

State of Louisiana Board of Ethics

White Paper on the Effects of Act 23 on Louisiana's Ethics Program¹

1. Introduction

The Board of Ethics is an administrative agency with investigative and prosecutorial authority and until early 2008, with quasi-judicial adjudicatory authority as well. These tripartite powers of the Board are the genesis of Act 23 of the 1st Extraordinary Session of 2008 (hereafter 'Act 23 or "HB 41"). In recent years, the courts have given increasing attention and disapproval to the commingling of investigative, prosecutorial and adjudicative authority of administrative agencies.

Allen v. State Board of Dentistry, 543 So.2d 908, (La. Sup. Ct., 1989) involved the suspension by the Board of Dentistry of a license to practice dentistry. The court found that the Board's counsel had acted as investigator, then he prosecuted the charges before the Board, and subsequently drafted detailed findings of fact and conclusions of law for the Board's disciplinary committee before the Board had arrived at such findings. The court held that the foregoing violated respondent's rights under R. S. 49:960 (A) to a neutral adjudicator and his right to due process of law. The court also required "in connection with the hearing the appearance of complete fairness."

In a later case, *In Re Georgia Gulf Corporation*, 694 So. 2d 173, 96-1907 (La. 5/9/97), the alleged denial of due process and violation of the La. Administrative Procedures Act was limited to the former Ethics Administrator's involvement in assisting the Board in writing the adjudicatory opinion. There is no indication in the opinion that such action by the Ethics Administrator was the only deficiency in the statutory procedures for investigating, prosecuting and adjudicating by the Board.

Importantly, the court first reaffirmed the general prohibition against "impermissible commingling of prosecutorial and adjudicative roles". The court then specifically referred to La. R. S. 49:960 (A) which prohibits the decision maker (formerly the Board of Ethics) from

¹ The White Paper on the Effects of Act 23 on Louisiana's Ethics Program was adopted by the Louisiana Board of Ethics at its August 26, 2009 meeting.

communicating, directly or indirectly, in connection with any issue of fact or law, with any person "engaged in the performance of investigative, prosecuting, or advocating functions, except on notice and opportunity for all parties to participate". Prior to Act 23, when the Board of Ethics adjudicated issues of fact and law, the members of the Board routinely and as required by the statutes communicated with its investigatory staff including the Ethics Administrator regarding issues of fact and law and then adjudicated those issues. That process on its face appears to have been an "impermissible commingling of prosecutorial and adjudicative roles".

The court noted that " the Ethics Commission had altered its procedure for preparing the Ethics Commission' opinion after our decision in *Allen* to specifically extend equal access to opposing parties in a noticed hearing to consider the draft opinion." The court ruled that was not sufficient, noting that in the instant case, the Commission had its counsel prepare findings of facts and conclusions of law before the Commission had actually issued its ruling on the merits. Speaking for the court, Justice Knoll sent a rather pointed message to the Commission on Governmental Ethics:

What message does the Ethics Commission convey when the agency charged with discerning facts and judging conflicts of interest depends upon its general counsel to prosecute ethical violators and supply the findings of fact utilized to support its adjudication of the charges brought before it? The failure to clearly delineate and differentiate the functions of the prosecutor and adjudicator presents too great a danger that the appearance of impropriety will be perceived. Thus, we find that the appearance of impropriety that concerned us in *Allen* is equally present in the case now before us.

In *Jones v. Board of Ethics for Elected Officials*, 694 So. 2d 171, 96-2005 (La.5/9/97), a State Senator sought an injunction against the Board of Ethics for Elected Officials prohibiting it from hearing the ethics charges against him. The Senator relied on the *Georgia Gulf* case in contending that "the pre-hearing procedure of the Board of Ethics was fraught with due process violations and that the procedures to be used by the Board was similarly flawed."

The Board responded that the trial court did not have jurisdiction to hear the case. The trial court overruled that objection and issued the injunction. Upon review by the Court of Appeal, First Circuit, it concluded the trial court's injunction was improper.

Upon review by the Supreme Court, it ruled the injunction of the trial court was proper. In its application for a rehearing, the Board stated it would change its procedures to comply with the *Georgia Gulf* case and therefore, the *Jones* case should be remanded to the Board, rather than

the district court. The Supreme Court declined to void the injunction issued by the district court but did remand the case to the Board of Ethics.

The Board then adopted a rule authorizing the Ethics Administrator, with the concurrence of the Chair of the Board, to appoint for each adjudicatory hearing a staff attorney to prosecute the case before the Board.² Then Senator Jones unsuccessfully attacked the Board's composition through the courts. While the matter was then pending before the Board, Senator Jones entered into a consent decision with the Board of Ethics and the case ended there. In the meantime, the Board retained the statutory power to direct investigations of complaints and after review of evidence produced by the investigations, decide whether charges should be filed, and finally adjudicate those charges. In exercising these powers, the members of the Board became familiar in an ex-parte, confidential manner with the evidence against the respondent that was produced in the investigatory stage and had determined that the evidence warranted the filing of charges. There has been no judicial determination as to whether the temporary trial counsel rule of the Board is sufficient to comply with the *Georgia Gulf* decision.

Against this background, HB 41 was introduced in the House of Representatives. Instead of preserving the traditional adjudicatory power in the Board of Ethics and providing for an independent staff to investigate allegations, file charges and prosecute the charges filed, Act 23 transfers the adjudicatory power from the Board of Ethics to administrative law judges³ while leaving with the Board the responsibility for investigating, filing charges, and prosecuting charges before the administrative law judges. This change fundamentally alters the historical and constitutional role of the Board of Ethics and adversely impacts its capacity to enforce the public ethics laws of Louisiana.

2. Historical Background to Louisiana's Ethics Program

The first ethics program in Louisiana had its foundation in Article 19, Section 27 of the 1921 Constitution. That section was added to the Constitution by Act 528 of 1964, adopted as a

² See Rule 501 et seq of the Rules for the Board of Ethics

³ R. S. 49: 994 E provides: "All adjudications involving alleged violations of any provision of law under the jurisdiction of the Board of Ethics shall be heard by administrative law judges who are licensed to practice law in Louisiana."

constitutional amendment on November 8, 1964. Part 2 of section 27 authorized, but it did not mandate, the Legislature to enact a "code of governmental ethics". Part 3 of section 27 authorized, but did not mandate, that the legislature enact the "Louisiana Commission on Governmental Ethics" for "all state employees other than state officials covered by part 4" of the section. Part 4 of the section provided that the "legislature shall establish the "Louisiana Board of Ethics for Elected Officials" for "all elected officials, including members of the legislature."⁴

For our purposes, it is important to note that Article 19, Sec. 27 of the 1921 Constitution provided for two administrative bodies with each one having exclusive authority and powers over elected officials and the other having exclusive authority and powers over public employees. The two bodies would not share authority and powers over the same persons.

Until Act 23 was adopted, no ethics board shared its authority and powers with another governmental body. Today's R. S. 42:1141C(3)(a) divides the former authority and powers of the Board of Ethics between the Board and a panel of three administrative law judges. Sometimes, Act 23 refers to the administrative law judges as a panel and other times as an "Ethics Adjudicatory Board".

The first code of ethics was enacted by Act 110 of 1964. It enacted one code of ethics for state elected officials and one code of ethics for non-elected state officials and employees. Commensurate with this concept, the act created a Board of Ethics for State Elected Officials to administer the code of governmental ethics for officials and a Commission on Governmental Ethics for non-elected state employees.⁵ Each board had plenary authority within its own ethics regime. Local governmental public officials and employees were not subject to either code or either enforcement body.

Following the adoption of the La. Constitution in 1974, particularly Article 10, Section 21 thereof, the Legislature adopted Act 443 of 1979 which enacted one code of ethics for elected officials and employees of the state and its political subdivisions. Act 443 also continued the

⁴ Section 27 did not explicitly provide for the imposition of penalties upon those who violate the code of ethics. It provided merely for "public findings of violations of the code of ethics."

⁵ Prior to Act 110 of 1964, there was no code of ethics in our constitution or our statutes. There were a few isolated provisions on ethics but no code. For example, see La. Constitution of 1921, Article 3, Section 29 (requiring that a legislator with a personal or private interest in a legislative instrument shall disclose that fact to his legislative body and recuse himself from voting) and Section 30 (making it a crime, punishable by forfeiture of office, for a member of the legislature to offer to or to actually vote on a matter in exchange for a fee or a reward).

Board of Ethics for Elected Officials and a Commission on Ethics for Public Employees, each to administer the same code of ethics but over different groups of persons.

Act 64 of 1996 eliminated the Commission on Ethics for Public Employees and the Board of Ethics for Elected Officials and in lieu thereof created the Board of Ethics to administer and enforce one code of ethics for all public officials and employees of the state and its political subdivisions. This is the self-contained ethics program that is in place today.

Thus, the constitutional foundation of Louisiana's Ethics Administration Program is Article 10, Section 21 of the Louisiana Constitution of 1974. It provides:

The legislature shall enact a code of ethics for all officials and employees of the state and its political subdivisions. The code shall be administered by one or more boards created by the legislature with qualifications, terms of office, duties, and powers provided by law. Decisions of a board shall be appealable, and the legislature shall provide the method of appeal.⁶

Since 1996, the sole authority empowered to administer Louisiana's ethics program has been the constitutionally mandated Board of Ethics. That plan is also plainly evident in current statutory law. La. R.S 42:1132C provides:

C. Jurisdiction. The board shall administer and enforce the provisions of this Chapter and the rules, regulations, and orders issued hereunder with respect to public employees and elected officials.

The foregoing provision remains unchanged today and is consistent with the constitutional provision for a code of ethics for all elected officials and public employees of the state and its political subdivisions and because all public officials and public employees are subject to one code, it follows that only one board should administer that code.

From 1964 to 2008, a period of 44 years,⁷ the Louisiana Ethics Program has always had one board with complete administrative and enforcement authority over a discrete group of

⁶ The 1974 Constitution also contains Article 3, Section 9 which provides: "Legislative office is a public trust, and every effort to realize personal gain through official conduct is a violation of that trust. The Legislature shall enact a code of ethics prohibiting conflict between public duty and private interests of members of the legislature." Instead of adopting a separate code of ethics for the members of legislature only, the Legislature included the members of the Legislature along with executive branch officials under a single code of ethics.

⁷ During these forty years, the following governors have served: John McKeithen, 1964-1972; Edwin Edwards, 1972-1980; David Treen, 1980-1984, Edwin Edwards, 1984-1988; Buddy Roemer, 1988-1992; Edwin Edwards, 1992-1996; Murphy Foster, 1996-2004; and Kathleen Blanco, 2004-2008. During that time period, no governor and no legislative body proposed that the adjudicatory power of the Board of Ethics be transferred to administrative law judges or to another else.

public officials or employees. Stated differently and most importantly, at no time in Louisiana's history has a unitary or self-contained ethics program been administered by two public bodies.

3. Legislative History of Act 23

Pursuant to his constitutional authority, the Governor issued a call for a special session of the Legislature to convene February 10, 2008. HB 41, later adopted as Act 23, was considered in that session. That was the very first legislative session during the current governor's first term. Also, it was the first legislative session for 58 members of the House and seven members of the Senate. Some 172 bills were introduced and considered during that 16 day special session.

The title to HB 41 does not explicitly say that it would transfer the adjudicatory function of the Board of Ethics to administrative law judges nor does it describe the resulting relationship of the Board to the administrative law judges. Accordingly, someone reading the title only may not have immediately perceived the dramatic changes H B 41 would bring about.

Reports from prior Board members indicate that neither the Governor's representatives nor the Legislative leaders conferred with them prior to the introduction of HB 41 to ascertain their opinions or suggestions to how to address the problem inherent in commingling of investigation of allegations, filing of charges, prosecution of charges, and adjudication of charges under one board and its staff. Records indicate that HB 41 was introduced in the House of Representatives and was provisionally referred to the Committee on House and Governmental Affairs on Saturday, February 9, 2008. The Legislature convened on Sunday, February 10; the bill was heard in the first committee on Tuesday, February 12; and was finally passed when each house adopted the conference committee report on HB 41.

There were numerous sets of committee and floor amendments proposed in the House and in the Senate. However, it is clear from the legislative history of HB 41 that the initial and consistent intent of the bill's authors was to transfer the adjudicatory power from the Board of Ethics to the administrative law judges in the Division of Administrative Law. That produced a most unusual result: the Board of Ethics, the ethics body which is mandated by the Constitution to administer the code of ethics, is now a prosecutorial staff that appears in a subservient role before administrative law judges whose status is that of state employees.

4. Discussion of the Legal Problems Caused by Act 23 in the Processes for Obtaining Appeals and Supervisory Writs

a. Panel of Administrative Law Judges Is Not a Board Who's Decisions May Be Appealed or Reviewed through a Supervisory Writ

Some may argue that the panel of administrative law judges established by Act 23 is a "board" within the meaning of Article 10, Section 21. That argument is not supported by the text of the constitutional provision nor the legislative history. There are numerous classifications or categories of officials and employees that the legislature might have carved out and placed under the jurisdiction of a single board of ethics, thereby allowing for the possibility of multiple boards.

The constitution provides that "the code shall be administered by one or more boards." That provision allows the Legislature to create a board for each of the following classifications of public servants or employees: (1) state level: members of the legislature only, members of the executive branch elected officials only, executive branch appointed officials only, public employees only, and (2) local level: elected officials only, appointed officials only, or public employees only.

It is important to note that since 1996, Louisiana has had only one Code of Ethics that applies to all elected officials and employees of the state and its political subdivisions (the Ethics Program). Also, Louisiana has had a single board, the Board of Ethics, to administer that code. Additionally, it should be noted that the Constitution contemplates that the ethics program "shall be administered" by a board of ethics.

Since 1974, the Louisiana Constitution has required appeals be from a decision of a board, meaning a board of ethics. See La. Const. Art. 10, Sec.21. That section also requires the Legislature to "provide for the method of appeal." R.S. 42:1142A entitled "Appeals" currently provides that any public servant or private party who is aggrieved by a decision of the Board of Ethics "may appeal" that decision to the Court of Appeal, First Circuit.⁸ The legislature, the

⁸Curiously, R. S. 42:1142E provides: "A decision of the Ethics Adjudicatory Board or a panel thereof may be appealed under this Section in the same manner as a decision of the Board of Ethics." And, R. S. 42:1142A continues to provide for appeals from decisions of the Board of Ethics to the Court of Appeal, First Circuit. Thus, Act 23 created conflicting methods for an appeal of an ethics decision. This point will be discussed later herein.

Board of Ethics and the general public have always understood that the Board of Ethics (or its predecessors) was that board whose decisions could be appealed.

Apparently recognizing that appeals may be constitutionally taken from the existing Board of Ethics only, an amendment was added to the original HB 41 to require that decisions of the administrative law judges "flow" through the Board of Ethics. Act 23 enacted R. S. 42:1141C.(5) to provide that if the administrative law judges determine that there has been a violation of a law under the jurisdiction of the Board of Ethics, then the latter "shall ... issue a decision adopting the determination of the ethics adjudicatory panel". (Emphasis added). That was an apparent attempt to transform decisions of the administrative law judges into "agency decisions" of the Board of Ethics from which an appeal to the Court of Appeal, First Circuit could be taken.⁹ If that were in fact the legal result, it would fulfill the constitutional requirement for vesting the Court of Appeal, First Circuit, with appellate jurisdiction. However, under Act 23, there is never a decision of the Board of Ethics from which an appeal may be taken.

b. The Subject Text in R. S. 42:1141C(5) Is either Nugatory or Unconstitutional.

The subject text in R. S.42:1141C(5) mandates that the members of the Board shall vote to adopt decisions of the administrative law judges. If the members of the Board, all public officials who have taken an oath of office, vote pursuant to this mandate, it is obvious that the result is not a decision of the Board. Instead, the decision remains what it was initially, a decision of the administrative law judges.

Any review of a determination by an administrative body certainly calls for the exercise of some discretion. Yet this provision of law would mandate a favorable vote by the members of the Board of Ethics approving the decision of the administrative law judges. Clearly, an informed and duly conscientious Board membership can be expected to inquire what discretion they have in such instances. On its face, the statute disallows any discretion. If a Board member disagrees

⁹ La. Const. Art. 10, Sec. 21 provides in relevant part: "Decisions of a board (of ethics) shall be appealable, and the legislature shall provide the method of appeal." (brackets added) R.S 42: 1142 provides in pertinent part: "Whenever action is taken against any public servant or person by the board or panel or by an agency head by order of the board or panel, or whenever any public servant or person is aggrieved by any action taken by the board or panel, he may appeal therefrom to the Court of Appeal, First Circuit, if application to the board is made within thirty days after the decision of the board becomes final. The Court of Appeal, First Circuit, shall promulgate rules of procedure to be followed in taking and lodging such appeals. All of these references to "board" are references to decisions of the board of Ethics. Rule 3-1.1 of the Uniform Rules of the Courts of Appeal provides for appeals "from a final decision of any administrative body." It is well established in field of administrative that only "agency decisions" are appealable.

with the decision of the administrative law judges, he may violate his conscience and vote to adopt. Or, he may follow his conscience and either vote against a motion to adopt or abstain from voting. Such votes against adoption or abstentions from voting can easily deprive the Board of the necessary votes to take any action on the decisions of the administrative law judges..

The effort to remove the inherent discretionary authority of an administrative or quasi-judicial board and mandating members thereof to cast their vote in a certain manner is entirely foreign to law. The Board of Ethics, its legal staff, and interested members of the public are not, after reasonable research, aware of any precedent or legal authority whatsoever for such a proposition. Because this subject text of Act 23 does not have and cannot have any legal efficacy, it is a *nugatory* law.¹⁰

Because the respondent may have no right of appeal in such cases, the appellate court would likely convert any order of appeal into an application for a supervisory writ seeking to enjoin any adverse action of the administrative law judges until the Legislature addresses this anomaly in the law. In ordering this remedy, it is probable that the appellate court would also declare R. S. 42:1141C(5) either nugatory or unconstitutional.

c. Act 23 Denies the Board of Ethics Any Right of Appeal from a Decision of the Administrative Law Judges

Act 23 places the adjudication of ethics charges in the Division of Administrative Law. All proceedings in that division are conducted in accordance with the La. Administrative Procedures Act, R. S. 49: 992, et seq. Sec. 992 (3) thereof provides:

Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency. However, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter. (Emphasis added)

Although the Board of Ethics is a party before the administrative law judges, the foregoing prohibits its appeal of any adverse decision by the administrative law judges.

¹⁰ See Black's Law Dictionary, Fifth Edition, 1979: "Nugatory. Futile; ineffectual; invalid; destitute of constraining force or vitality."

Also, Act 23 provides that if the administrative law judges determine that there has been no violation of any law under the jurisdiction of the Board of Ethics, the latter "shall close the file". In such an instance, if the Board of Ethics would in fact vote to close the file, it would in effect be waiving any right of appeal, even if R. S. 49: 992(3) did not apply, to test on behalf of the public the correctness of the decision of the administrative law judges.¹¹ That is especially troublesome when the Board of Ethics has already established precedent on the merits of a case to the contrary or if the Board of Ethics has issued one or more advisory opinions which are clearly contrary to the determination of the administrative law judges.

d. Review of Interlocutory Decisions of Administrative Law Judges

Another troublesome and unchartered area is the question of what supervisory relief from the courts does the respondent have before the administrative law judges when he disagrees with an interlocutory ruling of the administrative law judges? Act 23 does not address this issue. Does the respondent have a right of appeal to or review by the Board of Ethics? Does the respondent have a right to seek supervisory writs from the appellate court? All of these unanswered questions are embedded in Act 23.

e. Act 23 Provides Conflicting Rights of Appeal for Aggrieved Parties

Since the various acts relating to ethics procedures that were adopted in the First Extraordinary Session and the Regular Session of 2008, there are now two statutes concerning the right of appeal. R.S. 42:1141A and E. R.S.42:1141A was not changed in pertinent respects:

A. Whenever action is taken against any public servant or person by the board or panel or by an agency head by order of the board or panel, or whenever any public servant or person is aggrieved by any action taken by the board or panel, he may appeal there from to the Court of Appeal, First Circuit, if application to the board is made within thirty days after the decision of the board becomes final. Any refusal by the board or panel to issue a declaratory opinion or any preliminary, procedural, or intermediate action or ruling by the board or panel is subject to the supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana. The Court of Appeal, First Circuit,

¹¹Some have argued that this result is the same in instances where an administrative law judge renders a decision adverse to a regulatory department of the State. That should not be persuasive because the Board of Ethics is a disciplinary body, not a regulatory department..

shall promulgate rules of procedure to be followed in taking and lodging such appeals.

Presumably the text includes the action of the Board in adopting the decision of the administrative law judges pursuant to R.S.42:1141C(5). However, R.S.42:992(3) would preclude such an appeal.

On the other hand, R.S.42:1141B, which is new law enacted by Act 23, provides:

“A decision of the Ethics Adjudicatory Board or a panel thereof may be appealed under this Section in the same manner as a decision of the Board of Ethics.”

The question arises as to whether this language intends that a party may appeal the same decision twice: first, the decision of the administrative law judges and secondly, the decision of the Board of Ethics. The potential conflicts posed by the various appeal and writ provisions of Act 23 and, left unanswered in the act, are readily apparent.

5. The Problems Inherent In Having Two Ethics Bodies Within One Ethics Program

Sec. 23 places two ethics bodies within one Ethics Administration Program, one a constitutionally based Board of Ethics and the other a statutorily created panel of administrative law judges. The two "board" system now in place is fraught with conflicts. The intersection of the powers of the two "boards" reveals the conflicts.

Under Act 23, “an ethics adjudicatory panel shall determine whether a violation of any provision of law within the jurisdiction of the Board has occurred.” See R.S. 42:1141C (4) (d) (ii). When the ethics adjudicatory panel determines no violation of law has occurred, “the Board of Ethics shall close its file on the charges.” See R.S. 42:1141C (4) (e). When the ethics adjudicatory panel determines a violation of law has occurred, “the Board of Ethics shall . . . issue a decision adopting the determination of the ethics adjudicatory panel.” R.S. 1141C. These are troublesome provisions.

In the end, one must inquire about the workability of the Ethics Program if a majority of the Board of Ethics votes against adoption of the decision of the panel of administrative law judges or abstains from voting on that issue. It does not appear that a court would issue a mandamus ordering the members of the Board of Ethics to vote to adopt a determination of the administrative law judges. Similarly, the Board of Ethics may in good conscience believe that it cannot order that the determination of the panel of administrative law judges be enforced. That of

course raises issues of respondents' rights and the public interest in the orderly administration of the Ethics Program.

6. The Qualifications of Administrative Law Judges Do Not Meet the Requirements of Article 10, Section 21

Article 10, Section 21 requires that the members of a board of ethics must be composed of persons meeting qualifications and having terms of office fixed by the Legislature. These requirements envision persons meeting specific qualifications set by law and having specific terms of office fixed by law before being selected or appointed to serve as a members of the Board of Ethics. No special qualifications, terms of office, and no unique prohibitions against certain conduct¹² have been specifically established for administrative law judges.¹³ Their names are “drawn from a hat” to determine which shall serve as members of the panel of administrative law judges.

They are not elected by Legislature or appointed by the Governor as is the case for members of the Board of Ethics. Nor are they nominated by the presidents of the private colleges and universities of the state as is the case for members of the Board of Ethics. Neither are they employed on a demographic basis.

The qualifications of the administrative law judges are not unique. In fact, the administrative law judges are public employees in the Department of Civil Service. See R. S. 42:994 B. They are not public officials. On the other hand, members of the Board of Ethics are public officials.¹⁴ As such, they are required under R. S. 42:141 to take an oath of office. The administrative law judges take no oath of office; they are not confirmed by the Senate as are the seven gubernatorial appointees to the Board of Ethics. And two other persons are elected to the Board of Ethics by the House of Representatives and two others by the Senate. All persons elected or appointed to the Board of Ethics must first be nominated by the presidents of the independent colleges and universities located in Louisiana. Thus there is a vast difference between the members of the Board of Ethics and administrative law judges.

¹² See for example R.S.42:1132B(4)(a) setting forth several restrictions on actions of members of the Board of Ethics.

¹³ R.S. 49:994 A states that their qualifications to serve are: "(1) An administrative law judge shall be a resident of Louisiana, (2) An administrative law judge shall be licensed to practice law in Louisiana; (3) An administrative law judge shall have been engaged in the actual practice of law for at least five years prior to his appointment."

¹⁴ Public officials are those persons who hold public office. In R. S. 42: 1 "public office" is defined as any state or local office, elective or appointed, as well as a "position as a member on a board or commission."

The intended use of administrative law judges is to adjudicate disputes arising within the regulatory agencies of the State. The Board of Ethics is not a regulatory body. It is a disciplinary body much like the Louisiana Attorney Disciplinary Board and the Louisiana Judiciary Commission, each charged with the enforcement of a code of conduct. The broad experience of the members of the Board of Ethics is more suited to discharge the responsibilities of the Board over the Governor, the Speaker of the House, the President of the Senate, other legislators, and numerous state and local elected officials who may be called as respondents on serious questions of ethical conduct and even members of the judiciary when called upon to respond to questions of compliance with Campaign Finance Laws.

7. The One Year Prescriptive Period in Act 23 May Have Severe Consequences Upon the Board's Enforcement of the Code

Prior to the adoption of Act 23, there were two statutory time period limitations that applied to enforcement actions of the Board of Ethics. These were found in R. S. 42:1163:

Sec.1163. Prescription

No action to enforce any provision of this Chapter shall be commenced after the expiration of two years following the discovery of the occurrence of the alleged violation, or four years after the occurrence of the alleged violation, whichever period is shorter.

Act 23 introduced a new and shorter prescriptive period codified as R.S.42:1141C(3)(c):

If the board does not issue charges within one year from the date upon which a sworn complaint is received or, if no sworn complaint was received, within one year from the date the board voted to consider the matter, the matter shall be dismissed.

The object or topic of prescription was not included in the call of the Governor for a special session or in the title of the original bill (HB 41), the engrossed bill, the re-engrossed bill or the enrolled bill and for this reason may be invalid under Article 3, Section 15 of 1974 Constitution mandating that each bill shall contain but one object and that the title of a bill shall be indicative of its object. Also, a review of the relevant committee hearings indicates little or no discussion of the one year prescriptive period and its potential adverse impact upon the Board's enforcement of the Code of Ethics. For example, is the one year period tolled while the newly required offer of a consent opinion is being made and considered? Finally, it is noteworthy that text adding the shortest period of prescription in the enforcement of the Code of Governmental

Ethics was not placed in the same section of the Revised Statutes that already contained the two longstanding prescriptive periods of two and four years.

There is a further question of interpretation: does the shorter one year period impliedly repeal the two and four year periods? If so, is the repeal partial or complete? If applied as written, it appears that Act 23 will shorten the prescription period in most, if not all, complaints considered by the Board for investigation and possible filing of charges. The two and four year prescriptive periods, although remaining on the books, may have been impliedly repealed.

Under Act 23's one year prescriptive period, the Board's investigators and supervising attorneys have only one year, from the receipt of a sworn complaint or from the date the Board votes to investigate, to issue charges or the matter "shall be dismissed". For many of the complaints alleging violations of the Code of Governmental Ethics, a one year period to investigate and decide whether to file charges may not be harmful. Generally, most persons charged with low profile or simple violations usually provide statements and relevant documents without requiring the Board's staff to utilize judicial means to force production of relevant evidence. But a one year period is not adequate for high profile, more complex matters in which the persons under investigation decline to voluntarily give statements provide documents or inform the investigators where relevant evidence may be found. The latter factual scenarios are not theoretical, some have already been encountered.

8. Recommendations

In view of the numerous problems imposed by Act 23 upon Louisiana's Ethics Administration Program, the Board of Ethics respectfully and earnestly recommends that the following actions be taken:

1) The Governor, the Speaker of the House and the President of the Senate in a joint letter to the President of the Louisiana Law Institute request that a special committee be formed to draft legislation to resolve various legislative issues that directly affect the administration of the Code of Ethics.

2) The Law Institute committee would include but not be limited to representatives from the Office of the Governor, several members from the House and Senate leadership, representatives of the board of Ethics, representatives of non-partisan, public interest organizations, and an appropriate number of members (professors of law, judges and practicing attorneys) of the Council of the Louisiana State Law Institute.

3) The Law Institute committee would perform the appropriate research to determine the model way to organize and fashion an impartial board to provide for a rational, workable and constitutional allocation of the responsibilities for investigating complaints, deciding when to file charges, prosecuting charges, and adjudication of charges, all necessary to a fair and impartial enforcement of the Code of Governmental Ethics.¹⁵

4) The recommended draft legislation would:

- a) clearly delineate and separate the functions of investigation, prosecution, fact finding and adjudication so as to ensure fundamental fairness and afford due process to all persons charged with violations of the public ethics laws,
- b) restore the authority of the Board of Ethics to adjudicate charges brought by an ethics prosecuting counsel who is independent of the Board of Ethics, and
- c) resolve the issues related to appeal methodology and appropriate prescriptive periods, together with appropriate tolling of the period for reasons beyond the control of the ethics prosecuting counsel.

¹⁵ Although, there was much criticism in the media following the first special session of the legislature in early 2008 concerning the "clear and convincing" evidence standard required to find a violation of the Code of Ethics, the Board is satisfied that this standard is the same as that employed by the Louisiana Judiciary Commission and Louisiana State Bar Association attorney disciplinary system. Consequently, it appears appropriate for a disciplinary system with power and authority to enforce a code of ethics applicable to the highest ranking officials of the Executive and Legislative branches of government to utilize the same evidentiary standard.