

# ETHICS REFORM IN NEW ORLEANS: PROGRESS—AND PROBLEMS TEN YEARS POST-KATRINA

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*“You will know them by their fruits.”<sup>1</sup>*

Ten years ago, Hurricane Katrina was the catalyst that precipitated historic changes in New Orleans city government, and in the storm’s aftermath, unprecedented ethics reforms strengthened the systems safeguarding of public integrity.<sup>2</sup> New Orleans city government has not instinctively installed watchdogs to oversee its own activities, but Katrina unleashed a tsunami of reform. The press, public, and prosecutors collectively fueled post-Katrina ethics reform through civic sector engagement.<sup>3</sup>

Overwhelming public and political support<sup>4</sup> empowered

1. Matthew 7:16 in the New King James version of The Bible suggests how to distinguish true prophets from false prophets—by their “fruits,” by focusing on their works rather than their words. A modern American idiom expresses the same concept: “Actions speak louder than words.” Our local ethics bodies should be evaluated in this same way—not by their promises, but by their productivity.

2. During 1994–95, fully ten years before Katrina, New Orleans accomplished the first comprehensive revision of its 1954 home rule charter by engaging in a lengthy public process that secured voter approval for extensive amendments to the city’s organic law. A home rule charter is the equivalent of a municipality’s “constitution.” See *Home Rule Charter*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A local government’s organizational plan or framework, analogous to a constitution, drawn by the municipality itself and adopted by popular vote of the citizenry.”). The revised home rule charter that took effect on January 1, 1996, *authorized* an Office of Inspector General (OIG), *mandated* creation of an Ethics Review Board (ERB), and *required* competitive selection of professional services contractors (e.g., lawyers, accountants, architects, and engineers). Despite these new requirements, “Ten years after New Orleans’ 1994–95 home rule charter revision process, the city still had no ethics review board, no office of inspector general, and no reform in procurement of professional services. Ten years of no progress—and no progress in sight—provides us with a good test case: We must credit Katrina as the catalyst . . . .” David A. Marcello, *Systemic Ethics Reform in Katrina’s Aftermath* in RESILIENCE AND OPPORTUNITY: LESSONS FROM THE U.S. GULF COAST AFTER KATRINA AND RITA 82, 91–92 (Amy Liu et al. eds, Brookings Institution Press 2011).

3. See Marcello, *supra* note 2, at 92 (attributing post-Katrina ethics reform to “the synergy arising out of high-profile prosecutions, press coverage, civic activism, and the political upheaval caused by an environmental catastrophe”).

4. Home rule charter amendments were overwhelmingly approved by voters,

three new ethics entities:

- The Office of Inspector General (OIG) uses audits and investigations to fight fraud, waste, abuse, and corruption.<sup>5</sup>
- The Office of Independent Police Monitor (OIPM) monitors the New Orleans Police Department (NOPD) to identify problems, analyze data, and suggest solutions.<sup>6</sup>
- The Ethics Review Board (ERB) is responsible for enforcing the city's ethics code and also safeguards the independence of local ethics entities by periodically conducting a national search and hiring a new inspector general.<sup>7</sup>

The OIG and OIPM function only through oversight; they can highlight poor performance and recommend improvements but cannot implement changes. Of the three local ethics entities, only the ERB enjoys the power to punish misconduct.

The environmental catastrophe that provoked ethics reform wrote a unique chapter in New Orleans' history, but the city's experiences with these three new ethics entities during the post-Katrina decade (2005–2015) were not unique; they offer valuable lessons for other municipalities. For example, the OIG-OIPM relationship demonstrated that structural design flaws at the outset may surface later as operational problems; and the ERB illustrated that even well designed systems can be poorly implemented.

This Article adopts an operational metric, subjecting each of the three local ethics entities to this test: "How did they perform in practice?" The next two sections deal briefly with OIG and OIPM performance; the Article then delves deeply into the ERB's troubling track record during 2010–2015. The concluding section makes recommendations for improvement among all three ethics

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and enabling ordinances were generally approved unanimously by the City Council and signed by the mayor. *See Orleans Charter*, TIMES-PICAYUNE, Nov. 19, 1995, at A18.

5. *See* NEW ORLEANS, LA., HOME RULE CHARTER § 9-401(2) (2010); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(2) (1994).

6. *See* NEW ORLEANS, LA., HOME RULE CHARTER § 9-401(2) (2010); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1121(3), (10) (1994).

7. *See* NEW ORLEANS, LA., HOME RULE CHARTER § 9-402(1) (2010); NEW ORLEANS, LA., CODE OF ORDINANCES §§ 2-719(1) (2015) (establishing the Ethics Review Board), 2-1120(3)(a) (2012) (establishing the Office of Inspector General).

entities.

### I. OFFICE OF INSPECTOR GENERAL

The first Inspector General (IG), Robert Cerasoli, addressed numerous start-up needs during 2007–2009—winning City Council budget support, finding office space and hiring staff, securing local and state legislative reforms, and building sufficient public support to win voter approval of home rule charter changes that assured permanent funding for the three ethics entities.<sup>8</sup>

The second IG, Ed Quatrevaux, took over in October 2009.<sup>9</sup> Under his leadership, the OIG demonstrated impressive productivity: 61 reports, 15 follow-up reports, 30 public letters, and an estimated savings of \$57.9 million for city government.<sup>10</sup> Collaboration with federal investigators yielded indictments and multiple high-profile convictions during 2010–2014.<sup>11</sup> The OIG's own investigations resulted in the suspension or dismissal of numerous city employees for misconduct.<sup>12</sup> OIG findings in draft

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8. See Marcello, *supra* note 2, at 84–85.

9. *Meet the Inspector General*, NEW ORLEANS OFF. OF INSPECTOR GEN., <http://www.nolaoig.gov/about/meet> (last visited Sept. 19, 2016).

10. See 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 2 (2015), available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf).

11. See 2010 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1, 4 (2011) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2010\\_Annual\\_Report\\_FINAL.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2010_Annual_Report_FINAL.pdf) (outlining federal proceedings that produced two guilty pleas in 2010—including Technology Chief, Greg Meffert); see also 2011 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1 (2012) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2011\\_Annual\\_Report\\_120314\\_Final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2011_Annual_Report_120314_Final.pdf) (outlining the conviction of Mark St. Pierre in 2011); 2012 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1 (2013) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2012\\_Annual\\_Report\\_130124\\_FINALr.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2012_Annual_Report_130124_FINALr.pdf) (outlining eleven indictments and eleven convictions in 2012); 2013 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1 (2014) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2013\\_Annual\\_Report\\_final\\_140303.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2013_Annual_Report_final_140303.pdf) (outlining seven indictments and seven convictions in 2013); 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1 (2015) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf) (outlining ten indictments and three convictions in 2014). Among those convicted in 2014 was ex-Mayor C. Ray Nagin, Jr., who was found guilty on twenty out of twenty-one counts by a federal jury. Matt Smith & Deanna Hackney, *Ex-New Orleans Mayor Ray Nagin guilty after courtroom 'belly flop'*, CNN, (Feb. 14, 2014, 9:38 AM), <http://www.cnn.com/2014/02/12/justice/louisiana-nagin-convicted/>.

12. See 2010–2014 ANNUAL REPORTS, *supra* note 11. OIG actions led to the termination or suspension of seventeen city employees in 2012; nine in 2013; and thirteen in 2014. During this three-year period, the OIG referred only three matters

reports were sustained overwhelmingly in final reports,<sup>13</sup> and no factual errors or material omissions were identified during the 2010–2014 reporting period.<sup>14</sup> To produce such positive outcomes, the OIG maintained a high level of excellence within its workforce.<sup>15</sup>

Annual Quality Assurance Review Advisory Committee<sup>16</sup> reports praised the OIG’s “extraordinarily productive” and “outstanding” record of “very effective and timely interventions.”<sup>17</sup> According to the committee, the OIG’s work was “taken quite seriously”; four of the six entities reviewed by the

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to the Judiciary Commission and one to the state board of ethics. But the ERB relied heavily on referrals to avoid its investigative and disciplinary responsibilities. *See, infra*, Section III.

13. *See* OIG annual reports in which final findings sustained draft findings at rates of 100% in 2010 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 7, available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2010\\_Annual\\_Report\\_FINAL.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2010_Annual_Report_FINAL.pdf); 92% in 2011 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 8, available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2011\\_Annual\\_Report\\_120314\\_Final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2011_Annual_Report_120314_Final.pdf); 94% in 2012 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9, available at <http://www.nolaoig.gov/records/annual>; 97% in 2013 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9, available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2012\\_Annual\\_Report\\_130124\\_FINALr.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2012_Annual_Report_130124_FINALr.pdf); and 93% in 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 7, available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf).

14. *See id.*

15. *See* OIG annual reports for percentages of professional staff with advanced degrees, reporting 68% in 2010 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 7 (2011) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2010\\_Annual\\_Report\\_FINAL.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2010_Annual_Report_FINAL.pdf); 82% in 2011 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 7 (2012) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2011\\_Annual\\_Report\\_120314\\_Final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2011_Annual_Report_120314_Final.pdf); 88% in 2012 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 8 (2013) available at <http://www.nolaoig.gov/records/annual>; 87% in 2013 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9, available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2013\\_Annual\\_Report\\_final\\_140303.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2013_Annual_Report_final_140303.pdf); and 89% in 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9 (2015) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf). Furthermore, staff successfully met continuing professional education requirements (95% in 2011 and 100% for each of the other four years) and the majority of audit/investigative staff were nationally certified (100% in 2010; 93% in 2011; 92% in 2012; 100% in 2013; and 100% in 2014). *See id.*

16. *See* NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(16)(a) (2012) (regarding “[e]xternal review of the office of inspector general”).

17. *See* 2011 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 5 (2012) available at <http://www.nolaoig.gov/files/qualityassurance/QAR%20Report%20for%202011.pdf>; 2012 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 1, 21 (2013) available at [http://www.nolaoig.gov/images/reports/External\\_Reviews/QAR\\_Report\\_-\\_2012.pdf](http://www.nolaoig.gov/images/reports/External_Reviews/QAR_Report_-_2012.pdf).

OIG showed “virtually complete compliance” with OIG recommendations.<sup>18</sup> The advisory committee commended the OIG for being “data-driven in its approach,” which “furthers the objectivity” of its analysis.<sup>19</sup> The committee also “appreciated the brevity” and “clarity” of OIG reports.<sup>20</sup> Overall, the committee issued a “very favorable assessment” of the OIG’s work.<sup>21</sup>

These excellent performance data, the dollars saved, the advisory committee’s glowing evaluation—all taken together do not adequately assess the OIG’s beneficial impact. Its other significant achievements during 2010–2015 included a national search and exemplary public process for selecting the independent police monitor;<sup>22</sup> securing local<sup>23</sup> and state

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18. See 2012 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 1 21 (2013), available at [http://www.nolaoig.gov/images/reports/External\\_Reviews/QAR\\_Report\\_-\\_2012.pdf](http://www.nolaoig.gov/images/reports/External_Reviews/QAR_Report_-_2012.pdf). The “beauty” in OIG recommendations often exists mainly “in the eye of the beholder”—a factor beyond OIG control. Data from the 2010 mayoral transition year are instructive: the outgoing Nagin administration accepted only 40% of the OIG’s recommendations, while the incoming Landrieu administration accepted 94% of its recommendations. See 2010 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 7 (2011) available at <http://www.nolaoig.gov/records/annual>. In the four years thereafter, OIG Annual Reports indicated that recommendations were accepted at declining rates, signaling a steadily decreasing enthusiasm for OIG suggestions in the Landrieu administration. See 2011 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 8 (2012) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2011\\_Annual\\_Report\\_120314\\_Final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2011_Annual_Report_120314_Final.pdf) (reporting an acceptance rate of 86% in 2011); 2012 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9 (2013) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2012\\_Annual\\_Report\\_130124\\_FINALr.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2012_Annual_Report_130124_FINALr.pdf) (reporting an acceptance rate of 82% in 2012); 2013 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9 (2014) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2013\\_Annual\\_Report\\_final\\_140303.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2013_Annual_Report_final_140303.pdf) (reporting an acceptance rate of 77% in 2013); 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9 (2015) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf) (reporting an acceptance rate of 72% in 2014).

19. See 2011 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 7 (2012) available at <http://www.nolaoig.gov/files/qualityassurance/QAR%20Report%20for%202011.pdf>.

20. See *id.*; 2012 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 21 (2013) available at [http://www.nolaoig.gov/images/reports/External\\_Reviews/QAR\\_Report\\_-\\_2012.pdf](http://www.nolaoig.gov/images/reports/External_Reviews/QAR_Report_-_2012.pdf).

21. See 2011 QUALITY ASSURANCE REVIEW ADVISORY COMMITTEE: REP. REVIEWING ACTIVITIES 8 (2012) available at <http://www.nolaoig.gov/files/qualityassurance/QAR%20Report%20for%202011.pdf>.

22. See 2011 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 1 (2012) available at [http://www.nolaoig.gov/images/reports/Annual\\_Reports/2011\\_Annual\\_Report\\_120314\\_Final.pdf](http://www.nolaoig.gov/images/reports/Annual_Reports/2011_Annual_Report_120314_Final.pdf).

23. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(10)(n) (2012) (assuring the OIG’s right to attend all city procurement meetings “including

legislative reforms<sup>24</sup> that strengthened its investigative capabilities; and publishing two guides to foster legal compliance and good management among public entities administering city funds.<sup>25</sup> Finally, OIG reports on deficient police practices detonated shock waves of public concern and media coverage about gross inadequacies in sex-crime investigations<sup>26</sup> and the underreporting of rapes and robberies.<sup>27</sup>

The work of an active and well-regarded OIG in Orleans Parish proved contagious in adjacent parishes. Jefferson Parish voters embraced the concept, and St. Tammany's home rule charter revision commission fielded calls for its implementation.<sup>28</sup>

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meetings involving third-party transactions"); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(12)(e) (2012) (requiring city personnel to provide information and documents upon written request from the OIG, specifically providing that "[n]o subpoena is required"); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(20)(b) (2012) (imposing a duty on "every city officer, employee, department, agency, board, commission, public benefit corporation, contractor, subcontractor, and licensee of the city to report to the Office of Inspector General any instance of fraud or abuse").

24. 2010 La. Sess. Law Serv. No. 600 (West) (codified at La. Stat. Ann. § 44:4.1(B)(18) (exempting from disclosure under the Public Records Act confidential documents of local ethics entities, such as the OIG, ERB, or OIPM, enabling them to conduct private investigations without impugning the integrity or reputation of individuals who are under investigation because of unproven complaints or allegations)); 2012 La. Sess. Law Serv. No. 838 (West) (codified at La. Stat. Ann. §§ 33:9613(A)(3), 33:9614(B)-(C), 33:9613(A)(4), 33:9614(D)-(E)) (strengthening the OIG's subpoena power and the privileged status of documents held by local ethics entities)).

25. See MODEL BOARD MANUAL & MODEL ADMINISTRATIVE PROCEDURES: GUIDE FOR BOARDS, COMMISSIONS, AND PUBLIC BENEFIT CORPORATIONS, available at [http://www.nolaig.gov/index.php?option=com\\_mtree&task=att\\_download&link\\_id=55&cf\\_id=37](http://www.nolaig.gov/index.php?option=com_mtree&task=att_download&link_id=55&cf_id=37) (containing the Model Board Manual), [http://www.nolaig.gov/index.php?option=com\\_mtree&task=att\\_download&link\\_id=39&cf\\_id=37](http://www.nolaig.gov/index.php?option=com_mtree&task=att_download&link_id=39&cf_id=37) (containing the Model Administrative Procedures).

26. See NEW ORLEANS, LA., OFF. OF INSPECTOR GEN., REP. OF INQUIRY INTO DOCUMENTATION OF SEX CRIME INVESTIGATION BY FIVE DETECTIVES IN THE SPECIAL VICTIMS SEC. OF THE NEW ORLEANS POLICE DEPT 1 (2014) available at [http://media.nola.com/crime\\_impact/other/Sex\\_crimes\\_audit\\_NOPD.pdf](http://media.nola.com/crime_impact/other/Sex_crimes_audit_NOPD.pdf) (revealing that five detectives in the sex crimes unit submitted reports documenting their investigative work in only 14% of cases assigned to them).

27. See 2014 NEW ORLEANS, LA., OFF. OF INSPECTOR GEN. ANN. REP. 9 (2015) available at [http://www.nolaig.gov/images/reports/Annual\\_Reports/2014\\_Annual\\_Report\\_150106\\_final.pdf](http://www.nolaig.gov/images/reports/Annual_Reports/2014_Annual_Report_150106_final.pdf); see also Richard A. Webster, *New Orleans Police Failings Highlight Inspector General's findings in 2014*, TIMES-PICAYUNE (Jan. 7, 2015, 11:35 AM), [http://www.nola.com/politics/index.ssf/2015/01/new\\_orleans\\_police\\_failings\\_hi.html](http://www.nola.com/politics/index.ssf/2015/01/new_orleans_police_failings_hi.html) (noting that performance audits found "that over 40 percent of rapes and 37 percent of robberies were misclassified as miscellaneous, unfounded or dropped to lesser charges").

28. See Robert Rhoden, *Enhanced Audits of St. Tammany Parish Public Bodies Set to Begin*, TIMES-PICAYUNE (Apr. 15, 2015, 11:33 AM), <http://www.nola.com/>

Ed Quatrevaux counseled policymakers in both parishes from the start.

But this exemplary record of performance was blemished by a troubled OIG-OIPM relationship. A months-long independent review of the OIPM concluded that “the Monitor and Inspector General both failed to live up to their professional obligations” and bemoaned “their combined inability to cultivate or sustain a professional, respectful relationship with each other.”<sup>29</sup>

The report was prepared by the Police Assessment Resource Center (PARC).<sup>30</sup> Their \$75,000 contract for professional services was initiated by the IG and awarded without benefit of competitive selection—a gambit that one op-ed commentator characterized as “a little rich from such a stickler for the proprieties of governance, but he said there was only one outfit up to the task.”<sup>31</sup>

The OIG actually tried two rationales to justify this noncompetitive contract—first, by styling it a “cooperative endeavor agreement” and citing § 9-314 of the charter as authority.<sup>32</sup> But the more pertinent charter provision would have been § 6-308(5), which requires competitive selection of *all* professional services contracts in excess of \$15,000.<sup>33</sup> If this “cooperative endeavor” rationale gained legal respectability, it

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politics/index.ssf/2015/04/enhanced\_audits\_of\_st\_tammany.html (noting that St. Tammany Parish ultimately went a different route: “In a split vote in February 2014, the task force recommended the enhanced system of audits rather than [creating] an IG office”).

29. See NEW ORLEANS, LA., POLICE ASSESSMENT RESOURCE CTR.: PEER REV. OF THE NEW ORLEANS OFF. OF INDEP. POLICE MONITOR 44 (2016) [hereinafter PARC REPORT] available at <http://www.documentcloud.org/documents/2727884-PARC-Peer-Review-of-New-Orleans-OIPM-January.html>.

30. *Id.*

31. See James Gill, *When it Comes to New Orleans' Independent Police Monitor 'Independent' is Redefined as 'Subservient,'* NEW ORLEANS ADVOCATE (Oct. 10, 2015, 5:42 AM), [http://www.theadvocate.com/new\\_orleans/opinion/james\\_gill/article\\_626518bb-7642-5156-91bc-b0cc11186ad7.html](http://www.theadvocate.com/new_orleans/opinion/james_gill/article_626518bb-7642-5156-91bc-b0cc11186ad7.html).

32. See Cooperation Endeavor Agreement Between New Orleans & Police Assessment Resource Ctr. 1 (July 15, 2015) (on file in Ethics Documents Depository, <https://drive.google.com/folderview?id=0B1iDQLcXhjDnUEROTIVKbmtGcGs&usp=sharing>) [hereinafter EDD].

33. See NEW ORLEANS, LA., HOME RULE CHARTER § 6-308(5)(b) (2010); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-7 (2012) (setting the competitive selection threshold by ordinance at \$15,000); see also NEW ORLEANS OFFICE OF INSPECTOR GENERAL, REVIEW OF CITY PROCUREMENT DOCUMENTS 4–10, 2013-2014, available at [http://www.nolaoig.gov/index.php?option=com\\_mtree&task=att\\_download&link\\_id=15&cf\\_id=37](http://www.nolaoig.gov/index.php?option=com_mtree&task=att_download&link_id=15&cf_id=37) (establishing the OIG's familiarity with these requirements).

would wholly undermine competitive selection requirements, since every professional services contract could be made “noncompetitive” by the simple expedient of calling it a cooperative endeavor agreement. The OIG should be vigorously opposing, not proposing such a legal argument. As for the OIG’s second, sole-source procurement rationale (“there was only one outfit up to the task”), the surest test is to submit the project to competitive selection and see if more than one submission is responsive.<sup>34</sup>

Whatever its origins, the PARC report criticized both the IG and the IPM, expressing disappointment that they had “engaged in scorched-earth tactics against each other such that coexistence became impossible.”<sup>35</sup>

## II. OFFICE OF INDEPENDENT POLICE MONITOR

The OIPM was established by ordinance in July 2008<sup>36</sup> and charged with analyzing data to detect patterns of misconduct among NOPD officers.<sup>37</sup> The OIPM receives and refers civilian complaints, monitors how they are handled in NOPD internal investigations, and makes recommendations to the superintendent for improved management of complaints and investigations: “The New Orleans City Council created a hybrid police accountability mechanism when it created OIPM—combining elements of a quality and control body focused on misconduct complaints with a systematic, evaluative monitor. As such, OIPM does indeed have a broad charge.”<sup>38</sup> Police Monitor Susan Hutson characterized their role as follows: “We investigate the investigation. That’s what we do. We call those ‘case reviews’ . . . [w]e don’t have investigatory power over normal things. We just don’t.”<sup>39</sup>

The OIPM’s Community-Police Mediation Program (one of

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34. For the OIG’s explanation of both legal arguments, see *Re: Reporting on PARC Contract Procurement* in EDD, *supra* note 32.

35. *Id.*

36. NEW ORLEANS, LA., ORDINANCE CALENDAR NO. 23,146 (July 18, 2008); David Hammer, *N.O. Council Gives Powers to Independent Police Monitor*, TIMES-PICAYUNE, (July 10, 2008, 3:17 PM), [http://blog.nola.com/news\\_impact/print.html?entry=/2008/07/no\\_council\\_creates\\_independent.html](http://blog.nola.com/news_impact/print.html?entry=/2008/07/no_council_creates_independent.html).

37. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1121(3) (2012).

38. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1121(4)–(5), (8), (10) (2012); PARC REPORT, *supra* note 29, at 6–8, 36.

39. See Anitra D. Brown, *Independent*, NEW ORLEANS TRIBUNE, <http://www.theneworleanstribune.com/main/independent/> (last visited Sept. 19, 2016).

the first in the South)<sup>40</sup> allows police officers and community members to discuss their conflictual encounters directly with each other through voluntary, confidential mediation—an attractive alternative to the lengthy internal investigations that often yielded inconclusive results, leaving residents dissatisfied and police officers adversely impacted by complaints (even unsubstantiated complaints) impairing their chances for advancement.<sup>41</sup> By contrast, “a three-year study of police mediation programs in other U.S. cities revealed a 90–100 percent satisfaction rate *from both civilian complainants and police officers* after a mediation session.”<sup>42</sup>

The mediation program launched with a \$100,000 start-up grant from the U.S. Department of Justice.<sup>43</sup> The city’s 2015 budget allocated \$695,259 for the OIPM, which committed \$133,366 from that amount for mediation, but the program’s sustainability is threatened by a lack of assured funding: the principal reason why such mediation programs fail in the U.S. is the lack of adequate public funding.<sup>44</sup>

The OIPM faced organizational challenges from the outset, when it was created as a division of the OIG with no authority to report independently and no funding to call its own. Struggles over funding and independence produced resentment and deep divisions between the two offices and the two individuals who headed them. Their heated exchanges reached the boiling point during 2014–2015, when the police monitor accused the IG of creating a hostile work environment<sup>45</sup> and the IG attempted to

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40. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1121(15) (2012); Sister Alison R. McCrary, CSJ, *Alternative Dispute Resolution: New Orleans’ Community Members and Police Mediate Conflict*, 62 LA. B.J. 212, 213 (2014).

41. See McCrary, *supra* note 40; see also PARC REPORT, *supra* note 29, at 41 (concluding that “establishment and continuance of the New Orleans Community-Police Mediation program is vital to the City of New Orleans”).

42. McCrary, *supra* note 40 (emphasis added).

43. *Id.* (“Its origins may be found in “the Police-Civilian Review Task Force in 2001, the Department of Justice’s Civil Rights Division in 2011, the New Orleans City Ordinance creating the OIPM, and the Memorandum of Understanding between the NOPD and the OIPM.”).

44. *Id.* (“The number one reason around the country for the failure of these programs is the lack of public financing.”).

45. See Minutes of Ethics Review Bd. Meeting, at 2 (July 2014) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2014-07-07-ERB-Minutes.pdf>. As relations between Quatrevaux and Hutson continued to deteriorate in 2014, the ERB hired counsel to conduct an independent investigation of the Monitor’s allegation that the IG had created a hostile work environment. See *id.* The ERB later accepted its contract counsel’s conclusion “that the [IG] has **not** created a hostile work

fire her.<sup>46</sup> Most observers, and even the warring parties, ultimately concluded that a political “divorce” was the inevitable and best solution.<sup>47</sup>

Tensions between the police monitor and inspector general were both personal and institutional: a January 2014 news article characterized their relationship as “chilled to a frosty silence” and suggested that inadequacies in the organizational design of their two offices “may require the City Council to resolve ‘structural problems’ with the relationship.”<sup>48</sup> Little can be done about the personal problems, except to ask civility of both parties and to hope for better relations between subsequent personnel.<sup>49</sup> But the inadequately-planned structural relationship can be reformed. City Council members oversaw OIG-OIPM negotiations during 2015 that will make the two offices independent of each other, if voters approve a November 2016

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environment.” Minutes of Ethics Review Board Meeting, at 2 (Dec. 2014) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/05/2014-12-08-ERB-Minutes.pdf> (emphasis in original).

46. See *New Orleans’ IG, IPM at Odds Over Autonomy*, LA. WKLY. (Oct. 5, 2015), <http://www.louisianaweekly.com/new-orleans-ig-ipm-at-odds-over-autonomy/>; Jim Mustian & Matt Sledge, *New Orleans Inspector General Moves to Fire Independent Police Monitor as They Wage Political Warfare*, NEW ORLEANS ADVOCATE (Sept. 28, 2015, 3:35 AM), <http://theadvocate.com/news/neworleans/neworleansnews/13542629-123/new-orleans-inspector-general-moves>; Jim Mustian & Matt Sledge, *New Orleans Inspector General Ed Quatrevaux Drops Bid to Oust Police Monitor Susan Hutson*, NEW ORLEANS ADVOCATE (Oct. 15, 2015, 7:57 PM), <http://theadvocate.com/news/neworleans/neworleansnews/13706841-148/no-inspector-general-ed-quatrevaux>.

47. See Matt Sledge, *Relationship Between New Orleans Watchdog Agencies Fragile, ‘Divorce’ of Departments Would Need Voter Approval*, NEW ORLEANS ADVOCATE (May 9, 2015, 1:54 PM), <http://theadvocate.com/new/neworleans/neworleansnews/12303285-123/relationship-between-new-orleans-watchdog> (reporting that the OIG and OIPM were discussing “a proposal for a City Charter amendment to remove Hutson’s operation from Quatrevaux’s office”); see also Richard Rainey, *Standoff Continues Between New Orleans Inspector General, Police Monitor Over Independence*, TIMES-PICAYUNE (July 15, 2015, 3:55 PM), [http://www.nola.com/politics/index.ssf/2015/07/quatrevaux-hutson\\_standoff\\_per.html](http://www.nola.com/politics/index.ssf/2015/07/quatrevaux-hutson_standoff_per.html) (reporting the police monitor’s comment: “We need a budgetary separation. We need a legal separation, and we need a physical separation”); see also Minutes of Ethics Review Bd. Meeting (Mar. 2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-03-10-ERB-Minutes.pdf> (reporting the terms of an offer that was under consideration and recorded comments by IG Ed Quatrevaux, who “hoped an amicable solution was possible,” and IPM Susan Hutson, who was “optimistic that they will reach an agreement”).

48. See John Simerman, *Tug of War: New Orleans Watchdogs Battle over Who’s the Boss*, NEW ORLEANS ADVOCATE (Jan. 9, 2014) (on file with Loyola Law Review).

49. See PARC REPORT, *supra* note 29, at 44 (criticizing both parties, expressing disappointment that they had “engaged in scorched-earth tactics against each other such that coexistence became impossible”).

ballot proposition.<sup>50</sup>

### III. ETHICS REVIEW BOARD

The ERB's most important function may be its power to appoint the IG,<sup>51</sup> a function that it capably discharged when selecting IGs Cerasoli and Quatrevaux in 2007 and 2009.<sup>52</sup> The original ERB members<sup>53</sup> also signaled their intention to enforce the city ethics code by adopting ethics enforcement rules<sup>54</sup> and authorizing investigation of ethics complaints.<sup>55</sup> But as its

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50. See 2015 NEW ORLEANS, LA., CITY COUNCIL ANN. REP. 39 (2016), available at <http://nolacitycouncil.com/docs/news/2016/CCAR2015.pdf> (outlining adoption of Ordinance Calendar No. 31,019 to call an election for November 8, 2016, that would amend the Home Rule Charter and apportion dedicated funds among the OIG (.55%), OIPM (.16%), and ERB (.04%), while also establishing operational and financial independence for the OIPM and requiring external evaluation of all three ethics entities).

51. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-1120(3) (2012) (empowering the ERB to appoint the inspector general).

52. See Martha Carr, *Inspector General Chosen for N.O.*, TIMES-PICAYUNE (June 12, 2007, 3:47 PM), [http://blog.nola.com/times-picayune/2007/06/inspector\\_general\\_chosen\\_for\\_n.html](http://blog.nola.com/times-picayune/2007/06/inspector_general_chosen_for_n.html) (announcing selection of Robert Cerasoli as the city's first inspector general); see also Frank Donze, *New Orleans Gets New Inspector General*, TIMES-PICAYUNE (Sept. 3, 2009, 5:05 PM) available at [http://www.nola.com/politics/index.ssf/2009/09/new\\_orleans\\_gets\\_new\\_inspector.html](http://www.nola.com/politics/index.ssf/2009/09/new_orleans_gets_new_inspector.html) (announcing appointment of Ed Quatrevaux as the city's second inspector general).

53. The original ERB members who served during the critical start-up period between 2007 and 2010 were Dean Winston Brown, Ms. Leah Chase, Dr. Beverly Favre, Prof. Kathryn Lorio, Ms. Elizabeth Nalty, Rev. Cornelius Tilton, and Fr. Kevin Wildes, S.J. See Minutes of Ethics Review Bd. Meeting, at 1 (Jan. 2007) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2007-01-26-ERB-Minutes.pdf>. In the interest of full disclosure, it should be noted that the author served as ERB pro-bono counsel during its 2007–2009 start-up period; a full-time compensated general counsel took over attending the meetings in November 2009.

54. See Agenda of Ethics Review Bd. Meeting, item 4 (“Public hearing on Rules”) (Apr. 2008) (on file in EDD, *supra* note 32); Minutes of Ethics Review Bd. Meeting (Apr. 2008) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-04-29-ERB-Minutes.pdf> (amending and approving proposed ERB rules, soliciting public comments, and forwarding them to the City of New Orleans for promulgation, all in accordance with Home Rule Charter § 4-107(3) requiring notice-and-comment rulemaking). When the ERB launched its new website in 2016, it eliminated from the public record all of the agendas from meetings prior to January, 2016 that had been posted previously. All of those deleted agendas are now available in the EDD, *supra* note 32, which has become the sole online source for such information.

55. See Agenda of Ethics Review Bd. Meeting, at item 3 (Aug. 2009) (on file in EDD, *supra* note 32) (describing complaint procedure); see also Agenda of Ethics Review Bd. Meeting, at item 2 (Nov. 2009) (on file in EDD, *supra* note 32) (“Executive Session: Consideration of complaints deemed confidential pursuant to La. R.S. 33:9614”); Minutes of Ethics Review Bd. Meeting, at 1 (Nov. 2009) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2009-11-03-ERB-Minutes.pdf>; Agenda of Ethics Review Bd. Meeting, item 2 (“Executive Session: Consideration of

membership changed, the ERB lost focus on its legal responsibilities and fell distressingly far short of the vigorous ethics enforcement role contemplated in its enabling legislation.

An earlier draft of this Article released in July 2015 generated news coverage about how the ERB had abandoned local ethics enforcement, failed to recommend improvements to the city ethics code, and repeatedly violated transparency principles; how ERB members had failed to file annual income disclosure forms; and how the board was out of compliance with gender and ethnic diversity requirements in the city code.<sup>56</sup> The news coverage elicited immediate pushback from ERB Chair Michael Cowan<sup>57</sup> and former ERB General Counsel Steven Scheckman,<sup>58</sup> and for months thereafter the ERB resisted reform.<sup>59</sup>

In its earlier incarnation, this Article focused principally on the ERB's performance problems and on vitally needed reforms. One year later, it constitutes a commentary about the process of motivating and wresting change from a public body, which seldom comes easily. It documents how the ERB responded between July 2015, when this Article first precipitated a public debate about ERB operations, and August 2016, when the ERB completed more than a year of reaction, resistance, and reform.

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matters deemed confidential pursuant to La. R.S. 42:6.1") (Dec. 2009) (on file in EDD, *supra* note 32) (emphasis added); Minutes of Ethics Review Bd. Meeting, at 1 (Dec. 2009) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2009-12-01-ERB-Minutes.pdf>.

56. See Richard Rainey, *Ethics Report on New Orleans: Lots of Progress Since Katrina, But Long Way to Go*, TIMES-PICAYUNE (July 9, 2015, 1:28 PM), [http://www.nola.com/politics/index.ssf/2015/07/ethics\\_report\\_on\\_new\\_orleans\\_1.html](http://www.nola.com/politics/index.ssf/2015/07/ethics_report_on_new_orleans_1.html).

57. See Gordon Russell & Jacquetta White, *Critic Says New Orleans Ethics Review Board Falling Short of What It Should Be Doing, But Its Chairman Disagrees*, NEW ORLEANS ADVOCATE (July 14, 2015, 10:22 AM), <http://www.theadvocate.com/news/neworleans/neworleansnews/12904178-123/new-orleans-ethics-review-board>; *Critique of Ethics Review Board was Uninformed: Michael Cowan*, TIMES-PICAYUNE (Aug. 19, 2015, 7:00 AM) [http://www.nola.com/politics/index.ssf/2015/08/ethics\\_review\\_board\\_new\\_orlean.html](http://www.nola.com/politics/index.ssf/2015/08/ethics_review_board_new_orlean.html).

58. See Richard Rainey, *Former New Orleans Ethics Board Attorney Responds to Scathing Critique*, TIMES-PICAYUNE (July 15, 2015, 1:56 PM), [http://www.nola.com/politics/index.ssf/2015/07/scathing\\_critic\\_of\\_new\\_orleans.html](http://www.nola.com/politics/index.ssf/2015/07/scathing_critic_of_new_orleans.html).

59. See Charles Maldonado, *City Council to Consider Ordinance that Requires Ethics Board to File Ethics Forms*, LENS (Oct. 22, 2015, 4:56 PM), <http://thelensnola.org/2015/10/22/city-council-to-consider-ordinance-that-requires-ethics-board-to-file-ethics-forms/>. The ERB accepted financial disclosure responsibility and proposed to change its own rules accordingly, after the City Council scheduled consideration of an ordinance that would compel financial disclosure. *See id.*

Ongoing public scrutiny,<sup>60</sup> critical op-ed commentaries,<sup>61</sup> and City Council action<sup>62</sup> ultimately induced the ERB to accept and implement almost all of the recommended reforms, including financial disclosure.<sup>63</sup> Those changes are documented in this Article, which next examines in depth the ERB's most serious operational shortfall—its decision to abandon local ethics enforcement.

#### A. THE ERB ABANDONED LOCAL ETHICS ENFORCEMENT BECAUSE IT LACKED A GOOD UNDERSTANDING OF ITS LEGAL AUTHORITY

The ERB was ill-served by a legal memorandum prepared by its general counsel for a March 2012 strategic planning retreat.<sup>64</sup> The memo's crabbed and miserly view of the ERB's ethics enforcement authority led many members to conclude that the ERB possessed only "limited enforcement responsibilities in

60. The IG's attempt to have the ERB remove IPM Susan Hutson from office in October 2015 focused community attention, as never before, on the ERB and raised questions about its independence from the city's political leadership:

W.C. Johnson, co-chair of Community United for Change and co-host of the local cable-access show "OurStory," said . . . "The Mayor has spent enormous amounts of political capital to shape and form the Ethics Review Board. The Ethics Review Board has, in the past, been a rubber stamp for the Mayor's wishes."

See *New Orleans' IG, IPM at Odds Over Autonomy*, LA. WKLY. (Oct. 5, 2015), <http://www.louisianaweekly.com/new-orleans-ig-ipm-at-odds-over-autonomy/>.

61. See, e.g., James Gill, *New Orleans' Ethics Review Board Members Do Not Think Rules Apply to Them*, NEW ORLEANS ADVOCATE (July 27, 2015, 2:00 PM), <http://www.theadvocate.com/news/opinion/12932302-123/james-gill-ethics-board-has> ("An unethical ethics board is quite a hoot."); David Marcello, *Ethics Review Board Isn't Doing Enough to Enforce Rules*, TIMES-PICAYUNE (Aug. 13, 2015, 12:54 PM), [http://www.nola.com/opinions/index.ssf/2015/08/ethics\\_review\\_board\\_new\\_orlean.html](http://www.nola.com/opinions/index.ssf/2015/08/ethics_review_board_new_orlean.html); David Marcello, *City's Ethics Review Board Needs to Address Its Own Shortcomings*, LENS (Sept. 18, 2015, 6:00 AM), <http://www.thelensnola.org/2015/09/18/citys-ethics-review-board-needs-to-address-its-own-shortcomings/>.

62. See 2015 NEW ORLEANS, LA., CITY COUNCIL ANN. REP. 39 (2016) available at <http://nolacitycouncil.com/docs/news/2016/CCAR2015.pdf> (reporting the adoption of Ordinance Calendar No. 30,968 on November 5, 2015, "[E]xpressly requiring members of the Ethics Review Board to file annual income financial disclosure statements in accordance with the Louisiana Code of Governmental Ethics").

63. See Robert McClendon, *New Orleans Ethics Review Board Members Will Start Disclosing Finances*, TIMES-PICAYUNE (Oct. 22, 2015, 3:12 PM), [http://www.nola.com/politics/index.ssf/2015/10/ethics\\_review\\_board\\_will\\_start.html](http://www.nola.com/politics/index.ssf/2015/10/ethics_review_board_will_start.html) ("Responding to pressure from the public . . . the board announced Thursday that (Oct. 22) it was changing its policy.").

64. See Memorandum from Steven Scheckman, Gen. Counsel to New Orleans Ethics Review Board, at 4–5 (Jan. 2012) [hereinafter Counsel's Memo] (on file in EDD, *supra* note 32). General Counsel Steven Scheckman wrote to the ERB regarding "[t]he New Orleans City Code of Ethics."

connection with the city's ethics code.”<sup>65</sup> On the contrary, the city's constitutional home rule powers provided ample authority for vigorous local ethics enforcement, but because of its poor understanding of the law, the ERB failed to implement the system of dual state-local ethics jurisdiction contemplated in the city's charter.

### 1. THE ERB WAS INADEQUATELY INFORMED ABOUT HOME RULE AUTHORITY AS A CONSTITUTIONAL SOURCE OF SUPPORT FOR LOCAL ETHICS ENFORCEMENT

The general counsel's memorandum that facilitated the ERB's flawed legal understanding asked in bold type if the ERB had authority to impose fines under the state ethics code, and concluded (again in bold type) that “the Louisiana Board of Ethics will not permit the ERB to enforce the Louisiana Code of Governmental Ethics so its provisions are unavailable” for use by the ERB.<sup>66</sup> The memorandum thus boldly asked and answered the wrong question—whether the ERB could impose fines through power derived from the state board of ethics—while failing to appreciate the significance of powerful enabling provisions in both the state constitution and the city's charter. The City Council could by ordinance have empowered the ERB to levy fines, relying simply on its direct exercise of home rule powers and without need of any statutorily derived authority from the state ethics board.

The general counsel's memorandum only briefly noted home rule charter authority for the ERB to impose fines, then focused fruitlessly on two outdated provisions<sup>67</sup> of the city ethics code, asserting that “*the only way* in which the ERB could impose fines is through the State law incorporation clauses” that were “unavailable” to the ERB.<sup>68</sup> But as a constitutionally empowered home rule jurisdiction, the City of New Orleans may go well beyond this limited statutory authority in regulating ethical conduct at the local level of government, as long as it does not

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65. See Memorandum from ERB Education Working Group (Sept. 14, 2012) (on file in EDD, *supra* note 32) (reporting on members' conclusions at the ERB's March 2012 strategic planning retreat).

66. See Counsel's Memo, *supra* note 64.

67. See *id.* (finding that city ordinance §§ 2-716 and 2-717—“civil and criminal penalties”—were of no value to the ERB's ethics enforcement program).

68. See *id.* (emphasis added) (recommending reliance on La. R.S. 33:9612.1, authorizing local ethics ordinances to “regulate the same or similar activity as regulated by the provisions of the Code of Governmental Ethics”).

conflict with state law.

Counsel's memorandum never adequately acknowledged the generous legislative power that all home rule cities enjoy under the state constitution.<sup>69</sup> Nor did it acknowledge the enhanced legal protection that New Orleans enjoys because its home rule authority was established before the 1974 constitution was adopted.<sup>70</sup>

New Orleans' home rule charter explicitly directed the City Council to establish an ERB and empower it to enforce the city ethics code by imposing fines: the City Council "shall by ordinance establish an Ethics Review Board and shall authorize it to enforce the provisions of the Code of Ethics," including authority "to impose fines."<sup>71</sup> Counsel's memo need not have accepted as immutable provisions in the city code of ethics that had remained unchanged since its adoption in 1956. The memo could have suggested that the Council pass an ordinance adding a schedule of fines and authorizing the ERB to impose them under municipal home rule powers.

Home rule powers enshrined in the state constitution enabled the City Council to establish local ethics enforcement authority simply by passing an ordinance—a legal possibility never mentioned in the ERB general counsel's memorandum.

## **2. THE ERB WAS INADEQUATELY INFORMED ABOUT DUAL STATE-LOCAL JURISDICTION FOR ETHICS ENFORCEMENT**

The ERB abandoned local ethics enforcement because of its erroneous belief that the state ethics board's jurisdiction overwhelmed any meaningful opportunity for local enforcement,<sup>72</sup> but both New Orleans' home rule charter and its city ethics code

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69. See LA. CONST. ANN. art. VI, §§ 4, 6 (1974) (conferring upon home rule jurisdictions "the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution").

70. See LA. CONST. ANN. art. VI, §§ 4, 6 (1974).

71. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402 (2010).

72. A March 25, 2015 e-mail response to the author's public records request (on file in EDD, *supra* note 32) stated that "the original mission of adjudicating complaints was abandoned" by the ERB, citing "legal research and discussions with the state Ethics Board" as the reason for its decision. Note that the author's public records requests were directed to the ERB, but were referred to and answered by IG Ed Quatrevaux and other personnel in the OIG office, which agreed to staff the ERB during 2015 after its entire staff resigned at the end of 2014. See Marcello-Quatrevaux e-mail exchanges of March 16, 2015 (on file in EDD, *supra* note 32).

clearly contemplated an exercise of dual ethics jurisdiction by the state and city. The home rule charter directed that the city code of ethics “shall incorporate by reference and adopt the provisions of the Louisiana Code of Governmental Ethics and *shall provide for such other, more stringent provisions* as the Council may deem appropriate.”<sup>73</sup>

The city code of ethics also explicitly contemplated dual jurisdiction: “The city code of ethics . . . is intended to *supplement* the provisions of the state code of governmental ethics. In some matters, the city ethics code is intended to be *more restrictive* than the state code of governmental ethics.”<sup>74</sup> These more restrictive matters may be enforced by local ethics bodies.<sup>75</sup>

Louisiana law has long recognized dual jurisdiction between state and local ethics boards: “We find no prohibition from the Parish having their own Code of Conduct and enforcing it. Accordingly, it is possible for the two to have equal but separate jurisdiction that is enforceable by the proper authorities independently of the other.”<sup>76</sup> The state’s ethics administrator concurred with this description of dual jurisdiction: “In summary, the New Orleans Ethics Review Board has authority to enforce provisions of the city code of ethics that are not addressed in the state code, that are more stringent than the state code, or that will not be considered by the state board.”<sup>77</sup>

Ethics enforcement is a limited resource, so a triage system

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73. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402 (2010) (emphasis added).

74. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-774 (emphasis added) (contemplating that, if a local code is more restrictive, its provisions will be enforced; but correspondingly, “If any provisions of the state code of governmental ethics are more restrictive than any provisions contained in the code of ethics for the city, the provisions of the state code of governmental ethics prevail”).

75. Shared state and local jurisdiction is no anomaly: “In some cases, local governments can supplement state law, making requirements that are stricter than state law . . . .” See ROBERT WECHSLER, LOCAL GOVERNMENT ETHICS PROGRAMS: A RESOURCE FOR ETHICS COMMISSION MEMBERS, LOCAL OFFICIALS, ATTORNEYS, JOURNALISTS, AND STUDENTS, AND A MANUAL FOR ETHICS REFORM 71 (2d ed. 2013) available at <http://www.cityethics.org/publicationshttp://www.cityethics.org/files/lgep1-0%20-%20Robert%20Wechsler.pdf>.

76. See *Bodet v. Broussard*, 407 So. 2d 810, 812 (La. App. 4 Cir. 1981) (rejecting an assertion that the state board of ethics had exclusive jurisdiction over ethics enforcement).

77. See e-mail exchange between Kathleen Allen, ethics administrator for the state board of ethics, and author (May 4, 2015) (on file in EDD, *supra* note 32) (confirming after reviewing a legal summary of local ethics jurisdiction that, “I have reviewed and do not see anything wrong with your analysis”).

is useful in prioritizing scarce resources. The home rule charter prioritizes enforcement by prohibiting the ERB “from hearing any alleged violation that constitutes a violation of the State Code of Governmental Ethics *if the Ethics Review Board ascertains that the entity designated by the State to enforce said State Code has considered or is considering the alleged violation.*”<sup>78</sup> Deferral is required only if matters are being *considered* by the state ethics board. But the ERB believed its local ethics enforcement authority was much more limited: “[T]he ERB may only hear complaints of violations of the City’s code that are *not violations* of the state code.”<sup>79</sup>

Counsel’s memorandum analyzed fourteen provisions in the city ethics code<sup>80</sup> and concluded (sometimes grudgingly) that over half were immediately enforceable by the ERB.<sup>81</sup> These enforceable ethics provisions were not trivial pursuits: nonpartisanship and nondiscrimination,<sup>82</sup> freedom from reprisal,<sup>83</sup> public information,<sup>84</sup> prohibited financial interests,<sup>85</sup> political activities,<sup>86</sup> recusal,<sup>87</sup> conflict-of-interest restrictions on leases and concessions and on borrowing from contractors.<sup>88</sup> By declining to exercise its substantial ethics enforcement powers, the ERB rendered these significant, locally-enforceable provisions in the city code of ethics inert.

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78. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-774 (emphasis added).

79. See March 25, 2015 e-mail reply to the author’s public records request in the EDD, *supra* note 32 (emphasis added).

80. See NEW ORLEANS, LA., CODE OF ORDINANCES §§ 2-769–82.

81. See Counsel’s Memo, *supra* note 64 (commenting—in parentheses and quotation marks—on New Orleans Code of Ethics § 2-770 nonpartisanship and nondiscrimination “would appear to be enforceable,” § 2-772 freedom from reprisal and the disclosure of improper acts are “enforceable by the ERB,” § 2-773 matters of public information are “enforceable by the ERB in the sense of imposing a sanction,” § 2-777 prohibited financial interests are “enforceable by the ERB,” § 2-778 leases, concessions restricted are “enforceable by the ERB,” § 2-779 borrowing from, interest in contractors “enforceable by the ERB,” § 2-781 political activities “[supposed to be] otherwise enforceable by the ERB,” and § 2-782 recusal of board members “may be enforceable by the ERB but is also clearly enforceable by the Louisiana Board of Ethics”). See EDD, *supra* note 32, for the complete text of each section followed by pertinent excerpts from counsel’s memo and occasional comments by this author.

82. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-770.

83. See *id.* § 2-772.

84. See *id.* § 2-773.

85. See *id.* § 2-777.

86. See *id.* § 2-781.

87. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-782.

88. See *id.* §§ 2-778–79.

### 3. THE ERB DID NOT INVITE TRANSPARENCY AND PUBLIC PARTICIPATION WHEN IT ABANDONED LOCAL ETHICS ENFORCEMENT

The ERB abandoned local ethics enforcement without inviting public input by conducting its sole strategic planning retreat in March 2012 on a distant shore of Lake Pontchartrain, a drive of forty-five minutes or more away from most ERB constituents.<sup>89</sup> Minutes of the retreat were vague and inconclusive; a half-page of text summarized the day-long meeting and nowhere mentioned possible abandonment of local ethics enforcement.<sup>90</sup>

Before the retreat, consultants conducted interviews and prepared a report that said most ERB members believed they had “some enforcement and adjudication options . . . for those who will not comply with . . . City and State codes of ethics,” adding that “where it is allowed, the ERB *will undertake enforcement action*.”<sup>91</sup> But after the retreat, ERB members abandoned local ethics enforcement, and no such enforcement actions ensued.

### 4. THE ERB FAILED TO DISCHARGE MOST OF ITS CITY CODE AND HOME RULE CHARTER LEGAL RESPONSIBILITIES DURING 2010–2015

New Orleans’ home rule charter confers upon the ERB—and no other—power to enforce the city code of ethics:

The City Council shall authorize the Ethics Review Board [*i*] to establish additional recommendations for the Code of Ethics, [*ii*] to issue advisory opinions, [*iii*] to promulgate rules regarding the interpretation and enforcement of the Code of Ethics, [*iv*] to refer cases for investigation on referral or complaint, [*v*] to retain counsel, and [*vi*] to impose fines.<sup>92</sup>

Items *i-vi* are the muscle and sinew of ethics code enforcement. In 2011, the ERB unanimously adopted a mission statement that embraced all six of these powers enumerated in the home rule charter:

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89. See Minutes of New Orleans Ethics Review Bd. Strategic Planning Retreat (Mar. 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-03-08-ERB-Strategic-Planning-Retreat-Minutes.pdf>.

90. See *id.*

91. See Public Strategies Research Group, Strategic Planning Meeting Summary, at 5 (on file in EDD, *supra* note 32) (emphasis added).

92. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402 (2010).

The Ethics Review Board seeks to uphold and enforce high ethical standards and promote public confidence in the government of the City of New Orleans by overseeing a program of *ethics education*, issuing *advisory opinions*, *promulgating rules* regarding the interpretation and enforcement of the city's Code of Ethics, *proposing revisions* to that code, *referring cases* for investigation on referral or complaint, and *imposing fines*.<sup>93</sup>

After unanimously acknowledging these charter-driven responsibilities in its 2011 mission statement, the ERB thereafter ignored four of its six ethics tasks by proposing no revisions to the city code of ethics, issuing no advisory opinions, promulgating no rules to interpret or enforce the city code of ethics, and imposing no fines.<sup>94</sup>

Instead, the ERB relied all-too-eagerly on its referral powers, avoiding ethics complaints by routinely dismissing them or sending them elsewhere. Of 47 complaints or requests for investigation received during 2009–2013, the ERB closed more than three-fifths as matters “outside the ERB’s jurisdiction or without merit or sufficient corroborating evidence” (29 = 61%); more than a third (16 = 34%) were referred elsewhere (three to the state ethics board; five to the OIG; seven to the OIPM; one to the Louisiana Disciplinary Board); the remaining two (one pending since 2009) were unclear as to disposition.<sup>95</sup> Confidentiality restrictions make complaints hard to track, but none resulted in enforcement proceedings or any public findings

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93. See Minutes of Ethics Review Bd. Meeting (Apr. 2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-04-05-ERB-Minutes.pdf> (emphasis added) (adopting the ERB’s 2011 mission statement). In 2012, the ERB replaced this list of its responsibilities with a more general, less vigorous mission statement: “The Ethics Review Board seeks to uphold and enforce high ethical standards and promote the public’s confidence in the government of the City of New Orleans.” See Public Strategies Group, Strategic Planning Meeting Summary, at 2 (on file in EDD, *supra* note 32). But the responsibilities listed in its 2011 mission statement mirrored home rule charter and city code requirements that all remained legally effective, even after approving the new generic mission statement.

94. See Minutes of Ethics Review Bd. Meeting (Mar. 2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-03-01-ERB-Minutes.pdf> (noting that the chair “requested that Okyeame Haley serve as the point person or conduit on the ERB for updating the ethics laws for the City of New Orleans”). By the time Mr. Haley resigned from the ERB in December 2012, no updates had been recommended nor were any reported thereafter in ERB minutes.

95. See 2013 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 11 (2014) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2013-00-00-ERB-Annual-Report.pdf>.

of either “wrongdoing” or “no wrongdoing.”

According to the ERB’s 2014 annual report, “[T]he Ethics Review Board received eight complaints alleging ethical misconduct. Of the complaints received by the ERB, all were referred to other entities.”<sup>96</sup> In one series of 2014 transactions, the ERB sent three matters to the state ethics board, which accepted jurisdiction in only one, declined enforcement action in another, and returned the third to the ERB because the state board lacked jurisdiction.<sup>97</sup> When asked if the ERB had taken any further action on matters declined by the state board, the answer was “No.”<sup>98</sup> Thus, even when the state board declined jurisdiction, the ERB took no action.

According to its March 2015 response to a public records request, “The mission of the ERB today, aside from receiving OIG reports, is ethics training. The ERB will accept complaints of state ethics code violations but refers all of them.”<sup>99</sup> By so narrowly redefining its role, the ERB transformed itself into a mild-mannered information and referral service.

Two points bear emphasis. First, the ERB’s decision to abandon local ethics enforcement was a policy choice, not legally compelled. The constitutional powers of home rule jurisdictions provided ample opportunity for a vigorous ERB to pursue local ethics enforcement, but the ERB failed to do so. Second, by writing ethics enforcement out of its mission statement, the ERB unilaterally neutered the city ethics code. The home rule charter specifically and exclusively empowers the ERB “to enforce the provisions of the Code of Ethics.”<sup>100</sup> If the ERB declines to enforce the city ethics code, who fills the void?

The charter confers authority for the ERB to *enforce* the city code of ethics, not *repeal* it by refusing to exercise its enforcement powers. This poorly informed decision by the ERB cried out to be reopened and reconsidered with an eye toward reversing it. The ERB must play an active (not a moribund) role in local ethics

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96. See 2014 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 11 (2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2014-00-00-ERB-Annual-Report.pdf>.

97. See May 11, 2015 e-mail reply to the author’s public records request in the EDD, *supra* note 32.

98. See *id.*

99. See March 25, 2015 e-mail reply to the author’s public records request in the EDD, *supra* note 32.

100. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402(1) (2010).

enforcement.

Because the ERB declined to exercise its substantial ethics enforcement powers during 2010–2015, the board accomplished little of consequence on its charter-derived responsibilities.<sup>101</sup> But its abandonment of local ethics enforcement was not the ERB's only operational shortfall. The board's performance also suffered from a lack of compliance with other state and local laws, resulting in the following deficiencies: failure to recommend ethics code improvements; serial violations of “sunshine” laws; refusal to file annual income disclosure statements; a lack of gender and ethnic diversity among ERB members; and an inadequate program of ethics education. We next take up each of these shortcomings in turn.

**B. THE ERB NEGLECTED OPPORTUNITIES TO STRENGTHEN  
ETHICS ENFORCEMENT AND EXPAND ITS AUTHORITY BY  
FAILING TO RECOMMEND ANY REVISIONS TO THE CITY'S CODE  
OF ETHICS**

The home rule charter and city code both expressly invited the ERB to recommend revisions to the city ethics code,<sup>102</sup> which remained substantially unchanged since its adoption in 1956.<sup>103</sup> A sixty-year-old ethics code only modestly amended might seem like a strong reason to recommend improvements, but none were forthcoming—despite an acknowledged need within the ERB to strengthen outdated city ethics provisions.<sup>104</sup>

The ERB knew of its authority to recommend ethics code revisions.<sup>105</sup> The ERB was aware that it had authority under the

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101. See WECHSLER, *supra* note 75, at 68 (“[S]ome ethics programs and bodies are created pursuant to a charter provision. It is important to make sure that charter requirements are followed carefully. Too often, they are ignored.”).

102. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402(1) (2010) (“The City Council shall authorize the Ethics Review Board to *establish additional recommendations* for the Code of Ethics . . . .” (emphasis added)); see also NEW ORLEANS, LA., CODE OF ORDINANCES § 2-719(1) (2015) (“Pursuant to section 9-402 of the Home Rule Charter, the ethics review board may *establish additional recommendations* for the code of ethics . . . .”) (emphasis added)).

103. See generally NEW ORLEANS, LA., CODE OF ORDINANCES §§ 2-766–784.

104. See Minutes of Ethics Review Bd. Meeting (Oct. 2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-10-04-ERB-Minutes.pdf> (where ERB Chair Cornelius Tilton “referenced the recent changes in state statutes pertaining to functions of local ethics entities in Louisiana and intimated *the need to strengthen the ethics provisions* for New Orleans”) (emphasis added).

105. See Minutes of Ethics Review Bd. Meeting (Aug. 2008) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-08-26-ERB-Minutes.pdf>

existing city ethics code to address important public policies, such as discrimination and public information.<sup>106</sup> The ERB was urged to seek expanded powers that would enable it to regulate contributions by professional services contractors or to prohibit false declarations by public employees.<sup>107</sup> But no recommendations were forthcoming.

The ERB's general counsel disparaged a city ethics provision on leases and concessions as "very watered down," but never suggested that the City Council could strengthen it simply by enacting an ordinance to amend the ethics code.<sup>108</sup> He doubted that the ERB could enforce recusal provisions against board and commission members because "the ERB does not have removal power."<sup>109</sup> Counsel could have advised the ERB to ask the City Council for removal power, but again, no recommendations were forthcoming.

### C. THE ERB REPEATEDLY VIOLATED LAWS THAT IMPOSE "SUNSHINE" REQUIREMENTS ON GOVERNMENTAL ACTORS

Ethics bodies enforce the law against others. Credibility suffers when an ethics body violates the law, particularly when the violation involves "sunshine" laws.<sup>110</sup> Ethics bodies are

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(showing that board members were briefed during the ERB's second year of operations about their authority to recommend changes in the city's ethics code: "The ERB should make additions to the City Ethics Code"); *see also* Minutes of Ethics Review Bd. Meeting (Oct. 2008) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-10-28-ERB-Minutes.pdf> ("[T]he ERB has the ability to make recommendations on the city's code of ethics.").

106. *See* Minutes of Ethics Review Bd. Meeting (Aug. 2008) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-08-26-ERB-Minutes.pdf> (reporting that the ERB "may lend its weight to public records requests. A lack of response to public records requests is an ethical issue. The board may also begin responding to discrimination complaints"); *see also* Minutes of Ethics Review Bd. Meeting (Oct. 2008) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-10-28-ERB-Minutes.pdf> (reiterating "examples of areas on which the board may wish to focus; discrimination and public records requests").

107. *See* Minutes of Ethics Review Bd. Meeting (Dec. 2010) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-12-17-ERB-Minutes.pdf> (taking under advisement recommendations to restrict contributions from professional services contractors and to prohibit false declarations by city employees). The NOPD received widespread praise for an analogous "you lie, you die" policy penalizing false declarations by police officers. *See* Laura Maggi, *Lying Will Be a Firing Offense in New Orleans Police Department*, *TIMES-PICAYUNE* (Aug. 23, 2010, 11:00 PM), [http://www.nola.com/crime/index.ssf/2010/08/lying\\_is\\_now\\_a\\_firing\\_offense.html](http://www.nola.com/crime/index.ssf/2010/08/lying_is_now_a_firing_offense.html).

108. *See* Counsel's Memo, *supra* note 64.

109. *See id.*

110. "Sunshine" in government usually encompasses the open meetings and public

supposed to defend transparency in government, but New Orleans' ERB repeatedly violated Louisiana's open meetings law.

The open meetings law requires that before public bodies may retire into an executive session, they must first pass a motion explaining their reasons for meeting in private and then preserve those legally permissible reasons for private meetings in the minutes—both steps, legally required.<sup>111</sup> Beginning in 2010, the ERB routinely<sup>112</sup> violated the open meetings law by convening in executive session with perfunctory motions that stated no reason on the record—typically, by approving “a motion to enter into executive session” with no further reason given.<sup>113</sup> On one occasion, the ERB convened an executive session without ever considering a motion, specifying a reason, or recording a vote—a trifecta of neglect for transparency principles.<sup>114</sup>

The ERB's minutes document violations of the open meetings law at six of its seven total meetings in 2010; seven out of nine in 2011; seven out of nine in 2012; five out of eight in 2013; and five out of seven in 2014—a total of thirty out of forty, averaging three of every four meetings.<sup>115</sup> The ERB's general counsel was present at all meetings except for an absence on October 8, 2013, and on June 7, 2011, when he was represented at the meeting by the OIG's general counsel.<sup>116</sup>

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records laws. See LA. STAT. ANN. §§ 42:12, *et seq.*, 44:1, *et seq.* (2010). These two laws are the most direct statutory expressions of Louisiana's Right to Direct Participation: “No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.” See LA. CONST. ANN. art. XII, § 3. Other laws also contribute to “sunshine” in government by promoting transparency and protecting the public's right to know, such as the Local Government Budget Act and notice-and-comment rulemaking under the Administrative Procedure Act. See LA. STAT. ANN. §§ 39:1301, 49:950 *et seq.* (2010).

111. See LA. STAT. ANN. § 42:16 (2010) (“The *vote of each member on the question of holding such an executive session and reason for holding such an executive session shall be recorded and entered into the minutes of the meeting.*”) (emphasis added).

112. See author's chart of ERB Executive Sessions Held Without Reasons on the Record: 2009–2014 (on file in EDD, *supra* note 32).

113. See, e.g., Minutes Ethics Review Bd. Meeting (Jan. 2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-01-05-ERB-Minutes.pdf>.

114. See Minutes of Ethics Review Bd. Meeting (Nov. 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-11-20-ERB-Minutes.pdf> (“The board recessed into executive session at 3:25 p.m.”).

115. See author's chart of ERB Executive Sessions Held Without Reasons on the Record: 2009–2014 (on file in EDD, *supra* note 32).

116. See Minutes of Ethics Review Bd. Meeting (Oct. 2013) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2013-10-08-ERB-Minutes.pdf>; Minutes of Ethics Review Bd. Meeting (June 2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-06-07-ERB-Minutes.pdf>.

A second provision of the open meetings law requires advance public notice of meetings on a written agenda.<sup>117</sup> Poorly-worded ERB agendas that routinely announced, “Executive Session: Consideration of matters deemed confidential pursuant to La. R.S. 42:6.1” were equivalent to “Go Fish,” citing all the legal reasons why public bodies may meet in private but giving no hint on the agenda or in minutes of the specific reason for an executive session. The public is entitled to a single, specific reason when a public body meets in executive session, not every possible reason listed in the law. The ERB’s first use of this legally-noncompliant “in globo” terminology occurred on its December 1, 2009, agenda, and violations continued for more than a year-and-a-half thereafter.<sup>118</sup>

The ERB violated a third open meetings requirement when convening in executive sessions to discuss “prospective litigation,” because the agendas failed to include a “statement identifying *the parties involved* and reasonably identifying *the subject matter* of any prospective litigation *for which formal written demand has been made . . .*”<sup>119</sup> Omitting this legally required information violated the open meetings law on its face.

These serial violations of the open meetings law were more than an inconsequential technicality.<sup>120</sup> They undermined the

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117. See LA. STAT. ANN. § 42:19 (2010) (requiring that public bodies post a legally compliant agenda at least 24 hours before a meeting and requiring in § 42:19(A)(1)(b)(ii) (bb) that “[e]ach item on the agenda shall be listed separately and *described with reasonable specificity*”) (emphasis added).

118. Not until August 16, 2011, did the ERB finally cite specific reasons for convening in executive session: to conduct interviews for the ERB executive director’s position and for “[c]onsideration of *complaints of alleged ethical misconduct*.” See Minutes of New Orleans Ethics Review Board Meeting (Aug. 2011) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-08-16-ERB-Minutes.pdf> (emphasis added).

119. Three straight ERB agendas that announced executive sessions for “[d]iscussion of prospective litigation” on May 21, June 23, and July 7, 2014, all ignored the open meetings requirement that there be “attached to the written public notice of the meeting . . . [a] statement identifying *the parties involved* and reasonably identifying *the subject matter* of any prospective litigation *for which formal written demand has been made* that is to be considered at the meeting.” See LA. STAT. ANN. § 42:19(A)(1)(b)(iii) (2010) (emphasis added). At the last meeting of the year 2014, the agenda recited “[p]rospective litigation” as a reason for the executive session and again failed to supply the legally required information. Agenda of Ethics Review Bd. Meeting (Dec. 2014) (on file in EDD, *supra* note 32).

120. See *Greemon v. Bossier City*, 10-2828, 11-0039, p. 5 (La. 7/1/2011); 65 So. 3d 1263, 1267 (“The express procedure required by the Open Meetings Law is *not a ‘technical’ triviality, which may be ignored* at the whim of a public body.”) (emphasis added). The Louisiana Supreme Court reversed because the lawsuit was filed too late

ability of the press and public to monitor the ERB or hold its members accountable when meeting behind closed doors.

The ERB also failed to comply with a separate “sunshine” safeguard that is distinct from the state’s open meetings law and that is guaranteed by both the home rule charter and the city code.<sup>121</sup> Notice-and-comment rulemaking promotes transparency and public participation by requiring that agencies publish proposed rules, affording the public an opportunity to comment on them; agencies must then submit the rules for City Council review and approval before final adoption.<sup>122</sup> Rules that were revised and posted on the ERB website apparently never complied with these legally-compelled promulgation procedures.<sup>123</sup>

The ERB’s multiple and sustained failures to comply with sunshine laws were an institutional affront to transparency principles that are so central to promoting ethical and accountable government. But individually as well, ERB members set a bad example by their reluctance to embrace financial disclosure requirements.

**D. THE ERB’S CONTROL OF ITS OWN BUDGET REQUIRED  
MEMBERS TO FILE ANNUAL FINANCIAL DISCLOSURE  
STATEMENTS, BUT THEY FAILED TO COMPLY  
DURING 2010–2015**

ERB budget control and its members’ financial disclosure duties were linked when the ERB first asked for guidance from state officials: “The Louisiana Board of Ethics concluded that the ERB is not governed by the financial disclosure requirement *due to the fact that the ERB does not have control of its own funds. If the board gains the ability to administer its own budget*, the issue

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(after 17 months rather than within the 60-day peremptory time period), but the court did “not condone the Civil Service Board’s apparent failure to formally vote” or to give reasons for deliberating in executive session. *Id.* at p. 15; 65 So. 3d at 1272.

121. See NEW ORLEANS, LA., HOME RULE CHARTER § 4-107(3) (2010); see also NEW ORLEANS, LA., CODE OF ORDINANCES § 2-719 (2015) (providing that rules must first be noticed and published for public comment and thereafter must be approved by the City Council).

122. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-719(9) (2015) (providing that the “ethics review board, *pursuant to section 4-107 of the Home Rule Charter, shall adopt rules and regulations governing the transaction of its business*”) (emphasis added).

123. A March 25, 2015 e-mail reply to the author’s public records request informed that “the chairman is unaware of any rule promulgation . . . .” See March 25, 2015 e-mail reply to the author’s public records request (on file in EDD, *supra* note 32).

would need to be revisited.”<sup>124</sup> The ERB did revisit the matter after charter amendments approved annual funding for the ERB in 2008, but the state board concluded members still did not need to file disclosure reports because the ERB still lacked authority to expend funds of \$10,000 or more.<sup>125</sup>

The written record subsequently raised substantial questions about whether those earlier opinions remained valid. Minutes during 2012–2014 showed that the ERB allocated \$15,000,<sup>126</sup> \$30,000,<sup>127</sup> and \$35,000<sup>128</sup> to ethics education, documenting three separate instances of the board's authority to expend more than \$10,000.<sup>129</sup> Additionally, an OIG-ERB Memorandum of Understanding in 2012 stated that after funds are “appropriated and allocated each fiscal year between the ERB and OIG, each agency shall *maintain control* over said funds,”<sup>130</sup> again indicating ERB control over its own budget.

The ERB apparently did not know whether it had control over its own budget, as its chair gave contradictory answers to this vital question: When asked in May 2015 whether “the ERB does control its own budget,” the ERB chair responded, “Yes, that

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124. Minutes of Ethics Review Bd. Meeting (Dec. 2008) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2008-12-16-ERB-Minutes.pdf> (emphasis added).

125. Ethics Review Board: Financial Disclosure, Ethics Board Docket No. 2008-984a (2009) *available at* <http://ethics.la.gov/EthicsOpinion/DocView.aspx?id=6505&searchid=aed17b9f-4199-4f18-bd50-73348e957515&&dbid=0> (holding that even after the Home Rule Charter was amended to assure funding for the ERB, its members were “not subject to the financial disclosure laws” because the ERB did “not have the authority to expend, disburse or invest \$10,000 or more in funds,” but “still must first seek approval from the Chief Administrative Officer before any expenditure may be made. The CAO holds final authority on the expenditure of any funds”).

126. *See* Minutes of Ethics Review Bd. Meeting (Nov. 2012) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-11-20-ERB-Minutes.pdf>.

127. *See* Minutes of Ethics Review Bd. Meeting (Oct. 2013) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2013-10-08-ERB-Minutes.pdf>.

128. *See* Minutes of Ethics Review Bd. Meeting (May 2014) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2014-05-21-ERB-Minutes.pdf>.

129. The ERB should seek a legal assessment of its need to comply with the Louisiana Local Government Budget Act at LA. STAT. ANN. § 39:1301, *et seq.* The ERB appears to meet the definition of a “political subdivision” at LA. STAT. ANN. § 1302(1)(a) (“[A]ll districts, boards, or commissions created by such parish governing authority either independently or in conjunction with other units of government.”). If the ERB has not complied with the Local Government Budget Act in the past, it may need to do so in the future.

130. *See* Supplemental and Amended Memorandum of Understanding, at 1(a)(iii) (Dec. 12, 2012) (emphasis added) (on file in EDD, *supra* note 32).

is precisely the case”; but two months later in July “said any action that could cost more than \$10,000 had to be approved by the city’s chief administrative officer.”<sup>131</sup>

To protect its integrity and independence, the ERB *must* control its own spending. ERB members conduct the search and selection process for a new IG. Consider the damage to ERB independence if the city’s chief administrative officer (CAO) refused to provide funding for the legally-required national search. The ERB should also be enforcing the city ethics code against misconduct by city personnel—another task that could be hamstrung by a hostile CAO.

Financial control is vital to the independence and operational integrity of both the ERB and the OIG. Both should be treated equally with regard to budget independence, because both stand in the same relation to the ballot proposition that assured their annual funding.

After 2009, changing circumstances removed the rationale for *not* filing annual income disclosure statements, but by January 2015, only one ERB member<sup>132</sup> had a personal financial disclosure statement on file. The ERB’s response to financial disclosure is a study in “incrementalism” as a strategy for dealing with change. ERB members, who faced a filing deadline on May 15, 2015, were put on notice of their obligation several times and by multiple means in the weeks before and after that deadline.

The ERB chair first received notice of the need for disclosure in a May 5, 2015, e-mail exchange, one week before the next board meeting and ten days before the annual filing deadline for disclosure statements.<sup>133</sup> He subsequently received and shared with other board members two pertinent opinions from the State Ethics Board. At their May 12 meeting, ERB members received an oral presentation about financial disclosure requirements from this author, though no record of the presentation is preserved in minutes.<sup>134</sup> Thereafter, Commissioner James Brown (a lawyer)

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131. See E-mail exchange with Michael Cowan, ERB Chair (May 13, 2015) (on file in EDD, *supra* note 32); Rainey, *supra* note 56.

132. See *Search Personal Financial Disclosures by Name*, LA. ETHICS ADMIN. PROGRAM, <http://ethics.la.gov/PFDisclosure/SearchByName.aspx> (last visited Sept. 21, 2016) (listing Howard L. Rodgers, III).

133. See E-mail exchange with Michael Cowan, ERB Chair (May 5, 2015) (on file in EDD, *supra* note 32).

134. See Minutes of Ethics Review Bd. Meeting (May 2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-05-12-ERB-Minutes.pdf>.

put forward the two state ethics opinions from 2009 as authority that ERB members were not legally obligated to file disclosure statements.<sup>135</sup> A lengthy discussion ensued.

Some members discouraged disclosure, arguing that it was not legally required.<sup>136</sup> Some suggested that members could file disclosure forms individually or not, as they saw fit; other members felt that the board should act as a united group or not at all. Some members said that regardless of what the law required, they should file disclosure statements because it was “the right thing to do” for an ethics review board. But one member emphatically refused to file a disclosure statement he had never seen.<sup>137</sup> After twenty minutes of discussion, the board decided to do nothing in 2015, but agreed to “look at it again next year,”<sup>138</sup> as if compliance with the state disclosure law’s May 15 deadline was an optional matter.

My May 13 e-mail exchange with the ERB chair said that I was “astounded at the lack of legal focus and concern exhibited in the discussion” of financial disclosure requirements at the previous day’s meeting.<sup>139</sup> I recommended that the ERB look to the OIG’s general counsel for “an informed source of legal input” on compliance with the rapidly-approaching May 15 filing deadline, but no additional disclosure statements were filed by the deadline.<sup>140</sup>

When the issue surfaced as a matter of public concern in July 2015, the board rebuffed suggestions that members should disclose their finances. ERB Chair Michael Cowan said, “If we get the determination that we don’t (have to disclose finances), then I would intend to have another conversation about whether we should do this anyway because we are the Ethics Review Board.”<sup>141</sup> The board’s resistance to disclosure precipitated an

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(reporting that “discussion took place prompted by Dr. David Marcello’s e-mail to the chair about whether ERB members are subject to financial disclosure requirements” but making no mention of the author’s oral presentation at the meeting immediately before discussion of the matter among board members).

135. Minutes of Ethics Review Bd. Meeting (May 2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-05-12-ERB-Minutes.pdf>.

136. *Id.*

137. *Id.*

138. Author’s notes of May 2015 ERB Meeting (on file with author).

139. *See* E-mail exchange with Michael Cowan, ERB Chair (May 13, 2015) (on file in EDD, *supra* note 32).

140. *Id.*

141. Rainey, *supra* note 56.

opinion column entitled *New Orleans' Ethics Review Board Members Do Not Think Rules Apply to Them* and the columnist's sardonic observation that, "An unethical ethics board is quite a hoot."<sup>142</sup>

Two months later at the ERB's September 21 meeting, Commissioner Brown again cited the two outdated state ethics opinions as support for not filing disclosure statements: "Mr. James Brown told Mr. Ciolino that the ERB received 2 advisory opinions from the State Ethics Review Board and the ERB was advised that the board was not subject to the financial disclosure requirement."<sup>143</sup>

In October, however, the ERB took steps toward compliance, perhaps motivated by the October 1 introduction of an ordinance "to expressly require members of the ethics review board to file financial disclosure statements."<sup>144</sup> The ERB announced that its members would voluntarily file disclosure statements and that it would adopt a rule requiring income disclosure by members. The board nonetheless continued to resist local disclosure requirements. Later in that month, when the City Council considered an ordinance to compel disclosure under municipal law, the ERB Chair discouraged its adoption: "[B]oard Chairman Michael Cowan argued against the need for an ordinance, saying it was duplicative. But Councilwoman Latoya Cantrell said she was concerned that a board-adopted rule could be too easily revoked by another vote of the board."<sup>145</sup> The Council ultimately voted unanimously to require financial disclosure by ERB members.<sup>146</sup> The ERB's newly-appointed general counsel also opined that income disclosure was (and presumably had been for

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142. Gill, *supra* note 61.

143. Minutes of Ethics Review Bd. Meeting (Sept. 2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-09-21-ERB-Minutes.pdf>.

144. See NEW ORLEANS, LA., ORDINANCE CALENDAR NO. 30,968 (Oct. 1, 2015); *see also* Memorandum of author to Jared Brossett, New Orleans City Council Member (Sept. 29, 2015) (on file in EDD, *supra* note 32) (recommending a more far-reaching charter proposition that would allocate funding among the three ethics entities and thereby "end an unhealthy structural conflict whereby the IG decides on the amount of funds allocated each year for the ERB's budget while the ERB is called upon annually to approve or deny IG salary increases").

145. Maldonado, *supra* note 59.

146. In its 2015 annual report, the City Council highlighted the adoption of an ordinance "expressly requiring members of the Ethics Review Board to file annual income disclosure statements in accordance with the Louisiana Code of Governmental Ethics." See 2015 NEW ORLEANS, LA., CITY COUNCIL ANN. REP. 39 (2016) *available at* <http://nolacitycouncil.com/docs/news/2016/CCAR2015.pdf>.

some years) a legal requirement for ERB members under the state code of ethics.<sup>147</sup>

During the six months between May 5, 2015, when income disclosure was first brought to the ERB's attention, and November 5, when the ordinance required income disclosure as a matter of municipal law, ethics board members traveled a tortuous path toward transparency. Their incremental movement toward reform bore some resemblance to the five stages of grief: denial, anger, bargaining, depression, and ultimately, acceptance.<sup>148</sup>

Transparency is integral to governmental ethics, and financial disclosure by board members is integral to transparency. Ethics boards should set an example for others in government, showing by their actions that ethics rules are important. ERB members should adhere to the highest standards of ethics and transparency,<sup>149</sup> but during 2010–2015, ERB members failed each year to file the legally-required financial disclosure forms.

#### **E. ERB MEMBERSHIP DOES NOT SATISFY DIVERSITY REQUIREMENTS**

No women, no Hispanics, and no Asians served on the ERB in 2015,<sup>150</sup> despite city code requirements that “boards and

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147. See Maldonado, *supra* note 59 (quoting ERB Counsel Dane Ciolino: “It’s my view that state law requires them to file these disclosures”).

148. See DR. ELISABETH KUBLER-ROSS, ON DEATH AND DYING 265 (1969).

149. On July 1, 2015, the Governor signed into law Act 450, which exempts members from annual income disclosure requirements if their board or commission cannot “expend, disburse, or invest more than fifty thousand dollars of funds in a fiscal year.” See 2015 La. Acts 450. The ERB’s budget in 2015 was \$148,199 and its proposed 2016 budget was \$120,000. 2016 NEW ORLEANS, LA., ANN. OPERATING BUDGET 430 (2016) available at <http://www.nola.gov/mayor/budget/documents/2016-proposed-operating-budget-book/>. Thus, the ERB still controlled a budget in excess of \$50,000 a year and therefore appeared still obligated to file annual financial disclosure statements under the new law. But regardless of what the law says at any given moment, ERB members should be governed on income disclosure questions by their oft-stated commitment to fostering an “ethical culture” and not simply by a concern for rules-based compliance.

150. 2014 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. (2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/08/2015-00-00-ERB-Annual-Report.pdf> (listing Dr. Michael A. Cowan, Chair; Allen C. Miller, Vice-Chair; Dr. Joe M. Ricks, Jr., Secretary; James A. Brown; Howard L. Rodgers, III, & Rev. Dr. Donald Frampton. Rev. Brandon Boutin is also listed as Dillard University’s recent appointee to fill the seventh board member opening; he was welcomed to his first ERB meeting in March 2015).

commissions should reflect the diversity of our population.”<sup>151</sup> University leaders nominate and the mayor appoints ERB members, subject to approval by the City Council.<sup>152</sup> Municipal law requires that public officials consider diversity when selecting new members.<sup>153</sup> The mayor and City Council should have redressed diversity imbalances with two summer 2015 vacancies, after news articles had already made the ERB’s lack of diversity a public issue.<sup>154</sup> But the mayor passed over female and Hispanic candidates to reappoint two current ERB members,<sup>155</sup> and the City Council used its consent calendar to confirm two new seven-year terms that maintained the lack of gender and ethnic diversity.<sup>156</sup> The “old boy” network has traditionally preserved familiar faces in power; now, at the start of a new millennium, it’s long past time for this system to be retired.

The city’s process for considering ERB nominees failed tests of transparency and accountability in 2015. Increased scrutiny of the process by press and public is a valuable safeguard, but enhanced transparency written into the city’s appointment and confirmation procedures would do still more to secure the desired diversity. ERB members will hire and may well fire the next IG or the next IPM. In addition, ERB members are solely responsible for enforcing local ethics requirements against public

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151. See NEW ORLEANS, LA., CODE OF ORDINANCES § 2-86 (stating strong public policies in favor of diversity on all of the city’s boards and commissions).

152. See *id.* § 2-719.

153. See *id.* § 2-86 (“It is the policy of the city that the mayor and all other appointing authorities and nominating organizations for boards, commissions, and other legal entities performing functions for or on behalf of the city should consider the demographic composition of the board or other entity in proposing or making appointments to the board or other entity to ensure that the board’s composition will be reflective of the city as a whole.”).

154. Charles Maldonado, *Mayor Disregards Diversity in Ethics Board Appointments; Members Fail in Disclosures*, LENS (Nov. 2, 2015, 2:28 PM), <http://thelensnola.org/2015/11/02/mayor-disregards-diversity-in-ethics-board-appointments-members-fail-in-disclosures/> (“Since the publication of a highly critical paper over the summer . . . the Ethics Review Board has come under criticism . . . for a lack of diversity among its members. . . . Most strikingly, the board has lacked a female member since May 2014.”).

155. *Id.* (“In re-appointing Ethics Review Board Chairman Michael Cowan to a second term three months ago, Landrieu passed over a Hispanic female nominee, Isabel Medina, a Loyola University Law School professor.”). Loyola’s nomination letter is dated July 30, meaning Landrieu’s decision came after the release of an earlier draft of this Article and the news reports about it.

156. *Id.* (“[T]he council shares responsibility for fulfilling the diversity mandate. But members of the council’s Governmental Affairs Committee, which reviews board and commission candidates before advancing them to the full council, did not raise the issue . . .”).

officials. Their political independence and their representation of the entire community must be beyond question. The city's appointment process needs improvement and should at least match comparable state procedures.<sup>157</sup>

In 2016, for the third straight year, still no women, no Asians, and no Hispanics served as members. The ERB needs energetic new members—not only for purposes of diversity, but also to reinvigorate local ethics enforcement and to propel improvements in its inadequate ethics education program.

#### F. THE ERB DID NOT NEED TO CHOOSE BETWEEN ETHICS ENFORCEMENT AND ETHICS EDUCATION

At its March 2012 strategic planning retreat, the ERB embraced a needless dichotomy by deciding that “it should prioritize ethics training and enforcement.”<sup>158</sup> This implication that the ERB could not possibly do both ethics training and ethics enforcement<sup>159</sup> seems particularly ill-founded, given the years-long lack of productivity in its much discussed but inadequately implemented ethics education program.

Administrative missteps surely contributed to the shortfall. The ERB solicited ethics education services in a June 2014 Request for Proposals (RFP); cancelled it two months later in August; promised a renewed RFP for October 2014;<sup>160</sup> then failed to deliver. Instead, the ERB ordered its executive director to implement ethics education “no later than January 31, 2015” and

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157. Maldonado, *supra* note 154 (“Medina, who previously had been nominated for the State Board of Ethics, said the city’s selection process was much less open. At the state level, nominees appear in an open meeting before a legislative committee, she said.” After turning in her resume to the president’s office, Prof. Medina “never heard from anyone until Cowan was reappointed. ‘In this process there was absolutely no contact. No interview. No affidavit. No questions,’ she said.”). The Lens article reported that experiences of other nominees confirmed “the process did not involve any vetting.” *Id.*

158. See Counsel’s Memo, *supra* note 64. Six months after the strategic planning retreat, the ERB recapitulated the same needless dichotomy. See Memorandum from ERB Education Working Group (Sept. 14, 2012) (on file in EDD, *supra* note 32).

159. See WECHSLER, *supra* note 75, at 71 (writing that ethics enforcement and ethics training are among “the *essential elements* of a local government ethics program,” and both are presumptively part of “an independent ethics commission *with teeth*, which gives swift advisory opinions, which has a monopoly on interpreting and *enforcing* the code, which can give waivers for exceptions, and which *provides training for all officials and employees, as well as for everyone who does business with the local government*”) (emphasis added).

160. See Minutes of Ethics Review Bd. Meeting (Aug. 2014) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2014-08-05-ERB-Minutes.pdf>.

sternly warned, “Any delay would require board approval.”<sup>161</sup> But the executive director and general counsel both departed in December 2014,<sup>162</sup> and the ERB still lacked a comprehensive ethics education program throughout 2015.<sup>163</sup>

ERB annual reports never recorded the number of city employees actually trained, but such records as do exist suggest that the numbers were very modest—a combined total of twenty-five participants from two agencies, receiving on average one hour of ethics training.<sup>164</sup> The ERB’s ethics consultant made only two presentations to city personnel during a three-year contract, and neither presentation addressed the rules in state and city ethics codes.<sup>165</sup> Occasional ERB training sessions for new city

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161. See Minutes of Ethics Review Bd. Meeting (Sept. 2014) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2014-09-02-ERB-Minutes.pdf>.

162. Richard A. Webster, *Executive Director, General Counsel of New Orleans Ethics Review Board Resigns*, TIMES-PICAYUNE (Dec. 11, 2014, 1:52 PM) [http://www.nola.com/politics/index.ssf/2014/12/executive\\_director\\_general\\_cou.html](http://www.nola.com/politics/index.ssf/2014/12/executive_director_general_cou.html); Signs of stress were evident a year earlier in minutes of the November 2013 meeting, where the “general counsel expressed concerns about the chair’s management style for the past year . . . .” See Minutes of Ethics Review Bd. Meeting (Nov. 2013) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2013-11-20-ERB-Minutes.pdf>. “With respect to the chair’s management style,” the executive director “reiterated the concerns raised and remarked that the chair had limited her interaction with the consultant and expressly forbidden any communication by the executive director with board members as regards the work of the consultant unless approved by him.” *Id.*

163. The ERB sought “Ethics Training” services in RFP No. 7102-01807 during March 2015 with a deadline for receipt of proposals by April 30 and a proposed award date of June 1, to be followed by several days of contract negotiation and an expected start date of July 1. The ERB proposed annual compensation of \$50,000 for the training services. NEW ORLEANS LA., BUREAU OF PURCHASING, RFP 7102-01807 (May 6, 2015) (on file in EDD, *supra* note 32).

164. When the Bureau of Purchasing was asked “What type of ethics training (content, number of hours, number of people trained, approximately) has already been conducted in the last 2 years . . . .,” its July 11, 2014 response offered the following account of ERB training activities: “Periodically, the ERB makes brief presentations on governmental ethics as part of Employee Orientation coordinated through the Department of Civil Service; participation is varied . . . . The ERB has presented to staff of the city council (approximately 45 minutes and 12–15 participants) and most recently to the board and staff of the City Planning Commission (9–10 participants; approximately 1 ¼ hours).” NEW ORLEANS LA., BUREAU OF PURCHASING, RFP 7101-01661, ADDENDUM NO.: TWO (2) (July 11, 2014) (on file in EDD, *supra* note 32). The consultant’s pilot training program “included the participation of approximately 30 participants.” *Id.*

165. Answer number four of “Questions and Answers,” prepared by the Bureau of Purchasing, cited two consultant trainings: “The state and local ethics codes were not discussed as part of *either* presentations [sic].” NEW ORLEANS LA., BUREAU OF PURCHASING, RFP 7101-01661, ADDENDUM NO.: TWO (2) (July 11, 2014) (emphasis added) (on file in EDD, *supra* note 32).

employees and ad-hoc continuing legal education for lawyers did not fulfill the commitment for comprehensive ethics education. The ERB repeatedly identified ethics education as a “high priority”<sup>166</sup> and as its “primary mission and focus,”<sup>167</sup> but in June 2012 the incoming ERB chair discouraged a mayoral executive order that would have required ethics code training for all city personnel.<sup>168</sup> Over the years, the ERB has promised grandly but delivered meagerly on ethics education.

The most recent promise in its July 2016 annual report was to “implement ethics training throughout municipal government.”<sup>169</sup> But ERB pronouncements on this “high priority” topic of ethics education have consistently proven to be hollow promises, language perennially repeated and recycled almost verbatim through seven years of prior ERB annual reports. All listed ethics education under “Future Work,” and all promised ethics training for various audiences—*in the future*:

- 2008: “Also, it is our priority to begin, with the OIG, to conduct education classes for city employees on ethics rules and regulations.”<sup>170</sup>
- 2009: “A high priority for the board is to create and execute an ethics educational training program for the employees of the City of New Orleans.”<sup>171</sup>
- 2010: “A high priority for the board is to create and execute an ethics educational training program for the

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166. See Minutes of Ethics Review Bd. Meeting (Jan. 2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-01-05-ERB-Minutes.pdf>.

167. See Minutes of Ethics Review Bd. Meeting (May 2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-05-18-ERB-Minutes.pdf>.

168. See Minutes of Ethics Review Bd. Meeting (June 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-06-05-ERB-Minutes.pdf> (“Dr. Cowan expressed reservation about moving forward with an executive order with the mayor until the ERB has developed more concrete plans with respect to ethics education.”).

169. See 2014 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 12 (2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/08/2015-00-00-ERB-Annual-Report.pdf>.

170. See 2007 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 4 (2008) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-06-05-ERB-Minutes.pdf>.

171. See 2008 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 10 (2009) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2008-00-00-ERB-Annual-Report.pdf>.

employees of the City of New Orleans.”<sup>172</sup>

- 2011: “*In the future*, the ERB will be providing ethics education training for our city employees, elected officials and the public. . . . A high priority for the board is to create and execute an ethics educational training program for the employees and citizens of the City of New Orleans.”<sup>173</sup>
- 2012: “*Shortly*, we will be launching an ethics education program for New Orleans’ elected and appointed officials and city employees. . . . A high priority for the board is to create and execute an ethics educational and awareness program for public officials and employees as well as citizens of New Orleans.”<sup>174</sup>
- 2013: “[T]he ERB *will continue to focus its efforts* on the development and implementation of government ethics education . . . .”<sup>175</sup>
- 2014: “[T]he ERB will maintain its consultancy with Judith Nadler, *leading to the formulation* of a detailed ethics education plan for municipal government.”<sup>176</sup>

These oft-repeated promises to deliver a comprehensive program of ethics education remained unfulfilled in 2015.

Those circumstances did not, however, prevent the ERB’s most recent annual report from announcing “the launching of the

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172. See 2009 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 9 (2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2009-00-00-ERB-Annual-Report.pdf>.

173. See 2010 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 2, 10 (2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2010-00-00-ERB-Annual-Report.pdf> (emphasis added).

174. See 2011 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 4, 9 (2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2011-00-00-ERB-Annual-Report.pdf> (emphasis added).

175. See 2012 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 14 (2013) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2012-00-00-ERB-Annual-Report.pdf> (emphasis added).

176. See 2013 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 10 (2014) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2013-00-00-ERB-Annual-Report.pdf> (emphasis added); see also Michael Cowan, *Post-Katrina Reform Movement Rolls on: Michael Cowan*, TIMES-PICAYUNE (Jan. 5, 2013 6:04 AM) [http://www.nola.com/opinions/index.ssf/2013/01/post-katrina\\_reform\\_movement\\_r.html](http://www.nola.com/opinions/index.ssf/2013/01/post-katrina_reform_movement_r.html) (“Finally, in 2013 the Ethics Review Board will initiate an ethics awareness and education seminar for city department heads and members of boards and commissions.”).

Ethics Review Board's ethics training for city employees, elected and appointed officials, and members of boards and commissions."<sup>177</sup> Their December 2015 launch trained exclusively city employees, and only a modest number of them: "[T]he first two ethics training sessions occurred for members of the city's Department of Safety and Permits. A total of 31 city inspectors took part in sessions on December 14 or 21."<sup>178</sup> City employees remained the exclusive recipients of training through the first half of 2016, when two additional sessions trained a modest "25 support service and engineering personnel of the Sewerage and Water Board and 25 engineers and managers in the same agency."<sup>179</sup> But, the ERB's annual report announced, "Plans are being made for 15–20 members of the mayor's office, the city council and the finance department to take part in the training in the coming year."<sup>180</sup>

These data suggest that approximately 100 city employees received training during a one-year period under the 2015–2016 ethics education contract, yielding a cost-benefit ratio of about \$500 per person. The ERB should seek much greater productivity and a significantly reduced cost per person, if this \$50,000 contract renews for an additional year in October 2016, as planned.<sup>181</sup>

#### IV. HOW THE ERB WENT ASTRAY

The ERB did not arrive at its distressed condition overnight. Its journey consisted of numerous incremental steps—*sub silentio* decisions that took place off the public's radar screen and even to a considerable extent beneath the consciousness of ERB members. The ERB never provoked a focused discussion about abandoning local ethics enforcement (neither among themselves, nor with the public) because multiple factors obscured their view of what was happening. The March 2012 strategic planning retreat was not the singular moment when the ERB withdrew

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177. See 2015 NEW ORLEANS, LA., ETHICS REV. BOARD 2015 ANN. REP. 4 (2016) available at <http://www.nolaerb.gov/wp-content/uploads/2016/08/2015-00-00-ERB-Annual-Report.pdf>.

178. See *id.* (emphasis added).

179. See *id.* (emphasis added).

180. See *id.*

181. See Minutes of Ethics Review Bd. Meeting (Aug. 2016) available at <http://www.nolaerb.gov/board-meetings/minutes-of-meetings/> (discussing agenda item nine, "Proposal for continuing ethics training").

from local ethics enforcement,<sup>182</sup> but it did embed in members' minds several misguided perceptions that accounted for why they turned away from local ethics enforcement.

Why did they do so? Because their general counsel's January 2012 memorandum presented a dim, discouraging view of the ERB's power to pursue local ethics enforcement; because the ERB uncritically accepted at its retreat the need to choose between ethics enforcement and ethics education; because the ERB acquiesced in a steady reduction of legal resources that were essential to properly understand and implement its local ethics enforcement authority;<sup>183</sup> because of animus toward rules-based compliance among some ERB members<sup>184</sup>—for all of these reasons, the ERB abandoned ethics enforcement. At any moment they could have reassessed their legal options and turned back toward enforcement; they can do so still.

The ERB's wayward direction demonstrated how easily

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182. See Minutes of Ethics Review Bd. Meeting (June 2011) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2011-06-07-ERB-Minutes.pdf> (showing the ERB's inadequate understanding of its legal authority over local ethics enforcement by reporting "that the ERB, pursuant to a recent opinion by the Louisiana Board of Ethics, is *not able to enforce ethics laws*") (emphasis added).

183. The ERB general counsel's starting salary in November 2009 was \$134,776 plus benefits. See E-mail exchange with Ed Quatrevaux, New Orleans Inspector Gen. (Apr. 29, 2015) (on file in EDD, *supra* note 32). Over the next three years, the general counsel steadily reduced the availability of legal services for the ERB, dropping to 75% of time in October 2010, then 50% of time a month later, and in 2012 to 25% of a 35-hour week. See Minutes of Ethics Review Bd. Meeting (Aug. 2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-08-17-ERB-Minutes.pdf>; Minutes of Ethics Review Bd. Meeting (Apr. 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-04-03-ERB-Minutes.pdf>. The part-time position continued to receive some benefits (though not health coverage after a certain point) and longevity increases of 2.5 percent. E-mail exchange with Ed Quatrevaux, New Orleans Inspector Gen. (Apr. 29, 2015) (on file in EDD, *supra* note 32). When the general counsel left altogether at the end of 2014, diminished expectations for legal support led the ERB to seek a replacement as contract counsel for \$40,000 per year and to consider consolidating the legal and executive director roles. See Minutes of Ethics Review Bd. Meeting (Dec. 2014) available at <http://www.nolaerb.gov/wp-content/uploads/2016/05/2014-12-08-ERB-Minutes.pdf>. Some might characterize these events as "good stewardship" of public funds; others, as abandoning ethics enforcement and redefining the ERB's mission by reducing its access to legal services through decisions made without the benefit of an informed public debate.

184. See 2011 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 9–10 (2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2011-00-00-ERB-Annual-Report.pdf> (disparaging "rules-based ethics" as "a set of don'ts" and discerning little value in ethics codes because they do "not assure that public servants will choose 'proper behavior' or 'good conduct'").

enforcement of the city ethics code could be subverted—not by design, but by inattention. The decision to abandon local ethics enforcement was a poorly informed policy choice, not legally compelled. Explicit provisions in the home rule charter and city code required that this flawed decision be reconsidered and reversed to fulfill the ERB’s enforcement responsibilities.

## V. CONCLUSIONS AND RECOMMENDATIONS

All three ethics entities faced start-up challenges. The OIG experienced problems in transition from its initial IG to his successor,<sup>185</sup> but the new IG righted the ship and steered a course toward productivity. To minimize transition problems in the future, the OIG should prepare and file with the ERB a written succession plan providing for sudden, unanticipated vacancies. Additionally, the ERB should adopt a standard protocol for the national IG search and hiring process, and departing IG’s should give generous notice of six months or more.

Despite structural problems and fiscal challenges, the OIPM managed to monitor critical incident reports involving use of force by NOPD officers,<sup>186</sup> engaged with the NOPD consent decree, and launched a well-regarded police-community mediation program. Its productive dialogue in 2015 with the OIG, ERB, and City Council produced a charter proposition that will reform structural problems impeding its operations, if approved by voters.<sup>187</sup> The

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185. See NEW ORLEANS, LA., OFFICE OF THE INSPECTOR GEN. ASSESSMENT OF THE TRANSITION OF THE NEW ORLEANS OFFICE OF INSPECTOR GENERAL FROM INSPECTOR GENERAL ROBERT CERASOLI TO INTERIM INSPECTOR GENERAL LEONARD ODOM 1 (Jan. 2009). Immediately after the first IG departed, the interim successor assigned two employees to investigate him. *Id.* The legislative auditor found no violations of law or regulation after reviewing the twelve-page report released on August 27, 2009. See *id.* The interim IG resigned just as the ERB was choosing the city’s second IG. Michelle Krupa, *Len Odom Resigns as New Orleans Interim Inspector General*, TIMES-PICAYUNE (Sept. 3, 2009, 2:29 PM) [http://www.nola.com/politics/index.ssf/2009/09/len\\_odom\\_resigns\\_as\\_new\\_orlean.html](http://www.nola.com/politics/index.ssf/2009/09/len_odom_resigns_as_new_orlean.html).

186. See Jonathan Bullington, *Police Monitor Report Questions NOPD Probes: Use of Force Incidents Examined*, TIMES-PICAYUNE (Apr. 23, 2015, 6:32 PM) [http://www.nola.com/crime/index.ssf/2015/04/independent\\_police\\_monitors\\_re.html](http://www.nola.com/crime/index.ssf/2015/04/independent_police_monitors_re.html). The OIPM prepared its reports with less than full compliance by the NOPD in providing agreed-upon access to the scenes of some critical incidents: “For a police watchdog to not have access, that’s problematic,” said Deputy Police Monitor Simone Levine.” *Id.*

187. NEW ORLEANS, LA., ORDINANCE CALENDAR NO. 31,019 (Oct. 15, 2015). The City Council later achieved a written agreement between the two offices on the terms of their separation. See Greg LaRose, *Inspector General, Police Monitor Split Backed by City Council*, TIMES-PICAYUNE (Oct. 15, 2015, 5:04 PM) [http://www.nola.com/politics/index.ssf/2015/10/inspector\\_general\\_police\\_monit.html](http://www.nola.com/politics/index.ssf/2015/10/inspector_general_police_monit.html); James Gill, *Truce*

same ballot proposition will correct another structural deficit: by allocating a fixed percentage of dedicated ethics funds to the ERB, the proposed charter reform will end an inherent conflict in which the IG annually allocates funding for the ERB while ERB members annually approve or disapprove IG salary increases.<sup>188</sup>

Post-Katrina ethics reforms produced a powerful vehicle for local ethics enforcement, but the ERB idled that engine of reform and impaired its own credibility by improperly convening in executive sessions; foregoing public scrutiny and possible criticism of its decision to abandon local ethics enforcement; routinely dismissing or referring ethics complaints; failing to recommend improvements to the city code of ethics; and abiding a withering away of legal support.<sup>189</sup> These decisions eroded ethics enforcement and undermined the vigorous role contemplated in the ERB's authorizing legislation.<sup>190</sup>

The ERB's 2014 annual report (released in March 2015) revealed how fundamentally flawed was its understanding of the ERB's mission and jurisdiction. The report identified only two very modest duties for the ERB: (i) "overseeing" the OIG; and (ii) "promoting ethics awareness though [*sic*] education."<sup>191</sup>

The 2014 annual report also badly misunderstood ERB and

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*Between New Orleans Inspector General Ed Quatrevaux, Independent Police Monitor Susan Hutson a Big Win*, NEW ORLEANS ADVOCATE (Oct. 31, 2015 4:01 PM), <http://theadvocate.com/news/opinion/13763874-113/james-gill-the-truce-between>.

188. For an example of this troubling linkage, see Minutes of Ethics Review Bd. Meeting (Oct. 2013) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2013-10-08-ERB-Minutes.pdf> (approving an IG salary increase to Step 9 with annual compensation of \$186,158). Earlier in the same meeting, an ERB member (who later voted against the IG salary increase) voiced concerns about a recent transfer of funds away from the ERB to cover the OIG's budget deficit. *Id.*

189. Within a year after the ERB hired a fulltime general counsel in November 2009, his commitment to provide legal services for the ERB dropped to 50% of time, and in the month after the March 2012 strategic planning retreat, dropped to 25% of a 35-hour week. See Minutes of Ethics Review Bd. Meeting (Aug. 2010) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2010-08-17-ERB-Minutes.pdf>; Minutes of Ethics Review Bd. Meeting (Apr. 2012) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-04-03-ERB-Minutes.pdf>. Thereafter, for more than two-and-a-half years, the ERB general counsel continued in a part-time position consisting of fewer than nine hours a week, until finally vacating the position entirely in December 2014.

190. See NEW ORLEANS, LA., HOME RULE CHARTER § 9-402 (2010); NEW ORLEANS, LA., CODE OF ORDINANCES § 2-719(1) (2015); Marcello, *supra* note 61.

191. See 2014 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 4 (2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/03/2014-00-00-ERB-Annual-Report.pdf>.

OIG roles in ethics enforcement, when it proclaimed: “Now *someone* is watching. Now *someone* is enforcing ethics laws and rules in the City of New Orleans. That ‘someone’ is the Office of Inspector General.”<sup>192</sup> The OIG may have been “watching,” but it surely was not “enforcing” ethics laws because the OIG is explicitly *not* an enforcement body. The “someone” who should have been enforcing ethics laws and rules in New Orleans was the ERB, which *is* explicitly charged with enforcement responsibility.<sup>193</sup> But ethics enforcement and rules-based compliance were not demonstrably part of the ERB’s activities by 2015.

The ERB is *the* local ethics enforcement authority. If the ERB won’t do it, nobody else will. If city ethics are being enforced elsewhere (e.g., by the State Board of Ethics, or in court, or before the Civil Service Commission or Police Integrity Bureau, or by the District Attorney or U.S. Attorney), then the ERB need not duplicate the efforts of others. But New Orleans cannot abandon local ethics enforcement—and local enforcement is the ERB’s job.

The ERB’s failures were performance and policy failures, not attributable to systemic or structural problems. That’s both the bad news and the good news—good news, because satisfactory solutions simply depended upon *better-informed policy choices* and *improved implementation*. The following list of five recommended reforms appeared in the July 2015 Article that provoked a public discourse about the ERB’s wayward course. Each recommendation is now followed by an “UPDATE” regarding reforms implemented by the ERB during the subsequent year.

*First*, the ERB needed new legal counsel<sup>194</sup> to assure

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192. 2014 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 5 (2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/03/2014-00-00-ERB-Annual-Report.pdf>.

193. *See* NEW ORLEANS, LA., HOME RULE CHARTER § 9-402(1) (2010); *see also* WECHSLER, *supra* note 75, at 55 (describing the differences between an ethics commission and an OIG: “An ethics commission and its staff provide training, independent advice, oversight of disclosure, and enforcement with respect to officials’ conflicts of interest, *all things an inspector general does not provide*. An inspector general’s office might do investigations for the ethics commission and might uncover ethical misconduct in other investigations, but *that is its only possible role in government ethics*”) (emphasis added).

194. The ERB initiated a competitive selection process for contract counsel in March 2015, proposing an annual fee of \$50,000. *See* NEW ORLEANS LA., BUREAU OF PURCHASING, RFP 7102-01807 (May 6, 2015) (on file in EDD, *supra* note 32) (contemplating awarding a contract for legal services by June 20, 2015). The ERB

compliance with all “sunshine” law requirements<sup>195</sup> and to assist the ERB in coordinating income disclosure and budget control imperatives going forward. Assisted by informed counsel and with vigorous public participation, a reinvigorated ERB could launch community conversations about ethics enforcement, ethics education, ethics code revision, ERB budget control, and annual financial disclosure by ERB members.<sup>196</sup>

UPDATE: (a) In January 2016 the ERB’s new general counsel delivered a written report on “Going into Executive Session” that gave the board step-by-step instructions on how to comply with the Open Meetings Law.<sup>197</sup> The report counseled that ERB agendas must “describe the purpose of any proposed executive session. To describe the purpose with ‘reasonable specificity,’ the description should use the statutory language set forth in Louisiana Revised Statutes section 42:17(A).”<sup>198</sup> Pursuant to the new legal guidance, ERB agendas and minutes began routinely recording the reasons for executive sessions, thereby complying with the Open Meetings Act for the first time in approximately six years.

(b) The new counsel dispelled confusion about budget control and corrected the mistaken view that ERB members need not adhere to income disclosure requirements: “In response to Mr. Brown, Mr. Ciolino told the board that the two opinions from the Louisiana Board of Ethics were both based on a factual premise that the ERB did not control a budget of \$10,000 or more. However, Mr. Ciolino told the board . . . that the board does

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selected Loyola Law Professor Dane Ciolino in September of 2015. They might make good use of their contract counsel’s services to perform the following functions for them: (1) advise the board in its conduct of disciplinary proceedings; (2) advise the board in interpreting the city ethics code and preparing advisory opinions for their approval; (3) advise the board in requesting additional power and revisions to the city ethics code; and (4) present rule-based training about ethics code compliance to city personnel.

195. Among the “sunshine” essentials are open meetings and public records laws, notice-and-comment rulemaking, and local government budget act requirements. *See* La. Stat. Ann. §§ 42:12, *et seq.*, 44:1, *et seq.*, 49:950, *et seq.*, 39:1301.

196. At the ERB’s February 29, 2016 meeting, its new counsel solicited the public’s suggestions for improvement in ERB operations and announced a date of April 15 for submissions. *See* Minutes of Ethics Review Bd. Meeting (Feb. 2016) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2016-02-29-ERB-Minutes.pdf>.

197. *See* Minutes of Ethics Review Bd. Meeting (Jan. 2016) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/03/2016-01-25-ERB-Minutes.pdf>.

198. *See* Memorandum from Dane S. Ciolino, ERB General Counsel, to Ethics Review Board, 2 (Jan. 21, 2016) (on file in EDD, *supra* note 32).

indeed control a budget of \$10,000 or more.”<sup>199</sup> Counsel advised ERB members to file their financial disclosure forms in compliance with state ethics laws.<sup>200</sup>

(c) ERB counsel launched a community conversation at the February 2016 ERB meeting by inviting all “interested citizens with any public comments for proposed rule changes to be submitted by April 15.”<sup>201</sup> He promised their proposals would be “placed on the agenda for a Public Hearing at the ERB’s April 25, 2016 meeting which will also include public discussions,”<sup>202</sup> and perhaps a bit too ambitiously, proposed “that the ERB’s June meeting should include a vote on all proposals of rule changes and procedures,”<sup>203</sup> which did not happen.

*Second*, the ERB must exercise its local ethics enforcement authority to the fullest extent. The ERB can surely do *both* ethics education and ethics enforcement. If not, the ERB will be little more than an ethics cheerleader.

UPDATE: In October 2015, the ERB reconvened in a public meeting and “announced that the outcome of the Executive Session was to *approve an investigation of alleged violation* of the City Code of Ethics.”<sup>204</sup> One month later the minutes reported, “Mr. Ciolino told the board that he is currently working on *reconsidering the ERB’s enforcement authority*.”<sup>205</sup> In December, Mr. Ciolino delivered to the board a memorandum entitled “ERB Enforcement Authority” that recognized dual city-state jurisdiction over ethics matters: “The state constitution does not . . . prohibit local codes of conduct or ethics ordinances. Moreover, such codes or ordinances are expressly permitted by state statute.”<sup>206</sup> In a subsequent e-mail exchange, counsel

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199. See Minutes of Ethics Review Bd. Meeting (Oct. 2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-10-23-ERB-Minutes.pdf>.

200. See Maldonado, *supra* note 59 (quoting ERB Counsel Dane Ciolino: “It’s my view that state law requires them to file these disclosures”).

201. See Minutes of Ethics Review Bd. Meeting (Feb. 2016) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2016-02-29-ERB-Minutes.pdf>.

202. See *id.*

203. *Id.*

204. See Minutes of Orleans Ethics Review Bd. Meeting (Oct. 2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-10-23-ERB-Minutes.pdf> (emphasis added).

205. See Minutes of Ethics Review Bd. Meeting (Nov. 2015) available at <http://www.nolaerb.gov/wp-content/uploads/2016/05/2015-11-10-ERB-Minutes.pdf> (emphasis added).

206. See Memorandum from Dane S. Ciolino, ERB General Counsel, to Ethics

confirmed “that *the ERB’s authority to enforce provisions of the city ethics code (which we both agree is beyond dispute) exists quite independently* of whether the state ethics code is incorporated or not,” replying, “Yes, absolutely. Agreed.”<sup>207</sup>

*Third*, the ERB should recommend revisions to strengthen the city ethics code. It should supplement its more vigorous role in ethics enforcement with written advisory opinions, and it should give oral advice that guides public officials toward proper conduct.<sup>208</sup> With scant local ethics enforcement machinery currently in place, the ERB’s wisest course will be to rely on OIG lawyers and investigators in building disciplinary cases rather than attempting to rebuild the ERB’s internal capacity.<sup>209</sup> This strategy would also establish a useful separation of functions by having the OIG manage investigations while the ERB handles adjudication.<sup>210</sup> The ERB and OIG should memorialize this arrangement in a cooperative endeavor agreement

**UPDATE:** (a) At its December 2015 meeting, the ERB approved a motion calling upon the City Council to incorporate

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Review Board 1 (Dec. 16, 2015) (on file in EDD, *supra* note 32).

207. See December 17, 2015 e-mail exchange between the author and Dane S. Ciolino (emphasis added) (on file in EDD, *supra* note 32). The same e-mail exchange posed this question: “Does the ERB currently have enforcement authority with regard to the city ethics code?” ERB counsel replied, “Of course it does. Has anyone ever disputed that?” In response, the author cited multiple footnotes documenting that “the original mission of adjudicating complaints was abandoned” by the ERB and that the ERB “refers all of them,” then observed in conclusion, “There may be a new day dawning at the ERB, but it’s been a long dark night for ethics enforcement over quite some period of years.” *Id.*

208. The July 2015 Article recommended that the ERB might also considerably improve its website, which invited e-mail inquiries but left many pertinent questions unanswered: Would complaints and opinion requests be treated confidentially? How long does it take to get a written opinion? Is advice available over the phone? The new ERB general counsel took on the task of improving the website and in February 2016 informed “the board that the ERB’s website will be an informational website that will include agendas, meeting minutes and proposed actions. Mr. Ciolino told the board that he plans to have the ERB website implemented in one week.” See Minutes of Ethics Review Bd. Meeting (Feb. 2016) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2016-02-29-ERB-Minutes.pdf>.

209. See WECHSLER, *supra* note 75, at 55 (“An inspector general’s office might do investigations for the ethics commission . . .”).

210. For a description of how the Louisiana State Bar Association Office of Disciplinary Counsel separates the investigative function from decision-making in its disciplinary proceedings, see Louisiana Attorney Disciplinary Board, <https://www.ladb.org/about/>; see also *Georgia Gulf Corp. v. Bd. of Ethics for Pub. Employees*, 96-1907 (La. 05/09/97); 694 So. 2d 175 (requiring investigative and prosecutorial functions to be separated from the state ethics board’s adjudicatory role).

provisions of the state ethics code into the city code of ethics.<sup>211</sup> One month later, ERB counsel reported that the recommended revision had been communicated in a letter to the Council,<sup>212</sup> which approved an ordinance accomplishing the change on April 7, 2016.<sup>213</sup> This was the first (and to date, only) ERB recommendation for revision of the city ethics code. Much more could be done: e.g., conduct a national survey of other municipal ethics codes<sup>214</sup> and recommend best practices to the City Council; enhance enforcement powers by asking the Council to establish a schedule of fines that the ERB can impose for violations of the city ethics code; further enhance enforcement powers by asking the Council for procedures to suspend or remove board and commission members when the ERB finds them in violation of the city ethics code.<sup>215</sup>

(b) The new ERB website, which launched during the second quarter of 2016, requires that “[r]equests for advisory opinions must be in writing . . . .”<sup>216</sup> The ERB has apparently decided that it will not respond to oral requests for guidance.

(c) Counsel advised the ERB in May 2016 that it needed to reform “structural problems with the way the current prosecutorial functions and the adjudicative functions are completely under the ERB”; he recommended giving prosecutorial functions “to the OIG since the investigative staff is available and the office has the ability to bring charges.”<sup>217</sup> But at the next ERB meeting in August, counsel reported on the OIG’s resistance to signing a proposed memorandum of understanding without additional funding for performing these investigative and

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211. See Minutes of Ethics Review Bd. Meeting (Dec. 2015), available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-12-16-ERB-Minutes.pdf>.

212. See Minutes of Ethics Review Bd. Meeting (Jan. 2016) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2016-01-25-ERB-Minutes.pdf>.

213. See Dane S. Ciolino, *City Council Incorporates into City Code of Ethics Certain Provisions of the State Code of Ethics*, CITY OF NEW ORLEANS ETHICS REV. BOARD (June 11, 2016) <http://www.nolaerb.gov/2016/06/11/487/>.

214. See, CARL VINSON INSTITUTE OF GOVERNMENT, COUNTY ETHICS ORDINANCES: AN ANALYSIS AND COMPARISON FOR GWINNETT COUNTY, GEORGIA (2007).

215. See generally Remarks delivered by the author at the April 25, 2016, meeting of the ERB [hereinafter Marcello Reform Recommendations 2016] (on file in EDD, *supra* note 32).

216. *Opinions*, CITY OF NEW ORLEANS ETHICS REV. BOARD, <http://www.nolaerb.gov/resources/opinions/> (last visited Sept. 21, 2016).

217. See Minutes of Ethics Review Bd. Meeting (May 2016) available at <http://www.nolaerb.gov/wp-content/uploads/2016/07/2016-05-25-ERB-Minutes.pdf>.

prosecutorial functions.<sup>218</sup>

*Fourth*, the ERB should train its own staff or competitively select an ethics education expert (or do both) and direct them to provide rules-based training on compliance with state and local ethics laws.<sup>219</sup>

**UPDATE:** (a) The ERB relied on an ethics education expert during 2015–2016 to provide ethics training at a cost of \$50,000 annually.<sup>220</sup> As requested during the ERB’s “community listening” process,<sup>221</sup> the board began reporting for the first time in July 2016 the number of public employees actually receiving ethics training: 31 employees trained during December 2015 and another 50 employees trained during the first half of 2016, then perhaps 15–20 more members of the mayor’s office, producing a rather high cost-benefit ratio of approximately \$500 per person trained.<sup>222</sup> The ERB and its ethics education consultant should address this high cost-benefit ratio by announcing at the start of a new 2016–2017 contract year how many participants they expect to train during the next year; they should broaden the target population to include not only city employees; but also elected officials and the hundreds of appointed members who serve on city boards and commissions; and they should give participants training on the rules in city and state ethics codes.<sup>223</sup>

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218. See Minutes of Ethics Review Bd. Meeting (Aug. 2016) available at <http://www.nolaerb.gov/board-meetings/minutes-of-meetings/>.

219. The state board of ethics is required to provide a mandatory hour of ethics training each year for all state and local employees, but there remains ample opportunity for the ERB to make its own significant contribution, since data suggest that state officials face an overwhelming challenge. In 2014 the state ethics board documented that 234,846 people received ethics training—only 10,066 (4%) in live seminars by ethics staff; 16,068 (7%) by ethics liaisons and proctors; and the remaining 208,712 (89%) via online instruction. Telephone interview with Kathleen Allen, ethics administrator for the state board of ethics (Apr. 2015) (statistics taken from Internal Database of the Ethics Administration Program) (on file with author).

220. At the August ERB meeting, the ethics contractor reported that she would submit the final invoice before October, when the contract would renew for a second year at \$50,000. See Minutes from New Orleans Ethics Review Bd. Meeting (Aug. 2016) available at <http://www.nolaerb.gov/board-meetings/minutes-of-meetings/>.

221. See Marcello Reform Recommendations 2016, *supra* note 215.

222. See discussion, *supra* notes 178–79.

223. Numerous responsible voices have emphasized the need for rules-based compliance at the heart of an ethics education program. New Orleans’ Chief Administrative Officer and other senior city personnel “expressed a particular desire to ensure public servants’ understanding and compliance with ethics codes.” See Minutes of Ethics Review Bd. Meeting (Feb. 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-02-28-ERB-Minutes.pdf> (emphasis added). The first ERB Chair, Rev. Kevin Wildes, called for an “ethics

(b) In response to a question about coordination with the ethics liaison required under the state code, the ethics education consultant suggested that the ERB request “names of the designated ethics liaison trainers for each city department”; minutes reflect that the ERB passed the requested motion, then ostensibly “withdrew” it at the mover’s request but without actual board action.<sup>224</sup> Minutes give no explanation for these machinations. In fact, however, the ERB and its ethics education consultant *should* know the names of designated ethics liaisons in city government—and more, should be coordinating an effective program of ethics training with them.

*Fifth*, the mayor and City Council must increase diversity by appointing and confirming new members on the ERB. This enhancement of diversity should have started with two summer 2015 appointments but did not.

UPDATE: As this Article went to press, the ERB remained devoid of women, Asian, or Hispanic members for the third straight year and more than one full year after its lack of compliance with city code requirements surfaced as a matter of public concern.

The improvements finally accepted by the ERB were all eminently achievable from the outset. The ERB possessed all the power it needed to be a self-correcting mechanism, but not until the waning months of 2015 did the ERB implement reforms that were always comfortably within its grasp: Income disclosure? Check!<sup>225</sup> “Sunshine” law compliance? Check!<sup>226</sup> Budget control?

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educational program [that] will assist in *preventing ethical violations* within the government and will encourage employees to *inform the board when violations occur*” (emphasis added). See 2008 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 10 (2009) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2008-00-00-ERB-Annual-Report.pdf>; 2009 NEW ORLEANS, LA., ETHICS REV. BOARD ANN. REP. 9 (2010) available at <http://www.nolaerb.gov/wp-content/uploads/2016/03/2009-00-00-ERB-Annual-Report.pdf>. The second ERB Chair, Rev. Cornelius Tilton, cited “the inclusion of state ethics provisions” as a necessary component of ethics education. See Minutes of Ethics Review Bd. Meeting (Aug. 2012) available at <http://www.nolaerb.gov/wp-content/uploads/2016/04/2012-08-07-ERB-Minutes.pdf>.

224. See LA. STAT. ANN. § 42:1170(C)(4) (2014) (requiring each political subdivision to “designate at least one person who shall, with the assistance of the board, provide information, notices, and updates to employees and officials of the political subdivision and assist the board in any way necessary . . . .”); see Minutes from New Orleans Ethics Review Bd. Meeting (Aug. 2016) available at <http://www.nolaerb.gov/board-meetings/minutes-of-meetings/>.

225. See Maldonado, *supra* note 59 (“A City Council committee on Thursday advanced a measure that will require the city’s Ethics Review Board to submit

Check!<sup>227</sup> Enforcement of the local ethics code? Check!<sup>228</sup> And even, finally, recommending improvements in the city ethics code? Check!<sup>229</sup>

The ERB can do still more by conducting a national survey of other municipalities and recommending “best practices” to improve the city ethics code; by strengthening and asserting its ethics enforcement powers; and by increasing significantly the numbers and types of public servants experiencing its ethics training program.<sup>230</sup> The mayor and City Council also need to shoulder their responsibility for appointing and confirming new members who will increase ethnic and gender diversity on the ERB.

What global conclusions can we draw? The three post-Katrina ethics entities produced a healthier local government environment with more systems in place to discourage and detect corruption. Of the three local ethics entities, the OIG demonstrated the best record of success. Perhaps not coincidentally, it’s also the only one of the local ethics entities governed by regular evaluations at multiple levels through annual quality assurance and three-year peer reviews.<sup>231</sup> The

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annual personal financial disclosures, though *according to the board’s lawyer, board members were already required to do so . . . .* ‘It’s my view that *state law requires them to file these disclosures,*’ Ciolino said.”) (emphasis added).

226. The ERB properly noticed its entry into executive session at the October 2015 meeting, when an agenda item explicitly described the legally permissible purpose of considering “an investigative proceeding regarding allegations of misconduct.” See Agenda of Ethics Review Bd. Meeting, item 6 (Oct. 2015) (on file in EDD, *supra* note 32).

227. See Maldonado, *supra* note 59 (reporting the opinion of ERB’s new contract counsel that “the CAO’s sign-off on expenditures was a formality,” adding “that if the city administration were ever to block an expenditure, it would call the board’s independence into question. ‘And that would be a significant problem, probably something that would require litigation,’ Ciolino said”).

228. By November 2015, news reports indicated that the ERB had accepted jurisdiction over an ethics complaint and was shouldering the burden of investigating allegations of retaliation itself rather than referring the matter elsewhere. See Charles Maldonado, *Inspector General’s Office, Two City Officials Under Ethics Board Investigation*, LENS (Nov. 24, 2015, 12:22 PM) <http://thelensnola.org/2015/11/24/inspector-generals-office-two-city-officials-under-ethics-investigation/>.

229. The ERB’s new contract counsel advised the board at its December 2015, meeting that the city ethics code should be amended to incorporate provisions of the state ethics code, as directed by the home rule charter. See Minutes of Ethics Review Bd. Meeting (Dec. 2015) *available at* <http://www.nolaerb.gov/wp-content/uploads/2016/04/2015-12-16-ERB-Minutes.pdf>.

230. See Marcello Reform Recommendations 2016, *supra* note 215.

231. The most recent three-year peer review by the Association of Inspectors

ERB and OIPM need comparable peer review by external evaluators.<sup>232</sup> Even organizations that perform evaluation and oversight functions need to be held accountable through their own external evaluation and oversight processes.

We might view the last months of 2015 and first quarter of 2016 as the turning point when the ERB accepted and began to implement recommendations for reform.<sup>233</sup> Will it continue to embrace change and improve its operations in the future? Time will tell—and public scrutiny will help.

Public scrutiny encourages ethics entities to submit themselves to the same rigorous standards of accountability and high performance that they encourage among others. We should expect transparency from these local ethics entities and should remain vigilant observers of their performance, because better-

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General unanimously concluded that the OIG “met all relevant Green and Yellow book standards for the period of review.” See Letter from Thomas Caulfield to Inspector General Edouard R. Quatrevaux (Apr. 6, 2015) available at <http://www.nolaog.gov/files/peerreviews/Peer%20Review%20Report%202015.pdf>.

232. In a series of interviews conducted before the 2012 planning retreat, the ERB recognized its lack of measurable performance data, but never corrected the deficiency: “Board members acknowledge that the ERB does not have indicators or measures in place to assess its mission success.” See Public Strategies Group, Interview Themes, at 2 (on file in EDD, *supra* note 32) (summarizing interviews conducted during February 22 and March 1, 2012). Consultants also reported “an emerging sense that the approach, breadth and resource commitment to the education effort has been ‘stuck’ in neutral for some time.” *Id.* But the ERB seemed unable to correct its course and had little more to show for its ethics education efforts four years later. The ERB’s agendas repeatedly referred to an “ERB self-evaluation process.” See Agenda of Ethics Review Bd. Meeting (Dec. 2012) (on file in EDD, *supra* note 32); see also Agenda of Ethics Review Bd. Meeting (Mar. 2014) (on file in EDD, *supra* note 32) (referencing a self-evaluation instrument). Both initiatives proved unavailing: “The Board never engaged in any evaluation process and never developed an instrument or any reports for its self-evaluation process.” See April 29, 2015 e-mail exchange with Inspector General Ed Quatrevaux (on file in EDD, *supra* note 32) (responding on the ERB’s behalf to a public records request); see also Agenda of Ethics Review Bd. Meeting (Jan. 2016) (on file in EDD, *supra* note 32); Agenda of Ethics Review Bd. Meeting (Feb. 2016) (on file in EDD, *supra* note 32) (both listing a renewed “ERB self-evaluation” process). Self-evaluation did not work much better in its third incarnation than it did in its first two. Half a year after ERB members received the 2016 self-evaluation forms, only four had bothered to fill it out, and their responses were of the “plain vanilla” variety. See ERB Self-evaluation Forms (on file in EDD, *supra* note 32). The ERB needs to submit itself to external evaluation procedures and will be required to do so, if voters approve the November 2016 charter proposition.

233. See David Marcello, *2015 Could Be Landmark for Ethics Reform*, NEW ORLEANS ADVOCATE (Dec. 8, 2015, 11:04 AM) <http://theadvocate.com/news/opinion/14216962-123/tulane-law-expert-why-2015-could-be-landmark-year-for-new-orleans-ethics-reform>.

performing ethics watchdogs will produce better-performing municipal government, serving all our best interests.

Civic sector involvement was essential in creating the three local ethics entities.<sup>234</sup> We've accomplished a great deal in the ten years since Katrina. To accomplish even more, we must remain vigilant observers and defenders of the vigorous local ethics watchdogs that were created in the aftermath of that devastating storm.

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234. Citizens for 1 Greater New Orleans has been instrumental in establishing and defending the integrity of these three local ethics entities. *See, e.g.*, Marcello, *supra* note 2, at 84–84 (commending Citizens for its work in introducing the OIG to New Orleans and supporting local and state legislative initiatives to expand legal powers of the OIG and ERB); *see also* David Marcello, *Strategic Plan for Ongoing Local Ethics Reform* (on file in EDD, *supra* note 32) (a briefing paper presented to Citizens' Executive Committee during the fall of 2015).