

# OFFICE OF THE NASSAU COUNTY ATTORNEY CONTINUING LEGAL EDUCATION PROGRAM

## REPRESENTING THE MUNICIPAL CLIENT: THE DUAL DEMANDS OF GOVERNMENT ETHICS AND PROFESSIONAL RESPONSIBILITY

Fall 2011

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### I. INTRODUCTION TO GOVERNMENT ETHICS

#### A. ETHICS IN A MODERN, PLURALISTIC SOCIETY

1. Morality and Ethics, distinguished
2. *Malum in Se* and *Malum Prohibitum*, compared

#### B. PURPOSES OF GOVERNMENT ETHICS LAWS

1. Fostering public confidence
2. Guiding and protecting honest officials (prevention)

#### C. MARK DAVIES' THREE PILLARS OF GOVERNMENT ETHICS

1. Clear, comprehensive ethics code
2. Reasonable disclosure requirements
3. Effective Administration

#### D. GOVERNMENT ETHICS LAWS AND AUTHORITY

1. NY General Municipal Law, Article 18
2. Various state constitutional and statutory provisions
3. Case law (e.g. dual office holding; prohibited appearance of impropriety)
4. Penal Law Arts. 195 (official misconduct) and 200 (bribery, unlawful gratuities)
5. Federal honest services fraud; Hatch Act
6. Informal opinions of NYS Attorney General and NYS Comptroller
7. Local Municipal Ethics Code
8. Advisory opinions of local Board of Ethics
9. Regulations and policies of individual agencies
10. NY Public Officer's Law sec. 74 (state employees)

#### E. HOW TO ANALYZE A GOVERNMENT ETHICS PROBLEM

1. Start with NY General Municipal Law, Article 18
2. Always Check Local Municipal Ethics Code
3. No Statute Violated? Consider "Appearances"

**IF IN DOUBT, ASK BOE FOR FREE, CONFIDENTIAL ETHICS ADVICE**

- F. SUGGETED READING  
Leventhal, *Why Do We Need A Government Ethics Code?*  
Nassau Lawyer, Nassau Co. Bar Assoc., Spring 2004.

## II. N.Y. GENERAL MUNICIPAL LAW ARTICLE 18

- A. WHO MUST COMPLY?
- B. PROHIBITED INTEREST IN CONTRACT WITH MUNICIPALITY
1. Penalty for violation: misdemeanor, contract void
  2. Elements of violation:
    - a. Contract
    - b. Financial benefit
    - c. Control
  3. Exceptions; Disclosure of Interest
- C. APPLICANT DISCLOSURE IN LAND USE APPLICATIONS
1. Penalty for violation: misdemeanor
  2. Applicants in land use matters must disclose:
    - a. The name and address of officials with interest in applicant
    - b. The nature and extent of the interest
    - c. Note: by common law, official must recuse
- D. N.Y. GEN. MUN. LAW, ART. 18: OTHER PROHIBITIONS
1. Penalty for violation: disciplinary action (not misdemeanor)
  2. Standards of Conduct:
    - a. Requesting or Accepting Gifts
      - i. Vague Standard
      - ii. Public sector norm = public sector crime?
      - iii. New York's bribery statutes
      - iv. Giving or receiving unlawful gratuities
      - v. Why is ethics training important?
    - b. Disclosure or Personal Use of Confidential Information
    - c. Payment for Matters before Own Agency
    - d. Contingent Fees for Matters before Any Agency
- E. NEEDED: A NEW STATEWIDE MUNICIPAL ETHICS CODE
1. Rigid Regulation: Prohibited Interests in Municipal Contracts
  2. The Undefined Term: Confidential Information
  3. The Vague Prohibition on Gifts and Favors
  4. Gaps in Coverage
    - a. Two Hats
    - b. Revolving Door
    - c. Nepotism
  5. Onerous Annual Disclosure Requirement
  6. Ineffective Administration
  7. Failed legislative efforts at reform

F. APPENDIX

1. N.Y. Gen. Mun. Law, Article 18 (Sections 800-809).
2. Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees*, NYSBA/MLRC Municipal Lawyer, Summer 2005, Vol. 19, No. 3.
3. Article 18 Hypotheticals

**III. LOCAL MUNICIPAL ETHICS CODES**

A. AUTHORITY DERIVED FROM NY GEN MUN LAW ARTICLE 18

Filling gaps left by N.Y. Gen. Mun. Law Article 18

B. IMPORTANCE OF PLAIN LANGUAGE GUIDE

C. LOCAL CODE SHOULD INCORPORATE GML ART. 18

D. TYPICAL PROVISIONS OF A MODERN LOCAL ETHICS CODE

1. Conflicts of Interest Prohibited
2. Recusal
3. Disclosure of Interest
4. Misuse of Municipal Resources
5. Gifts and Favors; Gratuities
6. Representation of Others; Appearances before Municipality
7. Political Solicitation of Subordinates, Vendors, Contractors
8. Disclosure of Confidential Information
9. Solicitation of Future Employment
10. Revolving Door
11. Inducement of Others
12. Prohibited Appearance of Impropriety
13. Annual Financial Disclosure
14. Powers and Duties of Ethics Board
15. Penalties for Violation

E. SUGGESTED READING

1. Davies, *Enacting a Local Ethics Law- Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3.
2. Davies, *Enacting a Local Ethics Law- Part II: Disclosure*, NYSBA/MLRC Municipal Lawyer, Fall 2007, Vol. 21, No. 4.
3. Davies, *Enacting a Local Ethics Law- Part III: Administration*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1.

F. APPENDIX

1. Nassau County Conflicts of Interest Booklet.
2. Leventhal, *Running a Local Municipal Ethics Board: Glossary of Government Ethics Terms*, NYSBA/MLRC Municipal Lawyer, Spring 2006, Vol. 20.

## IV. COMMON LAW CONFLICTS OF INTEREST

### A. COMMON LAW CONFLICTS OF INTEREST

1. No need for statutory violation<sup>1</sup>
2. Court may set aside board decisions where members with conflicts have failed to recuse themselves<sup>2</sup>
3. Common law conflicts should be clear and obvious; not petty or speculative<sup>3</sup>
4. A disqualifying interest is one that is personal or private; not one that an official shares with all other citizens or property owners<sup>4</sup>
5. Potential conflicts
  - a. Business and employment relationships<sup>5</sup>
  - b. Financial interests<sup>6</sup>
  - c. Interest as a neighbor<sup>7</sup>
  - d. Prejudgment of applications<sup>8</sup>
  - e. Pending litigation (pending litigation against a municipal board or board members does not require recusal in a separate application by the plaintiff if the board or board members can act impartially, and where doing so would not create an appearance of impropriety)<sup>9</sup>
  - f. Family and personal relationships (a family or social relationship between an applicant and a board member does not, in and of itself, create a conflict of interest sufficient to require that member's recusal; the facts and circumstances must be judged on a case by case basis)<sup>10</sup>
6. What is a prohibited appearance of impropriety?<sup>11</sup>

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<sup>1</sup> 1993 Op. Atty. Gen. 6; 1990 Op. Atty. Gen. 38.

<sup>2</sup> *Id.*

<sup>3</sup> Peterson v. Corbin, 275 A.D.2d 35 (2d Dept. 2000), *app. dismiss.* 95 N.Y.2d 919 (2000); Friedhaber v. Town Bd. of Town of Sheldon, 16 Misc.3d 1140A (App. Term. 1<sup>st</sup> Dept. 2007), *aff'd* 59 A.D.3d 1006 (4<sup>th</sup> Dept. 2009).

<sup>4</sup> North Hempstead v. North Hills, 38 N.Y.2d 334 (1975); Tuxedo Conservation & Taxpayers Assn. v. Town Bd., 69 A.D.2d 320 (2d Dept. 1979); Segalla v. Planning Bd., 204 A.D.2d 334 (2d Dept. 1992).

<sup>5</sup> Tuxedo, *supra*; Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Ahearn v. Zoning Bd. of Appeals, 158 A.D.2d 801 (3d Dept. 1990), *lv. den.* 76 N.Y.2d 706 (1990); DePaolo v. Town of Ithaca, 258 A.D.2d 68 (3d Dept. 1999); Heustis v. Town of Ticonderoga Planning Bd., 11 A.D.3d 868 (3d Dept. 2004); Matter of Schupak v. Zoning Bd. of Appeals of Marletown, 31 A.D.3d 1018 (3d Dept. 2006), *app. den.* 8 N.Y.3d 842 (2007); 1990 Op. Atty. Gen. 38; 1991 Op. St. Comp. 48.

<sup>6</sup> Segalla, *supra*; Ahearn, *supra*; Parker v. Gardiner Planning Bd., 184 A.D.2d 937 (3d Dept. 1992), *lv. den.* 80 N.Y.2d 76 (1992); Byer v. Town of Poestenkill, 232 A.D.2d 851 (3d Dep't 1997); 2002 Op. Atty. Gen. 9; 1997 Op. St. Comp. 9; 1990 Op. Atty. Gen. 38.

<sup>7</sup> Matter of Tulip Gardens, Inc. v. Zoning Bd. of Appeals, 2009 N.Y. Misc. LEXIS 6437 (Sup. Ct. Nassau Co. 2009); 1988 Op. Atty. Gen. 59; 1988 Op. Atty. Gen. 60.

<sup>8</sup> Webster Assoc. v. Town of Webster, 59 N.Y.2d 220 (1983); Schweichler v. Village of Caledonia, 45 A.D.3d 1281 (4<sup>th</sup> Dept. 2007); 1993 Op. Atty. Gen. 6; 1988 Op. Gen. 60.

<sup>9</sup> 2000 Op. Atty. Gen. 22.

<sup>10</sup> Lucas v. Board of Appeals of the Village of Mamaroneck, 14 Misc. 3d 1214A (Sup. Ct. Westchester Co. 2007), *aff'd* 57 A.D.3d 784 (2d Dept. 2008); 1991 Op. Atty. Gen. 48; 1989 Op. Atty. Gen. 50.

<sup>11</sup> See, 2002 Op. Atty. Gen. 8; 1997 Op. Atty. Gen. 19.

## B. RECUSAL

1. Recusal v. Abstention
2. Recusal is the functional equivalent of a “nay” vote<sup>12</sup>
3. Legislators: special considerations
  - a. Legislators do not have a personal, First Amendment right to vote on any given matter<sup>13</sup>
  - b. Recusal by a Legislator disenfranchises voters
4. Rule of necessity<sup>14</sup>

## C. SUGGESTED READING

Steinman, Recusal and Abstention from Voting: Guiding Principles, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1.

## D. APPENDIX

Leventhal, How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest, NYSBA/MLRC Municipal Lawyer, Spring 2011, Vol. 25, No. 2.

## V. RECURRING ETHICS ISSUES:

### A. DUAL OFFICE HOLDING

1. Constitutional and Statutory Prohibitions (note application of N.Y. Municipal Home Rule Law)
2. Common Law Rule: In the absence of a constitutional or statutory prohibition, an individual may hold two government positions provided the two positions are not inherently incompatible.<sup>15</sup>
  - a. determine compatibility by comparing duties
  - b. you cannot be your own boss
  - c. same standard for compatibility of outside employment<sup>16</sup>

### B. POST EMPLOYMENT RESTRICTIONS (Look before you leave!)

1. Typically regulated by local code of ethics
2. Temporary Ban (“Appearance” broadly defined)
3. Lifetime Ban (Exception: only ministerial acts)
4. Waivers (e.g. the indispensable retiree)

### C. NEPOTISM

1. Post-Feminist Work Place: two career households
2. Article 18 does not prohibit nepotism
3. Local Code should regulate, but not prohibit two-official

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<sup>12</sup> See, N.Y. Gen. Constr. Law §41 (Quorum and majority).

<sup>13</sup> Nevada Commission on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).

<sup>14</sup> See, Matter of General Motors Corp.-Delco Products Div. v. Rose, 82 N.Y.2d 183 (1988); cf. Vesely v. Town of New Windsor, 90 A.D.2d 770 (2d Dept. 1982).

<sup>15</sup> People ex rel. Ryan v. Green, 58 N.Y. 295 (1874).

<sup>16</sup> 2006 Op. Atty. Gen. 22; Dupras v. County of Clinton, 213 A.D.2d 952 (3d Dept. 1995).

- households
- 4. Harm lies in the abuse of office that arises when a public official hires, retains, or promotes family members, or supervises them, or is supervised by them
- 5. Status of Domestic Partners

## **VI. DISCLOSURE**

### **A. TRANSACTIONAL DISCLOSURE**

### **B. APPLICANT DISCLOSURE**

### **C. ANNUAL FINANCIAL DISCLOSURE**

- 1. Purposes of Annual Financial Disclosure
- 2. Municipalities with populations less than 50,000
- 3. Who is required to file?
- 4. Disclosure requirement should be reasonable
- 5. Effect of Collective Bargaining Agreement
- 6. Review of Disclosure Statements

### **D. SUGGESTED READING:**

Davies, 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform, Pace Law Review, 1991 vo. 11, No. 2, p. 243.

## **VII. ETHICS BOARD: STRUCTURE, PURPOSE, PROCEDURE**

### **A. FUNCTIONS**

- 1. Advisory Opinions and Waivers
- 2. Repository for Transactional Disclosures and Notices of Recusal
- 3. Investigations and Enforcement
- 4. Administration of Financial Disclosure Law
- 5. Ethics Training

### **B. MEMBERSHIP**

- 1. For credibility: bi-partisan membership
- 2. For independence: fixed, staggered terms; budget; subpoena power

### **C. MEETINGS, DELIBERATIONS AND DETERMINATIONS**

- 1. Who may request an advisory opinion?
- 2. What is the effect of an Advisory Opinion?
- 3. Tips for Drafting Advisory Opinions
- 4. Who May File a Complaint?
- 5. Investigation and Hearing of Complaints
- 6. Application of FOIL: exceptions
- 7. Application of Open Meetings Law: executive session
- 8. Subpoenas for production of Board of Ethics records

**D. ENFORCEMENT**

1. Should apply not only to municipal officers and employees, but also to private individuals and companies
2. Penalties imposed by Ethics Board may include:
  - a. civil fines
  - b. voiding of contract
  - c. private censure
  - d. restitution
  - e. disgorgement of profits
  - f. employee discipline (subject to collective bargaining agreement)
  - g. criminal prosecution
  - h. debarment from further business with the municipality;
  - i. judicial injunction
3. At what stage should an ethics complaint be public?
4. Whistle blower protection

**E. SUGGESTED READING**

1. Freeman, Boards of Ethics: Public Disclosure? NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2.
2. Leventhal, Tips For Drafting Advisory Opinions, Talk of the Town & Topics, Assoc. of Towns of the State of NY, May/June 2004.

**F. APPENDIX**

Leventhal, Running a Local Municipal Ethics Board: Ten Steps to a Better Board, NYSBA/MLRC Municipal Lawyer, Fall 2008, Vol. 22, No. 4.

**VIII. MUNICIPAL ATTORNEY/CLIENT RELATIONSHIP**

**A. GOVERNMENT ETHICS AND LEGAL ETHICS DISTINGUISHED**

NY = last state to adopted a rule based ethics system  
Judiciary law §90: gives App. Div. rule making authority  
22 NYCRR part 1200 = Joint Rules effective 4/1/09  
(comments not adopted by App. Div. but published by NYSBA)

**B. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES (ATTORNEYS): RULE 1.11**

1. Confidential information
2. Revolving door
3. Misuse of government resources

compare: Rule 1.6: confidentiality (all attorneys)  
compare: GML §805-a, prohibited gifts  
compare: Penal Law Art. 200, bribery, unlawful gratuities  
compare: Penal Law §195, official misconduct

- C. SPECIAL RESPONSIBILITIES OF PROSECUTORS AND OTHER GOVERNMENT LAWYERS: RULE 3.8
  - 1. No criminal prosecution without probable cause
  - 2. Disclose Brady material to *pro se* defendant
  
- D. RULE 7.2, PAYMENT FOR REFERRALS
  - 1. Rule 7.2 (Payment for Referrals) – ADOPTED  
(subject to exceptions) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client.
  - 2. Proposed Rule 7.6 (Pay to Play) – NOT ADOPTED  
A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
  
- E. INTERESTS OF MULTIPLE CLIENTS (PART-TIME COUNSEL):  
RULE 1.7, CONFLICT OF INTEREST – MULTIPLE CLIENTS
  
- F. REPRESENTING PRIVATE CLIENTS BEFORE YOUR OWN MUNICIPALITY<sup>17</sup>
  
- G. CONSIDER OUTSIDE COUNSEL FOR DEFENSE AND INDEMNIFICATION:  
PUBLIC OFFICERS LAW §18(3)(B)
  
- H. DELIVERY OF MUNICIPAL RECORDS: PUBLIC OFFICERS LAW §80
  
- I. WHO IS THE CLIENT OF A MUNICIPAL ATTORNEY?
  - 1. Battling Branches, Inter-Agency Conflicts, Divided Boards, Rogue Officials, and other headaches
  - 2. RULE 1.13, ORGANIZATION AS CLIENT
  
- J. COMMENTATORS HAVE IDENTIFIED FIVE POSSIBLE CLIENTS OF THE GOVERNMENT LAWYER:
  - 1. the responsible official
  - 2. the government agency
  - 3. the branch of government (executive or legislative)
  - 4. the government as a whole
  - 5. the public.

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<sup>17</sup> See, 2000 Op. St. Compt. 22.

- K. LAWYER-CLIENT PRIVILEGE, GENERALLY
  1. Where *legal advice* of any kind is sought
  2. from a *professional legal adviser* in his capacity as such
  3. the communication relating to that *purpose*
  4. made in *confidence*
  5. by the *client*
  6. are at *his* instance permanently protected
  7. from disclosure by himself *or* by the legal adviser,
  8. except the protection may be *waived*.
- L. PRIVILEGE IN THE GOVERNMENT SETTING
- M. REASONS SUPPORTING THE GOVERNMENT LAWYER-CLIENT PRIVILEGE. The lawyer-client privilege is designed to facilitate the administration of justice by promoting freedom of consultation between the client and attorney.
- N. REASONS TO RESTRICT THE GOVERNMENT LAWYER-CLIENT PRIVILEGE.
- O. THE CIVIL/CRIMINAL DISTINCTION
- P. THE CLINTON ERA AND BEYOND<sup>18</sup>
- Q. 2<sup>ND</sup> CIRCUIT: PUBLIC INTEREST SUPPORTS GOVERNMENT ATTORNEY-CLIENT PRIVILEGE<sup>19</sup>
- R. PRACTICAL ADVICE FOR THE GOVERNMENT LAWYER
- S. SUGGESTED READING
  1. Salkin, Beware: What You Say to Your [Government] Lawyer May Be Held Against You – The Erosion of the Government Attorney-Client Confidentiality. 35 Urb. Law 283 (2003).
  2. Salkin and Phillips: PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM: Integrity in Public Service: Living Up to the Public Trust?: Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege. 39 Ind. L. Rev. 561 (2006)

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<sup>18</sup> In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998).

<sup>19</sup> In re Grand Jury Investigation v. John Doe, 399 F.3d 527 (2d Cir. 2005).

## IX. GOVERNMENT ETHICS RESOURCES

- A. Opinions of the NYS Attorney General are available on-line through a link on the Attorney General's website: <http://www.oag.state.ny.us>
- B. Opinions of the NYS Comptroller are available on-line through a link on the Comptroller's website: <http://www.osc.state.ny.us>
- C. Many useful ethics publications are posted on the website of the New York City Conflicts of Interest Board (NYC COIB): <http://www.nyc.gov/html/conflicts/html/home/home.shtml>
- D. Many useful ethics publications are posted on the website of the New York State Bar Association Municipal Law Section, including an archive of articles from the *Municipal Lawyer*. <http://www.nysba.org>
- E. The Conference on Government Ethics Laws (COGEL) is a national membership organization of government agencies, organizations, and individuals with responsibilities or interests in governmental ethics, elections, campaign finance, lobby laws and freedom of information. Publications, contacts, and other resources are available to members through the COGEL website: <http://www.cogel.org>

**NEW YORK STATE GENERAL MUNICIPAL LAW**  
**ARTICLE 18. CONFLICTS OF INTEREST OF MUNICIPAL OFFICERS AND**  
**EMPLOYEES**

**Sections 800 through 809**  
**Current through Ch. 689, 10/31/07**

**§ 800. Definitions**

When used in this article and unless otherwise expressly stated or unless the context otherwise requires:

1. "Chief fiscal officer" means a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, except that in a school district the term shall not mean a member of the board of education or a trustee thereof.
2. "Contract" means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law.
3. "Interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.
4. "Municipality" means a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.
5. "Municipal officer or employee" means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any

officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

6. "Treasurer" means a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.

### **§ 801. Conflicts of interest prohibited**

Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

### **§ 802. Exceptions**

The provisions of section eight hundred one of this chapter shall not apply to:

1.
  - a. The designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;
  - b. A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract;
  - c. The designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law;

d. The purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;

e. The acquisition of real property or an interest therein, through condemnation proceedings according to law;

f. A contract with a membership corporation or other voluntary non-profit corporation or association;

g. The sale of bonds and notes pursuant to section 60.10 of the local finance law;

h. A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract;

i. Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment.

j. Purchases or public work by a municipality, other than a county, located wholly or partly within a county with a population of two hundred thousand or less pursuant to a contract in which a member of the governing body or board has a prohibited interest, where:

(1) the member of the governing body or board is elected and serves without salary;

(2) the purchases, in the aggregate, are less than five thousand dollars in one fiscal year and the governing body or board has followed its procurement policies and procedures adopted in accordance with the provisions of section one hundred four-b of this chapter and the procurement process indicates that the contract is with the lowest dollar offer;

(3) the contract for the purchases or public work is approved by resolution of the body or board by the affirmative vote of each member of the body or board except the interested member who shall abstain.

2.

a. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee;

b. A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission;

c. A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber;

d. A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office;

e. A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of [fig 1] seven hundred fifty dollars.

f. A contract with a member of a private industry council established in accordance with the federal job training partnership act or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract.

**§ 804. Contracts void**

Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable.

**§ 804-a. Certain interests prohibited**

No member of the governing board, of a municipality shall have any interest in the development or operation of any real property located within Nassau County and developed or operated by any membership corporation originally formed for purposes among which are the following:

1. to plan for, advise, recommend, promote and in all ways encourage, alone or in concert with public officials and bodies and interested local associations, the development and establishment of any lands in Nassau County publicly owned with particular emphasis on industrial, business, commercial, residential and public uses, the augmentation [augmentation] [n1] of public revenues and furtherance of the public interest of the citizens of Nassau County;
2. to conduct studies to ascertain the needs of Nassau County as pertains to such publically [publicly] [n2] owned lands and supporting facilities and in Nassau County generally for the purpose of aiding the County of Nassau in attracting new business, commerce and industry to it and in encouraging the development and retention of business, commerce and industry;
3. to relieve and reduce unemployment, promote and provide for additional and maximum employment, better and maintain job opportunities and instruct or train individuals to improve or develop their capabilities for such jobs;
4. to implement and engage itself in plans of development of such publically [publicly] [n3] owned lands and other areas in connection with private companies and citizens and with public bodies and officials, and to participate in such operations, leasehold, loans, ownerships with respect to land, buildings or public facilities or interest therein as may be lawful and desirable to effectuate its corporate purposes and the best interests of the people of Nassau County.

**§ 805. Violations**

Any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor.

## **§ 805-a. Certain action prohibited**

1. No municipal officer or employee shall:

a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of [fig 1] seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part;

b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests;

c. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee; or

d. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of his municipality, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.

2. In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate this section may be fined, suspended or removed from office or employment in the manner provided by law.

## **§ 805-b. Solemnization of marriages**

Notwithstanding any statute, law or rule to the contrary, no public officer listed in section eleven of the domestic relations law shall be prohibited from accepting any [fig 1] fee or [fig 2] compensation having a value of [fig 3] one hundred dollars or less, whether in the form of money, property, services or entertainment, for the solemnization of a marriage by such public officer at a time and place other than the public officer's normal public place of business, during normal hours of business. For the purpose of this section, a town or village judge's normal hours of business shall mean those hours only which are officially scheduled by the court for the performing of the judicial function.

## **§ 806. Code of ethics**

1. (a) The governing body of each county, city, town, village [fig 1] , school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. [fig 2]

Notwithstanding any other provision of this article to the contrary, a fire district code of ethics shall also apply to the volunteer members of the fire district fire department. Codes of ethics shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

(b) Effective on and after January first, nineteen hundred ninety-one, such codes of political subdivisions, as defined in section eight hundred ten of this article, may contain provisions which require the filing of completed annual statements of financial disclosure with the appropriate body, as defined in section eight hundred ten of this article. Nothing herein shall be construed to restrict any political subdivision or any other municipality from requiring such a filing prior to January first, nineteen hundred ninety-one. Other than as required by subdivision two of section eight hundred eleven of this article, the governing body of any such political subdivision or other municipality may at any time subsequent to the effective date of this paragraph [fig 1] , adopt a local law, ordinance or resolution pursuant to subdivision one of section eight hundred eleven of this article and any such political subdivision or municipality, acting by its governing body, may take such other action as is authorized in such subdivision. Any political subdivision or other municipality to which all of the provisions of section eight hundred twelve of this article apply may elect to remove itself from the ambit of all (but not some) provisions of such section in the manner authorized in subdivision three of such section eight hundred twelve. In such event any such political subdivision or municipality shall be subject to certain conditions and limitations set forth in paragraphs (a), (b) and (c) of such subdivision three which shall include, but not be limited to, the promulgation of a form of an annual statement of financial disclosure described in subdivision one of such section eight hundred eleven.

2. The chief executive officer of a municipality adopting a code of ethics shall cause a copy thereof to be distributed to every officer and employee of his municipality. The fire district commissioners shall cause a copy of the fire district's code of ethics to be posted publicly and conspicuously in each building under such district's control. Failure to distribute any such copy or failure of any officer or employee to receive such copy shall have no effect on the duty of compliance with such code, nor the enforcement of provisions thereof.

3. [fig 1] Until January first, nineteen hundred ninety-one, the clerk of each municipality shall file in the office of the state comptroller and on or after January first, nineteen hundred ninety-one, the clerk of each municipality and of each political subdivision, as defined in section eight hundred ten of this article, shall file with the temporary state commission on local government ethics established by section eight hundred thirteen of this article, if such temporary state commission be in existence, and in all events shall

maintain as a record subject to public inspection:

(a) a copy of any code of ethics or any amendments to any code of ethics adopted within thirty days after the adoption of such code or such amendment,

(b) a statement that such municipality or political subdivision has established a board of ethics, in accordance with section eight hundred eight and/or pursuant to other law, charter, code, local law, ordinance or resolution, and the composition of such board, within thirty days after the establishment of such board.

(c) a copy of the form of annual statement of financial disclosure described in subdivision one of section eight hundred eleven of this article and either a statement of the date such annual statement form was promulgated by local law, ordinance or resolution of the governing body, if adopted pursuant to subparagraph (i) of paragraph (a) of subdivision one of section eight hundred eleven of this article, or a statement that the governing body has, by local law, ordinance or resolution, resolved to continue the use of an authorized form of annual statement of financial disclosure in use on the date such local law, ordinance or resolution is adopted, if adopted pursuant to subparagraph (ii) of paragraph (a) of subdivision one of section eight hundred eleven of this article, and if as of January first, nineteen hundred ninety-one, no such form was promulgated and no such resolve was made to continue using an existing annual statement form, a statement that the provisions of section eight hundred twelve of this article apply or that it is a municipality which is not subject to the provisions of section eight hundred twelve of this article because it is not a political subdivision as defined in section eight hundred ten of this article.

(d) on or before the fifteenth day of February in each year, the comptroller or the temporary state commission on local government ethics if such commission be in existence, or the clerk of the municipality or political subdivision during or after calendar year nineteen hundred ninety-one if such commission not be in existence, as the case may be, shall submit to the legislature a report listing the name of each county, city, town, village and school district which has as of the thirty-first day of December next preceding, failed to so file with him or with it, as the case may be, a code of ethics, or in the case of a filing by the clerk of the municipality or political subdivision, stating whether or not the municipality or political subdivision has in effect as of the filing date, a code of ethics.

(e) not later than April first, nineteen hundred ninety-one, the comptroller shall submit to the temporary state commission on local government ethics:

(i) a report that sets forth, (A) the name of each political subdivision, as such term is defined in section eight hundred ten of this article, the governing body of which has elected to satisfy the requirements of subdivision one of section eight hundred eleven of this article by continuing to use the annual statement form in existence at the time such election is made as authorized by subdivision one of section eight hundred eleven of this article, and (B) the name of each political subdivision, as so defined, other than those listed in clause (A) of this subparagraph (i), that timely promulgated an annual statement

form of financial disclosure in accordance with subdivision one of section eight hundred eleven of this article, and (C) in a separate category, sets forth the name of those political subdivisions that failed to continue using its existing form or to promulgate a form and which, therefore, by operation of subdivision two of section eight hundred eleven of this article have become subject, as of January first, nineteen hundred ninety-one, to the provisions of section eight hundred twelve of this article. The comptroller shall, at the same time such report is submitted to the temporary state commission on local government ethics, notify each political subdivision which is contained in the latter category that it is subject to section eight hundred twelve of this article; and

(ii) a copy of the most recent filing by all municipalities and political subdivisions, made pursuant to paragraphs (a), (b), (c) and (d) of this subdivision.

### **§ 807. Posting of statute**

The chief executive officer of each municipality shall cause a copy of this article to be kept posted in each public building under the jurisdiction of his municipality in a place conspicuous to its officers and employees. Failure to post any such copy shall have no effect on the duty of compliance with this article, nor with the enforcement of the provisions thereof.

### **§ 808. Boards of ethics**

1. The governing body of any county may establish a county board of ethics and appropriate moneys for maintenance and personal services in connection therewith. The members of such board of ethics shall be appointed by such governing body except in the case of a county operating under an optional or alternative form of county government or county charter, in which case the members shall be appointed by the county executive or county manager, as the case may be, subject to confirmation by such governing body. Such board of ethics shall consist of at least three members, a majority of whom shall not be officers or employees of such county or municipalities wholly or partially located in such county and at least one of whom shall be an elected or appointed officer or employee of the county or a municipality located within such county. The members of such board shall receive no salary or compensation for their services as members of such board and shall serve at the pleasure of the appointing authority.

2. The board shall render advisory opinions to officers and employees of municipalities wholly or partly within the county with respect to this article and any code of ethics adopted pursuant hereto. Such advisory opinions shall be rendered pursuant to the written request of any such officer or employee under such rules and regulations as the board may prescribe and shall have the advice of counsel employed by the board, or if none, the county attorney. In addition, it may make recommendations with respect to the drafting and adoption of a code of ethics or amendments thereto upon the request of the governing body of any municipality in the county.

3. The governing body of any municipality other than a county may establish a local board of ethics and, where such governing body is so authorized, appropriate moneys for

maintenance and personal services in connection therewith. A local board shall have all the powers and duties of and shall be governed by the same conditions as a county board of ethics, except that it shall act only with respect to officers and employees of the municipality that has established such board or of its agencies. The members of a local board shall be appointed by such person or body as may be designated by the governing body of the municipality to serve at the pleasure of the appointing authority and such board shall consist of at least three members, a majority of whom are not otherwise officers or employees of such municipality. Such board shall include at least one member who is an elected or appointed municipal officer or employee.

4. The county board of ethics shall not act with respect to the officers and employees of any municipality located within such county or agency thereof, where such municipality has established its own board of ethics, except that the local board may at its option refer matters to the county board.

5. A board of ethics of a political subdivision (as defined in section eight hundred ten of this article) and of any other municipality, which is required by local law, ordinance or resolution to be, or which pursuant to legal authority, in practice is, the repository for completed annual statements of financial disclosure shall notify the temporary state commission on local government ethics if such commission be in existence and if not, shall file a statement with the clerk of its municipality, that it is the authorized repository for completed annual statements of financial disclosure and that on account thereof, such completed statements will be filed with it and not with the commission. Should any local law, ordinance or resolution be adopted which provides for the filing of such completed annual statements with the temporary state commission on local government ethics instead of with such board of ethics, such board of ethics shall notify the temporary state commission on local government ethics of that fact.

#### **§ 809. Disclosure in certain applications**

1. Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant.

2. For the purpose of this section an officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them

(a) is the applicant, or

(b) is an officer, director, partner or employee of the applicant, or

(c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant, or

(d) is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

3. In the county of Nassau the provisions of subdivisions one and two of this section shall also apply to a party officer. "Party officer" shall mean any person holding any position or office, whether by election, appointment or otherwise, in any party as defined by subdivision four of section two [n1]of the election law.

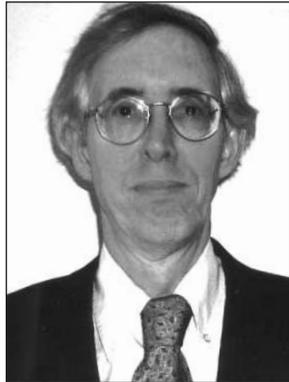
4. Ownership of less than five per cent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges shall not constitute an interest for the purposes of this section.

5. A person who knowingly and intentionally violates this section shall be guilty of a misdemeanor.

# Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees

By Mark Davies

Article 18 of the New York State General Municipal Law sets forth certain baseline conflicts of interest standards that apply in every municipality in the State, except New York City, where only Article 18's financial disclosure requirements apply.<sup>1</sup> Article 18 has been harshly criticized over the years for its complexity, for its overinclusiveness in the prohibited interest provisions of section 801, for its lack of penalties, and for its enormous gaps. Proposals to address these significant problems, however, have repeatedly fallen on deaf ears in the State Legislature.<sup>2</sup> Municipalities, their officers, employees, and counsel, and those who appear before or do business with municipal agencies thus have no choice but to understand and comply with current Article 18, although municipalities may (and should) adopt an effective local conflicts of interest law or resolution, as the case may be.<sup>3</sup> This article accordingly presents a plain language checklist of the requirements of Article 18 that municipal attorneys may employ for their municipal clients.<sup>4</sup> Attorneys must also consult any local municipal ethics code and may wish to modify this checklist to reflect any additional requirements contained in any such local code.



At the outset, one should emphasize that Article 18 defines both "municipality" and "municipal officer or employee" broadly. "Municipality" includes not just political subdivisions (counties, cities, towns, and villages) but school districts, public libraries, BOCES, consolidated health districts, urban renewal agencies, town and county improvement districts, industrial development agencies, fire districts, and even the OTB, as well as many other agencies.<sup>5</sup> "Municipal officer or employee" includes all officers and employees of the municipality, *whether paid or unpaid*, with certain exceptions.<sup>6</sup>

## (1) Prohibited Interest in a Contract with the Municipality

A municipal officer or employee may not have an interest in a contract with the municipality if he or she has any control over the contract, unless an exception applies.

*Applicable sections:* New York State General Municipal Law §§ 800–804, 805

*Penalty for violation:* misdemeanor; contract void and cannot be ratified

*Elements of a violation:*

- (a) Does the matter involve a *contract* with the municipality?

A claim against the municipality is considered a contract with the municipality.

*Note:* The officer or employee does **not** have to be a party to the contract.

- (b) Will the officer or employee *receive a financial benefit* as a result of that contract, or will his or her spouse or minor children or dependents or outside business or employer or a corporation in which the officer or employee owns stock receive such a benefit?
- (c) Does the officer or employee have any *control* over the contract? That is, does the officer or employee, either as an individual official or as a member of a board, have the power or duty to negotiate, prepare, or approve the contract or approve payment under it or audit bills under it or appoint anyone who does?

*Note:* It does not matter if the officer or employee disqualifies ("recuses") himself or herself; the question is whether he or she has the power or duty to do any of those things.

- (d) Do any of the *exceptions* in Gen. Mun. Law § 802 apply or is the contract an employment contract between the municipality and the officer or employee's spouse, minor child, or dependent?

The most common exceptions include: (1) having an interest that is prohibited solely because the municipal officer or employee works for a person or firm that has a municipal contract, where the officer or employee is only an officer or employee of the firm, has nothing to do with the contract at the firm, and will not have his or her compensation at the firm affected by

the contract; (2) having an interest in a contract between the municipality and a not-for-profit organization; (3) having an interest in an existing contract at the time the officer or employee joins the municipality (but this exception does not apply to the renewal of the contract); (4) having an interest in a contract where the interest arises solely from stockholdings and the officer or employee owns or controls less than 5 percent of the stock; (5) having an interest in municipal contracts where the total amount paid under the contracts is no more than \$750 during the fiscal year.

- If the answer to questions (a), (b), and (c) is yes and if the answer to question (d) is no, then the interest is prohibited. Neither recusal nor public bidding will cure the violation.
- If the answer to questions (a) and (b) is yes, but the answer to question (c) is no, then the interest is not prohibited but the officer or employee must disclose it to the municipal legislative body.
- If the answer to questions (a), (b), and (c) is yes, but an exception applies, then the interest is not prohibited, but the officer or employee must disclose it to the municipal legislative body (unless the interest falls under General Municipal Law § 802(2)).

## (2) Dual Employment

“Generally, one person may hold two offices simultaneously unless a constitutional or statutory prohibition bars concurrent holding of the positions, or unless the offices are incompatible.”<sup>7</sup> Two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency between the two offices.<sup>8</sup>

Examples of statutory prohibitions on holding simultaneous offices: town board member and town ZBA member (Town Law § 267(3)); two city offices (Second Class Cities Law § 19); elective and appointive village offices (Village Law § 3-300(3)).

Examples of incompatible offices: town board member and secretary to town ZBA (1990 Op. Atty. Gen. (inf.) 1099); town ZBA clerk and assistant town building inspector (1964 Op. Atty. Gen. (inf.) Jan. 23); county planning commission chair and ZBA member of village within same county (Op. Atty. Gen. (inf.) 86-36); village trustee and member of village housing authority (1976 Op. Atty. Gen. (inf.) 198).

## (3) Miscellaneous Ethics Requirements

*Applicable sections:* New York State General Municipal Law §§ 805-a, 805-b

*Penalty for violation:* disciplinary action

*Prohibitions:*

- (a) *Requesting gifts.* An officer or employee may not request a gift where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.
- (b) *Accepting gifts.* An officer or employee may not accept a gift (or gifts) worth \$75 or more where it might appear that the gift was intended to reward or influence him or her in performing his or her official duties.
- (c) *Disclosing confidential information.* An officer or employee may not disclose confidential information that he or she acquired in the course of his or her official duties.
- (d) *Using confidential information.* An officer or employee may not use confidential information to further his or her personal interests.
- (e) *Matters before your agency.* An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before his or her agency or an agency over which he or she has jurisdiction, or an agency to which he or she has the power to appoint someone.
- (f) *Contingent fees.* An officer or employee may not be paid (or make an agreement to be paid) in connection with any matter before any agency of the municipality where the payment depends on action by the agency with respect to the matter (but a fee based on the reasonable value of the services performed can be fixed at any time).

## (4) Disclosure

- (a) *Disclosure of interests in contracts* (New York State General Municipal Law § 803). See Item (1) above.
- (b) *Disclosure in land use applications* (New York State General Municipal Law § 809). Applicants in land use matters must disclose (i) the name and residence of State

officers, officers and employees of the municipality, and officers and employees of any municipality of which the municipality is a part, who have an interest in the applicant and (ii) the nature and extent of the interest. Officials are deemed to have an interest in the applicant if they or a family member is the applicant, works for the applicant, has stock in the applicant, is a member of a partnership or association applicant, or has an agreement with the applicant to receive anything if the application is approved. A “knowing and intentional” violation is a misdemeanor. By common law, the interested municipal official must recuse.

- (c) *Annual financial disclosure (New York State General Municipal Law §§ 810–813)*. Certain officials must file annual financial disclosure reports.<sup>9</sup>

## Endnotes

1. N.Y. Gen. Mun. Law §§ 800(4) (excluding New York City from the definition of “municipality” for Article 18 purposes), 810(1) (defining “political subdivision” for financial disclosure purposes to include New York City).
2. See Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, Footnotes, Winter 1996, at 5 (County Lawyers’ Association of the State of New York); *Final Report of the Temporary State Commission on Local Government Ethics*, 21 *Fordham Urban Law Journal* 1 (1993); Mark Davies, *New Municipal Ethics Law Proposed*, 5 *Municipal Lawyer*, March/April 1991, at 1.
3. In regard to adopting a local conflicts of interest law or resolution, see Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, Chapter 5 in *Ethics in Government—The Public Trust: A Two-Way Street* (NYSBA 2002); Mark Davies, *Empowering County Ethics Boards*, Footnotes, Spring 1999, at 11 (County Lawyers’ Association of the State of New York); Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 *Fordham Urban Law Journal* 61 (1993); Mark Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in *Ethical Standards in the Pub-*

lic Sector (American Bar Association 1999); Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in *Government Ethics and Law Enforcement: Toward Global Guidelines* (Praeger 2000).

4. See also Mark Davies, *Article 18 of New York’s General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 *Albany Law Review* 1321 (1996) (a comprehensive review of Article 18 that remains up to date); Mark Davies, *Ethics Laws for Municipal Officials Outside New York City*, in 1 *NYSBA Government, Law and Policy Journal*, Fall 1999, at 44; Steven G. Leventhal, *Running a Local Municipal Ethics Board: Tips for Drafting Advisory Opinions*, *Talk of the Towns & Topics*, May/June 2004; Mark Davies, *Working Rules on Ethics for Zoning Boards of Appeals*, *Talk of the Towns & Topics*, March/April 1996, at 28 and *An Ethics Checklist for Zoning Board Members*, *Talk of the Towns & Topics*, May/June 1996, at 23. Since 2003 the *Municipal Lawyer* has published a regular column on municipal conflicts of interest, including columns on, for example, compatibility of office, inspectors general, enforcement, New York City’s conflicts of interest law, establishment of a conflicts of interest training program, and ethical considerations for town attorneys.
5. N.Y. Gen. Mun. Law § 800(4).
6. N.Y. Gen. Mun. Law § 800(5); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 603(9).
7. Op. Atty. Gen. (Inf.) No. 2002-11 (citation omitted.)
8. *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); see James D. Cole, *Compatibility of Office*, 18 *Municipal Lawyer*, Summer 2004, at 19.
9. Mark Davies, *The 1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Change*, 11 *Pace Law Review* 243 (1991) (the Financial Disclosure Law, as interpreted by the former State agency responsible for administering it); Mark Davies, *New Financial Disclosure Law Becomes Effective January First*, *CityLaw*, January/February 2004, at 1 (review of changes to New York City’s financial disclosure law, including discussion of Article 18’s financial disclosure requirements).

**Mark Davies is the Executive Director of the New York City Conflicts of Interest Board and Chair of the Government Ethics and Professional Responsibility Committee of the Association’s Municipal Law Section. The views expressed in this article do not necessarily represent those of the Board.**

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# ARTICLE 18 HYPOTHETICALS

1. Mr. Jones has been the insurance agent for the Town of Oz for over 15 years. Recently his wife was elected to the Town Board. Provided that she recuses herself in regard to any matters relating to her husband's business,
  - a. May she serve on the Town Board?
  - b. May the Town renew its insurance contract through Mr. Jones when it expires?
  
2. Mr. Smith owns a construction business and serves on the Village Board of Trustees. Village Hall desperately needs extensive repairs to the outside of the building, but the Village is short of funds. Mr. Smith offers to have his construction company make the repairs at his cost (i.e., his cost for the materials and the actual salary of his employees, without benefits, during the time they work at the job site). Provided that Mr. Smith recuses himself from voting on the matter, may the Village contract with Mr. Smith to make the repairs?
  
3. A Town ZBA member requires a use variance to add a deck onto her home.
  - a. Provided that she recuses herself, may the ZBA member apply for the variance?
  - b. If the ZBA denies the variance, may she bring an Article 78 proceeding against the ZBA?

4. A Town Board goes out for sealed bids on the construction of a new Town Hall. One of the Town Board members is employed by a contractor that intends to bid on the project, so the Town Board member recuses himself on both sides of the bidding process – he does not discuss the bidding process or the project with any official of the Town or with anyone in the company and is not privy to any confidential information relating to the bidding process or the project either at the Town or at the company.
  - a. Has the Town Board member violated Article 18?
  - b. Would the answer be the same if the company is awarded the contract?
  - c. Would the answer be the same if the Town Board member is not employed by the company but the company is a partnership and the Town Board member's wife owns a 4% partnership interest? If the company is a corporation, and she owns 4% of the stock?
5. May a member of the Village Board of Trustees vote to hire his wife as the Village Clerk?
6. The head of the City Building Department leaves public service to go to work for a developer. On his first day on his new job, he appears before the City Building Department arguing that a building permit that he had under consideration while he was head of the Department should in fact be granted. Any problem under Article 18?
7. Ms. Stephens, who is a real estate broker and also sits on the Village Board of Trustees, brokers a deal for the sale of a lot by Mr. Smith to Mr. Jones. The sale is contingent, however, upon the Mr. Jones being able to sell an adjoining lot to the Village. When the issue of the sale of the lot to the Village comes before the Board, Ms. Stephens discloses her interest and recuses herself. The Village approves the sale and purchases the lot. Is there any Article 18 problem?

8. Town of Oz has a town attorney and a separate attorney, from another law firm, for the ZBA and Planning Board. Under Article 18, may the town attorney appear before the ZBA on behalf of a private client?
9. May the City Building Inspector inspect a building owned by his brother?
10. Mr. Lee sits on a board of education, which wishes to contract with the local YMCA to run an after-school program. Mr. Lee is also chair of the board of trustees of that local YMCA. Must Mr. Lee resign from either board before the contract can be executed?
11. A Town Board member purchases property in his town at a county tax sale. Any problem under Article 18?
12. A large, local university that regularly has matters before the Town Board, Town ZBA, and Town Planning Board – but does not currently have any matters pending before those bodies – gives free season passes for university football games to the members of those bodies as well as 25 additional passes to the Town Supervisor to be distributed as she sees fit to town employees. Does the gift violate Article 18?

# Code of Ethics Booklet

## — Dear Employee —

This booklet contains the text of the Nassau County Code of Ethics, which is binding on all paid and unpaid County officers and employees.

It also contains the Plain language Guide to Government Ethics, which can guide you in meeting the ethical requirements of the Code.

# Plain Language Guide to Government Ethics for Nassau County Officers and Employees

This plain language Guide to Government Ethics has been prepared by the Board of Ethics to assist you in avoiding actual or potential conflicts of interest. It is not intended to replace the actual text of the Nassau County Code of Ethics, reprinted later in this booklet which contains more specific limitations and exceptions as well as provisions applicable to specific classes of County officers and employees, such as Legislators.

## I. Introduction

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The purpose of the Code of Ethics is to foster integrity in government, promote public confidence, and help County officers and employees to discharge their official duties without fear of unwarranted accusations of unethical conduct.

## II. Who Must Comply?

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You must comply with the Code of Ethics if you are a County officer or employee, whether you are paid or unpaid. You must comply with the Code of Ethics if you are a member of a County board or commission.

## III. Guide to Government Ethics

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**1. Using Your Public Office for Private Gain.** You may not take an action or fail to take an action as a public servant for the purpose of obtaining a financial benefit for you, a member of your immediate family, or anyone with whom you have a business or financial relationship

**2. Contracts with the County.** Neither you, nor a member of your immediate family, may enter any kind of a contract with the County. In general, this does not prohibit you from seeking a license or permit from the County as a member of the public wishing to utilize County resources, or from getting a license to operate a business in the County other than on County property, or from serving as a foster parent. Further, if your position with the County is uncompensated, you are not prohibited from having contracts with agencies other than your own agency.<sup>1</sup>

**3. Owning/running a business.** If you are paid by the County, you may not own any part of a business or firm that does business with the County, or be an officer or director of such a business. However, you may own less than 5% of the stocks of a publicly-traded corporation that does business with the County.

**4. Working on contracts in which you have an interest.** Whether you are paid or unpaid, it is a misdemeanor for you to do any work for the County on a contract if you are an agent or principal of a firm that is interested in the contract, if you are an owner of any stock in a firm that is interested in the contract, or if you will profit from the contract in any way. It is also a misdemeanor for you to attempt to influence any action on such a contract.

**5. Misuse of County Resources.** You may not use County letterhead, personnel, equipment, supplies, or resources for a non-County purpose, nor may you pursue personal or private activities during times when you are required to work for the County.

**6. Gifts.** You may not accept gifts or favors worth more than \$75.00 per year from anyone other than your parent, spouse or child, if you know the person is interested in doing business with the County. You may not request or encourage gifts of any value from any person, other than your parent, spouse or child, who is interested in business dealings with the County.

**7. Moonlighting and outside interests.** You may not have an outside job or engage in outside activities that conflict with your duties as a county officer or employee.

**8. Confidential Information.** You may not disclose confidential County information or use it for any non-County purpose.

**9. Appearing for Others.** You may not communicate with any County agency on behalf of a person or entity from whom you receive a salary or compensation.

**10. Lawyers, Agents and Brokers.** You may not represent anyone other than yourself or the County in business or professional dealings with any County agency, unless your county position is uncompensated and there is no conflict between your outside professional activities and your official duties.

**11. Hiring and supervision of relatives.** You may not hire or press others to hire your relatives and you may not directly supervise or evaluate your relatives without the written approval of the Board of Ethics.

**12. Post-Employment Two-Year Ban.** For two years after you leave County service, you will not be permitted to communicate with any County agency on behalf of an entity with which you have a business relationship other than a governmental entity. However, if your position with the County is uncompensated, this restriction will only extend to post-employment communications with your own agency.

**13. Post-Employment Permanent Ban.** After you leave County service, you may never work on a particular matter you personally and substantially worked on for the County.

**14. Disclosure and Non-Participation.** You must refrain from acting on any matter in which you have a personal interest that could appear to compromise your impartial judgments and you must report the conflict and your intent to refrain from acting to the Board of Ethics.

**15. Serving not-for-profit organizations.** You may be an officer or director of, or a policymaker for, a not-for-profit organization that does business with the County if you do this activity on your own time, you refrain from taking any action as a County employee that could impact on that organization and you do not contact anyone at the County in regard to that agency. You may not receive compensation for such work but you may receive reimbursement for expenses that you incur in working for the organization.

## IV. Annual Financial Disclosure

Depending on the County position that you hold, you may be required to file an annual financial disclosure statement with the Board of Ethics.<sup>2</sup>

## V. Board of Ethics

You may request confidential advisory opinions and waivers, for good cause, from these requirements from the Board of Ethics. For further information or to obtain answers to specific questions, you may write or call the Board of Ethics at:

Nassau County Board of Ethics  
One West Street  
Mineola, NY 11501  
(516) 571-3002

### Board Members

Andrew J Turro, *Chair*

Lorna B. Goodman, *County Attorney*

Martha Krisel

E. Christopher Murray

Stephen E. Turman

<sup>1</sup> In addition to the prohibitions found in the Code of Ethics, Charter §2203 prohibits having an interest in the sale of a tax lien certificate, property acquired by the County in a tax collection procedure, or in any condemnation involving the County or a local municipality.

<sup>2</sup> See, Nassau County Administrative Code §22-4.3 (Financial Disclosure Law).

# Nassau County Code of Ethics



Section 2218 of the Nassau County Charter  
as amended by Local Law No. 4-2007

# Nassau County Code of Ethics:

Section 2218 of the Nassau County Charter as amended by Local Law No. 4-2007

## 1. Definitions.

*"Agency"* shall include any agency, Board, bureau, commission, department or other similar entity of the County.

*"Appear"* shall mean to make a communication in any form, personally or through another person, including, but not limited to, by letter, by telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation.

*"Board"* shall mean the Nassau County Board of Ethics.

*"County officer or employee"* shall include the officers and employees of any agency of the County, as defined herein, in addition to any officer who is appointed, pursuant to law, by the County to serve any other entity unless such person is subject to the Public Officers Law and the oversight of the State Ethics Commission or is otherwise exempt from the local ethics code.

*"Financial Interest"* shall mean (i) a foreseeable direct or indirect pecuniary or material benefit accruing to a County officer or employee as a result of a financial or business dealing with the County; (ii) an ownership interest in any entity, except a publicly-traded corporation of which the County officer or employee owns less than five percent of the outstanding stock; or (iii) a position as officer, director, trustee, or partner of an entity. For the purposes of this section, the financial interests of an officer or employee's spouse, domestic partner, minor children and dependents shall be deemed financial interests of such officer or employee; provided, however, that a County officer or employee shall not be deemed to have a financial or other private interest in the employment, by the County, of his or her spouse, domestic partner, minor child or dependent.

*"Ministerial act"* shall mean an administrative act, including the issuance of a license, permit or other permission by the County, which is carried out in a prescribed manner and which does not involve substantial personal discretion.

*"Relative"* shall mean mother, father, son, daughter, sister, brother, stepmother, stepfather, stepson, stepdaughter, aunt, uncle, cousins in the first and second degree of consanguinity, domestic partner, mother-in-law, father-in-law, sister-in-law, brother-in-law and grandparents.

## 2.. Conflicts of Interest Prohibited.

a. Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall:

- (1) Have a financial interest, except by operation of law, in any business or professional dealings with the County or any agency thereof or a financial interest in any entity which has business or professional dealings with the County.

(2) Participate as attorney, agent, broker, representative or employee in a business or professional transaction with, or lawsuit against, the County or any agency thereof for any person or entity directly or indirectly in any manner whatsoever or fail to ensure that adequate measures are taken to prevent his or her participating in any manner in any such transaction where a law firm or other entity in which such person is an owner, member or employee becomes involved as attorney, agent, broker or representative in such a transaction with, or lawsuit against, the County.

(3) Accept or retain other employment, engage in any business transactions, make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties.

*b.* A County officer or employee shall not appear before any agency or officer of the County except on behalf of the County, provided, however, that for County officers or employees serving in an unpaid capacity, this prohibition shall apply only to appearances before the agency served by such officer or employee.

*c.* No County officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter that is before the agency served by such officer or employee, or any agency over which he or she has supervisory control or to which he or she has the power to appoint any member, officer or employee.

*d.* No legislator, during his or her term and for a period of two years from the expiration of the term to which he or she was elected, shall engage in any employment as a lobbyist on behalf of any person, firm, corporation or association doing business with the County.

### 3. Gifts and Favors.

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No officer or employee of the County, whether paid or unpaid, shall accept gifts aggregating to seventy-five dollars or more during a twelve month period, nor solicit any gift of any value, whether in the form of services, loan, thing or promise of any other form, from any one person, firm or corporation which to his or her knowledge is interested directly or indirectly in any manner whatsoever in business or professional dealings with the County or any agency thereof. For purposes of this subdivision, the value of a gift of a ticket or comparable authorization entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket or the cost of entrance to the general public, notwithstanding the fact that part of the cost of attending is a tax-deductible or political contribution.

#### 4. Recusal and Disclosure of Interest. \_\_\_\_\_

a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take discretionary actions in the best interests of the County.

b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board and the nature of his or her private interest. The Board shall file and retain such disclosure as a public record. The Board may issue an opinion in response to such disclosure, give advice by letter or informal communication, or file the disclosure with no response. Neither the disclosure nor any response by the Board shall be confidential.

#### 5. Disclosure of Confidential Information. \_\_\_\_\_

No officer or employee of the County, whether paid or unpaid shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interest of himself or herself or others.

#### 6. Misuse of County resources. \_\_\_\_\_

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity is in furtherance of the interests of the County.

#### 7. Hiring and supervision of relatives. \_\_\_\_\_

No officer or employee of the County shall hire or induce others to hire a relative of such officer or employee nor shall any officer or employee of the County directly supervise or evaluate the work of any relative employed by the County except: a) as required by the Civil Service Law or rules promulgated thereunder; b) pursuant to a supervisory arrangement that began prior to the effective date of this subdivision; or c) with the written approval of the Board of Ethics. In determining whether to approve the request of an officer or employee to hire or supervise a relative, the Board shall consider, among other things, the nature of the relationship at issue and any steps that have been taken to ensure objectivity in any such hiring decision, salary determination, evaluations, recommendations for promotions and increases and other aspects of a supervisory relationship. Neither such request for

Board approval nor the determination of the Board shall be confidential. Nothing in this subdivision, nor any approval issued by the Board pursuant to this subdivision, shall relieve an employee of the continuing requirement to exercise his job duties in the best interests of the County, without giving raises, promotions or other beneficial terms or conditions of employment based on private interests or personal relationships, and the Board may continue to enforce such requirement, as it deems appropriate, whether or not it has approved the hiring or supervision of a relative.

## 8. Post-employment restrictions.

*a.* No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency. No person who has served as an unpaid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear before his or her former agency or the officers or employees thereof, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency.

*b.* No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency. A former officer or employee is also required to ensure that adequate measures are taken to prevent his or her participating in any manner in such particular case, proceeding, application or particular matter if a law firm or other entity in which such person is an owner, member or employee becomes involved with any aspect of such particular case, proceeding, application or particular matter

*c.* No former paid or unpaid officer or employee of the County shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interest of himself or herself or others.

## 9. Pecuniary interest of officers, employees or agents in execution of contracts prohibited. \_\_\_\_\_

No officer, employee or agent of the County, whether he or she be such by election, appointment or contract shall directly or indirectly, either on his or her own behalf or for another person or corporation, make or participate in making, including the preparation of specifications or plans for, any contract or agreement in which said officer or employee or agent is interested directly or indirectly as principal or agent or as an officer of or owner of stock in a corporation, nor shall an officer, employee or agent in any way influence the action of any other officer or employee or agent in relation to the making, or fail to recuse him or herself from the discussion and approval process of any County contract or agreement in which he or she has such an interest. In addition to other penalties that may be imposed by the Board as set forth in this Code, if any such officer or employee or agent shall willfully violate the provision of this section, such contract or agreement shall be voidable, and such officer or employee or agent shall be guilty of a misdemeanor and upon conviction thereof shall forfeit his office or employment or agency and shall be further punished by a fine of not more than one thousand dollars or by both such fine and imprisonment. The provisions of this section shall not apply to the making of a contract with the County to serve as a foster parent or to act as a physician for any County department or agency or to any ministerial acts taken by a County officer, employee or agent. Further, the provisions of this section shall not preclude a contractor or a contractor's officers and employees from advocating for or participating in the drafting of extensions, renewals or amendments of its own contract with the County nor preclude a contractor from assisting the County with the drafting of specifications upon request of a County agency.

## 10. Board of Ethics. \_\_\_\_\_

*a.* There shall be a Board of Ethics consisting of five members, three (3) of whom shall be appointed by the County Executive, subject to the confirmation of the County Legislature, all of whom shall reside in the County and who shall serve without compensation, and the County Attorney and another member who shall be appointed by the County Executive. A majority of such members shall not be officers or employees of the County or any municipality. The members of the Board shall elect a chairperson. Except for the County Attorney, each member shall serve for a term of five (5) years.

*b.* The Board shall have the authority to investigate complaints of actions in violation of this section. The results of any such investigation may be shared, in the discretion of the Board, with necessary and appropriate County officers and law enforcement officials. In furtherance of this investigatory function, the Board may request that the Commissioner of Investigations use the power and resources of his or her office to assist the Board.

*c.* The Board also shall render advisory opinions with respect to this section, such opinions to be rendered only to an officer or employee or former officer or employee requesting advice relative to himself or herself, or to the head of a County agency, to the County Executive or to a Legislator. All requests for opinions must be submitted to the Board in writing. The Board shall only disclose and distribute opinions to the person duly requesting it. However, where an advisory opinion is issued and the person who is the subject of the opinion fails to adhere to the guidance of an opinion that has been disclosed to him or her, such violation may, in the discretion of the Board, be disclosed to the head of such person's agency or the necessary and appropriate County officers or law enforcement officials, subject to the provisions in subdivision 11 herein. Notwithstanding the provisions of this paragraph, all such advisory opinions issued by the Board either prior to or subsequent to the effective date of this local law may be issued with the names and other identifying information redacted and such advisory opinions issued with appropriate redactions shall be made available to the public to the extent the Board determines that identities can be meaningfully protected. Opinions may also be issued and disclosed without the names redacted with the permission of any person who will be identified.

*d.* In lieu of a formal request for opinion, a County officer or employee may, at any time, submit to the Board an informational letter concerning his or her outside interests or activities whether or not such interests or activities appear to pose an explicit conflict of interest under this Code. Such an informational letter may also be submitted by an officer or employee concerning the outside interests or activities of someone to whom the officer or employee intends to make an offer of County employment or by a former County officer or employee. The Board shall file and retain such informational letter as a public record. The Board may issue an opinion in response to the informational letter, give advice by letter or informal communication, or file the informational letter with no response. Neither the informational letter nor any response by the Board shall be confidential.

*e.* The Board shall promulgate its own rules and regulations concerning its forms and procedures and shall maintain appropriate records of its opinions and proceedings.

*f.* The Board shall administer and enforce the provisions of Section 22-4.3(c) of the Nassau County Administrative Code relating to the filing of financial disclosure forms and financial disclosure requirements by County officials, officers and employees. The Board may delegate to any County officer the duty to distribute, collect and review financial disclosure forms and otherwise administer and enforce section 22-4.3 of the Nassau County Administrative Code relating to financial disclosure; provided, however, that such officer may not impose penalties but may make recommendations to the Board regarding the imposition of penalties for violations of section 22-4.3.

## 11. Penalties.

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A violation of any of the provisions of this section shall constitute cause for forfeiture of pay, suspension, imposition of fines of up to \$10,000 per violation or removal from office or employment, as may be imposed by the Board, after providing an opportunity to be heard in a proceeding conducted in accordance with due process. Any person found to have violated any such provision may file with the Board within seven days of such finding a written notice indicating his or her intent to commence a proceeding to review the determination pursuant to article seventy-eight of the civil practice laws and rules. Upon receipt of such notice, the Board shall stay the imposition of any penalty imposed pursuant to this subdivision until the commencement of the article seventy-eight proceeding. Resignation or dismissal from County employment shall not bar the imposition of penalties under this section for violations of the Code that occurred during the period of employment. Penalties may also be imposed under this section on a former employee for violations of the post-employment restrictions. The County Attorney shall provide for appropriate reporting and other services in relation to any such proceeding. Nothing in this section shall limit the imposition of any other penalties, fines and/or other sanctions which may be provided by law or prevent the County Executive or other appropriate supervisory officer from taking disciplinary action based on the findings of a separate inquiry or investigation.

## 12. Exemptions.

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a. No employee may have any interests or take any action prohibited by subdivisions two through six of this section without the approval of the Board; provided that the provisions of this section shall not prohibit, or require recusal or transactional disclosure as a result of:

- (1) An action specifically authorized by statute, rule, or regulation of the State of New York or of the United States.
- (2) A ministerial act.
- (3) Gifts:
  - (A) received by the County officer or employee from his or her parent, spouse or child; or
  - (B) accepted on behalf of the County and transferred to the County.
- (4) Gifts or benefits having a reasonable value that are received by a County officer or employee listed in section 11 of the Domestic Relations Law for the solemnization of a marriage by that officer or employee at a place other than his or her normal public place of business or at a time other than his or her normal hours of business.
- (5) Awards from charitable organizations.
- (6) Receipt of County services or benefits, or use of County facilities, that are

generally available on the same terms and conditions to residents or a class of residents in the County.

- (7) County officers or employees appearing or practicing before the County or receiving compensation for working on a matter before the County after termination of their County service or employment where they performed only ministerial acts while working for the County or where they are appearing in an official capacity as an officer or employee of another governmental entity.
- (8) Former County officers or employees appearing before the County where such appearances are a necessary incident of an otherwise permitted representation or employment in relation to an adjudicative proceeding before an agency or body, or a court other than an agency, Board or commission of the County.

*b.* Notwithstanding the foregoing provisions of this section, any textbook authored by a member of the faculty as Nassau Community College may be sold at the college and a royalty or other financial remuneration may be paid to such author, provided the sale of such a faculty authored textbook shall be made in accordance with the rules and regulations promulgated by the Board of Trustees of the college.

*c.* Notwithstanding the foregoing provisions of this section, a County officer or employee may be an officer, director or trustee of a membership corporation or other nonprofit corporation or association, public authority, or public benefit corporation, or hold a policy making position with such entity, and participate in all activities and transactions of such entity, provided he or she receives no financial remuneration either directly or indirectly from such entity other than expenses actually and necessarily incurred in the performance of his or her duties. Any officer or employee receiving such remuneration for expenses shall, for each year in which such remuneration is received, be required to complete and file the financial disclosure statement promulgated pursuant to the provisions of §22.4.3 of the Administrative Code. A County officer or employee serving a membership corporation or other nonprofit corporation or association pursuant to this paragraph, other than in an ex-officio capacity, shall recuse himself or herself from acting, in his or her capacity as County officer or employee, on any matters directly affecting such entity, shall not use any confidential County information nor, without the approval of the Board, communicate with any County Board, agency, officer or employee in furtherance of the interests of such corporation or entity nor work on any case, proceeding, application or particular matter which such person has been directly concerned with, personally participated in, or actively considered as a County officer or employee.

*d.* Notwithstanding the foregoing provisions of this section, a person serving the County or any agency thereof without compensation shall not be subject to the prohibitions set forth in subparagraphs one and two of paragraph (a) of subdivision two of this section.

*e.* Nothing in this section shall be deemed to prohibit an officer or employee of the County from providing services to a local development corporation, public authority, public benefit corporation, or similar entity as may be determined by the Board, where such services are provided pursuant to law or contract between the County and such entity, and the officer or employee does not receive additional compensation for such services. Such service shall not be deemed to be a private interest of such officer or employee nor to create a conflict with official duties.

*f.* Notwithstanding the foregoing provisions of this section, an officer or employee of the County shall not be deemed to be in violation of paragraph (a) of subdivision two of this section for making a contract with the County to serve as a foster parent unless the making of such contract is in conflict with the proper discharge of his or her official duties.

*g.* Notwithstanding any other provision of law, an elected official or a deputy county executive may attend a function given by a civic association or non-profit organization of a charitable or community nature, when invited and paid for by the sponsoring organization, or attend a function of an association composed of representatives of business, labor, professions or the news media, when invited and paid for by the sponsoring organization. In addition, a staff member may be designated to attend any such functions as a representative of an elected official when specifically requested to do so by the elected official.

*h.* Notwithstanding any other provision of law, an elected official or a deputy county executive may be a guest at ceremonies or functions sponsored or encouraged by the County as a matter of County policy. In addition, a staff member may be designated to attend any such ceremonies or functions as a representative of an elected official when specifically requested to do so by the elected official.

*i.* Notwithstanding any other provision of law, an officer or employee may be a guest at any ceremony, function, conference or occasion where the attendance of the public servant is in furtherance of the interests of the County, where the attendance has been approved in writing, in advance where practicable or within a reasonable time thereafter, by the County Executive or a deputy county executive, or in the case of the Legislature by the Presiding Officer or the Minority Leader, in the case of all offices of elected officials by said elected official or their designated officer, in the case of the Office of Legislative Budget Review by the Director of said office and in the case of the Clerk of the Legislature by the Clerk of the Legislature

# Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms

By Steven G. Leventhal

Local municipal ethics boards typically are composed of public-minded citizens who donate their services to help promote integrity in the operation of their local governments. Often, they are non-lawyers, with no government experience. Yet, in performing their official duties, they must interpret confusing combinations of legal and government terms. This Glossary was compiled to assist the members of local ethics boards in piecing together the puzzle of municipal ethics terminology.

Some of these terms are defined in Article 18 of New York State's General Municipal Law; others may be defined in your local code of ethics. This glossary should be used as a quick reference. It is not a substitute for the statutory definitions in particular cases where those definitions apply.

## Advisory Opinion

Confidential ethics advice available to municipal officers and employees from their local boards of ethics, or from the New York State Attorney General. In order to provide guidance to other public officials, advisory opinions may sometimes be released to the public in a version that does not reveal the identity of the inquiring municipal officer or employee.

## Annual Financial Disclosure<sup>1</sup>

Written statement of personal financial information filed by policymakers and other specified officers and employees in municipalities having populations of 50,000 or more, or as otherwise required by local law. Intended as a check on transactional disclosure and as a reminder to the officials of where their potential conflicts of interest lie.

## "Appear" or "Appear Before"<sup>2</sup>

Communication in any form, including, personally, through another person, by letter, telephone, or otherwise.

## Appearance of Impropriety<sup>3</sup>

Conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated.

## Applicant Disclosure<sup>4</sup>

Written statement filed by applicants in land use matters in which a municipal officer or employee, or a relative of the municipal officer or employee, has an interest in the application, is the applicant, works for the applicant, has stock in the applicant, is a partner or associate of the applicant, or has an agreement with the applicant to receive any benefit if the application is approved.

## Board of Ethics<sup>5</sup>

Municipal board established to administer the local government ethics program by providing training and confidential ethics advice to municipal officers and employees, investigating complaints, imposing sanctions, and administering the annual financial disclosure program.

## "Case Law" or "Common Law"

Law made by judges in their published opinions.

## Code of Ethics<sup>6</sup>

Standards of conduct set forth in Article 18 of the General Municipal Law, and in laws adopted by municipalities in local laws (in counties, cities, towns or villages) or in resolutions (in other municipalities). Intended to foster integrity in government, promote public confidence, and help municipal officers and employees to discharge their official duties without fear of unwarranted accusations of unethical conduct.

## Confidential Information

Information in any format that is either: (i) prohibited by federal or state law from disclosure to the public; or (ii) prohibited from disclosure by local law, ordinance, or resolution of the municipality, and exempt from mandatory disclosure under the New York State Freedom of Information Law ("FOIL") and the New York State Open Meetings Law.

## Conflict of Interest

An actual or potential conflict between the private interests of a municipal officer or employee, and his or her public duties, either by virtue of his or her

official job description, or by virtue of the powers and duties he or she actually performs, if different.

### **Contingency Fee**

A fee for services that is based on the outcome of the engagement, rather than on the value of the services rendered.

### **“Contract” With The Municipality<sup>7</sup>**

Any claim, account or demand against the municipality, or any agreement with the municipality, whether express or implied.

### **“Control” over a Contract with the Municipality<sup>8</sup>**

The power or duty, either as an individual or as a member of a board, to negotiate, prepare, or approve the contract, or to approve payment or audit bills under the contract, or to appoint anyone who does.

### **Freedom of Information Law (“FOIL”)<sup>9</sup>**

New York State law enacted to promote transparency in government by providing the public with a right of access to most government documents.

### **General Municipal Law, Article 18**

New York State law pertaining to conflicts of interest of municipal officers and employees.

### **“Gift” or “Financial Benefit”<sup>10</sup>**

Money, services, licenses, permits, contracts, authorizations, loans, travel, entertainment, hospitality, gratuity, or any promise thereof received by a municipal officer or employee on terms that are not available to the general public, including any gain or advantage to a third person at the request or with the consent of the municipal officer or employee.

### **“Incompatible” Offices<sup>11</sup>**

Two public offices that may not be held by the same municipal officer or employee because: (i) holding the two particular offices is prohibited by the constitution or by statute, (ii) one office is subordinate to the other, or (iii) the respective duties of the two offices are inherently inconsistent.

### **“Interest” in a Contract with the Municipality<sup>12</sup>**

Direct or indirect financial benefit, or other material benefit accruing to a municipal officer or

employee, as the result of a contract with the municipality, or accruing to his or her spouse, minor child, dependent, outside business or employer, or to a corporation in which the municipal officer or employee owns more than five percent of the corporate stock.

### **Lawyer-Client Privilege<sup>13</sup>**

Legal doctrine developed to promote freedom of consultation between a client and his or her attorney by protecting some, but not all, of their confidential communications from disclosure.

### **Ministerial Act<sup>14</sup>**

An action performed in a prescribed manner without the exercise of substantial independent judgment by the municipal officer or employee.

### **Municipal Officer or Employee<sup>15</sup>**

An officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission, or other municipal agency.

### **Open Meetings Law<sup>16</sup>**

New York State law enacted to promote transparency in government by providing the public with a right of access to most meetings of public bodies.

### **Outside Employer or Business<sup>17</sup>**

Any compensated activity, other than service to the municipality; any entity, other than the municipality, from which the municipal officer or employee receives compensation for services rendered or goods sold; or any entity in which the municipal officer or employee has an ownership interest, except a corporation of which the municipal officer or employee owns less than five percent of the outstanding stock.

### **Policy Maker<sup>18</sup>**

A person who either by virtue of his or her official job description, or by virtue of the powers and duties he or she actually performs if different, exercises responsibility of a broad scope in the formulation of plans for the implementation of goals or policy for a local agency or acts as an advisor to an individual in such a position.

### **Recusal**

Abstention from deliberating, deciding, or participating in an official matter in which the municipal officer or employee may have a conflict of interest. An abstention from voting will normally function as

a “nay” vote since under New York law a municipal body must usually take action by an affirmative vote of a majority of the entire body, including absent members, abstentions, and vacancies.<sup>19</sup>

### Relative<sup>20</sup>

A spouse, child, step-child, sibling, or parent of the municipal officer or employee, or a person claimed as a dependent on his or her latest individual state income tax return.

### Sanctions

The penalties that a board of ethics may be authorized to impose upon a municipal officer or employee, or other individual or firm, upon a finding that the code of ethics was violated, including fines, restitution, disgorgement of profits, or debarment from doing further business with the municipality.

### Statute

A law enacted by the federal, state or local legislature.

### Transactional Disclosure<sup>21</sup>

Written statement filed by a municipal officer or employee to record a conflict of interest when it arises; usually accompanied by his or her recusal.

### Waiver

Exercise of discretion by a board of ethics, where authorized by local law, to waive application of the local code of ethics in particular cases where its application would frustrate rather than advance the interests of the municipality.

### Endnotes

1. See Gen. Mun. Law § 812.
2. See Program Bill #29, An Act To Amend The General Municipal Law, In Relation to Municipal Ethics, March 29, 1999 (“Program Bill”) § 804-A-1.
3. See, e.g., *Tuxedo Conservation & Taxpayer Assoc. v. Town Bd. of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep’t 1979).
4. See Gen. Mun. Law § 809.
5. See Gen. Mun. Law § 808.
6. See Gen. Mun. Law §§ 800–805-b.
7. See Gen. Mun. Law §§ 800-2, 802.
8. See Gen. Mun. Law § 801.
9. Pub. Off. Law, Art. 6.
10. See Gen. Mun. Law § 805-a; Program Bill § 804-A-5.
11. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874), and its progeny.
12. See Gen. Mun. Law § 800-3.
13. See Salkin, *The Erosion of Government Lawyer-Client Confidentiality, The Urban Lawyer*, Spring 2003; *In re Grand Jury Investigation v. John Doe*, 399 F.3d 527 (2d Cir. 2005).
14. See Program Bill § 804-A-8.
15. See Gen. Mun. Law § 800-5.
16. NY Pub. Off. Law, Art. 7.
17. See Program Bill § 804-A-13.
18. See “Guidelines for Determination of Persons in Policymaking Positions,” promulgated by the Temporary State Commission on Local Government Ethics, reproduced in Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 Pace L. Rev. 243, 273 (1991).
19. See Gen. Construction Law § 41.
20. See Program Bill § 804-A-15.
21. See Gen. Mun. Law § 803.

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# How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest

By Steven G. Leventhal

In New York, most ethics problems can be analyzed by considering three questions: (1) does the conduct violate Article 18 of the New York General Municipal Law; (2) if not, does the conduct violate the local municipal code of ethics; and (3) if not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?



Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.<sup>1</sup> Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in most municipal contracts that he or she has the power to control individually or as a board member;<sup>2</sup> from accepting gifts or favors worth \$75.00 or more where it might appear that the gift was intended to reward or influence an official action;<sup>3</sup> from disclosing confidential government information;<sup>4</sup> from receiving payment in connection with any matter before his or her own agency;<sup>5</sup> and from receiving a contingency fee in connection with a matter before any agency of the municipality.<sup>6</sup>

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.<sup>7</sup> A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.<sup>8</sup> Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the “revolving door” (post-employment contacts with the municipality), establishing rules for the wearing of “two hats” (the holding of two government positions, or moonlighting in the private sector)<sup>9</sup> and, in some cases, prohibiting “pay to play” practices and the political solicitation of subordinates, vendors and contractors.

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts

have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.<sup>10</sup>

In *Matter of Tuxedo Conservation & Taxpayers Assn. v. Town Bd. of Town of Tuxedo*,<sup>11</sup> decided by the Second Department in 1979, the Town Board voted to approve a major development project. The decisive vote was cast on the eve of a change in the composition of the Board by a trustee who was Vice President of a public relations firm under contract to the developer’s parent company. The Court inferred that the Board’s approval of the development project would likely result in the public relations firm obtaining all of the advertising contracts connected with the project. Despite the fact that the Board member’s vote did not violate Article 18 of the New York General Municipal Law,<sup>12</sup> the Court annulled the Board’s decision approving the development project.

The *Tuxedo* Court concluded that “while the anathema of the letter of the law may not apply to... [the trustee’s] action, the spirit of the law was definitely violated. And since his vote decided the issue... [the Court] deemed it egregious error.” The Court directed the Board member’s attention to the

soaring rhetoric of Chief Judge Cardozo... ‘[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’ Thus, [the Court concluded that] the question reduces itself into one of interest. Was... [the trustee’s] vote prompted by the ‘jingling of the guinea’ or did he vote his conscience as a member of the Town Board? In view of the factual circumstances involved, the latter possibility strains credulity. For, like Caesar’s wife, a public official must be above suspicion.

Reviewing decisions of the courts of other states, the *Tuxedo* Court concluded that “[a]n amalgam of those cases indicates that the test to be applied is not whether there is a conflict, but whether there might be.... It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.”

Six years later, in *Matter of Zagoreos v. Conklin*,<sup>13</sup> the Second Department reaffirmed the principles announced in *Tuxedo*. There, a major, controversial development project was approved by votes of the Zoning Board of Appeals and the Town Board. At the ZBA, the decisive votes were cast by two Board members who were employed by the applicant. At the Town Board, the decisive vote was cast by a trustee who was employed by the applicant. As in *Tuxedo*, the Court annulled the decisions of the ZBA and the Town Board approving the development project despite the fact that the respective board members' votes did not violate Article 18 of the New York General Municipal Law.<sup>14</sup>

The *Zagoreos* Court noted that the employment of a board member by the applicant might not require disqualification in every instance. However, the failure of the board member-employees to disqualify themselves here was improper because the application was a matter of public controversy and their votes in the matter were likely to undermine "public confidence in the legitimacy of the proceedings and the integrity of the municipal government."

Further, the *Zagoreos* Court noted that the importance of the project to the applicant-employer was obvious, and that

equally so are those subtle but powerful psychological pressures the mere knowledge of that importance must inevitably place on any employee of the... [applicant-employer] who is in a position to either effectuate or frustrate the project and who is concerned for his or her future with the... [applicant-employer]. Any attempt to disregard these realities would be senseless for the public is certainly aware of them.

The Court found that, even in the absence of any attempt by the applicant-employer to improperly influence the board member-employees, "human nature, being what it is... it is inconceivable that such considerations did not loom large in the minds of the three [board member-employees]. Under these circumstances, the likelihood that their employment by the... [applicant-employer] could have influenced their judgment is simply too great to ignore."<sup>15</sup>

In the years since *Tuxedo* and *Zagoreos* were decided, the appellate courts of this state have consistently reaffirmed the vitality of the principle that a prohibited conflict of interest may exist in the absence of a statutory prohibition, and that a common law conflict of interest may justify the judicial invalidation of a municipal action. Moreover, the application of this principle has not been limited to

cases involving conflicts based on pecuniary interests or economic improprieties. A prohibited conflict of interest may exist, and that conflict may justify judicial invalidation of a municipal action, where the voting members of a municipal board have manifested bias or have prejudged an application.

In *Matter of Schweichler v. Village of Caledonia*,<sup>16</sup> three members of the Village Planning Board signed a petition in support of a developer's project and application for rezoning, and thus appeared to have impermissibly prejudged the application. In addition, the Planning Board's chairperson wrote a letter to the Mayor in support of the project and application for rezoning, stating that she "would really like to see new housing available to [her] should [she] decide to sell [her] home and move into something maintenance free."

Despite the fact that the Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law,<sup>17</sup> the Fourth Department concluded in *Schweichler* that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.

A common theme among many of the New York cases in which courts have declined to invalidate a municipal action based on the alleged conflicts of municipal officers and employees was the absence of a personal or private interest as distinguished from an interest shared by other members of the public generally.<sup>18</sup> In *Town of North Hempstead v. Village of North Hills*,<sup>19</sup> the Court of Appeals found that Village Board members were not disqualified from voting on an amendment to the Zoning Code that would allow cluster zoning of properties that they owned, where most land in the Village was similarly affected, and the disqualification of the Board members would preclude all but a handful of property owners from voting in such matters.<sup>20</sup>

In *Friedhaber v. Town Bd. of Town of Sheldon*,<sup>21</sup> the Fourth Department adopted the reasoning, and affirmed a decision by the Appellate Term, First Department, that distinguished between the "clear and obvious" conflict that would have arisen from a vote to change the zoning status of particular properties owned by the voting Board members, and their permissible vote to change the zoning status of other properties in which they had no interest.<sup>22</sup>

The Appellate Term noted that there were a sufficient number of votes to approve the change in zoning status even if the Board members had

disqualified themselves. Indeed, all of the reported cases in New York that have invalidated municipal actions based on common law conflicts of interest involved decisive votes cast by conflicted members of voting bodies. However, it should be noted that recusal involves more than the mere abstention from voting. A properly recused officer or employee will refrain from participating in the discussions, deliberations or vote in a matter.<sup>23</sup> The New York Attorney General has opined that:

The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.

Thus, it is our view that once a board member has declared that he or she has a conflict of interest in a particular matter before the board, that the board member should recuse himself or herself from any deliberations or voting with respect to that matter by absenting himself from the body during the time that the matter is before it.<sup>24</sup>

Accordingly, a municipal action that results from the influence or persuasion of a conflicted member of a voting body should also bear critical scrutiny and, where appropriate, judicial invalidation, even where the conflicted member refrained from voting.

Not every personal or private relationship between a board member and parties interested in a matter before the board will give rise to a disqualifying conflict of interest. Generally, a mere social relationship between a board member and the applicant will not give rise to a disqualifying conflict of interest where the board member will derive no benefit from the approved application.<sup>25</sup> In *Ahearn v. Zoning Bd. of Appeals*,<sup>26</sup> the Third Department concluded that:

...petitioner has shown nothing more than that, as active members of their community, the Board members

have a variety of political, social and financial interests which, through innuendo and speculation, could be viewed as creating an opportunity for improper influence. For example, petitioner perceives a conflict of interest in the fact that the wife of one of the Board members teaches piano to the applicant's daughter and was given a Christmas gift for doing so. Petitioner also contends that since the applicant is a long-term member of the Board, other junior Board members might have viewed him as their leader and might have been influenced even though the applicant disqualified himself from any Board consideration of the application. Petitioner sees a similar conflict in the applicant's involvement in local politics, and in the fact that one of the Board members purchased homeowners' and automobile insurance from the applicant. Petitioner also contends that one of the Board members was improperly influenced since his mother-in-law voiced her criticism of opponents to the applicant's project. We are of the view that these claims, and others advanced by petitioner, do not rise above the type of speculation that would effectively make all but a handful of citizens ineligible to sit on the Board.

Nor will every financial relationship between a board member and parties interested in a matter before the board give rise to a disqualifying conflict of interest. In *Parker v. Town of Gardiner Planning Bd.*,<sup>27</sup> the Third Department observed that:

Resolution of questions of conflict of interest requires a case-by-case examination of the relevant facts and circumstances and the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance. In determining whether a disqualifying conflict exists, the *extent* of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act (citation omitted; emphasis added).

In *Parker*, the Board Chairman was President of a local steel fabrication and supply company that sold products to a local construction firm owned by one

of the applicant's principals. During the previous three years, the construction firm purchased between \$400.00 and \$3,000.00 in steel products from the Chairman's steel company. During the same period, the Chairman's steel company had annual gross sales of approximately \$2,000,000.00 to \$3,000,000.00.

Based on these facts, the New York Attorney General concluded in an informal opinion letter that a conflict of interest existed and that the Chairman was required to recuse himself in the matter. However, the Town Board of Ethics reached a contrary conclusion, reasoning that the amount paid to the Chairman as a result of the purchases by the applicant's construction firm was insufficient to create a conflict of interest.

The *Parker* Court concluded that the determination of the Town Board of Ethics was rational and entitled to considerable weight, and found that “[u]nder these circumstances, . . . the likelihood that such a *de minimis* interest would or did in fact influence . . . [the Chairman's] judgment and/or impair the discharge of his official duties . . . [was] little more than speculative” (citations omitted).

In summary, courts may set aside board decisions (and by implication, other municipal actions) where decision-making officials with conflicts of interest have failed to recuse themselves. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearances are speculative or trivial.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality.

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

At the same time, officials should be mindful of their obligation to discharge the duties of their offices, and should recuse themselves only when the

circumstances actually merit recusal.<sup>28</sup> Such restraint should be exercised by the members of voting bodies, and in particular by legislators, because recusal and abstention by a member of a voting body has the same effect as a “nay” vote,<sup>29</sup> and, in the case of an elected legislator, also has the effect of disenfranchising voters.

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. These standards are derived from Article 18 of the New York General Municipal Law, local municipal codes of ethics, and from the application of common law principles.

## Endnotes

1. For a helpful summary of Gen. Mun. Law Article 18, see Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC Municipal Lawyer, Summer 2005, Vol. 19, No. 3, pp. 10-12.
2. See Gen. Mun. Law §§800-805.
3. See Gen. Mun. Law §805-a.
4. *Id.* N.B. The phrase “confidential information” is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.
5. *Supra*, note 4.
6. *Id.*
7. See Gen. Mun. Law §806.
8. See Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.
9. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible, such as those of chief financial officer and auditor. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); see also, 1997 Op. Atty. Gen. 14.
10. See e.g., *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dept. 1985); *Matter of Tuxedo Conservation & Taxpayer Assn. v. Town Board of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979).
11. 69 A.D.2d 320 (2d Dept. 1979).
12. The vote did not violate section 801 of the New York General Municipal Law (conflicts of interest prohibited) because that section generally prohibits a municipal officer or employee from having an interest in a contract with the municipality where he or she has the power or duty to approve or otherwise control the contract but, in *Tuxedo*, there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because that section only requires the disclosure of any interest of an officer or employee in a land use applicant—it does not mandate recusal by the interested officer or employee.
13. 109 A.D.2d 281 (2d Dept. 1985).
14. As in *Tuxedo, supra*, the vote did not violate section 801 of the New York General Municipal Law (conflicts of interest

- prohibited) because there was no contract with the Town; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because that section only requires disclosure of any interest of an officer or employee in a land use applicant.
15. See also *Conrad v. Hinman*, 122 Misc.2d 531 (Onondaga Co. 1984) (Trial court annulled a change from residential to commercial use granted by a Village Board of Trustees based on an "...inference of [an] actual or apparent economic impropriety..." where the decisive vote was cast by a Village Trustee who was co-owner of the subject property and was also an employee of the intended purchaser).
  16. 45 A.D.3d 1281 (4th Dept. 2007), *app. den.*, 10 N.Y.3d 703 (2008).
  17. As in *Tuxedo* and *Zagoreos*, *supra*, the vote did not violate section 801 of the New York General Municipal Law (conflicts of interest prohibited) because there was no contract with the Village; and the vote did not violate section 809 of the New York General Municipal Law (disclosure in certain applications) because the Planning Board members did not have an interest in the applicant as defined in that section. Further, section 809 of the New York General Municipal Law only requires disclosure of any interest of an officer or employee in a land use applicant.
  18. See *e.g.*, *Tuxedo*, *supra*.
  19. 38 N.Y.2d 334 (1975).
  20. See also *Byer v. Town of Poestenkill*, 232 A.D.2d 851 (3d Dept. 1996) (Town Board member not disqualified from voting on changes to zoning code that affected all property owners equally); *Segalla v. Planning Board of the Town of Amenia*, 204 A.D.2d 332 (2d Dept. 1992) (Planning Board member not disqualified from voting to approve master plan that affected nearly every property in the Town equally).
  21. 16 Misc.3d 1140A (App. Term 1st Dept. 2007), *aff'd*, 59 A.D.3d 1006 (4th Dept. 2009).
  22. See also *Peterson v. Corbin*, 275 A.D.2d 35 (2d Dept. 2000) (noting that "...in both *Tuxedo* and *Zagoreos*, the conflicts of interest on the part of the public officials were clear and obvious.").
  23. 1995 Op. Atty. Gen. 2; see also *Cahn v. Planning Bd. of the Town of Gardiner*, 157 A.D.2d 252 (3d Dept. 1990) (Planning Board members "...not only immediately disclosed their interests, but of critical importance, they abstained from any discussion or voting regarding the subdivisions....").
  24. 1995 Op. Atty. Gen. 2.
  25. See *Karedes v. Vil. of Endicott*, 297 A.D.2d 413 (3d Dept. 2002); see also *Matter of Lucas v. Board of Appeals of Vil. of Mamaroneck*, 14 Misc.3d 1214A (Westchester Co. 2007), *aff'd*, 57 A.D.2d 784 (2d Dept. 2008) (applying the "arbitrary and capricious" standard for proceeding under NY CPLR Article 78).
  26. 158 A.D.2d 801 (3d Dept. 1990), *lv. den.*, 76 N.Y.2d 706 (1990).
  27. 184 A.D.2d 937 (3d Dept. 1992), *lv. den.*, 80 N.Y.2d 761 (1992).
  28. For a helpful discussion of the principles applicable to recusal and abstention, see Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 17-19.
  29. See Gen. Const. Law §41.

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# Running a Local Municipal Ethics Board: Ten Steps to a Better Board

By Steven G. Leventhal

The members of a local municipal ethics board are often respected members of the community with no background in government. They may be drawn from the clergy, and have strong grounding in the principles of their respective faiths; they may be accomplished members of the Bar, thoroughly versed in the code of professional responsibility that governs the practice of law, or they may be civic minded citizens, committed to public service and confident in the wisdom of their own moral compasses.



But even with these impressive credentials, board members may be uncertain of the board's purpose and function, unaware of the standards of conduct applicable to municipal officers and employees, and unfamiliar with the structure, operation and language of government.

This article is intended to offer them guidance in organizing and running their boards.

## Step 1: Understand Your Mission

Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing. The dual goals of a municipal ethics program are to assist municipal officers and employees in avoiding ethical missteps before they occur, and to assure a skeptical public that the decisions of its government are based on the public interest and not on the private interests of the decision makers.

Many people use the words "morality" and "ethics" as if they had the same meaning. This is understandable, because their meanings are similar. Morality comes from the Latin word *mores*, for the characteristic customs and conventions of a community. Ethics comes from the Greek word *ethos*, for the characteristic spirit or tone of a community. But in the applied context of government ethics, it is inaccurate and unhelpful to think of these words as having the same meanings.

To illustrate the difference between morality and ethics, consider that an honest municipal employee, recognizing that she has a conflict of interest in a particular matter, may choose the official action that advances the public interest, even at the expense of

her own personal interest. Has she acted immorally? Certainly not. However, our well-meaning municipal employee has acted unethically, because even an innocent conflict of interest tends to undermine public confidence in government and justifies the suspicion that an official action was motivated by personal considerations rather than by the public interest.

It is unhelpful to think of government ethics in moral terms, because doing so implies a moral failure among municipal officers and employees, and breeds resentment among the honest majority, who take rightful pride in their personal integrity.

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*"Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing."*

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Some laws prohibit conduct that is inherently immoral, such as murder and larceny. This type of misconduct is known as a *malum in se*. It is prohibited because it is wrong. But some laws prohibit and even criminalize conduct that would otherwise be perfectly moral because we find it a safer, more economical or more efficient way to organize our society. The Vehicle and Traffic Law and the Internal Revenue Code are examples of laws that prohibit conduct that is not inherently immoral. This type of misconduct is known as a *malum prohibitum*. It is wrong because it is illegal.

Similarly, a local municipal ethics code does not prohibit conduct because the conduct is morally wrong.<sup>1</sup> Rather, it regulates official conduct in order to achieve the dual goals of assisting honest officers and employees in avoiding ethical missteps before they occur, and inspiring public confidence in government by encouraging high standards of conduct among municipal officers and employees. Ethics regulations are the rules of the road for official conduct.

## Step 2: Learn How to Analyze a Government Ethics Problem

So where do you find these rules of the road? They are scattered about in many legal nooks and crannies, including the State Constitution, various state and local statutes, published court decisions, and agency regulations. But don't be discouraged. In New York, most ethics problems can be analyzed by considering three questions:

- Does the conduct violate Article 18 of the New York General Municipal Law?
- If not, does the conduct violate the local municipal code of ethics?
- If not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.<sup>2</sup> Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in certain municipal contracts that he or she has the power to control individually or as a board member,<sup>3</sup> from accepting gifts or favors worth \$75 or more where it might appear that the gift was intended to reward or influence an official action,<sup>4</sup> from disclosing confidential government information,<sup>5</sup> from receiving payment in connection with any matter before his or her own agency,<sup>6</sup> and from receiving a contingency fee in connection with a matter before any agency of the municipality.<sup>7</sup>

If you find that the conduct under review violates Article 18, you are finished with your analysis. The conduct is prohibited by state law and you need go no further. But if you find that the conduct does not violate Article 18, you must ask yourself the second question: Does the conduct under review violate the local municipal code of ethics?

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.<sup>8</sup> A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18. It may prohibit conduct that Article 18 would allow.<sup>9</sup> Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the “revolving door” (post-employment contacts with the municipality), establishing rules for the wearing of “two hats” (the holding of two government positions, or moonlighting in the private sector) and, in some cases, prohibiting “pay to play” practices and the political solicitation of subordinates, vendors and contractors.

If, after determining that the conduct under review does not violate Article 18, you find that it does violate your local ethics code, your analysis is done. The conduct is prohibited by local law. But, if you find that the conduct neither violates Article 18 nor the local code of ethics, there is yet another question that you must consider.

Ethics regulations are not only designed to promote high standards of official conduct, but also to

foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts in some cases have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.<sup>10</sup>

Accordingly, the third question in this protocol for analyzing government ethics problems—Does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?—may well be posed instead as: How will this conduct look on the front page of the local newspaper?

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited, and what conduct is not. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. When the board finds that there is a prohibited appearance of impropriety, the finding should have a rational basis, and the board’s reasoning should be clear and convincing. Such a finding should be reserved for the rare cases involving conduct that is contrary to public policy, and that raise the specter of self-interest or partiality. It should not be found in cases where the improper appearances are speculative or trivial.<sup>11</sup>

Where a contemplated action by an official might create an appearance of impropriety, the board should recommend that the official refrain from acting. But ethics boards should be restrained in finding, after the fact, that an official’s conduct violated the implied duty to avoid appearances of impropriety. They should be especially restrained in finding that a member of a voting board, and in particular a legislator, was required to refrain from participating in a matter called for a vote, because an abstention by a member of a voting body will normally be counted as a “nay” vote,<sup>12</sup> and because the recusal of a legislator disenfranchises voters.

### Step 3: Set the Right Tone—Be Credible

By setting the right tone, the board can better advance the dual goals of helping the municipal workforce avoid ethical missteps before they occur and inspiring public confidence in government decision making.

One clear lesson of recently publicized scandals is that an otherwise forgiving public will not abide hypocrisy. Board members should scrutinize their own investment, business or political activities, and rid themselves of conflicts. They should avoid entanglements that might cast doubt on their objectivity.

A board that is perceived as politically motivated will have no credibility as the source of ethics advice or the arbiter of ethics disputes. Rather than inspire public confidence, it will reinforce public cynicism. Board members should avoid partisanship in their official and unofficial activities. They should banish political considerations from their deliberations and decision-making.

Most ethics inquiries escape public notice. But some draw intense public attention and attract press inquiries. The board is a deliberative body and speaks only through its duly rendered opinions and decisions. Individual board members should avoid public statements that may send mixed messages, and may undermine the force and credibility of the board's determinations.

According to Socrates, there are four things that a judge must do: listen patiently, speak wisely, deliberate soberly, and decide impartially. This ancient admonition is a worthy guide for the members of a municipal ethics board in the discharge of their official duties.

#### **Step 4: Empower the Board to Control Its Own Business—Be Independent**

There is an understandable tendency for a municipal administration to exercise direct or indirect influence over its appointed boards and commissions. This may occur with the best of intentions. For example, a municipal attorney or other official appointed to a board may feel that he or she is in the best position to call meetings, set the agenda, or guide the board in its deliberations. But an ethics board dominated by administration insiders cannot exercise independent judgment and oversight.

To ensure both the reality and the perception that the board can and does operate independently, the board should select its own chair. Like all boards, the ethics board must conduct its business at meetings attended in person by a quorum of its members.<sup>13</sup> Meetings should be called by the chair, or by a majority of the members.

A clerical employee should be appointed by the municipality to serve as secretary to the board, under direction of the chair. The secretary should be responsible for sending notices, receiving inquiries and complaints, keeping minutes, maintaining the transactional, applicant and annual disclosure statements filed with the board,<sup>14</sup> and keeping an indexed file of the board's opinions and decisions.

Under normal circumstances, the municipal attorney will serve as counsel to the board. The board should have a modest but sufficient budget to obtain independent legal advice on the rare occasions when the municipal attorney may have a conflict of interest,

and to allow for the services of a stenographer when a hearing is conducted. Because the activities of the board may sometimes be controversial, its expenditures for these purposes, within the limits of a modest budget, should not be subject to external approval.

#### **Step 5: Get the Message Out—Be Proactive**

Many local ethics boards never meet, and are completely ignored by their respective municipalities. But because the municipal ethics program is designed to help officers and employees avoid inadvertent ethical violations, it is essential that the board actively promote awareness among them of their ethical obligations, and encourage them to seek ethics advice when questions arise.

Ethics codes tend to be drafted by lawyers, written in *legalese*, and unintelligible to the common reader. Yet the municipal workforce is mostly composed of non-lawyers, all of whom must adhere to the code of ethics. Therefore, every municipality should prepare and distribute a plain-language guide to government ethics no more than two or three pages in length.<sup>15</sup>

The plain-language guide should include a short and simple statement of purpose. It should note that the guide was prepared to assist officers and employees in avoiding actual or potential conflicts of interest, but that it is not intended to replace the actual text of the local code of ethics. It should incorporate—in plain language—the mandates of Article 18 and the standards adopted by the local municipality in its code of ethics, and should advise against conduct that creates an appearance of impropriety.

The plain language guide should inform municipal officers and employees that they may obtain free, confidential ethics advice from the board of ethics, and provide the board's contact information. It should encourage officers and employees to resolve any doubts they may have about their ethical obligations by obtaining the board's advice before acting.

Ethics training is another important means of getting the message out. A regular series of educational programs should be conducted at convenient times and places so that they may be widely attended by the municipal officers and employees. Experience indicates that daytime programs will be widely attended by employees, even if attendance is not mandatory. Evening programs are generally more convenient for the members of boards and commissions, many of whom hold full-time outside employment.

#### **Step 6: Master the Art of Giving Ethics Advice**

The day will come. You may be at a cocktail party, or at a community event. You will be approached by an acquaintance who has heard of your appointment to

the ethics board and wishes to discuss an ethics question. But beware. You probably won't have all the facts that you will need to give a proper answer. Certainly, you don't want to be cited as having approved a code violation. Ethics inquiries often involve the exercise of judgment. The exchange of opinions among board members is an important part of the decision-making process. All ethics inquiries should be referred to the full board for determination.

The board should respond only to written requests for ethics advice, and should only decide actual "cases and controversies." Fact-finding is a critical step in rendering ethics advice. Only the facts of a particular case will determine the issues that you must consider. The particular facts of an actual case will often determine the outcome of an ethics inquiry. When a request is made for general information about the ethics code, the board should respond by providing the inquiring party with a copy of the plain-language guide.

The board of ethics should maintain a record of the question that was posed, and the information that it relied on in reaching its opinion. It should carefully consider whether it has all the facts that it needs to form an opinion. Ethics questions are often more complicated than they appear. If an employee holds a civil service title, you may need to review the job description associated with that title. But perhaps the employee is working "out of title," performing functions that are not part of his or her job description. Conflicts may sometimes arise based on the duties associated with a job title, or they may arise based on the duties actually performed. You may need to know whether a particular employee is a "policy maker," or is in a position to influence policy making. You may need to know how a particular agency interacts with another. Once you have gathered your facts, you still may not know the whole story. To avoid setting a bad precedent, limit the application of your opinion to the facts presented.

Article 18 authorizes a county ethics board to act with respect to officers and employees of the county, and with respect to officers and employees of a municipality within the county that has not established its own board of ethics.<sup>16</sup> A municipal ethics board other than a county board may act only with respect to its own officers and employees.<sup>17</sup> Ethics advice is intended to provide a shield against unwarranted criticism for honest officers and employees, not a sword for use by political or personal foes. Typically, a local municipal ethics board is authorized to give advice only to officers and employees inquiring about themselves.

The board should act promptly when it receives a request for ethics advice. Many inquiries will be time sensitive. For example, an outside job opportunity may be lost while a municipal employee waits for the ethics board to determine whether the duties of the

outside job would be compatible with the employee's government duties.<sup>18</sup> Untimely ethics advice is useless to the inquiring officer or employee, discourages officers and employees from seeking advice before acting, and undermines the purpose of preventing ethics violations before they occur.

The board's job is to interpret the obligations of officers and employees under the code of ethics and related authorities. Not every question posed to the board of ethics will raise a government ethics issue. For example, the professional conduct of attorneys—even municipal attorneys—is governed by the Lawyer's Code of Professional Responsibility.<sup>19</sup> Officers and employees seeking advice about the professional obligations of attorneys should be referred to the professional ethics committee of the local bar association. Inquiries that pose questions of municipal law should be referred to the municipal attorney.

In drafting your advisory opinions, remember that confidentiality advances the purposes of the municipal ethics program by encouraging officers and employees to seek advice before acting. Where possible, an advisory opinion should omit the name of the inquiring officer or employee, and any other identifying facts.

Your task will be easier if you develop a template for drafting opinions. First frame the issue presented. Next, set forth the governing authority. Discuss how the law applies to the facts, and then state the board's conclusion. Advisory opinions should identify which board members participated in the matter, and any members who may have recused themselves.<sup>20</sup> They should be dated and signed by the chair, and delivered only to the inquiring officer or employee unless he or she consents to a broader distribution.

In framing the issue, keep in mind that if the advice applies only to the inquiring officer or employee, the board's opinion is more likely to be exempt from disclosure under the New York Freedom of Information Law, and it is more likely that the board's deliberations may be conducted in executive session under the Open Meetings Law.<sup>21</sup> On the other hand, determinations that are broad declarations of policy may be subject to disclosure under the Freedom of Information Law, and the proceedings that produce them may be subject to public access under the Open Meetings Law.<sup>22</sup> Because officers and employees are more likely to seek ethics advice when their inquiries are treated as confidential, local municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of the inquiring parties.

Courts give great weight to the advisory opinions of local municipal ethics boards.<sup>23</sup> In giving ethics advice, be reasonable and practical. Keep in mind that inconsistent rulings encourage skepticism. But don't

ignore the lessons of experience. Respect your own precedents, but take a fresh look when warranted. Remember that your goals are to assist honest officers and employees in avoiding ethical missteps before they occur, and to inspire public confidence in government by encouraging high standards of conduct among municipal officers and employees. Treat every request for ethics advice as a teaching opportunity. Write advisory opinions that are clear, explanatory and educational.

### **Step 7: Adopt Rules of Procedure for Investigating Complaints**

Unlike a request for ethics advice, an ethics complaint can normally be filed by anyone—even anonymously—or the board may initiate an investigation on its own. Article 18 does not provide guidelines for the investigation of complaints by a local ethics board. Particular practices vary from one municipality to another, based on the board’s mandate as set forth in the local code of ethics.

Consistent with the authority conferred on the board by the local code of ethics, the board should adopt its own rules of procedure for investigating complaints, and have them in place before a complaint is received or an investigation is required. In adopting its rules, the board should be mindful of the fundamental requirements of due process: notice and an opportunity to be heard.<sup>24</sup>

The board should preserve a record of the complaint, all notices to and from the board, and all evidence that it receives in the course of its investigation including documents and testimony. The board should work closely with its counsel to ensure that the result of its investigation will withstand judicial review. (For a discussion of what to expect if the board or its members are sued, see Step 9.)

If the facts alleged by the complainant or discovered by the board raise the suspicion that a crime may have been committed, the matter should be referred to the District Attorney. To avoid interfering with the District Attorney’s investigation or prosecution of the case, the board should refrain from acting while the matter is under investigation or prosecution by the District Attorney’s office.

### **Step 8: Develop Procedures for Review of Annual Disclosure Statements**

In municipalities having populations of 50,000 or more, the board of ethics is usually charged with the responsibility of administering the financial disclosure law adopted pursuant to Article 18.<sup>25</sup> Depending upon the number of officers and employees required to file financial disclosure statements, the board of ethics

may not have the resources to adequately discharge this responsibility on its own without the assistance of staff assigned by the municipality to handle the daily administrative and clerical duties that such a program entails.

Even where the board of ethics has delegated the day-to-day administration of the financial disclosure law to staff, it still may be called upon to inspect the annual disclosure statements for the purpose of detecting any actual or potential conflicts that they may reveal. Undoubtedly, this task will be performed without the assistance of investigators, auditors or forensic experts. The board should exercise care in developing procedures for the review of annual disclosure statements, and in establishing the parameters of its review, in order to avoid the potential that its members will later be blamed for failing to catch an actual or potential conflict.

### **Step 9: Know What to Expect if the Board or Its Members Are Sued**

Because they are not “final determinations,” the advice given by an ethics board is not subject to judicial review and reversal.<sup>26</sup> As a result, there are few reported cases involving challenges to the decisions of local municipal ethics boards. But when an ethics board engages in the quasi-judicial function of determining whether an ethics violation has occurred, or imposes a fine or other penalty, its decisions will be subject to judicial review in a proceeding under Article 78 of the New York Civil Practice Law and Rules.<sup>27</sup>

In an Article 78 proceeding, the petitioner will have the burden of proving that the board’s determination was illegal, arbitrary or capricious, that the board abused its discretion, or that the decision was unsupported by substantial evidence.<sup>28</sup>

Lawsuits brought against the board will normally be handled by the municipal attorney, or other counsel retained by the municipality, at no cost to the individual board members. But what if the individual board members are sued by an aggrieved party? The individual members of a local municipal ethics board are entitled to a qualified immunity from individual liability where they exercised discretion within the scope of their official duties, and where they have not violated a plaintiff’s constitutional rights.<sup>29</sup>

A municipality may, by local law, provide for the defense and indemnification of its officers and employees in civil claims arising out of their acts or omissions while acting within the scope of their official duties, except where the claim is brought by or on behalf of the municipality. The indemnification will not apply to judgments based on intentional wrongdoing or recklessness, or to awards of punitive damages.<sup>30</sup> Where

the municipality provides an officer or employee with defense and indemnification, any settlement of the claim is subject to approval by the municipality.<sup>31</sup>

The municipality may purchase insurance to fund its obligations under the indemnity,<sup>32</sup> or it may purchase liability insurance to protect its officers and employees from liability arising out of the performance their official duties even without a local law providing for the defense and indemnification of officers and employees by the municipality.<sup>33</sup> Board members should inquire whether their municipality has adopted a local law providing for the defense and indemnification of its officers and employees, and whether the municipality has purchased insurance to protect them from liability arising from the performance of their official duties.

A lawsuit against the board of ethics or its members may pit the interests of branches, departments or agencies of government, or those of individual officers or employees, against one another, and may present the municipal attorney with a professional conflict of interest. It is sometimes difficult to determine whether a municipal attorney has a professional conflict of interest because he or she may, at various times, owe a duty of loyalty to one or more individual officers or employees, branches, departments or agencies of government, the government as a whole, or directly to the public.<sup>34</sup> This distinction is important because conversations with a municipal attorney will not be privileged unless they occur between the municipal attorney and his or her client.<sup>35</sup>

The joint defense of a municipality and the individual members of a municipal board will give rise to a professional conflict where the defendants assert inconsistent defenses. A professional conflict would also arise where the individual board members are sued for punitive damages, because a municipality cannot be liable for punitive damages.<sup>36</sup> Clients may waive the professional conflict by giving informed consent if a disinterested lawyer would conclude that defense counsel's professional judgment would not be impaired by the joint representation.<sup>37</sup> In cases where the municipal attorney has a professional conflict of interest, the indemnified officer or employee is entitled to be represented by private counsel of his or her choice.<sup>38</sup>

## Step 10: Take Advantage of Ethics Resources

We are fortunate that several dedicated government ethicists have labored in recent years to organize the subject of government ethics into a coherent discipline, and to develop a body of written materials available to assist local municipal ethics boards in doing their important and difficult work.

Articles by Professors Mark Davies, Patty Salkin, Les Steinman and others are available online. For example, back issues of this publication, the NYSBA/MLRC *Municipal Lawyer*, are available to members of NYSBA's Municipal Law Section on its Web site at [www.nysba.org/MunicipalLawyer](http://www.nysba.org/MunicipalLawyer). The Association's Municipal Law Section is a ready source of ethics education and support. An extensive online ethics library is available at the Web site of the New York City Conflicts of Interest Board.

An extensive library of local municipal codes is available on the Web site of "e-codes." Advisory opinions of the New York Attorney General and the New York Comptroller are available on their respective Web sites. Helpful information is available online to members of the New York State Association of Counties, the Association of Towns of the State of New York, the New York Conference of Mayors and Municipal Officials, and the Conference on Government Ethics Laws.

Congratulations and good luck. Your work is among the most important in government.

## Endnotes

1. In some instances, a municipal officer or employee may engage in morally culpable misconduct. But such cases are more likely to be prosecuted by the local district attorney's office than by the local municipal ethics board, and they are more likely to be prosecuted as violations of the New York Penal Law than as violations of the state or local codes of ethics. *See, e.g.*, Penal Law § 195.00 (official misconduct) and art. 200 (bribery involving public servants and related offenses).
2. For a helpful summary of Gen. Mun. Law Article 18, *see* Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC *Municipal Lawyer*, Summer 2005, Vol. 19, No. 3, pp. 10–12.
3. *See* Gen. Mun. Law §§ 800-805.
4. *See* Gen. Mun. Law § 805-a.
5. *Id.* N.B. The phrase "confidential information" is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. *See* Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC *Municipal Lawyer*, Spring 2004, Vol. 18, No. 2, pp. 22–24. For a suggested definition of "confidential information" in the context of Gen. Mun. Law, Article 18, *see* Leventhal, *Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms*, NYSBA/MLRC *Municipal Lawyer*, Spring 2006, Vol. 20, No. 2, pp. 20–21 (*Confidential Information*. Information in any format that is either (1) prohibited by federal or state law from disclosure to the public, or (2) prohibited from disclosure by local law, ordinance, or resolution of the municipality, and exempt from mandatory disclosure under the New York State Freedom of Information Law (FOIL) and the New York State Open Meetings Law).
6. *Supra*, n. 4.
7. *Id.*
8. *See* Gen. Mun. Law § 806.

9. See Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.
10. See, e.g., *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep't 1985); *Tuxedo Conservation and Taxpayer Association v. Town Board of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979).
11. See *Peterson v. Corbin*, 275 A.D.2d 35, 713 N.Y.S.2d 361 (2d Dep't 2000).
12. See Gen. Const. Law § 41.
13. Pub. Off. Law §§ 100-111 (Open Meetings Law); see Freeman, *Board of Ethics: Public Disclosure?* NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12-15; Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24.
14. For a thorough discussion of the types of disclosure statements typically filed with a local municipal ethics board, see Davies, *Enacting a Local Ethics Law—Part II: Disclosure*, NYSBA/MLRC Municipal Lawyer, Fall 2007, Vol. 21, No. 4, pp. 8-17.
15. A library of plain-language guides and leaflets is posted on the Web site of the New York City Conflicts of Interest Board.
16. See Gen. Mun. Law §§ 808(2)-808(4).
17. *Id.*
18. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874).
19. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.
20. Where a board member recuses himself or herself due to a conflict of interest, the member should refrain from participating in the discussion, deliberations or vote on the matter. See 1995 Op. Atty. Gen. 2. For a helpful discussion of the principles applicable to recusal and abstention, see Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 17-19.
21. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22-24; N.Y. Comm. on Open Gov't. FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).
22. *Id.*; see also Freeman, *Board of Ethics: Public Disclosure?*, NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12-15.
23. See *Byer v. Town of Poestenkill*, 232 A.D.2d 851, 648 N.Y.S.2d 768 (3d Dep't 1996); *Parker v. Gardiner Planning Bd.*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992); *DiLucia v. Mandelker*, 110 A.D.2d 260, 263, 493 N.Y.S.2d 769, 771 (1st Dept. 1985), *aff'd*, 68 N.Y.2d 844 (1986).
24. For further advice on investigations and enforcement procedures, see Davies, *Enacting a Local Ethics Law—Part III: Administration*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 11-16.
25. See Gen. Mun. Law §§ 810, 811, 812.
26. See *Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30 (2005), *reargument den.* 5 N.Y.3d 824 (2005); *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003); *Scarpatti-Reilly v. Town of Huntington Bd. of Ethics & Fin. Disc.*, 300 A.D.2d 404, 751 N.Y.S.2d 753 (2d Dep't 2002); *Neale v. Cohen*, 281 A.D.2d 421, 721 N.Y.S.2d 110 (2d Dep't 2001); *Hammer v. Veteran*, 86 Misc. 2d 1056, 386 N.Y.S.2d 170 (Sup. Ct. West. 1975), *aff'd*, 53 A.D.2d 629, 385 N.Y.S. 2d 1017 (2d Dep't 1976).
27. See, e.g., *Gray v. Epstein*, 2008 N.Y. Slip Op 51706U (Suff. Co. Sup. Ct. 2008) (Petitioner appealed decision of the Town of Smithtown Ethics Board that she violated the town code of ethics, and imposed a civil penalty of \$3,500; court affirmed the board's decision, but set aside the monetary penalty because the Code did not provide the Ethics Board with the authority to impose monetary penalties.).
28. See N.Y. Civ. Prac. Law & Rules § 7803.
29. See *Shechter v. Comptroller of City of New York*, 79 F.3d 265 (2d Cir. 1996).
30. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).
31. *Id.*
32. *Id.*
33. Gen. Mun. Law § 52 (Liability insurance for officers and employees).
34. See Salkin, *Beware: What You Say to Your Government Lawyer May Be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 Urb. Law 283 (2003); Salkin and Phillips, *Program On Law And State Government Fellowship Symposium: Integrity in Public Service: Living Up to the Public Trust? Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 Ind. L. Rev. 561 (2006).
35. *Id.*
36. See *Cook County, Illinois v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-260 (1981); *Sharapata v. Islip*, 56 N.Y.2d 332 (1982)).
37. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.24(c)(DR 5-105).
38. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).

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