NYSBA SPRING 2005 | VOL. 19 | NO. 2

Municipal Lawyer

A joint publication of the Municipal Law Section of the New York State Bar Association and the Edwin G. Michaelian Municipal Law Resource Center of Pace University

A Message from the Chair

The first time I met members of the Municipal Law Section I was chasing two toddlers around the grand old porches of the Mohonk resort. It was my first time attending a Section Fall Meeting. Shortly thereafter I was asked to serve on the Section's Executive Committee and here I am today, sending one of those toddlers off to college in the fall and composing my last message to the Section as Chair. Rather than bore everyone with a retrospective of all the wonderful things the Section has done, because we have, and all the fun we had, because we did, I thought I might offer something in this message that you might find useful. The end of my term as Chair happens to coincide with the end of my fourth year on the bench as Judge. I offer to you the following observations about my own view from the bench. Please take them in the spirit in which I offer them, to assist and to amuse.

I am basically a positive person so let me start with a list of what I like.

1. Attorneys and parties that are punctual.
2. Attorneys that are civil and/or polite to each other, the parties, the court, court personnel and, where applicable, jurors.
3. Attorneys who have their schedules with them in case I want to set a date for a conference, phone call or trial. If you have it with you, my secretary or law assistant will not have to call you back to arrange a date. We like talking to you, but about things that are worthwhile.
4. Attorneys who are familiar with their file.
5. Attorneys who can stand in front of me and say, "Counsel and I have already talked to each other about this."
6. Trial or hearing exhibits that are pre-marked.
7. Bates Stamps. I used one as a litigation legal assistant in a large law firm a very long time ago. Once you establish a rhythm with the stamp, it's as good as meditating. If you do not own one, borrow one or at least hand write the page numbers on exhibits longer than 10 pages.
8. A set of exhibits for the court's own use.[1] I find it helpful to be able to highlight, underline and make my own notes on a copy of the exhibit. It makes me happy. A very good thing to do for a bench trial.

Inside

9. Sharing of witness lists and a discussion of what, where practical, can be stipulated to in terms of evidence and facts.

Of course, I have identified some behaviors over the years that leave me somewhere between peeved and exasperated.

1. Surprises.[2] By the time I get on the bench for a trial you have been through multiple pretrial conferences, have been cajoled into pre-marking exhibits and asked many times whether or not I (or my staff) can do anything to help you. You have also given me your witness list and an idea of whom you can call and when during the trial. You most likely have talked with opposing counsel about what to expect too, in terms of witnesses. (See "likes" above.) I do not expect to have to go off the record for an hour to have the ten-inch stack of papers you found the night before trial marked for identification.

2. Boilerplate expert discovery responses. You can always provide the minimum amount of information to comply with CPLR Article 3101(d). I never understood how that furthered the interests of justice, or your client, however, I acknowledge that the minimum disclosure will beat a preclusion motion.

3. The Gotcha Game. I enjoy a good objection during a trial. I also respect an attorney's need to preserve the record for appeal. I can also tell when objections are made just to throw off opposing counsel's rhythm. I learned that trick in law school, too. If I quickly state "overruled" without asking you the grounds for your objection and either do not look up from my notes or break eye contact with the witness, make sure your next objection is based on legitimate grounds and not merely made to interrupt opposing counsel. If I get annoyed on a bench trial you can bet that there will be jurors that become annoyed also.

4. "Poking the Bear." I use this phrase to describe the behavior of attorneys during trial that "toss" evidence at opposing counsel and/or witnesses. It makes the trial longer and the time spent with each other unpleasant. It takes the same amount of energy, or less, to place the document on counsel's table or hand it to the witness.

5. Muttering and other demonstrative evidence of disdain. No one likes to be overruled. Chances are your excited utterances and/or eye rolling may give me more of a chuckle than really make me angry at a bench trial. I know that your microphone in the Court of Claims courtroom picked up your voice, something fun for those judges to read on the appeal, and you might look pretty silly when you roll your eyes. And of course, you already know that those types of reactions are not lost on jurors, but not in the way you think. Trust me, you do not look or sound all that attractive or intelligent to most of them when engaged in this type of behavior.

6. String citations. They looked terrific in law school papers and were quite impressive in those memos you wrote during your first legal job. I actually read all those cases. I begin to wonder, however, after the fifth or sixth case that says the same thing if your position is really so weak that you have to pummel me with a pound of paper. One or two cases on point, from the Court of Appeals and/or the appropriate department of the Appellate Division are sufficient. I can find the rest if I need it.

I was actually going to attempt to be clever and call this list my "Top Ten," but I could not come up with ten things I disliked. There is a lot more to like and enjoy about this profession and the people I work with than can be defined in a list like this one.

The honor of serving the Section in the capacity of Chair is now passed on to Tom Myers, who has very ably served in the position of first vice-chair and treasurer the last two years. I would also like to thank the Executive Committee members and our Section Committee Chairs for their help and hard work over the last few years. You have enriched my life more than you will ever know. God bless.

Endnotes

1. I am speaking for myself. If you are not sure, ask the judge if they want a set. He or she will appreciate your thoughtfulness.
2. I'm not speaking of the kind that come in an attractively wrapped box or the old college friend that calls unexpectedly. I like those.

Renee Forgensi Minarik

From the Editor

As the term of our Chair, Judge Renee Forgensi Minarik, comes to an end, I would like to recognize her outstanding service and highlight her many accomplishments that have enriched our Section and fostered the professional growth of our membership.

Programatically, Renee successfully pursued partnerships with the American Bar Association, the Environmental, Labor and other sections of the State Bar and the County Attorneys and School Attorneys Associations to offer our members a broad spectrum of cutting-edge seminars to enhance their practical skills and ethical training. As a result of Renee's efforts to invigorate the CLE committee, the Section now offers its members a diversity of quality programming throughout the year sufficient to satisfy MCLE biennial registration requirements.

Expanding services to members has been a focal point of Renee's tenure as Chair. Developing the Section's website and establishing a municipal listserve for members to share experiences and ideas are just two of the initiatives she has advanced. She vastly expanded the content of the *Municipal Lawyer*, while reducing its publication costs—a testament to her creativity and negotiating skills. Membership growth, and heightened committee productivity reflected in the development of CLE programs and *Municipal Lawyer* articles, are also byproducts of Renee's boundless energy, dedication and commitment to the Section.

Most importantly, Renee has rescued the Section from financial peril. Inheriting a significant budget deficit with no surplus to fall back upon, Renee's persistence and charm secured State Bar approval for fiscal changes in operations and revenues that have restored fiscal stability and accountability to the Section.

For the past 15 years, it has been my great pleasure and privilege to serve with Renee Minarik on the Municipal Law Section Executive Committee. We all owe Renee a deep debt of gratitude for her outstanding work on behalf of our Section.

Our Section has a rich history of former chairs who continue to contribute to the enrichment of the Section. I am certain that Renee will follow this path.

In her last *From the Chair* column, Renee provides a view from the bench after four years of service on the Court of Claims. Not surprisingly, civility, preparedness and respect for your adversary and the court rank high on her list of behaviors to be encouraged in the courtroom.

Paul Millus, Esq., a speaker at the Section's 2005 Annual Meeting, has provided an excellent synopsis of "First Amendment Issues in Public Employment." The article outlines the protections afforded to specific actions and speech of public employees both in and out of the workplace, and how the courts balance these protections against the public employer's right to promote the efficiency of the public services it provides through its employees.

Patricia Salkin, Associate Dean and Director of the Government Law Center at Albany Law School, exhaustively examines, "Ethical Considerations for Town Attorneys: Avoiding Conflicts of Interest and Other Potential Land Mines." Focusing on the Code of Professional Responsibility, Dean Salkin explores numerous scenarios where town attorneys may confront potential or actual issues pertaining to conflicts of interest, client loyalty and the duty of confidentiality.

Finally, the *Municipal Briefs* column examines recent decisions of the New York Court of Appeals and intermediate appellate courts on the subjects of civil service, Freedom of Information Law, Open Meetings Law, annexation and the financing of special improvement districts.

Lester D. Steinman

First Amendment Issues in Public Employment

By Paul Millus

The Supreme Court has long recognized that "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment."[1] Conversely, a government employer may impose certain restraints on the speech of its employees that would be unconstitutional if applied to the general public. What is speech on a matter of public concern? It is any speech which can "be fairly considered as related to any matter of political, social or other concern to the community."[2] However, even the Supreme Court acknowledges that "the boundaries of the public concern test are not well-defined."[3]

To determine whether speech relates to a matter of public concern, courts explore the motive of the speaker, the context in which the speech was made and the content of the speech.[4] While addressing motive, courts "attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose."[5] The mere fact that a government employee takes a personal interest in the subject matter of the speech at issue does not remove it from the protection of the First Amendment. "Mixed motivations" are involved in most actions an employee performs every day and courts will not hold plaintiffs to impossible standards of "purity of thought and speech."[6] Thus, while the speaker's motive is often a relevant part of the context of the speech, it is certainly not dispositive.

As for the context of an employee's statements, "[t]he key inquiry is whether the comment was made by plaintiff in his role as a disgruntled employee or as a private citizen."[7] For example, in *Ezekwo v. New York City Health & Hosps. Corp.*, [8] the plaintiff, a medical doctor, authored a series of verbal complaints, letters and memoranda to the director of the medical residency program. The complaints concerned areas of personal dissatisfaction, including *inter alia*, the lack of personal attention she received from the attending physicians, the lack of proper hospital maintenance and the director's poor management. When the plaintiff was denied the position of chief resident, she brought suit for First Amendment retaliation. The Second Circuit held that:

> [h]er complaints were personal in nature and generally related to her own situation within the . . . residency program. Our review of her prolific writings convinces us that Ezekwo was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor. . . . To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[9]

One can see from this case how the concepts of motive and context analysis may overlap.

Of the three factors, analyzing the content or subject matter of the speech is routinely considered to be the most important. As a general rule, the greater the degree of public concern (e.g., public safety, public health, the public fisc or civil rights in general) raised by the issues, the greater the likelihood that the court will balance the competing interests in favor of constitutional protection.[10]

Adverse Employment Action and Causation

Primarily, the issue of whether a public employee has a right to exercise her First Amendment rights arises in the context of a retaliation claim. In order to establish a viable claim, the employee must establish that she spoke out on a matter of public concern, suffered an adverse employment action and that the protected speech was a substantial or motivating factor in the decision to take action against the employee. That is to say, the adverse employment action would not have been taken absent the employee's protected speech.[11]

As for what constitutes an adverse employment action in this context, the Second Circuit has held that "[o]nly retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action."[12] Adverse employment actions do not only include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.[13] Indeed, adverse employment actions can be far less

tangible. Lesser actions may also be considered adverse employment actions, including negative evaluation letters, expressed accusations of lying, assignment of less desirable duties or reduction of class preparation periods for teachers.[14] In sum, when evaluating an action claimed to be adverse one can simply ask, does the effect of the action taken by the employer meaningfully affect this particular employee's employment, taking into account how other employees are treated and their reasonable expectations in the workplace?

In regard to causation, whether the speech was a "motivating or substantial" factor is obviously a highly fact-dependent inquiry. For example, the timing between the speech and the alleged adverse act may help discern motive. However, the time period between the exercise of the First Amendment right and the adverse employment action is not subject to a set period. Causation can also be established by circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment. However, there is no bright line test to define "the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship . . . ."[15] A plaintiff need not establish causation solely through temporal proximity. Instead, he can offer evidence of retaliatory animus.[16] It is sufficient to present evidence of retaliatory animus to create a triable question of fact where a supervisor has told an employee "to learn to keep his mouth shut" in connection with that employee participating in a legal proceeding commenced by a fellow employee.[17]

Even if an employee establishes that he was speaking about a matter of public concern, there was an adverse employment action and the speech was a substantial or motivating factor for the employment action, the municipal defendant still has the opportunity to escape liability by showing, through a preponderance of evidence, that it would have taken the same adverse employment action even in the absence of the protected conduct.[18]

The Balancing Tests

Even after setting forth a prima facie case, a public employee's freedom of speech is not absolute. The employer has additional defenses as outlined in the case of *Pickering v. Board of Education*[19] and its progeny. In *Pickering*, the Supreme Court held that courts may determine the extent to which the government may permissibly regulate the speech of its employees by balancing the interest of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The *Pickering* test involves a two-step inquiry: first, a court must determine whether the speech which led to an employee's discipline relates to a matter of public concern; and, second, if so, the balance between free speech concerns is weighed against efficient public service to ascertain to which the scale tips. The first part of the inquiry is commonly referred to as the public concern test and it serves a gatekeeping function for employee speech claims in federal courts.

The First Amendment protects an employee only when he is speaking "as a citizen upon matters of public concern," as opposed to when he speaks on matters of personal concern. If the speech that led to an employee's discipline was on a personal matter—for example, a complaint about a minor change in an employee's duties—the government is granted wide latitude to deal with the employee without any special burden of justification. When it is shown that the employee's speech was on a matter of public concern, the second step, or balancing portion of the test, comes into play. Under it, the government has the burden of showing that, despite First Amendment rights, the employee's speech so threatens the government's effective operation that discipline of the employee is justified.

The Supreme Court further explained the *Pickering* balancing test in the case of *Connick v. Meyers* so that the balancing test would only be performed after it was determined that the speech at issue was a matter of "public concern." It also decreased the degree of claimed disruption that must be demonstrated in order for a government employer to regulate speech. In *Connick*, after a decision in favor of the employee by the District Court, which was affirmed by the Fifth Circuit, the Supreme Court articulated a distinction between speech upon matters "inherently of public concern" and speech which gains public concern status upon consideration of the circumstances surrounding the making of the statement. Applying *Pickering,* the court held that, regardless of the content of the speech, the responsibilities of the employee or the context in which the speech was made, an employer is never required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[20]

The *Connick* decision is the foundation for a number of decisions where employers can find refuge, even in the face of taking action against an employee who has spoken out on a matter of public concern. In *Waters v. Churchill*,[21] a four-justice plurality held that the government could fire an employee for disruptive speech based on its reasonable belief of what the employee said, regardless of what was actually said. That decision in *Churchill* resulted in the remanding to the Second Circuit of an earlier decision in *Jeffries v. Harleston*[22] and the reversal of its earlier decision in

favor of the employee. In *Jeffries,* it was held that a government employer may take an adverse employment action against a public employee for speech on matters of public concern if the employer took the adverse employment action, not in retaliation for the employee's speech, but because of the potential for disruption.

Thus the state need only show a "likely interference" with its operations and "not an actual disruption" to justify the actions. Furthermore, "substantial weight" is to be given to the employer's reasonable predictions of disruption caused by an employee's speech. In fact, a government employer can prevail if it can demonstrate that it reasonably believed that the speech would potentially interfere with or disrupt its activities.[23] The Second Circuit has also determined, in accord with the Fourth, Sixth and Seventh Circuit Courts of Appeal, that the *Connick* requirement that the speech be a matter of public concern at the outset applies equally to a public employee bringing a First Amendment claim based on freedom of association and not mere speech.[24]

Chilled Speech

Government action which falls short of a direct prohibition on speech may also violate the First Amendment by chilling the free exercise of speech.[25] "However, not every assertion of a chilling effect will be considered a judicially cognizable First Amendment violation."[26] Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm and abstract injury is not enough.[27] The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as a result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." General indirect and conclusory allegations are not sufficient.[28] He must proffer some objective evidence to substantiate his claim that the challenged conduct prevented him from engaging in protected activity.[29] Accordingly, if the plaintiff continues to engage in the protected speech that allegedly motivated unconstitutional retaliation, then he would fail to establish an actual chilling of the speech.[30]

Political Speech

The First Amendment also restricts the power of government officials to dismiss public employees because of their political affiliation and protects plaintiffs from discharge solely because of their political beliefs.[31] However, political affiliation is a permissible employment criterion for positions involving policymaking and confidential employees. To apply the policymaker/confidential employee exception to the dismissal of a public employee, the government entity must show "that party affiliation is an appropriate requirement for the effective performance of the public office involved."[32] The Second Circuit has further held that "political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance, a reading which would exempt from [First Amendment] protection most policymaking and confidential employees."[33]

Courts have readily found that government attorneys with law enforcement responsibilities occupy policymaker/confidential positions.[34] Significantly, courts have also held that non-attorneys fulfilling law enforcement functions are policymaker/confidential employees.[35] Even public employees in positions authorized to receive and communicate confidential information are within the policymaker/confidential employee exception.[36]

In *Vezzetti v. Pellegrini*,[37] the Second Circuit enumerated several factors which are "useful" in determining whether a government employee is within the exception for policymaker/confidential positions and may be discharged at will.

> These factors include whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

This is not an exhaustive list of indicators, nor is any one factor or group of them always dispositive. There tends to be a cautious identification of the characteristics of a policymaker/confidential employee as the guidelines "do not lend themselves to easy or automatic application."[38] It is the inherent duties of the position, not the work actually performed by the employee, that are to be considered when weighing the policymaker/confidential employee exception.[39] In sum, a single question predominates: whether the employee in question is empowered to act and speak on behalf of a policymaker, especially an elected official. The more attuned the employee must be with the thought process and ideology of the employer, the more likely it is that an employee will be deemed a confidential employee.

New York State Law Protections

New York state law protects a public employee engaging in political activities outside the workplace.

For example, New York Civil Service Law section 107(1) provides, *inter alia*, that selection to or removal from an office or employment shall not relate to the employee's political opinions or affiliations.[40] Other activities outside the workplace are similarly protected. Under Labor Law section 201-d(2)(a), it is unlawful for any employer to adversely affect someone's employment in connection with that employee's political activities "outside of working hours, off of the employer's premises and without use of the employer's equipment or other property."[41]

New York's Whistleblower Law, Civil Service Law section 75-b, provides in pertinent part, that a public employer cannot "dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a government body information: (i) regarding a violation of a law, rule or regulation which creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. 'Improper governmental action' means any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation."

The public Whistleblower Law provides broader protection than New York Labor Law section 740, which applies to private employees. Under section 75-b, a plaintiff is not required to prove that the violation being reported poses a threat to health or safety or that the violation be "actual." Accordingly, a reasonable belief that an "improper governmental action" has occurred will satisfy plaintiff's burden.[42] Not only is there protection for those who make such disclosures, but New York state law also requires state employees to do so.[43]

As a conditional precedent to disclosing certain matters, Civil Service Law section 75-b(2)(b) requires that prior to disclosing information to a governmental body, a public employee "shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action." The "appointing authority" is the "officer, commission or body having the power of appointment to subordinate positions."[44] Failure to do so will preclude protection under the statute.[45]

A public employee who learns of a potential violation should act expeditiously as the statute of limitations for a whistleblower claim under Civil Service Law section 75-b(3) is one year. In addition, whistleblower claims cannot be maintained against individual defendants and individuals cannot be held liable under section 75-b.[46]

Furthermore, I note that the burden of proof is different from the burden in a First Amendment retaliation claim. Under New York law, a whistleblower claim requires that the plaintiff establish that the disciplinary proceeding was based "solely" on the employer's unlawful retaliatory action. [47] However, with a free speech/retaliation claim a plaintiff need only establish that the speech, in addition to being on a matter of public concern, was at least "a substantial or motivating factor" in the employer's adverse employment action.

In conclusion, the protections afforded to public employees in regard to what they say or do in and out of the workplace are many. Yet the courts routinely recognize the reasonable position that the government's mission should not be easily and unreasonably interfered with by particularly overzealous employees who feel the need to speak out about perceived wrongdoings, thus establishing a fair balance.

Endnotes

1. *City of San Diego, Cal. v. Roe*, 125 S.Ct. 521, 2004 WL 2775950 (Dec. 6, 2004).
2. *Connick v. Myers*, 461 U.S. 138 (1983).
3. *Roe*, 125 S.Ct. at 524.
4. *Lewis v. Cohen*, 165 F.3d 154 (2d Cir. 1999).
5. *Rao v. New York City Health & Hosps. Corp.*, 905 F. Supp. 1236, 1241 (S.D.N.Y. 1995).
6. *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003).
7. *Ianillo v. County of Orange*, 187 F. Supp. 2d 170, 181 (S.D.N.Y. 2002).
8. *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775 (2d Cir. 1991).
9. *Id.* at 781.
10. *Connick*, 461 U.S. at 152.
11. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977).
12. *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001).
13. *Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995).
14. *Bernheim v. Litt*, 79 F.3d 318 (2d Cir. 1996).
15. *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545 (2d Cir. 2001).
16. *Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2003).
17. *Id.* at 383.
18. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675, (1996); *Morris v. Lindau*, 196 F.3d 102 (2d Cir. 1999) ("This principle prevents an employee who engages in unprotected conduct from escaping discipline for that conduct by the fact that it was related to protected conduct.").
19. 391 U.S. 563 (1968).
20. *Connick*, 461 U.S. at 152.
21. 511 U.S. 661 (1994).
22. 52 F.3d 9 (2d Cir. 1995).
23. *Id.* at 13; *Waters*, 511 U.S. at 673.

24. *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004).
25. *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972); *Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3523 (U.S. Feb. 3, 2003) (No. 02-1156); *Hankard v. Town of Avon,* 126 F.3d 418, 423 (2d Cir. 1997).
26. *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).
27. *Laird*, 408 U.S. at 13-14.
28. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).
29. *Bordell v. General Electric Co*., 922 F.2d 1057, 1061 (2d Cir. 1991); *see also Colombo*, 310 F.3d at 117 (plaintiff must "show that the defendant's actions had some actual, non-speculative chilling effect"*); McGrath v. Nassau Health Care Corp.,* 217 F. Supp. 2d 319, 329 (E.D.N.Y. 2002) ("[P]laintiffs must show that they were injured, or are in immediate danger of being injured, because of the allegedly chilling behavior.").
30. *New England Health Care, Employees Union, Dist. 1199 v. Rowland*, 221 F. Supp. 2d 297, 343 (D. Conn. 2002).
31. *Elrod v. Burns*, 427 U.S. 347 (1976*); Branti v. Finkel*, 445 U.S. 507 (1980); *Hodge v. City of Long Beach*, 306 F. Supp. 2d 288 (E.D.N.Y. Feb 24, 2003).
32. *Branti v. Finkel*, 445 U.S. at 518; *see Kaluczky v. City of White Plains*, F.3d 202, 209 (2d Cir. 1995); *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993).
33. *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988).
34. *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996) (state deputy attorney general), *cert. denied*, 116 S.Ct. 1853 (1996); *Monks v. Marlinga*, 923 F.2d 423, 426 (6th Cir. 1991) (assistant prosecutor).
35. *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993) (deputy sheriff); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991) (deputy sheriff). *See also Gunaca v. State of Texas,* 65 F.3d 467 (5th Cir. 1995) (investigator in a district attorney's office falls within the personal staff exception of the Age Discrimination in Employment Act, 29 U.S.C. § 630(f)).
36. *Savage*, 850 F.2d at 66 (a secretary to the director of a correctional facility was deemed a "policymaker" because according to her job description she "acts on phone messages to the superintendent involving confidential matters, such as personnel actions, labor relations, and legal actions, and may be responsible for compiling confidential reports."); *Matthews v. Town of Blooming Grove*, 882 F.Supp. 1420, 1422 (S.D.N.Y. 1995) (a bookkeeper/clerk to a town supervisor who "may perform confidential duties, such as typing correspondence containing financial or legal information" was a policy maker/confidential employee).
37. 22 F.3d 483 (2d Cir. 1994).
38. *Id.* at 486.
39. *Regan*, 984 F.2d at 580.
40. *Richardson v. City of Saratoga Springs,* 246 A.D.2d 900, 667 N.Y.S.2d 995 (3d Dept. 1998).
41. *Baker v. City of Elmira*, 271 A.D.2d 906, 707 N.Y.S.2d 513 (3d Dept. 2000).
42. *Hanley v. New York State Executive Dept. Division for Youth*, 182 A.D.2d 317, 589 N.Y.S.2d 366, 368 (1992) (the New York Legislature passed the Whistleblower Statute to, inter alia, "mak[e] it easier for an employee to report suspected abuse").
43. On June 17, 1996, Gov. Pataki signed Executive Order 39 requiring state employees to promptly report incidence of "corruption, fraud, criminal activity, conflicts of interest, or abuse by another state officer or employee." Employees who knowingly fail to report such information can be subject to disciplinary action or termination.
44. Civ. Serv. Law § 75.
45. *Brohman v. New York Convention Center Operating Corp*., 293 A.D.2d 299, 740 N.Y.S.2d 312 (1st Dept. 2002) (The court held that employee had not provided notice to corporation of concerns regarding allegedly improper actions of president prior to disclosing information to public body precluding reliance on whistleblower protection of Civil Service Law).
46. Civ. Serv. Law § 75-b(1)(a) (McKinney 1999) (excluding individuals from definition of "public employer"); *Fry v. McCall*, 945 F.Supp. 655, 665-66 (S.D.N.Y. 1996) (former employee cannot maintain claims under § 75-b against officials in their individual capacities*); Kirwin v. New York State Office of Mental Health*, 665 F.Supp. 1034, 1039 (E.D.N.Y. 1987) (same); *Moore v. County of Rockland*, 192 A.D.2d 1021, 1024, 596 N.Y.S.2d 908, 911 (3d Dept. 1993).
47. Civ. Serv. Law § 75-b(3)(a).

Paul F. Millus is a partner with Snitow Kanfer Holtzer & Millus, LLP in Manhattan. He concentrates his practice in labor and employment, commercial litigation and the defense of municipalities.

Ethical Considerations for Town Attorneys: Avoiding Conflicts of Interest and Other Potential "Land Mines"

By Patricia E. Salkin

I. Introduction

Municipal attorneys are bound not only by the Code of Professional Responsibility, but also by Article 18 of the General Municipal Law and by applicable provisions of any locally adopted code of ethics. While larger towns in New York typically employ full-time attorneys, the majority of New York's 932 towns retain the services of part-time attorneys, who may be simultaneously engaged in the private practice of law. This type of arrangement can lead to a large number of scenarios where certain conduct on the part of the attorney and his or her law firm can give rise to illegal and/or unethical action. Conflicts of interest is an area full of land mines for municipal attorneys. Identifying the client of the government lawyer, client loyalty, duty of confidentiality, and dual office holding within the municipality are some of the other areas of concern for municipal attorneys. Although municipal attorneys must be conversant with state and local ethics laws that guide the conduct of their municipal clients, this article also highlights issues of ethics and professionalism of the municipal attorney, with a particular focus on the Code of Professional Responsibility. After all, "It is the duty of lawyers who accept public office or employment 'to remain above suspicion even at personal financial sacrifice.'"[1]

II. Conflicts of Interest

A. Representing Private Clients in Town

It is a conflict of interest for a part-time town attorney to represent private clients before administrative agencies of the town since it may conflict with his or her duty to protect the interests of the municipality.[2] Relying on Canon 9, which states, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," the Committee on Professional Ethics opined that, "if there is doubt as to whether or not the acceptance of professional employment will involve a conflict of interests between two clients, or may require the use of information obtained through the services of another client, the employment should be refused."[3] Although the ethical considerations provide that a lawyer can represent multiple clients only after such is explained to each client and they each agree, the committee, in this case, opined that a public body cannot consent to this type of dual representation if a conflict is involved.[4] Subsequently, the Committee on Professional Ethics reconsidered its position on "the government cannot consent" rule and concluded that a per se ban is unjustified and should no longer be imposed in the state.[5] The committee concluded that "where a lawyer is faced with a conflict of interest, and one of the affected parties is a governmental entity, the lawyer may accept or continue the representation with the entity's consent, provided there is full compliance with DR 5-105(C), i.e., the 'obviousness' test is satisfied and full disclosure has been made."[6] The attorney general opined that where the town retained the services of an attorney to represent the planning board, it would be a conflict of interest for that attorney to complete the provision of legal services to existing clients which would involve appearances before the planning board for these clients, and that the planning board could not waive these potential conflicts.[7]

It is also a conflict of interest for a part-time town attorney who is responsible for criminal proceedings on behalf of the town to represent private clients in criminal proceedings in the town since "acting as a prosecutor one day and as a defense counsel another gives rise to the appearance of professional impropriety."[8] It had been believed that where the part-time town attorney has no responsibility for criminal proceedings on behalf of the town, he or she may represent private clients on criminal matters but not before a town justice in the town he or she represents, or where a violation or construction of an ordinance of the town is at issue.[9] This approach offered five criteria to be met before a part-time town attorney could undertake criminal defense matters:

(1) his or her statutory or other responsibility to prosecute criminal proceedings on behalf of the town does not require prosecution of crimes or offenses contained in the Penal Law or any other law enacted by the state legislature;

(2) the defense does not require an appearance before a judicial or other official of the town where he or she is employed;

(3) the town where he or she is employed, or a violation or a construction of one of its ordinances or local laws is not involved;

(4) the offense charged is unlike any of those he or she prosecutes; and

(5) the investigating officers and law enforcement personnel involved are not those with whom he or she associates as a prosecutor.[10]

A 1993 opinion of the NYSBA Committee on Professional Ethics refined this test further, finding that "[t]he prohibition on the lawyer/part-time public official's appearance in the courts of the locality engaging the lawyer flows from the representation of the 'locality,' not from the particular type of representation undertaken on behalf of the locality."[11] Therefore, "local part-time attorneys for municipalities, regardless of their title or actual responsibilities, may not undertake criminal defense cases pending before judicial officers of the same locality, notwithstanding their ability to handle such matters in other courts of the State."[12]

As to civil matters, the committee states that there is no blanket prohibition on the representation of private clients in civil cases in the town court.[13] Keeping in mind, however, that a part-time town attorney cannot represent a private client who is suing the town where he or she is employed, nor can the part-time attorney represent a client on a civil matter where the interpretation of a town law or ordinance is at issue.[14] It has been held a violation of the Code of Professional Responsibility for a part-time village attorney and his firm to represent the zoning board of appeals and, at the same time, appear as attorneys for a client requesting an appeal from the ZBA.[15]

The same 1993 opinion holds that a lawyer, who has contracted with a town to serve as a deputy counsel to the town to prosecute (for the purposes of plea negotiation) all infractions in violation of the Vehicle and Traffic Law in the town, may not represent private clients on criminal matters in any court of the state.[16]

The attorney general has opined that a part-time assistant town attorney, whose work is limited to matters relating to the town's plumber's examining board, may represent private clients before other town agencies, including the planning and zoning boards and the planning department without violating General Municipal Law section 805-a, so long as compensation is fixed based upon the reasonable value of services rendered.[17] Furthermore, to maintain public confidence in government, the facts of the particular representation must not create an appearance of impropriety or violate a common law conflicts of interest standard.[18] The attorney would be precluded from representing private clients before the plumber's examining board under General Municipal Law section 805-a(1)(c), which prohibits municipal officers and employees from receiving or entering into any agreement for compensation for services to be rendered in relation to any matter before a municipal agency of which he or she is an officer, member or employee. The attorney general noted that an appearance of impropriety could arise where the plumbing board attorney represents private clients in planning and zoning boards in which the town's interests are represented by the town attorney's office, since the plumber board attorney would be litigating against the office that retained him or her, thereby threatening the public trust in the impartiality of government decision making.[19]

Where a town retains outside "special counsel" pursuant to Town Law section 20(2)(a) for a specific subject matter, and this attorney does not function as a deputy or assistant town attorney (such office being a permanent part of the administrative legal structure of the town), it would not be a per se violation of the Code of Professional Responsibility for the special town counsel to also represent private clients before the town planning board and zoning board of appeals.[20] The committee was not persuaded that the interests of the attorney's private clients were "so conflicting, diverse or inconsistent with the interests of the town he or she serves as special counsel as to affect adversely his or her judgment or loyalty to either client . . ." creating a conflict under DR 5-105(A).[21] Noting that "retaining special counsel to appear before a town agency may give rise to a perception that his or her services are being secured in order to influence that agency or obtain special consideration," the committee concluded that without affirmative evidence to this effect, "the mere perception of impropriety is insufficient to justify a per se rule of disqualification."[22]

It is improper for an attorney to accept a retainer to defend a claim against a municipality while that attorney represents clients in prosecuting claims against the same municipality.[23]

A village attorney asked the attorney general whether he was prohibited from representing a private client before a town planning board where the village mayor he served was a member of that planning board.[24] While the attorney general found no conflict of interest for the attorney, primarily because the mayor was holding compatible positions, the

opinion concluded that to avoid the appearance of impropriety, the mayor should recuse himself from the planning board during any board action involving the attorney's private clients before the board.[25]

B. Law Partner Suing the Town

The New York State Bar Association's Committee on Ethics has opined that it is improper for a town attorney to continue to serve the town if his law partner brings a personal certiorari proceeding against the town, even where both the town attorney and his partner are represented by outside counsel.[26] Concluding that since the town attorney may not simultaneously represent the municipality and sue it, the committee found that his law partners are similarly precluded from suing the town unless, and until, the partner no longer represents the town.[27] In the situation, however, where a town desires to hire a part-time town attorney but his law firm is currently representing a client before the town, either the town must retain outside counsel to handle the matter, or the client of the private law firm must voluntarily assent to the withdrawal of the law firm and to retain new counsel.[28] The committee distinguishes the situation where the law firm had the client prior to the appointment of the town attorney and the cases where the client retains the firm after a member is the town attorney, but noting the prevailing interest is being served by qualified public officers.[29]

Where a special town attorney was appointed to assist the town in condemnation matters, an attorney who is associated with, and assists, the special town attorney may represent owners in condemnation proceedings by condemnors other than the town so long as: 1) the associated attorney avoids all matters involving the town as a party; 2) there is no relationship between the town and the condemning agency; and 3) the particular facts in the proceeding do not create a conflict or the appearance of a conflict.[30] The Committee on Professional Ethics noted that while Canon 5 directs a lawyer to exercise independent professional judgment on behalf of a client, and so long as the preceding considerations are satisfied, it is not improper for the attorney to represent owners of private property in condemnation proceedings brought by other public or private entities.[31] It would be improper, however, for a lawyer to represent an urban renewal agency of a government in title examination work and related matters and to represent private property owners in condemnation proceedings brought by that agency.[32]

C. Attorney Who Serves the Municipality in Another Capacity

Attorneys may hold public office other than serving in a counsel role to the town. This type of civic involvement is encouraged by the Code of Professional Responsibility.[33] Questions typically arise, however, when the attorney desires to represent private clients before the town. The Committee on Professional Ethics has opined that it is permissible for an attorney-member of a town zoning board of appeals to represent a private client in a personal injury case against the town where the town employs special outside counsel to defend it.[34] Such representation would not violate DR 8-101(A)(2), which provides, "A lawyer who holds public office shall not: Use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or a client," since the powers and duties of a member of the zoning board are so functionally divorced from the defense of a personal injury case that there is no per se disqualification. Furthermore, the committee found no violation of DR 5-101(A), which prohibits lawyers from accepting employment "if the exercise of professional judgement on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." This is so because a member of the zoning board has no authority to dispose of a personal injury case on behalf of the town. However, the committee has opined that an attorney for the town zoning board of appeals may not represent a private client in a zoning change application to the town board,[35] and that the deputy town supervisor may not represent clients in tax certiorari proceedings or other litigation against the town.[36]

The state comptroller opined that an attorney who serves as a town council member is not barred from practicing in the town justice court.[37] Even though the town council votes on the salary of the town justice, the comptroller noted an earlier opinion by the State Bar Ethics Committee holding that the mere possibility that a judge may be influenced by the lure or fear of the council member's vote does not pose a threat to the fair administration of justice.[38] The committee found that "[a] conflict of interest would arise only when the councilman sought to represent a client in an action against the city or one of its agencies, for in that instance a lawyer would have conflicting interests."[39] The comptroller reminds readers to consult applicable provisions in local ethics laws to make certain that such activity does not violate local law.

The Committee on Professional Ethics opined that an attorney who is a member of a town zoning board of appeals may represent a private client as a plaintiff in a personal injury action against the town.[40] While DR 8-101(A)(2) prohibits a lawyer from using his or her position as a public official to "influence, or attempt to influence, a tribunal to act in favor of the lawyer or client," and DR 5-101(A)

prohibits a lawyer from accepting employment where the exercise of professional judgment on behalf of a client may be affected by the lawyer's own financial, business, property or personal interests, these provisions are not violated as the zoning board member performs functions that are not related to the subject matter of the litigation.[41] Furthermore, the committee commented, "Absent evidence that a lawyer-member of a town zoning board of appeals is likely to influence or attempt to influence the town to act favorably in the personal injury lawsuit, or is trafficking on their own position in order to obtain a large volume of personal injury work, and given the lack of any apparent 'danger of cross-use of confidential information' or other compromise of the duty 'to maintain confidences and secrets,'. . . the duties and powers of a member of a zoning board of appeals are so functionally divorced from the defense of personal injury lawsuits that there is no basis for a per se disqualification . . . ."[42] The committee noted that EC 8-8 indicates that it is highly desirable for attorneys to hold public office, and that "to disqualify lawyer-members of municipal boards from handling all matters involving agencies of the municipality in which they serve, without reference to the nature of their public office or private employment, would seem unduly restrictive. . . ."[43]

D. Dual Office Holding

The attorney general has opined that a town attorney may not also serve as a town court justice unless his or her office does not represent the town in that court and there are other justices to hear matters affecting the town.[44] The attorney general relied on the Rules of Judicial Conduct,[45] which provide, in part, that a part-time judge may not participate directly or indirectly as a lawyer in any contested action or proceeding in the court in which he or she serves. Where a municipal attorney's office has no responsibility for the prosecution of violations of local regulations, and where other justices are available to preside over these matters, that attorney may also serve as a local court judge.[46]

Where a law firm performs legal services for a town, it may be a conflict of interest for a partner in that law firm to serve as a part-time town justice in that town.[47] Since "the duty of impartiality of a judge is an irreconcilable conflict with the duty of his partner or firm to prosecute before that court," the Committee on Professional Ethics opined that where "the legal services performed by the firm for the town do not involve criminal prosecution, and do not contemplate litigation before that court, then, in the absence of any other conflict of interest, there would be no impropriety in a partner holding the position of part-time town justice . . . ."[48] The committee noted, however, that the law firm's practice would still be limited by all of the applicable ethical considerations for the practice of law by a part-time town justice.[49]

It would present ethics concerns for a town supervisor and a town attorney to form a law partnership. In an opinion issued by the Committee on Professional Ethics, it was determined that law partners may not simultaneously serve as village mayor and village attorney, even where, under the partnership agreement, neither partner would share in any of the compensation paid by the municipality to the other.[50] Relying on Canon 9 prohibiting even the appearance of impropriety, the committee noted that "[a] continuing law partnership between a village mayor and a village attorney would expose the partners to a serious appearance of impropriety, even if both partners acted with utmost scrupulousness."[51] Loss of public confidence in the objectivity of the village attorney could result from the relationship, and potential conflicts could arise regarding, among other things, employment status, evaluation of job performance, and contract negotiation and terms.[52] Further, the committee noted that Canon 5 makes it clear that lawyers should not accept professional employment where their personal interests and loyalties could reasonably appear to be in conflict with their professional obligation of loyalty to a client. Although private clients may consent to a representation involving conflicting interests, "such consent cannot be given where the public interest is involved."[53] Finally, the committee noted that "assuming the village mayor would be disqualified from accepting employment from the village to serve either as a village attorney or on special retainer, any law partner would be similarly disqualified."[54]

It is not necessarily improper for a part-time town attorney to hold the position of a part-time county public defender where the town attorney responsibilities do not include prosecution duties and where, in the position of public defender, the attorney does not represent clients in courts of the town he represents.[55] This position supports the high responsibility of the Bar to defend indigent persons.[56] It would be improper, however, for a part-time municipal attorney to serve simultaneously as a public defender in the same municipality that maintains a police justice court.[57] The attorney general opined in response to a different inquiry that it would not be an incompatible conflict of interest for a county assistant district attorney to also serve on a panel of special counsels for a town within the county, as neither position is subordinate to the other and the duties are not inconsistent.[58] The attorney general commented, " . . . there is no conflict of duties when a municipal attorney, such as the town attorney, planning board attorney or zoning board attorney is

given the responsibility to prosecute violations of local laws in addition to their regular municipal duties."[59]

An attorney who is also a member of a county legislature may not act as counsel to a town zoning board of appeals where the town is located in the same county, as this presents inherent conflicts and the appearance of impropriety.[60] Specifically, since decisions of the zoning board of appeals may be reviewed by the regional or county planning boards, whose members are selected by the county legislature, "the relationship between the county legislature and the county planning board is sufficiently close and the legislature's interest in and control over county planning is great enough to merit the application of Canon 9 that prohibits even the appearance of impropriety or conflict of interest."[61] However, the attorney general has opined that a deputy town attorney is not per se prohibited from simultaneously serving on a village zoning board of appeals located within the town in which he serves, but the attorney general cautioned, "it must be noted that there can be infrequent instances where land use questions must be resolved concerning real estate on, or overlapping, the town-village boundary line. In such instances, you, as an attorney, must be constantly alert to the possibility of a conflict of interest . . . and the propriety of your dual status can be upheld only so long as situations involving such a conflict are avoided."[62] The attorney general also opined that the position of town attorney and service as a director of a local development corporation within the town—where the town contributes approximately five percent of the corporation's budget—are compatible. However, should a situation arise where the town and corporation entered into contracts with each other, the town attorney must recuse himself or herself from participating in the transaction on behalf of either the town or the corporation.[63]

E. Retaining Outside Counsel in Conflict Situations

Questions have arisen over the retention of outside legal counsel when a town attorney is unable to provide such service. Typically, the town board is the appropriate entity to retain such services for the town or a board/agency within the town. However, there have been situations where the town board refuses to do so. Where the town attorney is prohibited from providing legal representation due to conflicts of interest, the attorney general has opined that a municipal board or officer has implied authority to employ other legal counsel.[64] The attorney general stated, ". . . the failure of the town board to authorize and fund the employment of outside counsel to assist the zoning board of appeals, means that the office of town attorney has responsibility for defending the action . . . an exception would exist where the board possesses implied authority to hire outside counsel as in a case where the municipal attorney is incapable of or is disqualified from acting."[65] This opinion represents a logical solution to ensure that when the town attorney has a conflict the municipality receives appropriate independent legal counsel. In at least one town, a panel of three special counsels was appointed to replace the town attorney, planning board attorney or zoning board attorney when they are disqualified from serving including as a result of conflicts of interest.[66]

III. Client Loyalty

A. Who Is the Client of the Government Lawyer?

Before the duties of client loyalty and client confidentiality can be fully addressed, the issue of identifying who is the client of the government lawyer must be examined.[67] Canon 5 provides that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." This is often easier said than done in the public sector. Is the client of the part-time town attorney the supervisor, the town board, another local board (such as the planning board or the zoning board), some other town official, or the taxpayers of the town as a whole? The issue of client identification would be made somewhat easier if the retainer agreement between the attorney and the town were to make this clear in writing. Having done so, the part-time town attorney should be able to sleep better at night, knowing for certain who he or she is being paid to represent. Absent such clear direction, it is all too easy for two or more of these constituencies within the same government to present conflicting points of view and desired direction. To which entity does the part-time town attorney advise that outside counsel is needed? Is it always easy to retain separate outside counsel in small towns watching budget dollars? These are the practical questions that must be addressed in light of the rule that when in conflict, each entity is entitled to its own legal representation.[68]

There is no case law in New York that squarely addresses the question of who is the client of the [local] government lawyer. Part-time town attorneys, however, may draw analogies from a February 2001 opinion of the Southern District of New York that addressed the question of who within state government was the client of a private law firm retained to provide certain legal services to the State of New York.[69]

Although the opinion focused on the question of whether the client of the private law firm was the

state government as a whole, the entire executive branch of state government or a particular agency within the executive branch for purposes of conflict of interest analysis under ABA Model Rules of Professional Conduct (not for a privilege analysis), the court, in a case of first impression in New York, determined that the client could not be the government as a whole. It was the individual agency-attorney relationship that governed.[70]

A question still remains as to whether an individual public official can ever be considered the client of the government (municipal) attorney. For example, if the town supervisor exercises authority to hire a law firm to represent the town, is the supervisor the client for purposes of determining whether a privilege of confidentiality may attach? Can individual members of the board of supervisors have a legally privileged conversation with the town attorney? Who within the town is the client? The answers to these questions may best be described as moving targets depending upon the public official, the subject matter of the conversation and the context within which the conversation is occurring. At some point, an appropriate public official gives direction to the town attorney on particular legal matters. This could be an individual or it could be represented in a vote of the legislative body. When this happens, it is the first hint of identification of the client.

B. Representing Multiple Municipal Clients

A second potential ethics trap for part-time town attorneys who are engaged in a full-time private law practice is the issue of representing multiple towns and municipalities in the same area. It is not uncommon for attorneys to represent two, three, four or more local governments within their geographic region. While in and of itself these entities are separate and may retain the same legal counsel, difficulties may arise when issues of intermunicipal cooperation surface. For example, in January 2005, the lieutenant governor and the Department of State issued an RFP for municipalities who propose to engage in quality communities demonstration programs. One of the criteria for the grants is whether the proposal involves two or more municipalities. The same part-time municipal attorney cannot effectively counsel two or more clients to structure a deal, contract or agreement without violating the Code of Professional Responsibility.

A third ethics situation arises when a town attorney no longer represents the town. Town attorneys may change regularly, or the same lawyer/law firm may be on retainer for decades. What happens, however, when the long-standing part-time lawyer/firm changes? Can that lawyer/firm ever represent clients before the town? Is this seen as "switching sides" and thus prohibited under the Code of Professional Responsibility? While the answer likely depends upon the nature of the appearance before the town on behalf of a client, at least one case in the Second Department suggests that the answer can have a chilling effect for private law firms who take on municipal clients. Relying on DR 5-108,[71] the Appellate Division, Second Department, held that where a law firm had been retained by a municipality for approximately 25 years, first as counsel to the planning board and later as counsel to the village, and during that time had been involved in the site plan law that was developed, in effect, the firm was precluded from representing a client before the planning board for site plan review six years after the firm was no longer municipal counsel.[72] The court found that given the long-standing prior representation of the village in matters that directly related to zoning and site plan review, this was a ". . . substantial related matter in which [petitioners'] interests are materially adverse to the interests of the former client."[73]

IV. Duty of Confidentiality—The Circuit Courts in Conflict

Canon 4 states, "A Lawyer Should Preserve the Confidences and Secrets of a Client." Disciplinary Rule 4-101(B)(1) further provides that a lawyer shall not knowingly reveal a confidence or secret of a client. Furthermore, Ethical Consideration 4-4 reminds us that "[a] lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, a lawyer should avoid professional discussions in the presence of a person to whom the privilege does not extend." This ethical consideration takes on a life of its own after the recent federal circuit case *Reed v. Baxter*, arising out of the State of Florida. In that case, the city attorney was consulted after a fire commissioner was fired and a replacement was named. The local legal question was the legality of the testing and the new hire. The new fire commissioner and two members of the city council took part in that conversation. The court held that the conversation was not privileged since the conversation took place with persons to whom the privilege did not extend.

Around the same time that the duty of confidentiality was being played out at the local government level, the circuit courts were considering the issue at the federal level. Two cases arising from the independent counsel investigation of President and Mrs. Clinton, *In re Lindsey*[74] and *In re Grand Jury Subpoena Duces Tecum*,[75] have potentially chilling effects for all government lawyers with respect to whether or not a duty of confidentiality may exist in the public sector setting. In *Lindsey,* although the Circuit Court of Appeals did acknowledge that a government attor-

ney-client relationship exists, the case also broadly states that there is an "obligation not to withhold relevant information acquired as a government attorney."[76] Although some government ethics pundits thought that these cases would be limited to situations involving the White House and federal grand jury investigations, the Seventh Circuit stated that state government lawyers may not exercise an attorney-client privilege in an effort to shield information from a grand jury.[77] The attempt to use a federalism argument to distinguish the state actors in the Seventh Circuit case from the federal actors in the previous cases was unsuccessful.

In February 2005, the Second Circuit reached an opposite conclusion after the counsel to former Connecticut Governor Rowland refused to testify before a grand jury about confidential communications she had with the governor and his staff for the purpose of providing legal advice.[78] Unlike the Seventh Circuit, the Second Circuit emphasized that the *Lindsey* and *Grand Jury* cases involved communications by a *federal* executive, therefore, involving statutes and considerations unrelated to the present case.[79] The Second Circuit rejected the government's argument that the public interest lies in disclosure in furtherance of the "truth seeking" mission of the grand jury and that since the office of the governor serves the public, the counsel to the governor must yield her loyalty to the public, not to the governor. The court acknowledged that it is in the public interest for the grand jury to conduct a thorough investigation, but stated that "it is also in the public interest for high state officials to receive and act upon the best possible legal advice . . . " The court cited a Connecticut state statute that specifically provides for confidential communications between government lawyers and their clients.[80] The court continued that "the traditional rationale for the privilege applies with special force in the government context . . . ," noting that government officials should be able to seek out and receive fully informed legal advice and that "[u]pholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business."[81] The court was further persuaded that for government attorneys to discharge their duties, they require candid, unvarnished information from those employed by the office they serve, and that absent a privilege, this goal would be threatened.[82]

With the federal circuit courts now in clear controversy on this critically important issue for government lawyers, the stage has been set for a potential review by the U.S. Supreme Court to resolve this issue. In the meantime, government lawyers in New York can breathe a bit easier for the time being with the recent Second Circuit opinion.

V. Conclusion

Attorneys who assume part-time employment as town attorneys, whether hired as an employee of the town or contracted on a retainer basis to provide legal services, are subject to a myriad of additional ethical rules and guidelines because of the public service nature of the appointment. The issues are at times complex and may not always be readily apparent. There are implications for conduct and permissible actions not just of the part-time town attorney, but also for his or her law partners and associates. When in doubt, an opinion may always be requested from the New York State Bar Association's Committee on Professional Ethics for an application of one or more provisions of the Code of Professional Responsibility. Additionally, the attorney general and the state comptroller issue opinions interpreting Article 18 of the General Municipal Law and other common law municipal ethics questions. In addition to consulting the local code of ethics adopted by each town government, some towns may also have a local ethics board where attorneys may seek an opinion regarding the application of a local ethics law. In addition, government lawyers must take a more active role in discussions within the American Bar Association and the State Bar to ensure that the special circumstances that often confront government lawyers are considered in future modifications to professionalism codes and accompanying commentary.

Endnotes

1. *See* N.Y. State 300 (1973); N.Y. State 292 (1973); N.Y. State 324 (1974).
2. Op. NYSBA Committee on Professional Ethics No. 143-7/2/70 (22-70).
3. *Id.*
4. *Id*. Citing to N.Y. State 110 (1969), N.Y. State 111 (1969) and opinions cited therein.
5. *See* Op. NYSBA Committee on Professional Ethics No. 629 - 3/23/92 (20-91). The committee noted, "While we recognize the risk of corruption where governmental entities are involved, we believe that a blanket prohibition against lawyers accepting the consent of governmental entities is paternalistic and excessive, and that the danger is adequately addressed by several Disciplinary Rules . . ." Specifically, the committee points to DR 9-101(C) preventing lawyers from stating or implying that they have the ability to influence a legislative body or public official; DR 8-101(A) preventing lawyers from using their public positions to obtain or attempt to obtain a special advantage in legislative matters; and DR 1-104(A)(4) preventing lawyers from engaging in conduct including, among other things, dishonesty and participation in government corruption.
6. *Id*. The committee further instructed, "because government officials have a unique responsibility to act on behalf of the

public, a lawyer seeking consent from such an official must be satisfied not only that the official in question is legally authorized and empowered to furnish the requested consent and has complied with all applicable legal requirements, but also that the process by which the consent is granted is sufficient to preclude any reasonable public perception that the consent was provided in a manner consistent with the public trust. In the context of a consent sought from a municipality or other governmental entity, public disclosure of the request for consent ordinarily will satisfy this objective."

7. Op. N.Y. Att'y Gen. [Inf.] 93-36. The attorney general continued, "The purpose of section 805-a and common law conflict of interest rules is to ensure that public responsibilities are performed impartially and solely in the public interest. If a public body was allowed to waive conflicts of interests, this important public purpose would not be achieved." *Id*. *See also,* Op. Att'y. Gen. [Inf.] 87-67 where the attorney general opined that paid representation by the planning board attorney of a client before that board is prohibited by General Municipal Law § 805-a (1)(c).
8. Op. NYSBA Committee on Professional Ethics No. 234 - 3/17/72 (3-72) citing N.Y. State 184 (1971). Case law also supports this proposition. *See, e.g., Lanza v. Rath*, 150 Misc.2d 85, 568 N.Y.S.2d 278 (Sup. Ct., Onondaga Co. 1991).
9. *Id*.
10. Op. NYSBA Committee on Professional Ethics No. 657 (48-93), citing N.Y. State 544 (1982).
11. Op. NYSBA Committee on Professional Ethics No. 657 (48-93).
12. *Id*.
13. *Id*.
14. *Id*. Citing N.Y. State 580 (1987); N.Y. State 470 (1977); and N.Y. State 218 (1971).
15. *In re Thomas F. English, Jr.,* 182 A.D.2d 188, 587 N.Y.S.2d 34 (2d Dep't 1992).
16. *Id*. Citing N.Y. State 544 (1982).
17. Op. Att'y Gen. (Inf.) No. 03-8. The fixed compensation is required to satisfy General Municipal Law § 805-a(1)(d), which provides that municipal officers and employees may not enter into any agreements on compensation for services to be rendered in relation to any matter before any agency of his or her municipality where compensation is dependent or contingent upon any action by the agency. The attorney general had earlier opined that a part-time municipal counsel to a water board is, therefore, prohibited from representing private clients on a contingency fee basis before the planning board and zoning board of appeals of that municipality. *See* Op. Att'y Gen. (Inf.) No. 92-54.
18. Op. Att'y Gen. (Inf.) No. 03-8. The attorney general has opined that "even in cases where §§ 805-a(1)(c) and (d) do not prohibit representation of private clients before municipal agencies, such representation may violate common law conflict of interest standards." *See* Op. Att'y Gen. (Inf.) No. 97-41; Op. Att'y Gen. (Inf.) No. 93-36; *and see Zagoreos v. Conklin,* 109 A.D.2d 281, 491 N.Y.S. 2d 358 (2d Dep't 1985) *and Conrad v. Hinman*, 122 Misc. 2d 531, 471 N.Y.S.2d 521 (Sup. Ct., Onondaga Co. 1984).
19. *Id.*
20. Op. NYSBA Committee on Professional Ethics No. 630 - 3/23/92 (8-91).
21. *Id*. The committee commented that "The fact that a disappointed applicant to a planning board or a zoning board of appeals ultimately may commence litigation against the town does not disqualify special counsel from appearing in the first instance before the town agency. Of course, once litigation is anticipated, and perhaps before, the conflict would be palpable."
22. *Id*. Citing a prior opinion, the committee stated, "'we do not believe that the mere possibility of public suspicion should preclude appointment of persons best qualified by their experience and training to serve.'"
23. Committee on Professional Ethics Op. No. 322 - 12/18/73 (56-73). The committee relies on DR 5-105(A) and 5-105 (C) as well as EC 5-1 and EC 5-14.
24. Op. Att'y Gen. (Inf.) No. (97-38).
25. *Id*. The attorney general cited to a prior opinion finding it compatible for a person to serve both as mayor of a village and as a member of the town planning board since town zoning regulations are not applicable in villages. *See* Op. Att'y Gen. (Inf.) No. 86-58.
26. Op. NYSBA Committee on Professional Ethics No. 444 - 11/10/76 (73-76).
27. *Id.*
28. Op. NYSBA Committee on Professional Ethics No. 482 - 4/10/78 (12-78).
29. *Id*.
30. Op. NYSBA Committee on Professional Ethics No. 333 - 3/21/74 (9-94).
31. *Id.*
32. NYSBA Committee on Professional Ethics, Op. 111 - 8/4/69 (9-69). Although the attorney maintained that he would not represent the agency in price negotiations or in condemnation proceedings, where there was no agreement reached on compensation between the landowners and the agency, and that a number of the landowners were existing clients, the committee opined that it still would present a conflict of interest and that attorneys for public bodies must avoid even the appearance of a conflict.
33. EC 8-8 provides, "Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties."
34. Op. NYSBA Committee on Professional Ethics No. 655 (18-93). The committee cites to N.Y. State 484 (1978), where it concluded, "that a lawyer-member of a town's Zoning Board of Appeals, as well as his partners and associates, should be at liberty to represent private clients before other agencies of the town in matters unrelated to zoning where it is clear that such agencies are not functionally related to the Zoning Board of Appeals."
35. N.Y. State 292 (1975).
36. N.Y. State 510 (1987).
37. 1982 Op. NY St. Cptr 82-91.
38. *Id*. citing to N.Y. State 226 (1972). Note: This opinion was issued prior to the time when the state assumed responsibility for setting the salaries of all judges and justices.
39. *Id*.
40. Op. NYSBA Committee on Professional Ethics No. 655 - 12/22/93 (18-93).
41. *Id*.
42. *Id*.
43. *Id*.

44. Op. Att'y Gen. (Inf.) No. 89-63.
45. 22 NYCRR 25.40[c].
46. Op. Att'y Gen. (Inf.) No. 82-138.
47. Op. NYSBA Committee On Professional Ethics No. 280 - 1/25/73 (69-72).
48. *Id.*
49. *Id*.
50. Op. NYSBA Committee On Professional Ethics No. 323 - 1/24/74 (27-73).
51. *Id*. The committee continued, "Neither an agreement not to share in each other's village compensation nor the public announcement of such an agreement would adequately eliminate the appearance of impropriety."
52. *Id*.
53. *Id.* (Op. 323 - 1/24/74 (27-73))
54. *Id.* Citing N.Y. State 280 (1973) and *Wood v. Town of Whitehall*, 120 Misc. 124, 197 N.Y.S. 789 (Sup. Ct., Washington Co. 1923), *aff'd* 206 A.D. 786, 201 N.Y.S. 959 (3d Dept. 1923).
55. Op. NYSBA Committee on Professional Ethics No. 315 - 12/18/73 (41-73). The committee notes that to determine whether the town attorney has prosecutorial responsibilities, statutes, ordinances, and resolutions should be consulted. Further, the committee stated that such practice is subject to the same limitations as the private practice of criminal law ("i.e., the public defender should not represent criminal clients before a town justice of the town he represents or when the violation or construction of an ordinance of that town is involved.").
56. *Id*.
57. Op. NYSBA Committee On Professional Ethics No. 23 - 2/9/66 (11-65).
58. Op. Att'y Gen. (Inf.) No. 96-43.
59. *Id*.
60. Op. NYSBA Committee On Professional Ethics No. 326 - 1/24/74 (53-73).
61. *Id*. The committee cited to EC 8-8 which provided, in part, that a "'lawyer who is a public officer, whether full or part-time should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.'"
62. *Id*.
63. Op. Att'y Gen. (Inf.) No. 98-23.
64. Op. Att'y Gen. (Inf.) No. 83-77.
65. *Id*. In another opinion, the attorney general noted that, " . . . where there is litigation between the town board and another town department, the town attorney would represent the board, thereby forcing the other department to seek outside counsel." Under this circumstance there would be implied authority on the part of the department to retain legal representation. *See*, Op. Att'y Gen. (Inf.) No. 83-37. *See also* Op. Att'y Gen. (Inf.) No. (97-41.), where the attorney general reiterated that where a law firm represents the town board and the zoning board of appeals, in instances where such representation creates a conflict between the two boards, the zoning board of appeals has implied authority to employ legal authority to represent it in the matter.
66. This approach used by the Town of Kinderhook (Columbia County) was described in Op. Att'y Gen. (Inf.) 96-43.
67. For a more detailed discussion, see Jeffrey Rosenthal, "Who Is the Client of the Government Lawyer?" NYSBA Government, Law and Policy Journal, vol. 1, no. 1 (Fall 1999).
68. *See, e.g., Commco, Inc. v. Amelkin*, 62 N.Y.2d 60, 476 N.Y.S.2d 775 (1984).
69. *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001).
70. *Id*.
71. This DR provides that absent express consent upon full disclosure to a former client, a lawyer shall not, "1. Thereafter represent another person in the same of a substantially related matter in which that person's interests are materially adverse to the interests of a former client. 2. Use any confidences or secrets of a former client . . . . "
72. *Walden Fed. Sav. & Loan Ass'n v. Village of Walden*, 212 A.D. 2d 718, 622 N.Y.S. 796 (2d Dept. 1995), *lv. to app. dism'd*, 86 N.Y.2d 777, 631 N.Y.S.2d 603 (1995).
73. *Id*.
74. 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U. S. 996 (1998).
75. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).
76. For more discussion on these cases, see, Paul Shechtman and Nathaniel Marmur, "Government Lawyer Confidentiality After Lindsay," NYSBA Government, Law and Policy Journal, vol. 1 no. 1 at 30 (Fall 1999), and Norman Redlich and David. Lurie, "Federal Governmental Attorney-Client Privilege Decisions May Prove Significant to All Government Lawyers," in Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials (ABA 1999).
77. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002).
78. *U.S. v. Doe* (In re Grand Jury Investigation), 399 F.3d 527 (2nd Cir. 2005)
79. *Id*.
80. *Id*. The court further noted that "if *state* prosecutors had sought to compel George to reveal the conversations at issue, there is little doubt that the conversations would be protected. The Connecticut legislature has enacted a statute specifically providing that '[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.'" *Id*. citing Conn. Gen. Stat. Sec. 52-146r(b). (emphasis added.)
81. *Id*.
82. *Id*.

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Municipal Briefs

By Lester D. Steinman

Civil Service

A New York City employee with permanent civil service status who fails to establish city residency forfeits his office. Such a forfeiture, however, does not amount to misconduct that would entitle the employee to a pre-removal hearing. *Felix v. New York City Department of Citywide Administrative Services*, 3 N.Y.3d 498, 788 N.Y.S.2d 631 (2004).

In 1986, New York City adopted Local Law 40, requiring all non-uniform employees in mayoral agencies hired on or after September 1, 1986, to establish and maintain residency in New York City as a condition of employment. Under the local law, failure to establish or maintain such residence shall "constitute a forfeiture of employment." Prior to any such dismissal on residency grounds, an employee was entitled to notice of, and opportunity to refute, the charge that he or she resides outside the city.

Here, Felix was notified that the city believed he resided in Nassau County and was offered an opportunity to contest that claim. However, Felix was unable to provide sufficient documentation to establish New York City residency and was dismissed from his employment.

Thereafter, Felix filed suit for reinstatement on the grounds that he was discharged without a pre-removal hearing in violation of Section 75 of the Civil Service Law. That statute precludes the firing of a permanent civil service employee, except for incompetency or misconduct shown after a hearing on stated charges. The Supreme Court granted Felix's petition and the Appellate Division affirmed that determination.

Granting leave to appeal to New York City and reversing the lower court decisions, the Court of Appeals addressed two issues: (1) whether Felix's non-residency constituted misconduct for which he was entitled to a pre-removal hearing; and (2) if not, whether the notice and opportunity to contest the charge of non-residency provided to Felix under the New York City law satisfied due process.

Distinguishing a failure to maintain residency from an act of misconduct, the court ruled that "procedural due process afforded under Civil Service Law section 75 (1), i.e., a pre–removal hearing, is not necessarily required" for dismissals based upon failure to establish or maintain residency under the New York City local law.

Moreover, the court found that the procedure provided for in the local law satisfied due process. Felix was required to provide tax returns, a driver's license, voter registration card or similar documentation that would establish his New York City residency. "Documents such as these need not be subjected to the adversarial testing of a hearing in order for the municipality to determine whether a municipal employee has established that he or she resides in New York City."

Finding that Felix was afforded due process, the Court of Appeals concluded that the city correctly determined that Felix had failed to establish residency in New York City. The documents submitted by Felix to support his claim of New York residency were all dated after he was notified of the charge of non-residency. By contrast, two earlier dated tax returns established Felix's residency outside New York City. Accordingly, the court upheld the city's determination that Felix forfeited his position, requiring his dismissal from service.

FOIL and OML

For copies of records requested pursuant to New York State's Freedom of Information Law ("FOIL"), Public Officers Law section 87(1)(b)(iii) establishes a maximum of "twenty-five cents per photocopy not in excess of nine inches by fourteen inches . . . except when a different fee is prescribed by statute." Section 192-2 of the Town Code of Cheektowaga authorizing the town to charge $10.00 for copies of "[c]omputer-generated police and accident reports" requested under FOIL "is not a statute and the Town has no authority to charge the $10.00 fee." *New York Central Mutual Fire Insurance Company v. Town of Cheektowaga,* 13 A.D.3d 1189, 787 N.Y.S.2d 582 (4th Dept. 2004).

In a second case, a town board's failure to record its unanimous vote to terminate a probationary employee taken during a duly convened executive session, was held to constitute a "non-prejudicial technical violation of the Open Meetings Law." Balancing the nature of the employment interest with the purpose of the Open Meetings Law, the court ruled that annulment of the termination was unwarranted. *Specht v. Town of Cornwall,* 13 A.D.3d 830, 786 N.Y.S.2d 546 (2nd Dept. 2004).

Real Property Tax Law

The Town of Oyster Bay may not impose a special ad valorem tax levy for garbage collection on mass property[1] (telephone lines, wires, cables, poles, supports and enclosures for electrical conductors) owned by New York Telephone Company within the town's refuse and garbage district because those properties "do not and cannot receive direct benefit from that municipal service." *New York Telephone Company v. Supervisor of the Town of Oyster Bay,* 4 N.Y.3d 387 (2005).

Under Real Property Tax Law section 102(14), a special ad valorem levy is a charge imposed upon "benefited real property" at the same time and in the same manner as the general tax levy to defray the operational and maintenance costs of a special district improvement or service. For real property to be "benefited," the property "must be capable of receiving the service funded by the special ad valorem levy."

While the mass properties constitute "real property" under the statute, here "the inherent characteristics" of the mass properties precluded them from receiving the collection services of the garbage district imposing the levy. "In determining whether a property is benefited . . . we look to the innate features and legally permissible uses of the property, not the particularities of its owners or occupants or the state of the property at a fixed point in time. As a class of property, telephone poles can never produce or require municipal garbage collection."

As the dissenters warned, although the court's ruling was limited to the instant garbage district, the logic underlying its decision would be equally applicable to the town's public park, sewage, drainage and public parking districts to which the telephone company also pays special ad valorem levies. From the dissenters' perspective, the majority's restrictive definition of benefit is unwarranted because to be valid the levy "requires only an indirect or general benefit to the subject property." By contrast, the majority's requirement of a direct benefit "unnecessarily and unjustifiably" restricts the town's ability to impose an ad valorem levy on real property located within a special district ". . . [thus] undermining the town's ability to operate and maintain special districts." Undoubtedly, future litigation will demonstrate whether the dissenters concerns are well founded.

SEQRA

Annexations under Article 17 of the General Municipal Law are actions subject to the requisites of the New York State Environmental Quality Review Act ("SEQRA"). The scope of review required under SEQRA will depend upon the specific development plans for the property to be annexed. *City Council of the City of Watervliet v. The Town Board of Colonie,* 3 N.Y.3d 508, 798 N.Y.S.2d 88 (2004).

The petitioner, East-West Realty Corp. ("East-West"), owned approximately 37 acres of vacant property zoned for single-family residential use in the Town of Colonie and adjacent to the City of Watervliet. Receiving what it believed to be an unfriendly response from the Town of Colonie to its request to construct a senior citizen assisted living development at the site, East-West filed a petition with both municipalities to have 43 acres of property, including its 37 acres, annexed by the City of Watervliet. Other than indicating East-West's previously stated intention for the use, no formal plan of development accompanied the petitions.

Watervliet approved the annexation but Colonie disapproved the petition as not being in the overall public interest. Colonie maintained that SEQRA review was required to fully determine whether annexation was in the public interest. The Appellate Division agreed and the Court of Appeals affirmed.

Previewing the extent or level of environmental review required for this and other annexation applications, the Court of Appeals opined:

> Here, because the proposed annexation of approximately 43 acres is an unlisted action, an EAF is appropriate and must be completed before Watervliet or Colonie acts to adopt or reject the petition for annexation. Since the annexation proposal lacks a specific project plan that has been officially submitted or a rezoning proposal that changes the use for which the property may be utilized, the EAF will necessarily be limited to the annexation itself and its effects. Where, on the other hand, the annexation is premised upon a formal project plan, environmental review will be more extensive and must address the specific use of the property in evaluating the related environmental effects (citations omitted).

Endnote

1. The mass properties are situated on publicly- and privately-owned land. Where the land is privately-owned, the district levy is also imposed on the property owner on the basis of the land's valuation.

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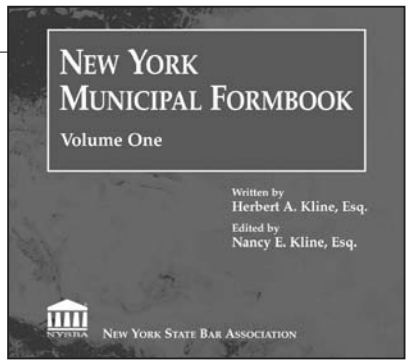

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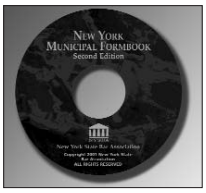

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Editor-in-Chief

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ISSN 1530-3969