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# Municipal Lawyer

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## A Message from the Chair

As my term as Chair comes to a close, I want to thank all of the very talented and dedicated members of our Section and the New York State Bar staff who have been working hard to keep our Section active and vibrant. We are very fortunate to have this support, and the continued success of our Section rests with those who somehow manage to find the time to write articles for this publication, develop our web site, attend and/or participate as speakers at our programs, and serve on our executive committee and subcommittees.

My priorities as Chair were first to keep up the good work that those before me started, and second to focus on improving the professionalism and collegiality of those practicing in the municipal arena. I also tried to bring greater attention to the fiscal constraints that municipal entities constantly face and the hardships that unfunded mandates—as well as ever-rising property taxes, fees and charges—place upon these entities and all New York residents. As many of you already know, school taxes in particular continue to rise much faster than the rate of inflation and our current property tax system for supporting education is in serious need of an overhaul. I expect that these factors, together with the emerging issues associated with compliance with GASB 45 and other post-employment benefits, will create even greater pressures on municipalities and the labor groups that serve them. We need to use our collective talents and resources to help steer the discussions in this area to a constructive and beneficial solution.

Our Section's programs have covered a wide array of subject matter and have proven to be not only timely but extremely informative as well. Members of our Section played an active role in the Special Task Force on Eminent Domain appointed by then New York State Bar President A. Vincent Buzard. This task force spent countless hours analyzing research on eminent domain laws and evaluating state and local legislative proposals introduced after the Supreme Court's *Kelo* decision. We have also strived to be attentive to the needs of our members by addressing, through programs and other materials, current developments in laws affecting ethics, public authorities, lobbying, labor relations, municipal finance, environment, and land use matters.

Anyone who has had the opportunity to attend one of our programs knows they not only benefit

## Inside

from the presentations and program materials, but also from the opportunity to network and share matters of interest with others practicing in our field, in addition to generally having a good time. One of the continuing challenges that our Section faces is to present informative programs and materials that appeal to a wide variety of specialty areas in municipal law. Other challenges include attracting a more diverse membership and to develop and train the next generation of municipal lawyers. Over 95 percent of our Section members are white, over 80 percent are men and over 60 percent are over 45. We need to do more to reach out to younger practitioners and minorities, to help our Section better reflect the general population we serve. Our Fall program incorporates a part of this effort by presenting primers in planning and zoning as well as public sector labor law.

As I have mentioned previously, my father recently retired from the practice of law, having served as a town attorney for most of his professional career. I still reach out to him from time to time for his advice, even though I know that at the conclusion of our discussion it inevitably results in, "OK then just do what you think is reasonable and proper." I believe that if you truly strive to meet the highest levels of ethics and professionalism, this is all the advice you will ever need. Thanks again for all your support. It has been a privilege to serve as Chair and I rest comfortably knowing that my friend Bob Koegel is taking over the reins. I hope to see you in the Fall and promise to remain active in our Section.

**Thomas Myers**

# From the Editor

On April 23, 2007, Governor Eliot Spitzer issued Executive Order No. 11 establishing the New York State Commission on Local Government Efficiency and Competitiveness. The Commission's mandate is to review and analyze New York's local government structure and operations and to recommend means to improve the delivery of public services through merger, consolidation or regionalization of local government entities or by partnering among local governments.

In contrast to the State's ongoing Shared Municipal Services Initiative program which focuses on intermunicipal cooperation in the delivery of services, the Commission is being asked to study "ways to consolidate and eliminate taxing jurisdictions, special districts and other local government entities" to enable services to be delivered more efficiently. The Executive Order also requires the Commission to examine the conduct of and participation in local government elections and the viability of establishing common election dates and procedures for local governments serving a "substantially common electorate."

Accompanying the Executive Order, Governor Spitzer wrote to local government officials requesting that, in each county, officials identify one or more "major merger, consolidation, shared service or smart growth initiative" that is either ongoing or can be initiated in 2007. Selected projects will receive heightened legal, financial and logistical support from State officials and agencies to aid in their implementation.

The fifteen-member commission will be chaired by former Lieutenant Governor Stanley Lundine. A website, www.nyslocalgov.org, has been established for public involvement. The Commission's report is due in one year.

Completing his term as Section Chair, Tom Myers, in his Message from the Chair, challenges us to strive for the highest levels of ethics, professionalism and collegiality. Further, Tom reminds us that, as a Section, it is imperative we become more diverse in order to develop and train the next generation of municipal lawyers. Tom's leadership in these and other areas during his term has established a strong foundation for the Section's continuing success. We are fortunate that Tom will continue to play a pivotal role in the Section's affairs.

Also in this issue of the *Municipal Lawyer*, Sharon N. Berlin, a partner in Lamb Barnosky, LLP, outlines the Workplace Violence Prevention Act recently enacted by the Legislature. Effective March 4, 2007, public employers are required to evaluate the risk of violence in their workplaces and develop workplace violence prevention and training program for their employees.

David B. Goldin, Administrative Justice Coordinator for the City of New York, discusses the recent promulgation of the "Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York." Effective February 13, 2007, it is the first comprehensive code of ethics for administrative law judges at any government level in New York State.

Patricia Salkin, Associate Dean and Director of the Government Law Center of Albany Law School, examines two recent federal court decisions applying the attorney-client privilege in the municipal government context. Finally, *Municipal Briefs* synopsizes First Amendment-based decisions relating to adult entertainment and aggressive panhandling legislation, revisits the issue of the enforceability of open space restrictions on a filed subdivision plat that is not recorded in the chain of title in the County Clerk's office, and outlines the consequences of failing to exhaust administrative remedies.

**Lester D. Steinman**

# Second Circuit Uses Predominant Purpose Test in Upholding Government Attorney-Client Privilege

By Patricia E. Salkin

## Introduction

Communications between attorneys and their clients have historically been protected as privileged under the common law.[1] For the privilege to attach, the communications: 1) must be between a lawyer and his or her client; 2) were intended to be and were in fact kept confidential; and 3) were made for the purpose of obtaining or providing legal advice.[2] The privilege in the government context has presented a series of unique obstacles. For example, the question of who is the client of the government lawyer is not always statutorily stated, and there is scant case law on the subject.[3] The third prong, however, may typically be even more problematic for government lawyers who often combine legal advice with policy advice and/or analysis of alternative scenarios. Such was the case in two recent federal court decisions of interest to New York municipal lawyers.

The Second Circuit was called upon to decide the novel issue of "whether the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light."[4] The D.C. Circuit Court had noted in 1998 that when attorneys are consulted in capacities other than as a lawyer, e.g., as a policy advisor, media expert, business consultant, etc., such consultation is not privileged.[5] *In re The County of Erie* involved a class action lawsuit challenging the constitutionality of a strip search policy enforced upon every detainee who entered the County Correctional Facility or Holding Center. In the course of discovery, the County withheld the production of certain emails between an assistant county attorney and her county clients, offering a privilege log instead. The emails in question "reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes."

Specifically, the Court categorized the emails as covering six broad issues:

1. Compliance of the County's search policy with the Fourth Amendment;
2. Possible liability of the County and its officials stemming from the policy;
3. Alternative search policies that could comply with constitutional requirements;
4. Guidance on implementing and funding identified alternative policies;
5. Maintenance of records concerning the original search policy; and
6. Evaluation of the County's progress implementing the alternative search policy.

The Magistrate Judge had concluded that the emails went beyond the rendering of legal analysis since they contained proposals for changing existing policy to comply with the constitution, and included drafting new policy regulations. The Magistrate opined that drafting and subsequent oversight of the implementation of a new policy crossed the line between legal advice and policymaking and administration. In addition, he believed that "no legal advice was rendered apart from policy recommendations."

## Predominant Purpose Test

Following a description of recent case law discussing the general existence of a government attorney-client privilege in the civil context,[6] the Second Circuit focused on the question of whether the communications at issue were made for the purpose of obtaining or providing legal advice. Although the County asserted that the assistant county attorney could not have been conveying non-legal advice (since the County Charter specifically limits her authority to that of "legal advisor" and they argued that "only the County Sheriff and his direct appointees ha[ve] policy-making authority for the [Sheriff's]department"), the Court noted that such limitations on a lawyer's authority to formulate or approve of policy would not prevent the rendering of such advice to government officials. Recognizing that government lawyers may have dual legal and non-legal responsibilities, the Court noted that the mere lack of formal authority is not compelling proof that the communications should be characterized as legal rather than policy.

The Court said that "[t]he predominant purpose of a particular document—legal advice, or not—may

also be informed by the overall needs and objectives that animate the client's request for advice." Here, the Court concluded that Erie County's objective was to determine how to meet the constitutional limitations on a strip search policy, rather than to determine public policy. In concluding that each of the emails in question was sent for the "predominant purpose" of soliciting or rendering legal advice, the Court noted that "[i]t is to be hoped that legal considerations will play a role in governmental policymaking," and that "[w]hen a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice." The Court stated that such a finding serves to reinforce the notion that the availability of sound legal advice benefits not just the public official, but the public at large.

### Be Careful of Unintended Waivers

Although the Second Circuit determined that the emails satisfied the requirements of the attorney-client privilege, the Court remanded the case to determine whether the distribution of some of the emails to others within the Sheriff's Department constituted a waiver of the attorney-client privilege.[7]

### Southern District of New York follows *Erie*

In March 2007, the Southern District of New York handed down a decision in *MacNamara v. City of New York*,[8] a case arising from the arrest of protestors during the 2004 Republican National Convention (RNC) held in New York City. Similar to Erie County, the City of New York refused to produce certain documents requested during discovery and instructed witnesses not to answer questions during depositions based on several privileges, including the attorney-client privilege, the self-critical analysis privilege and the deliberative process privilege. In preparation for the RNC, the New York City Police Department (NYPD) started planning more than a year in advance by organizing various committees and subcommittees to address various aspects, including legal issues, of arrest processing during the Convention. The Legal Subcommittee was tasked with, among other things, assisting in the development of the NYPD's Mass Arrest Processing Plan (MARP). It is the MARP and its implementation that was the subject of the lawsuit.

### No Self-Critical Analysis Privilege, Deliberative Process Privilege

Following the RNC, the NYPD asked the committees and subcommittees to create a self-critique report (or "after action report") assessing their performance during the RNC. Other NYPD officials were also asked to complete post-event critiques assessing various field operations during the RNC. In producing these documents during discovery, the City redacted sections that contain recommendations and opinions, and directed at least one witness not to answer questions at a deposition regarding the content of an after action report, contending that such information was protected by the "self-critical analysis" privilege. The City asserted that members of the NYPD would be less forthcoming if their evaluations might later be disclosed in litigation, and "the prospect of public disclosure would chill the candor of the NYPD members in describing mistakes that may have [been] made . . . which in turn would undermine the NYPD's ability to effectively deliver police services at future large-scale events."

Noting that this privilege is an open question in the Second Circuit, the Court said that to the extent the privilege is recognized, the party invoking it is required to:

> Demonstrate that "the information . . . resulted from a critical self-analysis undertaken by the party seeking protection; [that] the public [has] a strong interest in preserving the free flow of the type of information sought; [and that] the information [is] of the type whose flow would be curtailed if the discovery were allowed."[9]

In declining to find the existence of the privilege in this case (and indeed, the Judge is doubtful that the privilege should exist at all), the Court concluded that the City failed to offer support for its conclusory allegations. Furthermore, the Court was not convinced that NYPD officials would be less than forthcoming in the future if such post-event analysis were not protected by privilege, and the Court was not convinced that such disclosure would deter the NYPD from investigating the effectiveness of its policing strategies.

The Court was also not persuaded that the deliberative process privilege existed. This privilege exists where communications are predecisional and deliberative, meaning that the communications were generated to assist the decision maker in making a decision.[10] Noting that the privilege is qualified, requiring courts to balance the agency interest in non-disclosure with the public interest in transparency of the government decision-making process, the Court found that the City failed to demonstrate that the redacted comments and recommendations were intended to specifically assist a policymaker in the "formulation or exercise of policy-oriented judgment,"[11] and hence the privilege could not attach.

## Attorney-Client Privilege Exists

Where the City's privilege log indicated that certain redacted documents were privileged where the documents described discussions with NYPD Legal and were transmittal memos between NYPD and Corporation Counsel, the Court found these to be privileged communications. In finding additional documents protected by the privilege (and asking for additional information with respect to two memos), the Court cited to *In re The County of Erie* to explain why the Plaintiff's assertion was flawed (that the documents at issue should not be protected because they implicate the Legal Bureau's roles in formulating NYPD policy). The Court noted that the requested documents consist of communications between the Legal Bureau, the Legal Subcommittee and various NYPD officials regarding policies and procedures that were being considered, the legal implications of those policies, and possible alternatives. Since the information was provided so that the Legal Bureau could render legal advice regarding various policies, the Court determined that the attorney-client privilege attached.

## Crime Fraud Exception

In further asserting that the documents were not protected by the attorney-client privilege, the Plaintiffs suggested that they fell within the crime fraud exception because the communications were made in furtherance of contemplated or ongoing criminal or fraudulent conduct. Specifically, the Plaintiffs alleged the communications demonstrate that the Legal Bureau attorneys had "aid[ed] in the systematic falsification of affidavits by arresting officers." Yet, the Court notes, the Plaintiffs failed to provide evidence to support claims that any false affidavits were created at the direction of the Legal Bureau. Finding no evidence of fraudulent conduct, the Court determined that the crime fraud exception to the attorney-client privilege was inapplicable.

## The Future of the Government Attorney-Client Privilege

At least so far as the Second Circuit is concerned, following its 2005 decision in *In re: Grand Jury Investigation*, which came down firmly on the side of the "well established and familiar principle[s]" supporting the attorney-client privilege,[12] and these recent 2007 rulings, government lawyers in New York can reasonably rest with the notion that the privilege does exist in both the civil and criminal contexts. This privilege is not, however, unchecked. Government attorneys must be clear to identify who their client is, and careful to not inadvertently waive the privilege by sharing communications with non-client parties. Where appropriate, municipal attorneys should be clear in characterizing communications with government officials as provision of legal advice, and not simply the public policy advice absent a "predominant legal purpose." Uncertainties remain, however, and public policy questions abound regarding the application of the attorney-client privilege in the government context.[13] In the Fall of 2007, the New York State Bar Association's Committee on Attorneys in Public Service will be hosting an invitational summit on the government attorney-client privilege. If you are interested in finding out more about the Summit agenda, please contact Patricia K. Wood at pwood@nysba.org.

## Endnotes

1. For a general discussion, see, Patricia E. Salkin, "Beware: What You Say to Your Government Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality," 35 Urb. Law. 283 (2003).
2. *See* 8 John Henry Wigmore, Evidence in Trials at Common Law, sec. 2290 at 542 (McNaughton rev. 1961).
3. *See Brown & Williamson Tobacco v. Pataki*, 152 F.Supp.3d 26 (S.D.N.Y. 2001).
4. *In re The County of Erie*, 2007 U.S. App. LEXIS 26 (2d Cir. 2007).
5. *See In re Lindsay*, 148 F.3d at 1106 (D.C. Cir. 1998).
6. *Id.* The Court noted that, "[i]n civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance" (citing *In re Grand Jury Investigation*, 399, F.3d at 523; *Ross v. City of Memphis*, 423 F.3d 596, 601; and *In re Lindsay*, 148 F. 3d 1100, 1107). The Court further noted that, "[a]t least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or corporate entity." *Id*.
7. *Id.* Just as this article was going to press, oral arguments were heard in the District Court on this issue.
8. 2007 U.S. Dist. LEXIS 17478 (S.D.N.Y. 2007).
9. *Id.* (citing *Mitchell v. Fishbein*, 227 F.R.D. 239, 252 quoting *Wimer*, 1997 WL 375661, at 1).
10. *Id.* (citing *Marisol A. v. Guiliani*, No. 95 Civ. 10533, 1998 WL 132810 (S.D.N.Y. 1998)).
11. *Id.* (citing *Tigue v. United States Department of Justice*, 312 F.3d 70 (2d Cir. 2002)).
12. *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005).
13. *See* Salkin and Phillips, "Eliminating Political Maneuvering: A Light in the Tunnel for the Government-Attorney Client Privilege," 39 Ind. L. Rev. 561 (2006).

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# Adopting a Code of Ethics for Administrative Law Judges

By David B. Goldin

## I. Background

The City of New York has embarked on an ambitious effort to reform its administrative tribunals, an effort that can serve as a model for other jurisdictions. Many people have their most significant encounters with the administration of justice when they appear before a municipal tribunal. Recognizing that hearings must always be fair, that participants are entitled to a process that is both efficient and respectful, that the general public should understand how those values are ensured and that all of those goals can best be achieved by implementation of uniform standards across City tribunals, Mayor Michael R. Bloomberg in January 2006 signed an executive order[1] creating the position of Administrative Justice Coordinator. For the past year, the Coordinator's office has been working to enhance the professionalism of adjudications, to increase public awareness of the tribunals and to minimize the inconvenience of the hearing process.

A key undertaking has been the development of a code of ethics for City administrative law judges and hearing officers ("ALJs"). Effective February 13, 2007, the "Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York"[2] is also the first comprehensive code of ethics for ALJs at any level of government—State or local—in New York State.[3] With increasing recognition that ALJs—no less than their judicial-branch counterparts—should be subject to appropriate codes of ethics,[4] the City's experience offers useful guidance to the issues raised in framing such a code.

Approximately 500 ALJs (variously denominated administrative law judges, hearing officers or hearing examiners) serve the City on a variety of administrative tribunals, among them the City's parking violations bureau (formally, the Adjudication Division of the Department of Finance), the Environmental Control Board (which hears civil matters involving violations of, *inter alia*, the City's quality-of-life laws governing sanitation, building construction and maintenance, fire safety and prevention, road repair, and air, noise and water pollution), the Taxi and Limousine Commission, the Tax Appeals Tribunal, and the administrative tribunals of the Police Department, the Department of Health and Mental Hygiene and the Department of Consumer Affairs. The City's Office of Administrative Trials and Hearings ("OATH") includes 12 ALJs with a specialized caseload of more complex matters such as personnel, disciplinary, discrimination, commercial, licensing and real estate cases. All of the City's ALJs are lawyers. Some, such as those serving OATH, are full-time employees appointed for a fixed term of office. Most City ALJs, however, are part-time per diem employees or independent contractors, many of whom maintain private legal practices or integrate their ALJ service with other occupational activities or family obligations. Some City tribunals—such as OATH and the Tax Appeals Tribunal—handle cases in which, typically, all parties are represented, and hearings may include multiple witnesses and last for days. At other tribunals, respondents are usually *pro se*, and hearings rarely take more than an hour.

In 2005, the City's Charter Revision Commission proposed that the City Charter be amended to require the adoption of a code of ethics for ALJs.[5] The general election that year saw an overwhelming affirmative vote on a ballot question asking approval for a Charter amendment to direct that a code be promulgated jointly by the Mayor and the Chief Administrative Law Judge of OATH.[6]

The impetus to adopt a code of ethics derived from three sources.[7] First, there was a recognition that City ALJs were subject to no single uniform code of ethics. By its terms, the State Code of Judicial Conduct ("State Code")—formally, the Rules of the Chief Administrator of the Courts Governing Judicial Conduct[8]—does not apply to administrative law judges "unless adopted by the rules of the employing agency."[9] Although OATH's ALJs had been made subject to the State Code by the mayoral executive order that created that tribunal,[10] no formal decision had ever been made to impose the State Code on City ALJs or to determine how its provisions would apply. As discussed in more detail below, some of the State Code is not readily applicable to all City ALJs. City ALJs are subject to other ethical rules—as lawyers, they are governed by the Code of Professional Responsibility; as City employees and contractors, they are subject to the City's Conflicts of Interest Law[11]—but those rules do not specifically address the particular ethical issues that confront administrative judges.

Second, adoption of a code of ethics for City ALJs can be expected to enhance the professionalism of the City's administrative judiciary. Articulating a single overarching set of ethical principles will stimulate the ongoing development of an administrative judiciary able to discuss and apply a shared body of ethical doctrine.

Third, adoption of a code will increase the transparency and accountability of tribunals by informing the public of what standards apply to the conduct of City ALJs and providing a means of guaranteeing that those standards will be met.

## II. The State Code and the City Rules

The City Rules are based on the State Code, which in turn is drawn from the American Bar Association's Model Code of Judicial Conduct. The familiar presentation of judicial ethics in both the City Rules and the State Code reflects an organization of key principles that has proven useful over years of application and that comes with a long history of interpretation and refinement in governing bodies and academic circles across the country.[12]

Basic differences between City ALJs and judges of the judicial branch mean that the State Code could not simply be made applicable without modification. Some of those differences are inherent in the concept of an administrative judiciary, some reflect peculiar features of the City's tribunals. Four of the critical differences are discussed below.

First, administrative tribunals are not "independent" in the same sense as are judicial courts. Administrative tribunals are located within the executive, not the judicial branch, which means that constitutional separation-of-powers principles do not bear on the tribunals' jurisdiction. ALJs have only such authority as is statutorily invested in them or delegated to them by the employing agency. An ALJ cannot decide that a statute or regulation is unconstitutional; if the ALJ's authority is delegated by the employing agency, the ALJ ordinarily cannot deem an agency regulation contrary to statute.[13]

Second, because administrative tribunals are located within executive agencies, principles of appellate review do not apply precisely as they would in the judicial branch. In many instances, the ALJ's decision is technically a recommendation, which is subject to further review before becoming final agency action. Although both that process of intra-agency review and any subsequent challenge under CPLR Article 78 may be informally characterized as "appeals," neither is strictly identical to an appellate court's review of a trial court's decision, order or judgment.

Taken together, the factors just mentioned give rise to some practices in administrative tribunals that vary significantly from expectations based on the conduct of judges in the judicial branch. For example, in some City administrative tribunals, ALJs' draft decisions are reviewed by supervisors before issuance and may be subject to editing for clarity, logic and consistent application of law.

Third, ALJs are not elected. Unlike some judges of the judicial branch, ALJs have not run for office and need not worry about running for re-election. In general, then, ALJs are less likely to be part of the pervasively political milieu out of which some elected judges emerge.

Finally, most City ALJs are part-time per diem employees with outside activities and interests. Typically, lawyers who work part-time as City ALJs are not identified as "judges" when making appearances outside of their official duties. Although City ALJs are accorded public respect, their status is not precisely equivalent to that of their judicial branch counterparts.

All of those factors influenced the drafting of the City Rules and explain why its text varies from that of the State Code. They also explain why it is reasonable to expect that interpretation and application of the City Rules, while always mindful of analogous State Code provisions, will likely depart somewhat from the State Code model to take account of the different position of City ALJs. The City Rules are intended to emphasize and support the core values of fairness and impartiality in adjudication. At the same time, the City Rules are *not* intended to require modification of the current structures and practices of the City's tribunals. That is because the Rules are a code of ethics for ALJs, spelling out the standards of conduct applicable to administrative judges: the Rules are not a plan for reorganizing tribunals or redesigning their operations. In some instances, that consideration has been a basis for varying the City Rules from corresponding parts of the State Code.

In any context, the process of creating a code of ethics for administrative law judges can be expected to begin with rules of conduct for judges of the judicial branch and to entail modification of those rules to make them fully applicable to the administrative judiciary. The discussion that follows therefore concentrates on the points at which the City Rules depart from the State Code and explains why those modifications were necessary.

## III. Structure of the City Rules

Apart from its preamble, an introductory section on terminology and a concluding section on the scope of its application, the State Code contains five

substantive sections, each headed by a canon, which is then followed by detailed rules and guidelines. The canons are: "A judge shall uphold the integrity and independence of the judiciary";[14] "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities";[15] "A judge shall perform the duties of judicial office impartially and diligently";[16] "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations";[17] "A judge or candidate for elective judicial office shall refrain from inappropriate political activity."[18] Each section corresponds closely with one that appears in the City Rules, with the wording of each canon applied to City ALJs. In several instances, however, the City Rules depart somewhat from the State Code; those differences are discussed in more detail below. The City Rules also add two concluding sections, on enforcement and on advisory opinions.

### A. City Rules § 101. "A City administrative law judge shall uphold the integrity of the tribunal on which he or she serves."

Following the State Code, the City Rules emphasize that administrative tribunals must "adjudicate fairly, without partiality, prejudgment or impropriety" and that City ALJs are obligated to uphold those standards.[19] As explained above, the City Rules do not include "independence" among the core values of the administrative judiciary. That omission occurs in recognition of the location of the administrative judiciary within the organization of government. But the importance of maintaining impartiality, and the appearance of impartiality, remains paramount.

### B. City Rules § 102. "A City administrative law judge shall avoid impropriety and the appearance of impropriety in all of his or her activities."

The City Rules[20] closely track the State Code[21] in setting forth the basic duty of a judge to sustain public confidence in the integrity and impartiality of the tribunal on which he or she serves. The State Code bars a judge from testifying voluntarily as a character witness in any proceeding. [22] The City Rules limit the prohibition to testimony before a City tribunal on which the ALJ serves.[23] The State Code prohibits a judge from holding membership in an "organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status."[24] (But a judge is not barred "from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members."[25]) The City Rules extend the prohibition to organizations that practice discrimination on the basis of:

> actual or perceived age, race, creed, color, gender (including gender identity), sexual orientation, religion, national origin, disability, marital status, domestic partnership status, alienage or citizenship status, military status, or any other protected status enumerated in the City Human Rights Law, Administrative Code § 8-101, or the State Human Rights Law, Executive Law § 291.[26]

### C. City Rules § 103. "A City administrative law judge shall perform his or her duties impartially and diligently."

This section devotes the greatest detail to elaborating upon the duties of a sitting judge. The State Code includes a proviso that "[t]he judicial duties of a judge take precedence over all the judge's other activities."[27] Recognizing that many City ALJs are balancing their service as ALJs with ongoing private practices and other professional and family commitments, the City Rules do not require that the duties of an ALJ "take precedence" over the rest of his or her activities.

#### 1. Adjudicative responsibilities

Both the State Code and the City Rules, in setting forth adjudicative responsibilities, address the importance of treating parties appropriately. Following the State Code, the City Rules require that a City ALJ "shall be faithful to the law and maintain professional competence in it" and not be swayed by outcry or fear of criticism;[28] "shall require order and decorum in proceedings";[29] "shall be patient, dignified and courteous" to those who appear before him or her;[30] "shall accord to [parties and their representatives] the right to be heard according to law";[31] "shall perform judicial duties with impartiality" and without manifesting bias or prejudice based upon a person's membership in any group protected against discrimination under federal, State or City law;[32] shall similarly require the parties and their representatives to refrain from manifesting bias or prejudice;[33] "shall dispose of all judicial matters promptly, efficiently and fairly";[34] and shall not make "pledges or promises of conduct in office," or commitments concerning particular cases, "that are inconsistent with the impartial performance of the adjudicative duties of the office."[35]

The City Rules depart from the State Code with respect to four aspects of adjudicative responsibility: treatment of ex parte communications, obligations toward parties not represented by professionals, restrictions on public comments and use of nonpublic information obtained while serving as an ALJ.

### a. Ex parte communications

Of course, it is fundamental to fairness in adjudication that a judge ordinarily may not exchange communications about the substance of a proceeding with one party outside the presence of another party and without notice or disclosure to the absent party. The State Code expresses the principle thus: "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding. . . ."[36] City ALJs too may not engage in separate communications with parties or their representatives.

From the standpoint of developing a code of ethics for City ALJs, however, the State Code's reference to "other communications"—i.e., communications other than those with parties—is problematic. A literal reading of that language might lead to preclusion of the internal process used by some City tribunals to review ALJs' decisions before issuance. Since that process involves only other ALJs, not representatives of petitioning agencies, it does not involve ex parte communications or compromise impartiality. Consistent with the view that the point of the City Rules is to establish standards of conduct for ALJs, not to alter tribunal processes, the City Rules do not include a prohibition on "other" communications under the heading of "ex parte communications."[37] The City Rules also add a definition of "ex parte communication,"[38] not found in the State Code, to clarify what is being covered. That does not mean the City Rules would permit an ALJ to receive or rely upon an undisclosed communication from a non-party, since such conduct would almost surely violate obligations of fairness and impartiality that pervade the City Rules.[39] Of course, an ALJ is not permitted to receive or rely upon an undisclosed communication about the matter before him or her from the agency whose representative is appearing in the matter, as that would be an ex parte communication, even if the ALJ's tribunal were itself part of the same agency.

### b. Litigants without professional representation

Unlike a judge of the judicial branch, a City ALJ most often hears cases in which a government agency is prosecuting a claim against a *pro se* litigant. In judicial branch courts, government prosecution typically entails a defendant's right to representation; *pro se* litigants are most often found, usually as plaintiffs, in private litigation. The situation is quite different in a tribunal that adjudicates parking tickets or violations of quality-of-life laws or commercial regulations.

The City Rules therefore include a provision with no parallel in the State Code. They direct that a City ALJ "take appropriate steps to ensure that any party not represented by an attorney or other relevant professional has the opportunity to have his or her case fully heard on all relevant points."[40] The Rules specify nine practices that a City ALJ may find useful in fulfilling that obligation:

> (i) liberally construing and allowing amendment of papers that a party not represented by an attorney has prepared; (ii) providing brief information about the nature of the hearing, who else is participating in the hearing and how the hearing will be conducted; (iii) providing brief information about what types of evidence may be presented; (iv) being attentive to language barriers that may affect parties or witnesses; (v) questioning witnesses to elicit general information and to obtain clarification; (vi) modifying the traditional order of taking evidence; (vii) minimizing the use of complex legal terms; (viii) explaining the basis for a ruling when made during the hearing or when made after the hearing in writing; (ix) making referrals to resources that may be available to assist the party in the preparation of the case.[41]

A City ALJ is not required to follow every one of those practices in every case, and in particular situations other approaches to fulfilling the obligation to a *pro se* litigant may be appropriate. Although the distinction may sometimes call for careful weighing of competing concerns, fulfilling the obligation to *pro se* litigants does not mean an ALJ should ignore his or her responsibility to treat all parties fairly and impartially—the ALJ may not become an advocate for one party or the other. In particular, the City Rules specify that communications between the ALJ and the *pro se* litigant remain fully subject to the prohibition on ex parte communications. "[A]ny steps taken" to ensure a *pro se* litigant's opportunity for a full presentation of his or her case should be "reflected in the record of the proceeding,"[42] although typically the practices mentioned above would inherently appear in the record without need for any special identification of them.

### c. Public comment on proceedings

The State Code[43] prohibits a judge from making "any public comment about a pending or impending proceeding in any court within the United States or its territories." (There are exceptions for a judge's public statements made in the course of official duties, for explanations of court procedures for public information and for proceedings in which the judge is a litigant in a personal capacity.) The prohibition reflects a concern

that the dignity of the courts may be undermined if judges engage in public debate concerning the merits of pending cases.

Because City ALJs are somewhat less publicly recognizable as judges, there is less risk that their comments will have a similarly deleterious effect. Moreover, because so many City ALJs serve on a part-time basis, the burden imposed by a broad restriction on public comment is greater. Therefore, the City Rules prohibit public comment only if it bears on a proceeding pending or impending before a City tribunal.[44]

#### d. Nonpublic information

Both the State Code[45] and the City Rules[46] bar "disclos[ur]e or use, for any purpose unrelated to judicial duties, [of] nonpublic information acquired in a judicial capacity." The meanings of the two provisions are quite different, however, because they rest on different definitions of "nonpublic information." The State Code uses this definition:

> Nonpublic information denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.[47]

By contrast, the City Rules definition is: "'Nonpublic information' is confidential information of which a City administrative law judge becomes aware as a result of his or her judicial duties and which is not otherwise available to the public."[48] The State Code focuses narrowly on information that is legally withheld from public access; the City Rules broaden the scope of the prohibition to cover any confidential information unavailable to the public. Under the City Rules, an ALJ could not, for example, make private use of confidential commercial information provided by a litigant in the course of a proceeding before the ALJ. The State Code provision would not cover such information unless it were the subject of a court order.

#### 2. Disciplinary responsibilities

The State Code provides that a "judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."[49] The City Rules limit that obligation by making it applicable only when a City ALJ has received information "in the course of performing judicial duties:"[50] otherwise, an attorney serving part-time as an ALJ might become subject to the ethical obligation under the City Rules even if he or she received the information while engaged in private practice.[51]

#### 3. Disqualification

The City Rules largely follow the State Code. One exception is with respect to determining the degree of family relationship between a litigant and a judge. The State Code uses the civil law system, which depends on a complicated explanation to establish categories such as the fourth and the sixth degrees of relationship.[52] To encourage ready understanding by non-lawyers, the City Rules discard reliance on civil law classification and simply use the term "closely related," defined as meaning

> that the relationship between one person and another is that of parent and child; siblings; grandparent and grandchild; great-grandparent and great-grandchild; first cousins; or aunt/uncle and niece/nephew.[53]

### D. City Rules § 104. "A City administrative law judge shall conduct his or her extra-judicial activities so as to minimize the risk of conflict with judicial obligations."

The City Rules follow the basic tenet of the State Code with respect to off-bench activities. Any judge, whether of the judicial or the executive branch, must be mindful that extra-judicial activities do not "cast reasonable doubt on the judge's capacity to act impartially as a judge"; do not "detract from the dignity of judicial office"; do not "interfere with the proper performance of judicial duties and are not incompatible with judicial office."[54]

Recognizing that the great majority of City ALJs are part-time City employees, the City Rules are written to permit lawyers who serve as City ALJs to engage in the full range of extra-judicial activities that do not run afoul of that basic tenet. In certain respects, the City Rules therefore depart significantly from the State Code. For example, the State Code[55] provides that a judge may participate in planning for but may not personally engage in fund-raising on behalf of a charitable organization of which the judge is an officer, director, trustee, advisor or member. In like circumstances, the City Rules permit a City ALJ to engage personally in fund-raising as long as such activity is not inconsistent with service as an ALJ.[56]

The State Code states that a "full-time judge shall not practice law" but does not articulate specific limitations on the legal practice of a part-time judge.[57] Limitations may be inferred, however, from the State Code's restrictions on judges' "financial and business dealings."[58] Rather than rely on inference, the City Rules—mindful of the fact that so many City ALJs

serve part-time and continue to practice law—spell out the restrictions imposed on legal practice.[59]

### E. City Rules § 105. "A City administrative law judge shall refrain from inappropriate political activity."

The State Code[60] contains an extensive set of limitations on the types and extent of political activity in which judges and candidates for elective judicial office are permitted to engage. Violations of those provisions are among the most common reasons for disciplinary sanctions to be imposed by the State Commission on Judicial Conduct. By contrast, the City Rules impose few restrictions on political activity: a City ALJ may "not act as a leader or hold an office in a political organization"; may "not solicit funds for a political organization or candidate"; may not continue in office as a City ALJ while a candidate for elective non-judicial office; and, if running for elective judicial office, must comply with the applicable State Code provisions. ("A 'political organization' is a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office."[61]) Otherwise, the City Rules caution that a City ALJ "who engages in any other partisan political activity should be mindful that such activity not detract from, or reduce public confidence in, the fairness, impartiality or dignity of his or her office or the tribunal he or she serves. . . ."[62]

Regulation of ALJs' political activity under the City Rules is based on a recognition that there is a broad public expectation judges will not engage prominently in political activity and some public identification of ALJs as judges. Accordingly, the City Rules prohibit ALJs from engaging in the most intense forms of political activity—party or club leadership and fund-raising for candidates or organizations. As long as they are not inconsistent with an ALJ's other obligations under the City Rules, however, other types of political activity are not precluded by the Rules.

Unlike many judges of the judicial branch, ALJs are not elected to office. In addition, because they are less likely to be products of a political culture and do not have to worry about running for re-election, City ALJs are not subject to the same kinds of political pressures that may bear on the elected judiciary. Since so many City ALJs are part-time judges who engage in a range of other activities, it would be especially inappropriate to extend unduly restrictions on their ability to express and act on their political concerns and interests. The specific prohibitions contained in the City Rules are designed to take those factors into consideration.

### F. City Rules §§ 106 ("Misconduct"), 107 ("Advisory opinions; advisory committee")

The State Code does not include provisions for enforcement, which are established separately elsewhere. Special issues are raised by the sanctioning and removal of State judges who are elected or have been appointed to office for fixed terms.

There is no unified mechanism in the City for sanction or removal of ALJs, and the City Rules do not purport to create one. As noted above, ALJs covered by the City Rules are employed under a variety of circumstances. The City Rules simply provide that a violation constitutes misconduct and may subject a City ALJ to discipline.[63] A complaint alleging a violation may be made to the head of a tribunal on which an ALJ serves, in which case the head shall advise the Administrative Justice Coordinator and the Chief ALJ of OATH. A complaint may also be made directly to the Coordinator or the Chief ALJ. In either case, the Coordinator and the Chief ALJ are jointly to refer the complaint, as appropriate, to the head of the tribunal, the Conflicts of Interest Board and/or the Department of Investigation. The Chief ALJ is to maintain a confidential record of complaints received and a publicly available index of instances in which violations of the City Rules are found to have occurred and of the discipline imposed in each such case.

The head of a tribunal or an ALJ may request an advisory opinion concerning application of the City Rules to anticipated future conduct. Requests for advisory opinions are to be directed to the Chief ALJ of OATH and responses are to be made jointly by the Chief ALJ of OATH and the Administrative Justice Coordinator. The Chief ALJ of OATH and the Administrative Justice Coordinator are authorized to appoint an advisory committee with whom to consult in developing advisory opinions.

## IV. Conclusion

Administrative law judges are not *per se* subject to the State Code of Judicial Conduct. Adoption of an appropriate code of ethics for administrative law judges is warranted because other rules of conduct, such as those applicable to lawyers or municipal employees generally, do not cover all of the issues that affect the performance of the administrative judiciary. Because of key differences between administrative judges and their counterparts in the judicial branch, the State Code of Judicial Conduct cannot readily be made applicable to administrative law judges without some significant modifications. Areas in which modifications may be made are suggested by the City's experience in developing its Rules of Conduct for administrative law judges.

## Endnotes

1. Executive Order No. 84 (January 26, 2006).
2. 48 R.C.N.Y., Appx. A.
3. New York State has had a requirement that each State tribunal adopt an "administrative adjudication plan." 9 N.Y.C.R.R. § 4.131. Only the Workers' Compensation Board, however, has actually adopted a code of judicial conduct for its ALJs.
4. *See* Patricia E. Salkin, "Symposium: Modern Ethical Dilemmas for ALJs and Government Lawyers: Conflicts of Interest, Appearances of Impropriety, and Other Ethical Considerations: Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary," 11 Widener J. Pub. L. 7 (2002).
5. "Advancing Accountability: Balanced Budgets and Administrative Ethics: Final Report of the 2004–2005 New York City Charter Revision Commission" (August 2, 2005) ("Charter Revision Commission Report") (available at www.nyc.gov/html/charter).
6. The question received a 79 percent "yes" vote. New York City Charter Revision Commission press release, "Voters Endorse Charter Changes by 3-1 Margin" (available at www.nyc.gov/html/charter). The new provision has been codified as New York City Charter § 13-a.
7. *See* Charter Revision Commission Report, *supra*, note 5; Transcripts of the Meeting of the Charter Revision Commission on January 19, 2005 and of the Expert Forum of the Charter Revision Commission on March 7, 2005 (available at www.nyc.gov/html/charter).
8. 22 N.Y.C.R.R. § 100.
9. 22 N.Y.C.R.R. § 100.6(C).
10. Executive Order No. 32 (1979).
11. *See* New York City Conflicts of Interest Board Advisory Opinions 93-10 (Revised) (January 31, 1994) and 95-8 (April 10, 1995) (advising that New York City Conflicts of Interest Law applies to City Parking Violations Bureau ALJs); *In re Naomi Rubin*, New York City Conflicts of Interest Board Case No. 94-242 (April 24, 1995) (applying Conflicts of Interest Law to Parking Violations Bureau ALJ).
12. Although the City Rules are based on the State Code because of its familiarity, they also draw on model codes of conduct that have been framed to apply to federal and state administrative law judges, including the National Association of Administrative Law Judges' Model Code of Judicial Conduct for State Administrative Law Judges (1999), the American Bar Association's Model Code of Judicial Conduct for State Administrative Law Judges (1995) and the American Bar Association's Model Code of Judicial Conduct for Federal Administrative Law Judges (1989).
13. The question of the "independence" of the administrative judiciary has been widely debated. *See, e.g.*, James E. Moliterno, "The Administrative Judiciary's Independence Myth," 41 Wake Forest L. Rev. 1191 (2006); Edwin L. Felter, Jr., "Special Problems of State Administrative Law Judges," 53 Admin. L. Rev. 403 (2001); L. Hope O'Keeffe, "Note: Administrative Law Judges, Performance Evaluations, and Production Standards: Judicial Independence Versus Employee Accountability," 54 Geo. Wash. L. Rev. 591 (1986).
14. 22 N.Y.C.R.R. § 100.1.
15. 22 N.Y.C.R.R. § 100.2.
16. 22 N.Y.C.R.R. § 100.3.
17. 22 N.Y.C.R.R. § 100.4.
18. 22 N.Y.C.R.R. § 100.5.
19. 48 R.C.N.Y., Appx. A, § 101.
20. 48 R.C.N.Y., Appx. A, § 102.
21. 22 N.Y.C.R.R. § 100.2.
22. 22 N.Y.C.R.R. § 100.2(C).
23. 48 R.C.N.Y., Appx. A, § 102(D).
24. 22 N.Y.C.R.R. § 100.2(D).
25. *Id*.
26. 48 R.C.N.Y., Appx. A, § 102(E).
27. 22 N.Y.C.R.R. § 100.3(A).
28. 48 R.C.N.Y., Appx. A, § 103(A)(1). 22 N.Y.C.R.R. § 100.3(A) provides, in part: "A judge shall not be swayed by partisan interests, public clamor or fear of criticism." 48 R.C.N.Y., Appx. A, § 103(A)(1), by contrast, provides that a City ALJ "shall not be swayed by partisan interests, public clamor or fear of *public* criticism" (emphasis added). The word "public" was added in recognition that in some City tribunals draft decisions are reviewed internally before issuance: an ALJ is not ethically obligated to resist his or her supervisor's criticisms and suggestions for improvement of a draft decision.
29. 48 R.C.N.Y., Appx. A, § 103(A)(2).
30. 48 R.C.N.Y., Appx. A, § 103(A)(3).
31. 48 R.C.N.Y., Appx. A, § 103(A)(4).
32. 48 R.C.N.Y., Appx. A, § 103(A)(5).
33. 48 R.C.N.Y., Appx. A, § 103(A)(6).
34. 48 R.C.N.Y., Appx. A, § 103(A)(9).
35. 48 R.C.N.Y., Appx. A, § 103(A)(11).
36. 22 N.Y.C.R.R. § 100.3(B)(6).
37. "A City administrative law judge shall not initiate, permit or consider ex parte communications. . . ." 48 R.C.N.Y., Appx. A, § 103(A)(7). In both the State Code and the City Rules, the general prohibition is followed by several exceptions not relevant here.
38. "An 'ex parte communication' is a communication that concerns a pending or impending proceeding before a City administrative law judge and occurs between the City administrative law judge and a party, or a representative of a party, to the proceeding without notice to and outside the presence of one or more other parties to the proceeding." 48 R.C.N.Y., Appx. A, § 100(G).
39. 48 R.C.N.Y., Appx. A, §§ 101, 102(A), 103(A)(5), 103(A)(9).
40. 48 R.C.N.Y., Appx. A, § 103(A)(8).
41. 48 R.C.N.Y., Appx. A, § 103(A)(8)(a).
42. 48 R.C.N.Y., Appx. A § 103(A)(8)(b).
43. 22 N.Y.C.R.R. § 100.3(B)(8).
44. 48 R.C.N.Y., Appx. A, § 103(A)(10).
45. 22 N.Y.C.R.R. § 100.3(B)(11).
46. 48 R.C.N.Y., Appx. A, § 103(A)(12).
47. 22 N.Y.C.R.R. § 100.0(K).
48. 48 R.C.N.Y., Appx. A, § 100(N).
49. 22 N.Y.C.R.R. § 100.3(D)(2).
50. 48 R.C.N.Y., Appx. A, § 103(C)(2).
51. That is not to say that a corresponding ethical consideration would not apply to an attorney in private practice who obtained information about another attorney's unethical or unprofessional conduct. *See* Code of Professional Responsibility EC 1-04. It should be clear, though, that the source of that obligation would be the Code of Professional Responsibility, not the City Rules.

52. A judge is disqualified if, *inter alia*, a party to the proceeding is a person within the "sixth degree of relationship" to the judge (22 N.Y.C.R.R. § 100.3(E)(1)(d)) or the lawyer representing a party is a person within the "fourth degree of relationship" to the judge (22 N.Y.C.R.R. § 100.3(E)(1)(e)). 22 N.Y.C.R.R. § 100.0(C) provides:

> The degree of relationship is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

53. 48 R.C.N.Y., Appx. A, § 100(D). Thus, parties within the "sixth degree of relationship" under the civil law definition would not be "closely related" within the meaning of the City Rules. Disqualification is always required "in a proceeding in which the City administrative law judge's impartiality might reasonably be questioned" (48 R.C.N.Y., Appx. A, § 103(D)(1)). The degree of relationship between the ALJ and a party is relevant to determining whether the ALJ's disqualification is automatically required. If a litigant is the ALJ's second cousin, disqualification is not automatically required on the ground that the party is closely related to the ALJ (48 R.C.N.Y., Appx. A, § 103(D)(1)(d)) but it might very well be required on the ground that the ALJ had a "personal bias or prejudice concerning a party" (48 R.C.N.Y., Appx. A, § 103(D)(1)(a)) or simply on the ground that the ALJ's impartiality might reasonably be questioned.

54. 22 N.Y.C.R.R. § 100.4(A); *compare* 48 R.C.N.Y., Appx. A, § 104(A).

55. 22 N.Y.C.R.R. § 100.4(C)(3)(b)(i).

56. 48 R.C.N.Y., Appx. A, § 104(B)(2) provides:

> In connection with civic or charitable activities, a City administrative law judge may participate in fund-raising or solicitation for membership if:
>
> (a) the City administrative law judge does not use or permit use of the prestige of judicial office for fund-raising or solicitation for membership;
>
> (b) the fund-raising or solicitation for membership is not directed at persons who have appeared, are appearing or are foreseeably likely to appear before the City administrative law judge;
>
> (c) the City administrative law judge's participation in the fund-raising or solicitation for membership would not detract from the dignity of judicial office or interfere with the proper performance of judicial duties or be incompatible with judicial office;
>
> (d) the fund-raising or solicitation for membership is not prohibited by Chapter 68 of the City Charter [the City Conflicts of Interest Law] or any other provision of law.

57. 22 N.Y.C.R.R. § 100.4(G).

58. "A judge shall not engage in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position; (b) involve the judge with any business, organization or activity that will ordinarily come before the judge; or (c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." 22 N.Y.C.R.R. § 100.4(D)(1).

59. 48 R.C.N.Y., Appx. A, § 104(F) provides:

> (1) Consistent with all other provisions of these Rules, with Chapter 68 of the Charter [the City Conflicts of Interest Law] and the rules and opinions of the Conflicts of Interest Board, any applicable agency or tribunal rules and with all other provisions of law, a City administrative law judge may practice law, as long as such activity affects neither the independent professional judgment of the City administrative law judge nor the conduct of his or her official duties.
>
> (2) A City administrative law judge shall not represent or appear on behalf of private interests before the City tribunal on which he or she serves.
>
> (3) A City administrative law judge primarily employed by the City [*i.e.*, on a full-time basis or regularly scheduled to work more than 20 hours per week as an ALJ] shall not represent or appear on behalf of private interests before any City tribunal or agency.
>
> (4) A City administrative law judge shall not be associated or affiliated with any firm, company or organization that regularly represents or appears on behalf of private interests before the City tribunal on which he or she serves.

60. 22 N.Y.C.R.R. § 100.5.

61. 48 R.C.N.Y., Appx. A, § 100(P). The definition in 22 N.Y.C.R.R. § 100.0(M) is virtually identical.

62. 48 R.C.N.Y., Appx. A, § 105(E).

63. 48 R.C.N.Y., Appx. A, § 106(A).

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# The New York State Workplace Violence Prevention Act

By Sharon N. Berlin

## I. Introduction

The New York State Legislature has amended Labor Law § 27-b to require New York public employers to develop and implement a program to prevent workplace violence. The new law, the New York State Workplace Violence Prevention Act ("the Act"), took effect on March 4, 2007 and requires public employers to evaluate their workplaces to assess the risk of violence, to develop a written workplace violence prevention program and to implement an annual training program concerning issues related to workplace violence.

The Act applies to all state employers and political subdivisions of the state, including public authorities, public benefit corporations, and all other governmental agencies or instrumentalities. School districts, already required to establish and maintain "school safety plans" pursuant to § 2801-a of the Education Law, are specifically excluded.

Although employers are required to comply with the Act's requirements commencing on March 4, 2007, the New York State Department of Labor ("DOL") has until July 2007 to promulgate rules and regulations regarding the Act.

## II. Risk Evaluation and Determination

The Act requires all public employers to evaluate their workplace or workplaces to determine the existence of factors or situations that might place employees at risk of workplace violence. A "workplace" means any location away from an employee's domicile, permanent or temporary, where an employee performs any work-related duty in the course of his or her employment by an employer.

Employers should evaluate and consider existing working conditions for circumstances that often precede workplace violence, including, but not limited to:

- Employees working in public settings (e.g., social services or other governmental workers, police officers, firefighters, teachers, public transportation drivers, health care workers, and service workers);
- Employees working in high crime areas;
- Employees working late night or early morning hours;
- Employees exchanging money with the public;
- Employees working alone or in small numbers;
- Employee access to means of obtaining assistance such as communication devices and alarm systems;
- Uncontrolled access to the workplace;
- Areas of previous security problems.

The DOL recommends that public employers also review any past incidents of workplace violence to identify patterns or trends occurring in the workplace. In addition, employers should review their occupational injury and illness logs and incident reports to identify injuries that may have resulted from workplace violence. Employers should survey employees at all levels regarding violent incidents both reported and unreported. Finally, employers should evaluate physical workplace building security.

## III. Written Workplace Violence Prevention Program

The Act requires that a public employer with 20 or more full-time permanent employees develop and implement a *written* workplace violence prevention program for their workplace or workplaces. The written program must include a list of the risk factors identified by the employer in its risk evaluation. The program must also describe the methods the employer will use to prevent incidents of workplace assaults and homicides. Examples of applicable methods include, but are not limited to:

- Making high-risk areas more visible to more people;
- Installing more or better external lighting;
- Installing video surveillance;
- Installing door buzzers, and other alarms;
- Using drop safes or other methods to minimize cash on hand;
- Posting signs stating that limited cash is on hand;
- Providing training in conflict resolution and nonviolent self-defense responses;
- Establishing and implementing reporting systems for incidents of aggressive behavior.

The DOL suggests a variety of administrative and work practice controls to address workplace violence, such as establishing a liaison with local police and state prosecutors, adopting safety procedures for off-site work and creating a system of communication during emergencies. The DOL also stresses the importance of management commitment and employee involvement in the creation of a written workplace violence prevention program because employee knowledge and understanding of workplace violence is important for its prevention. Post-incident responses, such as trau-

ma-crisis counseling and other employee assistance programs to assist victims and other employees, may also be considered.

A model written Workplace Violence Prevention Plan is available on the Department of Labor's website at http://www.labor.state.ny.us/workerprotection/safetyhealth/workplaceviolence.shtm.

## IV. Employee Information and Training Program

The Act requires that public employers with 20 or more full-time employees make the workplace violence prevention program available, upon request, to its employees and their designated representatives (i.e., union officials). Public employees must be informed of the Act's requirements, including its reporting and enforcement provisions, the risk factors in their workplace or workplaces, and the location and availability of the written workplace violence prevention program. In addition, all public employers must conduct employee training on the risk of occupational assaults and homicides at their workplace or workplaces, both at the time of their initial job assignment and annually thereafter. Employee training must include, at least: (1) the measures employees can take to protect themselves from such risks, including specific procedures the employer has implemented to protect employees, such as appropriate work practices, emergency procedures, use of security alarms and other devices; and (2) the details of the written workplace violence prevention program established and implemented by the employer. The Department of Labor suggests that employers instruct employees to limit physical interventions in workplace altercations unless a designated emergency response team or security personnel are available.

The training programs should involve all employees, including supervisors and managers. Finally, employers should regularly re-evaluate their workplace violence prevention program and employee training to determine overall effectiveness and to identify deficiencies or changes that should be made.

## V. Reporting Systems and Enforcement

The Act requires employers to implement a reporting system for employees to use if they believe that either a serious violation of a workplace violence prevention program or an imminent danger of workplace violence exists. The Act requires the employee to report the matter to a supervisor in the form of a written notice. The employer must be given a reasonable opportunity to correct the activity, policy or practice in question. This written reporting requirement, however, does not apply where an imminent danger or threat exists to the safety of a specific employee or, where applicable, to the general health of a specific patient, and where the employee has a reasonable, good faith belief that reporting to a supervisor would not lead to corrective action.

If written notice is provided by an employee and the employer fails to correct the reported matter after a reasonable period of time, the employee may request an inspection by the DOL. A request for inspection must be in writing, must set forth the specific grounds for the request and must be signed by the employee or employee representative. The DOL must provide the employer in question with a copy of the request for inspection prior to or at the time of the inspection and no prior notice of the inspection is required. Furthermore, at the request of the employee, the DOL may withhold that employee's identity and the names of other individual employees or their representatives.

A representative of the employer and an authorized employee representative must be given the opportunity to accompany and aid DOL representatives during an inspection, should the individuals so desire. The DOL's authority to inspect an employer's premises is not limited to the alleged violations stated in the complaint, and DOL officials may inspect any other area in which there is reason to believe a serious violation of the law exists. The inspection may also include interviews with a reasonable number of employees concerning matters of safety in their workplace. The law grants DOL officials the authority to conduct inspections on their own initiative, without a prior request, if there is reason to believe that an inspection is necessary or within a general administrative plan for enforcement.

## VI. Retaliation is Prohibited

The Act specifically prohibits public employers from retaliating against employees who: (1) report an alleged serious violation to a supervisor; (2) request an inspection by the DOL; or (3) accompany DOL officials during an inspection.

## VII. Conclusion

For all employers, the first step in complying with the Act's requirements is to engage in a thorough review of their workplaces to determine the existence of factors that might place employees at risk of workplace violence. Employers with 20 or more permanent full-time employees must develop and implement a written workplace violence prevention program. All employers must make this information available and provide relevant training for their employees.

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# Municipal Briefs

By Lester D. Steinman

## Adult Uses

Pre-enactment review and analysis of evidence of negative secondary effects, such as increased crime or decreased property values, is a constitutional prerequisite to the adoption of local legislation prohibiting public nudity.[1]

In September 2001, Plaintiff opened an adult entertainment business offering nude and semi-nude female dancing in the Town of Hartford, Vermont. Nine months later, the Town Selectboard adopted an ordinance prohibiting such public nudity. Notwithstanding the advice of the Town Attorney that it should discuss the secondary effects of nude dancing when enacting the legislation, the Selectboard failed to do so. Nor did the Selectboard examine the actual or potential negative secondary effects of public nudity in the community.

Subsequent to the enactment of the legislation, in September 2002, the Town's Department of Planning and Development Services obtained and disseminated to the Selectboard studies analyzing the negative secondary effects of adult businesses. A special Town meeting was held to discuss these materials and, the next day, the Town electorate rejected a referendum to disapprove the Town's Public Indecency Ordinance.

Plaintiff then brought suit to challenge the ordinance. Applying the four-factor test set forth in the *United States v. O'Brien*[2] to evaluate First Amendment freedom of expression claims, the District Court declared the ordinance violative of the federal and Vermont constitutions because it failed to satisfy the second prong of the *O'Brien* test that it further an important or substantial government interest. As found by the District Court, the Town failed to demonstrate that "at the time it enacted the Ordinance, it relied upon at least some evidence reasonably believed to be relevant to its interest in preventing negative secondary effects associated with nude adult entertainment, and that the evidence fairly supported its rationale for the Ordinance."

On appeal, the Second Circuit affirmed the District Court's decision. Applying the standard articulated by the United States Supreme Court in *City of Renton v. Playtime Theaters, Inc.*[3] to determine whether the ordinance furthered an important or substantial governmental interest, the Court of Appeals opined that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses."

Here, although the Town was not required to conduct its own studies before enacting the ordinance, it was required to obtain and analyze relevant secondary effects evidence prior to the enactment of the legislation. While the record establishes that members of the Selectboard were aware that such evidence existed elsewhere, the Selectboard did not actually review that evidence and thus could not be said to have relied upon same when enacting the ordinance. Based upon the Town's failure to establish that the ordinance furthered a substantial governmental interest, the Second Circuit held that the ordinance unconstitutionally violated the Plaintiff's rights to free expression under the First Amendment.

## Subdivision Approval

The Spring 2006 *Municipal Lawyer* (From the Editor, p. 3) detailed a federal District Court decision holding that notations on a filed subdivision map that certain parcels are to remain as open space and not be developed were not binding on subsequent purchasers of those parcels who did not have notice of those restrictions. For such a condition to run with the land and be binding on future owners, the District Court opined, it must be memorialized in a written document recorded in the chain of the title in the County Clerk's office.[4]

On appeal, however, the United States Second Circuit Court of Appeals has ruled that the enforceability of an open space restriction imposed by a subdivision plat under Town Law § 276 against a subsequent purchaser presented an unresolved question of New York State law which, in the first instance, should be addressed by the New York State Court of Appeals.[5] The uncertainty surrounding the enforceability of the open space restriction also led to the Circuit Court's reversal of the District Court's award of damages under 42 U.S.C. § 1983. Critical to the Plaintiff's civil rights claim was the existence of a valid property right in the issuance of a certificate of occupancy that was infringed in an arbitrary or irrational manner. To establish such a valid property interest, a "clear entitlement" to the certificate of occupancy must be shown. Here, given the uncertainty as to the law governing the enforceability of the open space restriction, that requirement was not satisfied.

## Aggressive Panhandling

A City of Rochester ordinance, that prohibits persons "on a sidewalk or alongside a roadway" from soliciting money or anything of value from any occupant in a motor vehicle on a street or other public place, constitutes an enforceable, content-neutral, time, place and manner regulation of expression narrowly tailored to serve a significant government interest while still leaving open ample alternative channels of communications.[6]

Defendant Michael Barton was ticketed for violating § 44-4(H) of the City of Rochester's Aggressive Panhandling ordinance when he solicited money from motorists while walking on a highway exit ramp in downtown Rochester. Moving to dismiss the accusatory instrument filed against him, Barton argued that § 44-4(H), regardless of whether it could constitutionally be applied to him, was overbroad in that the restrictions imposed applied not only to aggressive panhandling but also to the passive solicitation of motorists from the sidewalk, "including an individual holding up a sign simply stating 'Food,' or participating in the city firefighters' annual 'Fill-the-Boot' fundraising campaign."

The Rochester City Court agreed and dismissed the accusatory instrument. Although it found that § 44-4(H) was content-neutral, it ruled that the provision was not narrowly tailored because it "allow[ed] for the prosecution of those . . . guilty of nothing more than peacefully asking for assistance."[7]

The County Court reversed, ruling that § 44-4(H) was content-neutral, narrowly tailored and left open ample alternative channels of communication. Noting that the ordinance was "aimed specifically at a certain type of conduct engaged in at a certain location" and "applied evenhanded[ly] . . . and equally to all persons conducting the same unwanted conduct," the County Court held that § 44-4(H) was not overbroad even though it applied not only to Defendant's soliciting but also to bona fide charitable canvassing.[8] A Judge of the Court of Appeals granted leave to appeal and the Court affirmed the County Court judgment.

At the outset, the Court of Appeals assumed, without deciding, that panhandling constitutes speech or expressive conduct entitled to the same First Amendment safeguards afforded to charitable solicitations.[9] Second, the Court acknowledged that Defendant, even though his conduct may not be constitutionally protected, had standing to challenge § 44-4(H) as being overbroad in order to prevent the constitutionally protected speech of others from being "chilled" by the existence of that provision. However, to prevail on such a challenge, "a real and substantial amount of constitutionally protected conduct" must be prohibited. "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. (*Members of City Council of Los Angeles v. Taxpayers for Vincent*, 461 U.S. 789, 800 [1984])."

Notwithstanding that, as argued by the Defendant, passive as well as aggressive panhandlers fall within the purview of § 44-4(H), the provision constitutes a valid, content-neutral, time, place and manner regulation of expression that is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." Here, promoting the free and safe flow of traffic constitutes a substantial governmental interest. The ban is content-neutral in that it applies to all persons asking motorists for donations "regardless of their message." Nor is an attempt made to silence any particular message or viewpoint, notwithstanding that the ordinance may have "an incidental effect on some speakers or messages but not others." Further, the ordinance is narrowly tailored because it addresses a specific problem, traffic safety hazards resulting from occupants of motor vehicles on public streets or public places being solicited for handouts, a substantial government interest that would be achieved less effectively absent § 44-4(H). Finally, because § 44-4(H) does not prohibit the non-aggressive solicitation of pedestrians on a sidewalk, ample alternate avenues are available to "communicate any message of indigency or need through begging."

## Exhaustion of Administrative Remedies

A planning board determination—consistent with a prior determination of the municipal code enforcement officer that a proposed use is a permitted use under the zoning ordinance—may not be challenged in an Article 78 proceeding against the Planning Board. For persons aggrieved by the determination as to the permissibility of the use, the proper remedy is to appeal the code enforcement official's determination to the Zoning Board of Appeals and then to bring an Article 78 proceeding against the Zoning Board of Appeals to annul an affirmance of the code enforcement official's determination.[10]

Here, the Bassett Hospital of Schoharie County ("BHSC") filed an application for site plan approval with the Village of Cobleskill Planning Board to construct a sixty-space parking lot on its property in the Village. During the course of proceedings before the Planning Board, an issue was raised regarding the legality of the proposed use. The Planning Board observed that the code enforcement official for the Village had previously determined that the proposed parking lot was a permitted use and did not question that determination.

After the Planning Board approved the site plan, neighboring property owners sued to annul the Plan-

ning Board's determination on various grounds, including that the parking lot was not a permitted use. The Supreme Court agreed that the parking lot was not a permitted use, granted the petition and enjoined BHSC from constructing the parking lot.

On appeal, the Appellate Division, Third Department reversed the Supreme Court's decision. In its ruling, the appeals court observed that the local zoning enforcement official and the Zoning Board of Appeals, not the Planning Board, are empowered to interpret the local zoning ordinance. Here, the Petitioners were aware of the enforcement official's determination but failed to appeal that determination to the Zoning Board of Appeals. Given such failure to exhaust administrative remedies, together with the absence of authority for the Planning Board to deny site plan approval based upon the zoning issue, the Third Department ruled that whether the parking lot was a permitted use was not an issue properly before the Supreme Court. The Third Department's decision is also noteworthy for a footnote declaring that "even if BHSC failed to fully raise this issue" below, the appeals court "may consider this purely legal issue for the first time on appeal (citations omitted)."

## Endnotes

1. *White River Amusement Pub, Inc. v. Town of Hartford, Vermont*, 481 F.3d 163 (2d Cir. 2007).
2. 391 U.S. 367 (1968).
3. 475 U.S. 41 (1986).
4. *O'Mara v. Town of Wappinger,* 400 F. Supp. 2d. 634 (S.D.N.Y. 2005).
5. *O'Mara v. Town of Wappinger*, 485 F. 3d 693 (2d Cir. 2007).
6. *People v. Barton*, 8 N.Y.3d 70 (2006).
7. 8 Misc. 3d 291, 298 (Rochester City Court 2004).
8. 12 Misc. 3d 322 (Monroe Co. Ct. 2006).
9. In its opinion, the Court of Appeals observed that "[t]he United States Supreme Court has yet to rule on this issue and lower courts have expressed differing views (citations omitted)."
10. *Swantz v. Planning Board of the Village of Cobleskill*, 34 A.D.3d 1159 (3rd Dep't 2006).

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Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
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- only attorneys admitted more than 24 months may earn credits for writing.

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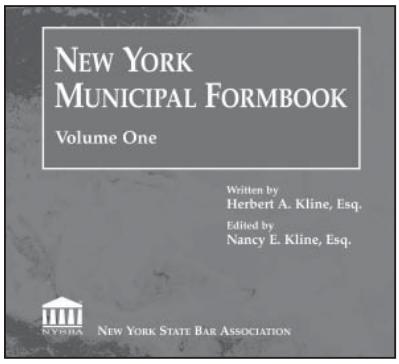


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