set forth in case law. They are as follows:

1. The position was created by law and the duties are continuing and not occasional.
2. The incumbent performs an important public function.
3. The position has a definite term for which a commission is issued, a bond posted, and an oath required.
4. The position is one of dignity and importance.
5. The position calls for the exercise of some portion of the sovereign power of the State.

Of these five characteristics, the most important one is whether the position calls for the exercise of some of the government’s sovereign power. Government employees who do not have such authority usually will not be held to fit the legal definition of a public officer.

**Types of Misconduct.** Misconduct in office is a general term which refers to three types of offenses. Specifically they are:

*malfeasance*—an act which is wrongful in itself or which should not be done at all.

*misfeasance*—an act which is otherwise legal but performed in a wrongful manner.

*nonfeasance*—the omission of an act which is required by the duties of the office.

The difference between malfeasance and misfeasance is clarified in the following example. A public official awards a contract for the corrupt purpose of enriching a friend. If the official has no authority to award the contract, he can be charged with malfeasance. If awarding such contracts is one of his duties, he can be charged with misfeasance.

Nonfeasance can be charged when the duty is ministerial and mandated by law. A ministerial duty is one prescribed by law or superior authority and which does not involve discretion or the exercise of judgment. When the act is discretionary, it would be necessary to show that the failure to perform the act was corrupt. However, any intentional forbearance or deliberate refusal by an official to do what is unconditionally required by the obligation of the office is corrupt. An official mandated by law to perform a certain act is not permitted to judge in opposition to that which is required.

***Elements of Misconduct.*** In order to demonstrate that the crime of misconduct has been committed, the prosecution must prove that the offender was a public officer at the time of commission or omission of the alleged act. The act or omission must be proven to have been in the exercise of public duties or under color of office. Under “color of office” denotes that the offender was able to do the unlawful act because the person is a public officer or because of the opportunity afforded by that fact. In addition, the prosecution must show that the offender had a corrupt motive except where there was a failure to perform a nondiscretionary duty required by law.

***Limitations and Procedures.*** Maryland law provides that the prosecution of malfeasance, misfeasance, nonfeasance, or a conspiracy to commit such offenses shall be instituted within two years after the offense is committed. If the offense is nonfeasance or if it is continued over time, the statute of limitations would not begin to be calculated until the duty ends or the offender resumes performance of the duty.

Ethics agencies may seek to enforce ethics sanctions for these offenses in addition to sanctions under other Maryland law. It should be noted that ethics agencies will defer to a prosecuting authority at least until the case is completed before adjudicating an ethics violation. Ethics laws do not generally carry a statute of limitations.